801.40

[redacted]

July 13, 1993

BY HAND

Richard B. Smith, Esquire
Premerger Notification Office
Federal Trade Commission

[redacted]

Dear Rich:

I am writing to memorialize the informal interpretations of the FTC Premerger Notification Office which you provided over the telephone yesterday in response to my July 6, 1993 letter.

My letter asked a number of questions concerning the [redacted] Improvements Act of 1976 and the implementing regulations. Of a [redacted]

In brief, as described in the letter, X, the new limited [redacted] voting securities, entitling the holders, persons A, B, and C, to vote for the manager or managers; and (c) nonvoting interests [redacted]

The first question I asked was whether the formation of X would be reportable under 16 C.F.R. § 801.40, assuming applicable size tests were met and no exemptions otherwise applied. You indicated that the Premerger Office viewed X as a corporation for Hart-Scott purposes. Therefore, you advised that the formation of X would be subject to a reporting obligation under § 801.40 to the same extent as if X were a corporation rather than a limited liability company.

The second question I asked was whether the interests to be held by A, B, C, and D would constitute "voting securities" under the Act and the regulations. You agreed with the analysis in my letter, and thus you advised that the interests to be held by A, B, and C would constitute voting securities, but that the interests to be held by D would not constitute voting securities.

Third, I asked how control of X should be determined. You again agreed with the analysis in my letter. You thus advised that the percentage of the voting securities of X held by each of

advised that, in accord with § 801.1(b)(1)(i), a person holding 50% or more of X's voting securities would control X. You agreed that the alternative control test in § 801.1(b)(1)(ii), for entities without outstanding voting securities, would be inapplicable. You therefore advised that the nonvoting securities held by D could not confer control of X

rules and exemptions applicable to

that because D will receive only nonvoting securities, D would not qualify as an acquiring person and would not have any potential filing obligation.

You also advised under § 801.40(a) that the assets of Y in

contributions of persons like A, B, and C, who will acquire

indicated that the contributions of persons like D, who will receive only nonvoting, nonconvertible securities in the new entity, are not counted toward the size of the new entity under § 801.40(c). You confirmed that D's interests would not constitute voting securities, even if, like typical nonvoting preferred stock, they would confer certain voting rights in the

[redacted]

[redacted]

securities of corporations.

I believe the above fully and accurately describes the [redacted] error, please call me immediately.

As always, I appreciate your time and most helpful assistance.

Very truly yours,

[redacted]

Attachment