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March 27, 1989

Mr. Patrick Sharpe
Compliance Specialist
Premerger Notification Office
Bureau of Competition
Room 301
Federal Trade Commission
Washington, D.C. 20580

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PRE-MERGER
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Dear Mr. Sharpe:

As we discussed in our telephone conversation of March 21, I am writing pursuant to Section 803.30 of the Premerger Notification Rules (the "Rules") to request your informal interpretation regarding the application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act"), and the Rules to the transaction described below.

Summary of Proposed Transaction.

Our client is a corporation ("Company A") with assets in excess of \$10 million. Company B is a corporation with annual net sales in excess of \$100 million. Company A will form a new, wholly-owned subsidiary ("Newco") by contributing minimum capital (\$1,000) for 100% of the outstanding voting securities of Newco. At the closing, Company A will transfer substantially all of its operating assets (excluding cash and cash equivalents) and all related liabilities to Newco. Simultaneously with such transfer, Company A will sell 51% of the Newco stock to Company B for a cash price of less than \$1 million. Upon request, Company B may guaranty up to \$3.5 million of the debt assumed by Newco in the transfer of assets and liabilities.

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As a newly created entity, Newco will not have a regularly prepared balance sheet. On the closing date, after the transfer of assets, Newco's total assets will be slightly under \$15 million. Because Newco will be newly created, it will not have an annual statement of income and expense. The annual net sales of Company A from its annual statement of income and expense for the most recent fiscal year are slightly in excess of \$25 million.

Reporting Requirements under the Act.

The purchase by Company B of 51% of the outstanding voting securities of Newco is a potentially reportable transaction. We believe that the sale should be exempt from the Act's reporting requirements pursuant to the minimum dollar exemption of § 802.20 of the Rules and §§ 801.11(c) and (e) of the Rules. Section 802.20 provides that an acquisition of less than \$15 million of voting securities is exempt from the requirements of the Act if as a result of the acquisition the acquiring person will not hold voting securities which confer control of an issuer (and its controlled entities) with annual net sales or total assets of \$25 million or more. The purchase price of the voting securities paid by Company B will be less than \$15 million. Company B will, however, gain control of the issuer Newco (i.e., a 51% ownership interest). Thus, the question becomes whether Newco has annual net sales or total assets of \$25 million or more.

Section 801.11(c) of the Rules provides that annual net sales of a person shall be as stated on the last regularly prepared annual statement of income and expense of that person and that total assets of a person shall be as stated on the last regularly prepared balance sheet of that person. Being a newly created entity, Newco will not have either an annual statement of income and expense or a regularly prepared balance sheet. Section 801.11(e) provides that the assets of an acquired person that does not have a regularly prepared balance sheet shall be either all assets held by the acquired person at the time of acquisition or where applicable, its assets as determined in accordance with § 801.40(c). Newco's assets at the time of acquisition will be approximately \$15 million, and while we do not believe that § 801.40(c) is applicable (see below), Newco's assets determined in accordance with § 801.40(c) would also be considerably less than \$25 million. Thus, unless Company A's annual net sales for the last fiscal year are deemed to be Newco's annual net sales, Company B will not gain control of an issuer with annual net sales or total assets of \$25 million or more. The Rules do not address how (if at all) annual net sales of an acquired person that does

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not have an annual statement of income and expense are calculated. We conclude from this omission that no such calculation need be made and that Newco will not be deemed to have any "annual net sales".

Moreover, even if Company A's annual net sales are deemed to be Newco's annual net sales, the sales should be limited to those sales attributable to the assets to be transferred to Newco. Subsequent to the fiscal year end, Company A sold a subsidiary with 1988 sales of such an amount that the 1988 sales which relate to the assets to be transferred to Newco are less than \$25 million.

In our telephone conversation you asked whether the transaction was the formation of a joint venture under § 801.40. We do not believe that this transaction is subject to § 801.40 because Company B is buying stock from Company A and the cash consideration for the stock is going to Company A. However, Company B may guarantee some of the debt assumed by Newco. If this transaction is considered the formation of a joint venture, the criteria of § 7A(a)(3) of the Act must nonetheless be met. Therefore, the issue of whether the minimum dollar exemption is available would also apply to a § 801.40 transaction. As noted above, we do not believe that under the Act and the Rules Newco will be deemed to have annual net sales or total assets of \$25 million or more.

Please telephone me at [REDACTED], if you have any questions or need additional information. I will like to receive your interpretive advice by March 31.

Very truly yours,

[REDACTED]

per staff meeting 3-30-89

[REDACTED] This is not an 801.40 deal. This is a reportable transaction. You must go by financial statements. If a restated income statement is generated prior to consummation, you may go by that.

called [REDACTED]

4-4-89