[redacted]

August 25, 1999

Richard B. Smith, Esq.
Pre-Merger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

Re: Request for Confirmation of Hart-Scott-Rodino Exemption Issues

Dear Mr. Smith:

[redacted]

understanding of a telephone conversation we had on Thursday, August 12, 1999. Our August 12, 1999 telephone conversation involved a discussion regarding the applicability of certain exemptions to the pre-notification filing requirements under § 7A of the Clayton Act (the "Act"), [redacted] common stock of a company.

The general facts of the circumstances considered were as follows:

Company A loaned Company B money in exchange for the issuance of a promissory note. At the same time, Company B issued Company A warrants for shares of [redacted] that time entitling Company A to appoint one of the six directors on the board of directors of Company B. There is no direct correlation between Company A's right [redacted] is, the warrants are not convertible into one-sixth of the shares of outstanding common stock. Under the terms of the stockholder's agreement, the stockholders' agreement terminates upon an initial public offering of Company B. Company B is about to make an initial public offering. Company A is contemplating exercising its

[redacted]

warrants for shares of common stock of Company B. Other than the warrants,

Assuming the statutory "size-of-the-parties" and the "size-of-the-transaction" thresholds are met, I had asked for your clarification as to whether either (i) the "no increase

connection with Company A's contemplated exercise of its warrants for shares of common stock of Company B.

Following our telephone conversations, my understanding of the availability (or lack thereof) of each such exemption under the above facts is as follows:

(i) The "no increase in the percentage of outstanding voting securities" exemption.

Section 801.12 of the pre-merger notification rules (the "Rules") provides that the calculation of the "percentage of voting securities" under the Act or the Rules is always conducted using the number of votes for directors of an issuer presently entitled to be cast.

its warrants for shares of common stock of Company B will increase the percentage of outstanding voting securities of Company B held by Company A. Upon Company A's

voting securities of Company B to owning some percent of the outstanding voting securities of Company B. The pre-notification filing exemption set forth in § 18a (c)(10) of the Act, 15 U.S.C. § 18a (c)(10), therefore, will not be available to Company A and Company B under these circumstances.

(ii) The "investment purposes only" exemption.

Whether the pre-notification filing exemption set forth in § 18a (c)(9) of the Act, 15 U.S.C. § 18a (c)(9), is available under any particular circumstance depends strictly upon the timing of a party's acquisition of voting securities of the issuer. Assuming the acquiring party acquires or holds ten percent or less of the outstanding voting securities of the issuer

addition, you indicated that at the time of the acquisition the acquiring party may not be engaged directly in business in competition with the issuer.

[redacted]

Company B was the acquisition of convertible voting securities of Company B. As such, Company A's original acquisition of the warrants for shares of common stock of Company B would have been exempt from the pre-notification filing requirements of the Act pursuant to

[redacted]

Company A may not have the right to appoint any person to the board of directors of Company B. Further, at the time Company A exercises the warrants Company A may not be engaged directly in business in competition with Company B.

If the stockholder's agreement granting Company A the right to appoint a director to the board of directors of Company B is terminated upon Company B's initial public offering, assuming Company A has no other right to appoint a director to the board of directors of

[redacted]

business in competition with Company B, the exemption from the pre-notification filing

[redacted]

Recognizing, of course, that any response you provide is not a formal interpretation, I would appreciate it if you could confirm whether my basic understanding of the matters set

[redacted]

Very truly yours,

[redacted]

JDN/
Cc: Lawrence D. Bradley, Esq.

9/1/99 - Left phone mail for writer advising that the Program Office (NU abbreviated earlier) Letter Ruling with the corrections noted for Part. paragraph on page 3. In that paragraph, control of the issuer through the right to appoint half or more of its Director would [illegible] assumed the issuer was a [illegible] the ability to

[redacted]

as a partnership, LLC, etc., [illegible] fact, have the same result.

RPB Smith

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