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FOR: Mr. Patrick Sharpe
Premerger Notification Office
Federal Trade Commission

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FROM:

DATE: February 24, 1998

PLEASE DELIVER THE FOLLOWING:

DIRECT DIAL:

TO: Joseph Krauss, Esq.

COMPANY: Federal Trade Commission

FAX NO: 202/326-2624

PHONE NO:

TOTAL NUMBER OF PAGES: 3 (including this page)

MESSAGE FROM SENDER:

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§ 802.60

February 26, 1998

Via Facsimile

Joseph G. Krauss, Esq.,
Premerger Notification Office,
Federal Trade Commission,
Bureau of Competition,
Sixth Street and Pennsylvania Avenue, N.W.,
Room 303,
Washington, D.C. 20580.

Underwriter" Exemption (16 C.F.R. § 802.60)
Under the Hart-Scott-Rodino Antitrust

Dear Mr. Krauss:

Further to my July 8, 1997 letter to Richard B. Smith, Esq. and our recent conversations and in-person

1976, as amended, (the "Act"). As we have discussed, it is requested that the Premerger Notification Office (the "PNO") confirm that the "securities underwriter" exemption (16 C.F.R. § 802.60) applies to all acquisitions of voting securities by broker-dealers for the purposes of resale in the ordinary course of business.

Specifically, for the reasons discussed in my July 8 letter, it is requested that the PNO issue an interpretation

provision extends to any acquisition of voting securities for the purposes of resale in the ordinary course of business if the entity making the purchase is either:

> (a) a registered "broker" or "dealer" within the meanings of 15 U.S.C. § 78c(a)(4) or § 78c(a)(5), or a person that would be required to be so registered in the absence of an exemption under the Securities Exchange Act of 1934 (the "Exchange Act") or the rules promulgated under that statute; or
>
> (b) i. a non-United States entity (including a United States entity engaged in business as a broker or dealer entirely outside the United States, or engaged in business in the United States as permitted by Rule 15a-6 promulgated under the Exchange Act) whose activities, if conducted in the United States, would be described by the definitions of "broker" or "dealer" within the meanings of 15 U.S.C. § 78c(a)(4) or § 78c(a)(5); or (ii) a non-United States resident affiliate of such entity.

As is described in my July 8 letter and as we discussed during our telephone conversation on November 21, 1997 and during several of our recent meetings, there do not appear to be any issues of antitrust enforcement or policy that support withholding the requested clarification. The types of acquisitions that would be covered by the interpretation are akin to other activities conducted in the ordinary course of business by entities that are engaged in securities underwritings or distributions.

Treating all such acquisitions similarly for purposes of the notification and waiting period requirements (the "Requirements") of the Act would yield the following benefits, among the others discussed in my July 8 letter. First, such an interpretation would provide much-need certainty regarding the applicability of the "securities underwriter" exemption to transactions that occur under circumstances requiring a swift, even instantaneous, determination as to whether the acquisition would be subject to the Requirements. Second, providing the requested clarification would ensure that firms that regularly make such

acquisitions may do so on a basis that allows them to compete effectively with their foreign-based counterparts.

As we discussed during our telephone conversation, clarifying that such acquisitions are exempt from the Requirements would not create a loophole that would include transactions that might give rise to significant competitive concerns. The proposed clarification would retain the requirements of the "securities underwriter" exemption that the acquisition be conducted (i) for purposes of reselling the securities and (ii) in the ordinary course of the business of the acquiror. [You confirmed during our telephone conversation that the exemption would apply even if the acquiror were unable actually to resell the securities because of such factors as adverse market changes as long as the purpose of the acquisition was to obtain securities for resale promptly in the ordinary course of business.] As a result, even under the requested interpretation, the range of acquisitions [illegible] [illegible] exemption codified at 16 C.F.R. § 802.64.

We appreciate your continuing attention to, and consideration in, this matter.

Very truly yours,

cc: Catherine McGuire, Esq.
(Securities and Exchange Commission)

Maryanne Kane, Esq.
(Federal Trade Commission)

David Cavicke, Esq.
(Commerce Committee,
United States House of Representatives)

3/24/98

- Advised writer that [illegible] Office agrees with positions and conclusions in letter, namely that securities underwriter exemption of § 802.63 applies to all acquisitions of voting securities by broker-dealers for the purpose of resale in the ordinary course of business.

JBK

*also confirmed w/ writer that letter requested an informal interpretation only.

JBK