JJ.
801.40

[redacted]

August 10, 1987

This material may be subject to the confidentiality provision of Section 7A (h) of the Clayton Act which restricts release under the Freedom of Information Act

John M. Sipple, Jr.
Senior Attorney
Premerger Notification Office
Bureau of Competition
Room 301
Federal Trade Commission
Washington, D.C. 20580

Re: [redacted]

Dear Mr. Sipple,

On August 6, 1987, I spoke with Mr. Wayne Kaplan of your office regarding whether filings under the Hart-Scott-Rodino Act ("the Act") would be required in connection with the formation by manufacturers and users of [redacted] a non-profit, research and development joint venture. He suggested that I direct this letter to you since he will be out of the office this week.

[redacted] will be structured as a membership corporation. Membership will be open to all United States producers and purchasers of [redacted] objective will be to develop advan[redacted]anufacturing techniques that can be used by its members in their own manufacturing processes. [redacted] only output will be knowledge; it will not manufacture any products for commercial sale. [redacted] plans to file a notice pursuant to section 6(a) of the National Cooperative Research Act of 1984 in order to invoke the protections of that Act.

The facts regarding [redacted] are well known to various branches and agencies of the government. Representatives of th[redacted] have testified before Congress about the need fo[redacted] and several executive branch task forces have been evaluatin[redacted] in light of its request for partial government funding. In addition, there have been two meetings at which counsel fo[redacted]

have advised Assistant Attorney General Rule of the status of the contemplated venture.

Given the anticipated funding o[redacted] the size-of-the-parties test will be satisfied with respect to many or all of its members. If the payment of membership dues is deemed the acquisition of a voting security, then a number of the likely members will also satisfy the size-of-the-transaction test. Annual dues will be based on a percentage of the member's [redacted]les or purchases, subject to certain minimums and maximums. Members will be required to commit to four years of membership. A number of the likely members will probably be assessed first year dues in excess of $3.75 million, thus implying a payment in excess of $15 million over the four-year commitment period.

[redacted]plans to qualify as a not-for-profit corporation within the meaning of section 501(c)(6) of the Internal Revenue Code. Pursuant to 16 C.F.R. § 802.40, filings pursuant to the Act are not required in connection with the acquisition of an interest in such a corporation. As I discussed with Mr. Kaplan, however, there is some uncertainty about whether [redacted]atisfies one of the requirements of section 501(c)(6). In particular, there is some question about whethe[redacted]plan to make the fruits of its efforts available only to those who elect to become members satisfies the requirement that they be made available to the "public." Thus, while we believe that [redacted] should qualify under section 501(c)(6), we cannot state unequivocally how the Internal Revenue Service will ultimately resolve that issue. Indeed, because of this uncertainty, [redacted] has considered seeking, and has found Congressional support for, legislation clarifying that limitations on disseminating the results of its research to non-member firms do not bar it from qualifying under section 501(c)(6).

The principal question on which we are seeking your guidance is whether the good faith belief o[redacted] members that the joint venture does, or with legislation will, qualify under section 501(c)(6) of the Internal Revenue Code is sufficient to satisfy the requirements of 16 C.F.R. § 802.40. Simply put, while the members do not wish to burden themselves or the Commission with a number of lengthy submissions, they do not wish to put themselves in the position of retroactively being found to have violated the Act if the Internal Revenue Service renders an adverse ruling and the legislation discussed above is not enacted. In view of the wealth of information regarding this joint venture that has been made available to the federal government in general and the Antitrust Division in particular, and the fact that [redacted]ill not manufacture any products

for commercial sale, we believe that members should not be required to file simply to protect against the contingency that [redacted] fails to obtain section 501(c)(6) status.

If the Commission has any reservations about the members' reliance on 16 C.F.R. § 802.40 in these circumstances, we request your view regarding whether a membership interest in a corporation such as described above constitutes a "voting security" for purposes of the Act.

If you require any additional information, please do not hesitate to call m[redacted] or my partner [redacted]

Thank you for your cooperation.

[redacted]

It is unreasonable to rely on 16 CFR § 802.40 when the parties have a good faith belief that they will qualify under § 501(c)(6) of the Internal Revenue Code as a not for profit corporation. In the event the corporation does not qualify filings would be required assuming the jurisdictional tests are met. The fact that the parties relied on the good faith belief that they qualified for the § 802.40 exemption will be an important factor in deciding whether to initiate an enforcement action.