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Since the consolidating statement is part of the financial statements it should be included in determining the annual sales ^{annually prepare}

December 17, 1996

VIA FACSIMILE
Victor Cohen, Esq.
Staff Attorney
Premerger Notification Office
Bureau of Competition

of the subsidiary to be sold. Together they show net sales ^{gross} of less than \$25MM + this, 802.20 applies

TH 22004

Washington, D.C. 20580

Re: Determining Annual Net Sales for Purposes of 16 C.F.R. § 802.20(b)

Dear Victor:

This letter memorializes our discussion of December 16, 1996 regarding the determination of annual net sales for purposes of 16 C.F.R. § 802.20(b).

The transaction is structured as follows. S, a foreign person, is selling a worldwide group (the "T" group) of subsidiaries to C, another foreign person. T has one U.S. subsidiary, TUSA.

The remaining companies in the T group are foreign issuers that do not have assets or sales in

16 C.F.R. § 802.20(b) exempts transactions where the acquiring person does not acquire voting securities "which confer control of an issuer which, together with all entities which it controls,

TUSA prepared its last annual financial statements as of December 31, 1995. TUSA's financial statements included a consolidated balance sheet, a consolidated summary of

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Net in this case means the gross sales of TUSA reflecting discontinued operations

✓

expenses of each of TUSA's divisions). The divisions are not separately incorporated, but are separately managed and are viewed as separate "profit centers." TUSA's financial statements were fairly summary in nature, as those of wholly-owned subsidiaries often are; they did not include notes. The financial statements were all prepared soon after the year-end according to

Because the W Division was sold prior to the end of TUSA's fiscal year, W Division's assets were not assets of TUSA at year-end and were thus not included on TUSA's balance sheet.

TUSA has earned revenue from W Division throughout 1995, and thus W Division's revenues were not excluded from TUSA's revenues as set forth on the consolidated summary of operations; however, the consolidating summary of operations clearly sets forth the revenues for the W Division.

On its October 31, 1996 balance sheet (TUSA's most recent regularly prepared balance sheet)

\$25 million and would allow the transaction to be exempted under 16 C.F.R. § 802.20, so long

as the "annual net sales" of TUSA are also below \$25 million.

year ended December 31, 1995 were approximately \$8.0 million and "adjusted gross revenues" were also approximately \$8.0 million. If W Division's revenues are not included in TUSA's revenues for § 802.20 purposes, the gross revenues of TUSA are \$23.3 million and the

corrections) and "Intrabrand Assistance" (i.e., assistance billed by one TUSA division to another TUSA division).

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adjusted gross revenues are \$20.9 million. Thus, if the W Division's revenues are not included in the revenue of TUSA, the § 802.20 exemption will apply and no Hart-Scott-Rodino filing will be necessary.

Interpretation #158 in the *Premerger Notification Practice Manual* (ABA Section of Antitrust Law, 1991) is directly applicable to this situation. Interpretation #158 asks "Whether income from discontinued operations, separately stated on an entity's last regularly prepared annual statement of income and expense, must be included for purposes of the size-of-person test." The "Interpretation and Commentary" states that "... the FTC staff determined that ... income from discontinued operations ... could be *excluded* by all persons who have separately stated the revenues of the discontinued operations somewhere in their financials. The current FTC staff position is that revenues from 'discontinued' operations may not be excluded if the company still holds the assets of the business which generated those revenues."

In this instance, TUSA has "separately stated the revenues of the discontinued operations [the

from TUSA's revenues when determining the annual net sales of TUSA. Therefore, TUSA's annual net sales and total assets are both below \$25 million and the transaction is exempt under

If the foregoing does not comport with your recollection of the advice given, please contact me as soon as possible. If we do not hear from you, we will proceed in reliance upon this advice. Thank you for your efforts in this matter. Best regards.

Sincerely,

[Redacted signature block]