[redacted]

802.1(d)(2)
801.40

[redacted]

June 16, 2000

By Facsimile [redacted]

[redacted]

Premerger Notification Office
Room 303
Federal Trade Commission
6th Street & Pennsylvania Ave. NW

[redacted]

Should Have Been Reported [redacted]

Dear Mr. Verne:

I was recently asked whether a transaction that closed over a year ago should have been reported under HSR. It appears to me that if the transaction qualifies as a § 801.40 formation of a joint venture or other corporation, filing was not required. On the other hand, if § 801.2 analysis is applied, you may conclude that filing should have been made. The transaction does [redacted] other's states. In other words, the issue appears to be HSR compliance alone.

In 1998 A, B, and C were independent corporations. Each distributed the same types of products, and none engaged in manufacturing. Each was its own ultimate parent entity, although [redacted]

[redacted]

The combination was effected by having A's shareholders exchange their stock in A for [redacted]

shareholders would proceed exactly as had A's shareholders. But because of tax advice rendered to B and C late in the game, Group, Inc. created two transitory subsidiaries which merged into B and C respectively and thus disappeared. Group, Inc. issued its stock directly to the B and C shareholders. Thus, the result was the same in all three cases, that is, A, B, and C became [redacted] and the former A, B, and C shareholders became Group, Inc. shareholders.

JOINT VENTURE ANALYSIS

Section 801.40 of the HSR regulations, entitled Formation of Joint Venture or Other Corporations, in pertinent part states:

[Contributors as "Acquirers"]

(a) In the formation of a joint venture or other corporation (other than in connection with a merger or consolidation), even though the persons contributing to the formation of a joint venture or other corporation and the joint venture or other corporation itself may, in the formation transaction, be both acquiring and acquired persons within the meaning of § 801.2, the contributors shall be deemed acquiring persons only, and the joint venture or other corporation shall be deemed the acquired person only.

[Conditions]

(b) Unless exempted by the Act or any of these rules, upon the formation of a [redacted] an acquiring person shall be subject to the requirements of the Act if:

[redacted]

(ii) The joint venture or other corporation will have total assets of $10 million or more; and

(iii) At least one other acquiring person has annual net sales or total [redacted]

(2)(i) The acquiring person has annual net sales or total assets of $10 million or more;

(ii) The joint venture or other corporation will have total assets of $100 million or more; and

(iii) At least one other acquiring person has annual net sales or total assets of $10 million or more. ...

If § 801.40 applied, filing would probably not be required because the joint venture or other corporation, Group, Inc., would not have total assets of $100 million or more, even assuming that at least two persons acquiring Group, Inc. stock each had net sales or total assets of $10 million or more. See § 801.40 (b)(2)(ii). Section 801.40 (b)(1) is not applicable because [redacted]

connection with a merger or consolidation. The HSR regulations use the word "consolidation" without ever defining it, although an example refers to a transaction in which corporations A and B consolidate into newly formed corporation C, with A and B losing their separate pre-[redacted] consolidation under state corporate law. Because in the subject transaction A, B, and C continue to exist, the transaction is not a consolidation. BUT THEY EXIST AS WHOLLY OWNED SUBS OF GROUP, INC. (SEE AXIN FORM 4-K8). WHY IS THIS A CONSOLIDATION

The determinative issue as to whether § 801.40 applies would appear to be whether the [redacted] transaction and were only added because a tax advisor consulted late in the process by B and C, unlike the tax advisor to A, believed that they enhanced the likelihood of favorable tax treatment. [redacted] Rather the formation of the joint venture was conceived, negotiated, and implemented as an exchange of stock, which only incidentally involved subsidiary mergers. In a true merger one of the merger partners disappears. Here A, B, C, and Group, Inc. all remain in existence.

NONJOINT VENTURE ANALYSIS

Section 801.2 of the HSR regulations defines acquiring and acquired persons. Of particular interest to us are § 801.2 (d)(2)(i) and (ii), which state:

> (i) Any person party to a merger or consolidation is an acquiring person if, as a [redacted] which it did not hold prior to the transaction.
>
> (ii) Any person party to a merger or consolidation is an acquired person if, as a result of the transaction, the assets or voting securities of any entity included within such person will be held by any other person.

[redacted] Group, Inc. itself. Under subparagraph (ii) the acquired persons are A, B, C, and Group, Inc.

Group, Inc.'s Acquisition of Voting Securities in A, B, and C

considered alone, would not satisfy the size-of-the-persons test. Although A was a $100 million player, Group, Inc. was not a $10 million player. Similarly, if the acquisition by Group, Inc. of B, a non-manufacturer with about $12 million in assets, were regarded as simultaneous with the acquisition of A, no reporting was required because Group, Inc. was still not a $10 million, much [redacted]

[redacted]

acquiring a company with about $12 million in assets.

When Group, Inc. acquired C, a $100 million player was acquiring a non-manufacturer whose assets were less than $10 million. Therefore, the size-of-the-persons threshold was not crossed.

In present context, a transaction to be reportable must involve an acquisition of either in excess of $15 million in voting securities or voting securities giving the acquiring person control of an entity with assets or sales of $25 million or more. Thus, Group, Inc.'s acquisitions of A, B, and C each crossed the transaction threshold, regardless of price paid, because each acquired company had sales in excess of $25 million. But because the acquisitions of A and C, even applying a sequential rather than simultaneous analysis, appear not to have crossed the size-of-the-persons threshold, the transaction test as to them appears irrelevant. In other words, even if a [redacted]

[redacted] Acquisitions By Shareholders of Group, Inc. Voting Securities

[redacted] shareholders received, we believe that none of the individual shareholders acquired more than $15 million in Group, Inc. voting securities.

* * *

[redacted]

Thank you very much for your assistance.

Sincer[redacted]

[redacted]

ADVISED THE WRITER TO FILE A CORRECTIVE FILING WITH GROUP, INC. (CONTAINING A & C) PRIOR TO ACQUIRE B. NO OTHER ADVICE.

B Michael Verne 6/20/00