[redacted]

September 12, 1991

**BY FAX**

Richard B. Smith, Esq.
Premerger Notification Office
Federal Trade Commission
[illegible]
Washington, D.C. 20580

Dear Mr. Smith:

I am writing to memorialize our telephone conversation today and to confirm your advice that the transaction outlined [illegible] Improvements Act of 1976 and the regulations promulgated thereunder.

FACTS

As I explained, Shareholder X currently owns and has [illegible] pursuant to which his shares in Company A will be offered to the public through investment bankers. That offering is scheduled to occur before the end of this month. Our client, Company B, proposes to negotiate with X for a direct purchase from X of approximately 12% of Company A's voting securities at a fixed [illegible] under the Act as soon as possible pursuant to the procedures outlined in 16 C.F.R. §801.30.

The timing of the secondary offering and the Hart-Scott-Rodino waiting period present a problem. The Hart-Scott-Rodino waiting period incident to Company B's acquisition of Company A voting securities will expire only after the date of [illegible] voting securities to Company B and, for some reason (which we do [illegible]

[redacted]

[redacted]

Richard B. Smith, Esq.
September 12, 1991
Page 2

Antitrust Division successfully challenge Company B's [redacted]

Accordingly, Company B proposes to agree with X that, [redacted]

secondary offering and any diminution in the share price from the time of the first secondary offering to the subsequent secondary offering. Without such a guarantee, X will not be willing to sell the Company A stock to Company B.

[redacted]

conversation, we do not believe that this proposed agreement between X and Company B in any way violates the Act. It is true that, when X and Company B agree to the transaction, the price risk incident to the ownership of Company A voting securities [redacted] vote the Company A stock. Thus, these key elements of beneficial ownership of Company A stock will remain with X.

Moreover, the proposed arrangement is not part of an avoidance device. X has not acted as Company B's agent in acquiring Company A voting stock and Company B will not make any open market purchases of Company A stock. Company B is also not delaying its premerger filing under the Act. As we discussed, the arrangement with X is the functional equivalent of X selling Company B an option to purchase Company A stock, the acquisition of which would be clearly exempt under the regulations. 16 [redacted] approval of the foregoing arrangement based in part on its unusual fact pattern does not provide a significant regulatory gap or loophole to the Act's reporting requirements.

~~In sum, we believe that the proposed arrangement~~ between X and Company B does not violate the Act or its [redacted]

[redacted]

[redacted]

Richard B. Smith, Esq.
September 12, 1991
Page 3

involved in this transaction, our client will be taking immediate steps in reliance on this advice and, accordingly, we would very much appreciate hearing from you by close of business tomorrow, September 13, whether the Staff disagrees with our conclusion.

We appreciate your consideration of this issue and would, of course, be happy to answer any further questions that you may have.

Sincerely,

[redacted]

9/13/91 Advised [redacted] that letter
[redacted]
had been reviewed by PHN staff and it was in
agreement that Company B's agreement with X
did not pass beneficial ownership of the 13% of A's
voting stock to B. Although price at which stock was to
be purchased was fixed, thus giving B the benefit of
[illegible] and the detriment of any fall in
price, such is true of any agreement to [illegible]
a fixed price. Such agreements also limit the holder's
right to transfer the stock (~~short~~ absent breaking the agreement)
but does not pass such right to the buyer. Since
B did not acquire the right to vote the stock, transfer
[illegible] in our view X still holds A's
voting stock. B's agreement to [illegible]
fall in the price of A's stock should X be required to make
[redacted] another "secondary offering" does not change this conclusion.
R.B. Smith