[redacted]

$ 901.90

March 21, 1991

John M Ciesla, Jr. [redacted]

Premerger Notification Office
Federal Trade Commission
Room 306
6th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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Re: Joint Venture Formation

Dear John:

This letter serves to memorialize our telephone conversation of March 19, 1991. Based on the facts I provided, you advised that you did not believe that either taken separately, or as a whole any of the transactions we discussed were reportable. The facts we discussed are summarized below:

[redacted]

My client, a indirect wholly-owned subsidiary of a [redacted] ("Company A") and a [redacted] company ("Company B") had discussions beginning in the Fall of 1990 concerning the [redacted]

[redacted]

cash. During the course of the discussion, Company A learned that certain widget manufacturing assets owned by a United States manufacturing company ("Company C") were for sale. In contemplation of, but not conditioned on, the formation of a joint venture, Company A contractually committed itself and Widget Manufacturing Company ("WMC") (a subsidiary

[redacted]

for the payment of [redacted] and the assumption of approximately [redacted] in liabilities. On or about January

[redacted]

manufacturing assets from Company C.1/

On or about January 2, 1991, Company A and Company B each contributed [redacted] million in cash to WMC and subscribed to 50% of the voting securities of WMC. WMC has operated as an ongoing business throughout 1991.

During January and February 1991, the parties continued to negotiate additional capital infusions for WMC as well as the details of the management and operation of the venture. Throughout this period there was no legal obligation for either company to contribute any additional funds or assets. However, it was anticipated that if the parties could agree, Company A would contribute its widget assets to WMC and Company B would

by the parties over the period 1991 - 1993, total assets of the WMC as measured by 16 C.F.R. § 801.40(c) were at various times above and below $25 million.

On March 6, 1991, the parties finally agreed to the amount of capital each would commit to WMC.2/ Company A agreed to contribute its widget manufacturing assets, and Company B would contribute [redacted] million in cash with each maintaining their 50/50 voting security interest in WMC. Thereafter, each of Company A and B would contribute additional cash equally in an amount "required immediately for the business." The maximum amounts committed to be contributed in cash during 1991 and 1992, when combined with the initial cash and asset

Analysis:

For purposes of the analysis, I asked you to assume that the parties did not structure the transaction in stages, or as a voting security sale versus a joint venture formation, in order to avoid an Hart-Scott-Rodino reporting obligation, and to further assume that at the time of the joint venture

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1/ Company C would have sold the assets to another buyer had Company A not been willing to close by this date.

2/ Although the parties have agreed to the capital structure, the document containing the agreement has not been executed.

formation on January 2, 1991, the parties had not committed to

As I understand your advice, based on the specific facts set out above, the parties should likely consider the sale of 50% of WMC to Company B as a joint venture formation and not simply the sale of voting securities.3/ Viewed as the formation of a potentially reportable joint venture, the parties on January 2, 1991, were required to determine whether the acquisition of the voting securities in connection with the formation was reportable.

Given that Company A and B each have worldwide sales or assets exceeding $100 million, the issue of reportability turns on whether WMC has $10 million in assets and whether the exemption provided by 16 C.F.R. § 802.20 applies. As a result of the formation, Companies A and B each hold 50% of the voting securities of WMC, which each acquired for less than $15 million.4/ Therefore, unless WMC has sales or assets of $25 million or more, the transaction is not reportable. Since the only assets any party to the transaction agreed to

16 C.F.R. § 801.40(c) did not approach $25 million. The fact that the parties subsequently agreed to make capital contributions which will exceed $25 million does not affect the reportability of the transaction, (again, assuming there was no purpose of avoidance).

I understand your caution that if the parties had in fact agreed to contribute more than $25 million and then structured such commitments as non-binding to avoid the reporting obligations at the time of the joint venture formation, that such a structuring would, in your view, be a device employed for the purpose of avoiding a reporting obligation and subject to 16 C.F.R. § 801.90. I am assured by Company A and B that the transaction was not so structured.

the better view would be that the transaction should be viewed as a sale of assets and not a joint venture

4/ The fair market value of the voting securities is also less than $15 million.

[redacted]

If this letter does not accurately summarize our telephone conversation or does not correctly reflect your conclusions, would you please contact me no later than noon, Friday, March 22, 1991.

Very truly yours,

[redacted]

[redacted]

Called on 3/21/91 - Confirmed the advice ~~given with the caveats~~ cautions as expressed in the letter.
Also, indicated that if the JV formed on 1/2/91 was a shell corporation rather than an ongoing operation w/ operating assets the analysis ~~would~~ and my advices would probably be different.