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801.40
802.20

May 6, 1999

Michael Verne
Federal Trade Commission
Premerger Notification Office
Bureau of Competition
Room 303
6th Street and Pennsylvania Avenue, N.W.
Washington, DC 20580

RE: Applicability of Section 801.40

Dear Mr. Verne:

This letter is intended to confirm our understanding of the advice you provided during a telephone conversation with [redacted] and me on Friday, April 30, 1999. Based upon that conversation, it is our understanding that Section 801.40 is applicable to the transaction described below and that, based primarily on sections 801.40 and 802.20, no premerger notifications need to be filed in connection with the transaction. The facts of the transaction are described below:

STATEMENT OF FACTS

Y Corporation and X Corporation are negotiating the terms of an agreement, titled an asset purchase agreement (the "Agreement"). Under the terms of the proposed Agreement, Y Corporation or an affiliate of Y Corporation ("Y Corporation") would organize a newly-formed Delaware corporation ("Newco"). Y Corporation would be issued shares of capital stock in connection with the formation of Newco and would be the sole stockholder of Newco prior to closing of the transactions contemplated by the Agreement. Upon signing of the Agreement, Y Corporation would arrange for a letter of credit (the "L/C") of approximately \$2,300,000 from which X Corporation could draw to pay transaction costs and certain operating and research and development costs pending closing. Obligations under the L/C would be assumed by Newco, subject to certain contingencies.

At closing, (i) new investors ("New Investors") would contribute at least \$7,000,000 cash to Newco in exchange for newly issued shares of capital stock and (ii) X

[redacted]

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Corporation would contribute, sell, transfer and assign to Newco substantially all of the assets and liabilities of a business unit (the "Business") of X Corporation in exchange for (a) preferred voting stock with a face value of \$7,500,000 and (b) a secured promissory note with a face value of \$7,500,000 (subject to reduction to \$7,000,000 in specified circumstances) and (iii) Newco will assume substantially all of the liabilities of the Business.

Following the closing, the approximate percentage of voting equity interests owned by each party will be as follows:

X Corporation	44%
Partnership	15% (?) - WHO IS PARTNERSHIP? Y CORPORATION?
New Investors	
(As a group)	41%

In addition, there will be reserved for issuance additional shares of voting stock for use in connection with management incentive compensation plans and upon exercise of warrants issued in connection with the contemplated transactions.

ANALYSIS

ALL SHAREHOLDERS OF NEWCO
HAVE BEEN IDENTIFIED PRIOR
TO THIS TRANSACTION

As we discussed and you concurred, Section 801.40, which relates to the formation of joint ventures and other corporations, is applicable to the foregoing transaction. While X Corporation is negotiating with Y Corporation an agreement styled as an asset purchase agreement, the facts described above demonstrate that the overall transaction by which X Corporation will become a major shareholder of the newly formed Newco in exchange for its "sale" of a business to Newco should be analyzed as a Section 801.40 transaction.

^{more than} The transaction meets the Size of Person Test under Section 801.40(b)(1), as well as the Size of Transaction test under 15 U.S.C. § 18a (a)(3)(A) (15% test). However, no person will take back \$15 million or more in Newco voting securities. Pursuant to section 802.20, each of the contributors to Newco is exempt from filing a premerger notification because each will pay less than \$15 million for its interest in Newco¹ and none has acquired 50% or more of the shares of Newco. ^{VOTING SECURITIES}

A Certain Voting Securities of Newco
Held at \$15m or less.

Seems okay
with A.B.A.
#114

¹ X Corporation's purchase price for its Newco interest is equal to \$15.5 - 16.0 million less the cash it will receive from the assets (\$7.0 - 7.5 million)

which is an equivalent payment

[REDACTED]
[REDACTED]
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If we have misunderstood our discussion and you conclude that, contrary to our understanding, a filing is necessary by one or more of the parties, please so notify us at your earliest convenience since the parties will be proceeding with the transaction in reliance in the aforementioned conclusion that no filing will be necessary.

Sincerely,

[REDACTED]

[REDACTED]

cc: [REDACTED]

AGRE - NO FILING IS REQUIRED.
B. Michael Verne 5/6/99
DICK SMITH CONCURS.