[redacted] 801.40 002

[redacted]

[redacted]

August 24, 2000

***VIA FACSIMILE***

Mr. Michael Verne
Federal Trade Commission
Premerger Notification Office
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

**Re:** **<u>Section 801.40 Analysis</u>**

Dear Mike:

This letter is intended to confirm my understanding of the advice you provided during a telephone conversation with me last week.

**<u>STATEMENT OF FACTS</u>**

Corporation A is negotiating the terms of an agreement with several investors. Under the terms of the proposed agreement, the proposed investors would form a new

[redacted]

million in cash will come in six months after formation. Upon formation, the investor

different persons for H-S-R analysis. No person will have the power to appoint 50% of

An additional block of common shares will be reserved for issuance to management. On a fully diluted basis, assuming the issuance of the common shares that are reserved for issuance to management, consultants and employees, Corporation A would hold 29% of the equity and the investor group would hold 51%.

[redacted]

[redacted]

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million in cash to Corporation A in the form of an equalization payment for its contribution. The additional $5 million in cash coming in six months later will also be passed through Newco to Corporation A to complete the equalization.

A third closing is also contemplated by the transaction agreement. If Newco is able to develop the technology sufficiently and is able to ship beta versions of products to two separate customers and receive revenues for such shipments, then the investor group will contribute an additional $10 million in cash to Newco. Corporation A has never developed

CONTINGENT CONTRIBUTION,
T INCLUDED IN SIZE OF
ENCE ON SIZE OF TRANSACTION.

receive payment as speculative. In any event, Corporation A does not anticipate that such shipments and revenues would be achieved prior to approximately one year from now; and

[redacted]

## ANALYSIS

[redacted]

million or more in Newco voting securities.[2]

[redacted]

the investor group is willing to pay $20 million, with no contingency, in order to obtain

[redacted]

The relevant question that needs to be determined is what an arms-length purchaser would pay Corporation A to obtain its 36% interest in Newco after the formation

[redacted]

[2] Absent an acquisition of a controlling interest, Section 802.20 exempts the acquisition of 15% of the voting securities, unless a person will hold shares in excess of $15 million. In this case, no person will obtain control, and the analysis therefore hinges on whether the $15 million test is met.

[redacted]

[redacted]



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customers, then the contingent payments from the investors would come in, raising their total amount paid for their equity interest to $30 million. However, as noted above, it is uncertain and speculative as to when or whether this additional $10 million will be invested by the investors. The contingent investment which will not come in unless the [redacted]

If I have misunderstood our discussion and you believe that, contrary to this [redacted]

[redacted]

AGREE - N. OVUKA CONCURS.
B. Michael Verne
8/28/00

[redacted]

[redacted]