801.11(e)
801.40

[redacted]

March 27, 1989

Informed party I am not an attorney

VIA FEDERAL EXPRESS

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

Re: Hart-Scott-Rodino Filing Criteria
Our File Reference: FBRS 2.7

[redacted]

Thank you so much for your time and patience in carefully reviewing various details of a leveraged [redacted] confirm the analysis you and I discussed and the [redacted] Rodino Antitrust Improvements Act of 1976 ("Hart-Scott-Rodino").

OVERVIEW

A new corporation ("New Corp.") will be formed involving two foreign corporations ("X Corp." and "Other Corp.") and approximately twenty to thirty natural persons. New Corp., through an acquisition vehicle, will buy-out the stock of an existing corporation ("Old Corp."). All but one or two of the natural person shareholders plan to form a voting trust which will hold [redacted]

Note: I verified that no one
or more of New Corp including X Corp and other Corp.

ANALYSIS

Part I: Formation of New Corp.

1. The formation of New Corp. should be analyzed under FTC Rule 801.40, 16 C.F.R. §801.40. (All Rules cited herein are FTC Rules regarding Hart-Scott-Rodino [redacted] Rule 801.11(e) is not applicable to determine the size of the corporation formed (the "acquired person") under Rule 801.40.

[redacted] (1987), regarding Rule 801.11(e) suggest that it is not available under Rule 801.40, this comment was meant to refer only to the new corporation being formed and not to the acquiring persons.

4. In evaluating the size-of-person of natural "acquiring persons" in a Rule 801.40 transaction, the [redacted] other guidelines for evaluating the assets of a natural person. However, the general rule is that book value is utilized for size-of-person tests, whereas fair market value is used for size-of-transaction tests. Accordingly, the book value of the natural person's assets as characterized in Rule 801.11(d) is the relevant measurement.

5. If the natural person does not have a regularly [redacted] though the natural person is not a "newly-formed entity", mentioned on page 7069 of the March 6, 1987 Federal Register, 52 Fed. Reg. 7069 (1987).

6. In the proposed transaction, all but one or two of the natural person shareholders will form an irrevocable voting trust with a reversionary interest

(required by Delaware law). However, because the trust cannot be formed until the individuals have acquired the shares in New Corp., the voting trust cannot exist until after the Rule 801.40 corporation has been formed. Thus, the voting trust is not an entity to be evaluated as an "acquiring person" under Rule 801.40.

7. One of the parties to the transaction, X Corp., is a foreign corporation which currently holds warrants which are 90% paid and debt of Old Corp. X Corp. also has a limited technology exchange agreement with Old Corp. X Corp. will exchange the Old Corp. warrants for New Corp. warrants, which are over 90% paid, will permit New Corp. to have the benefit of a rollover of the debt (subject to negotiated modifications in terms) and will [redacted] receive any securities which are presently entitled to vote in the election of directors. X Corp. did not want to be a shareholder because of the possible effects of [redacted] will contribute significantly in technological research and development of New Corp. In structuring the governance of New Corp., the debt and technology [redacted] significant corporate decisions. As you confirmed, under this structure, X Corp. is not an "acquiring person" to be evaluated under Rule 801.40.

8. Compiling the above and other factors, the formation of New Corp. evaluated under Rule 801.40 consists of the following possible "acquiring persons": [redacted] natural person shareholders, none of whom holds $10 million in assets. Accordingly, no Hart-Scott-Rodino filing is required for the formation of New Corp.

Part II: Acquisition of Old Corp. by New Corp.

9. New Corp. will form a wholly-owned subsidiary "Acquisition Corp." as an acquisition vehicle. This formation does not require reporting under Hart-Scott-Rodino.

10. [redacted] purposes of Hart-Scott-Rodino as an acquisition by New Corp. of voting securities of Old Corp.

11. The natural person shareholders, approximating twenty to thirty in number, collectively hold over 50% of the voting securities of New Corp. These shareholders, with the exception of one or two, Mr. CEO and possibly Mr. Chief Financial Officer ("Mr. CFO"), will form an irrevocable voting trust with a reversionary interest. The voting trust will hold less than 50% of the voting [redacted]

12. The voting trust will designate either Mr. CEO or both Mr. CEO and Mr. CFO as the voting trustees. Assuming, for example, Mr. CEO alone is the trustee, Mr. CEO will not be attributed with the shares of the trust in addition to his own shares, because he does not "hold" the shares of the trust. Similarly, if Mr. CEO and Mr. CFO are both trustees, neither one of them nor both of them will have attributed to their individual [redacted] constitute less than 50% of the shares of New Corp.

13. Under the circumstances discussed above, the formation of the voting trust does not affect the Hart-[redacted] Rule 801.11(e) can be invoked in measuring the size of person of New Corp. Accordingly, the value of the consideration being utilized to consummate the acquisition can be subtracted from the total assets of New Corp. This subtraction brings the value of assets of New Corp. below $10 million. Therefore, the statutory threshold of Hart-Scott-Rodino would not be met and no filing would be required. This conclusion would hold even if the other thresholds are met; i.e. even if the [redacted]

annual net sales or total assets and if over 15% or over $15 million of stock or assets were being acquired.

Conclusion

The assumptions and analyses set forth herein based

the above series of steps for the contemplated leveraged buy-out does not generate a Hart-Scott-Rodino reporting requirement for New Corp., X Corp., Other Corp., or any

do not hear from you by the end of the day on March 30, 1989, we will proceed accordingly.

Thank you again for your extensive time and assistance in analyzing this transaction.

Very truly yours,

[redacted]

[redacted]

I concur with this letter. This appears to be covered under

section

called [redacted]

3-31-89

[redacted]