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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
NOTIFICATION
OFFICE

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

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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. 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.

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

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

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not have an annual statement of income and expense are calculated. We conclude from this omission that no such

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

formation of a joint venture, the criteria of § 801.40 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.

questions or need additional information. I will try to receive your interpretive advice by March 31.

Very truly yours,

[Redacted Signature]

per staff meeting 3-30-89

This is not an 801.40 deal. This is a reportable transaction. You must go by financial statements. If a restated income

you may go by that.

called [Redacted]

4-4-89