

801.11
801.90

February 1, 1995

6 Pennsylvania Ave. N.W.
Room 603
Washington, D.C. 20580

Re: Telephone conversation of January 31, 1995

Dear Nancy:

I am writing to confirm our telephone conversation yesterday, during which we discussed the staff's position with respect to the requirement in Rule 801.11(c)(2) that "the total assets of a person shall be as stated on the last regularly prepared balance sheet of that person." Specifically, I informed you that I have a client that is contemplating a transaction which meets the Size-of-Transaction test, and in which the acquiring party clearly meets the Size-of-Person test. My client is a small company in the development phase, with no operating revenue, and which relies heavily upon venture capital to fund its operating expenses. As a result, its balance sheet assets routinely rise above and fall below \$10,000,000, as new cash is infused into the company and is expended at a substantial

a "regularly prepared balance sheet" under the rules.

My client's assets as of the most recently prepared balance sheet exceed the \$10,000,000 threshold, but it expects that its assets will fall below the threshold as of the next regularly prepared balance sheet. The parties would like to commit to the transaction in the near term, at which time the Size-of-Parties test would be satisfied, to be consummated within a reasonable period, at which time it is currently anticipated that the test will not be satisfied.

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Moreover, the fact that consummation of the transaction is timed with an eye toward the expected assets as of the date of consummation is not a "device for avoidance" as long as the balance sheet test is satisfied. You confirmed that this was indeed the staff's view.

Thank you very much for your assistance. I enjoyed talking to you.

Very truly yours,

[Redacted signature area]

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AB

OK, if the below \$10mm balance sheet is prepared in accordance with

monthly balance sheets