802.50

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[redacted]

March 15, 2002

FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION OFFICE
2002 MAR 15 A 9:53

Michael Verne, Esq.
Premerger Notification Office
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Request for Informal Advice

Dear Mr. Verne:

I am writing to confirm our telephone conversation Wednesday in which you advised that the following transaction is exempt from the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, (the "HSR Act" or the "Act"), and the rules promulgated thereunder, 16 C.F.R. § 801.1 *et seq.* (the "Rules").

[redacted] a U.S. company and its own ultimate parent (which I described as company "A" in our conversation), and [redacted]), a Mexican company (company "B" in our discussion), are the only two shareholders of a Mexican joint venture corporation, [redacted]' company "C" in our conversation). [redacted] currently holds a minority interest in [redacted] but has proposed buying [redacted] interest so that [redacted] would become a wholly-owned subsidiary of [redacted] a manufacturing company that makes appliance products. [redacted] sells appliances in Mexico and other countries but does not sell appliances directly into the U.S. Rather, pursuant to an export supply agreement between [redacted] and [redacted] pays [redacted] the units of appliances that [redacted] produces for sale to [redacted] as soon as [redacted] manufactures them, and [redacted] ips these units to a warehouse in Mexico where [redacted] takes possession of them. The agreement contemplates that the products being purchased by [redacted] will be shipped to the U.S. and, in fact, almost all are except for a small number of units shipped directly from Mexico to other countries.

Under the terms of the agreement between [redacted] and [redacted], which has been in effect for the past five years, title to the products, as well as the risk of loss, passes to [redacted] when the appliances arrive at the warehouse in Mexico. In addition, both [redacted] and [redacted] treat the sales of appliances from [redacted] to [redacted] taking place in Mexico

[redacted]

[redacted]

for tax and accounting purposes. U.S. customs forms prepared on behalf of [redacted] also treat [redacted] as the owner of the products before they cross the border into the U.S. [redacted] is listed on a Mexican customs form (pedimento) as the exporter of record, but we understand that this is because [redacted] has no branch in Mexico and that only a Mexican resident (including an entity) duly registered with the Mexican Federal Taxpayers Registry can act as an exporter of record (which is not the case with [redacted]. Further, according to Mexican Customs Law, a person or entity may act as an exporter of record regardless of the fact that the exporter does not have title to the exported goods, but rather sold these goods to another party in Mexico before they ultimately were exported. Finally, this form provides that [redacted]'s sales to [redacted] are made on an "ex works" basis, meaning title passes to [redacted] when the products leave [redacted] plant.

Under the HSR Act, transactions meeting the Act's Size-of-the-Persons and Size-of-the-Transaction dollar thresholds are reportable unless there is an applicable exemption. [redacted] and [redacted] meet the Size-of-the-Persons threshold. In addition, the [redacted] voting securities that [redacted] is acquiring from [redacted] are valued in excess of the $50 million Size-of-the-Transaction threshold. As we discussed, however, the transaction is exempt from the Act's filing requirements under Rule 802.50(b).

Rule 802.50(b) provides that an acquisition by a U.S. perso[redacted] of the voting securities of a non-U.S. issue[redacted] is exempt unless that issuer has (i) assets located in the U.S. with a book value of $15 million or more (not including cash and certain other investment assets) or (ii) sales "in or into" the U.S. valued at $25 million or more in the issuer's most recent fiscal year. In this case, while we understand that appliances manufactured by [redacted] and purchased by [redacted] for transportation to and resale in Mexico sometimes travel briefly through the U.S. [redacted] does not have assets with a book value of $15 million or more located in the U.S. The question, therefore, is whether [redacted]'s sales to [redacted] are sales "in or into" the U.S. [redacted]'s sales to [redacted] were considerably in excess of $25 million in [redacted]'s most recent fiscal year. These sales are not sales in or into the U.S. by [redacted] however. [redacted] sells appliances to [redacted] in Mexico, where both legal and beneficial ownership, including the risk of loss, pass to [redacted]. Moreover, both [redacted] and [redacted] treat the sales as taking place in Mexico for other purposes in the ordinary course of business (tax, accounting, customs). Given these facts, it is [redacted] not [redacted], that is making sales of appliances into the U.S. Because [redacted] is selling the appliances to [redacted] in Mexico, and [redacted] has no direct sales to the U.S., [redacted] has no sales in or into the U.S. for purposes of Rule 802.50(b).

This analysis is supported by an informal interpretation issued by the Premerger Notification Office. See ABA *Premerger Notification Practice Manual* (1991 ed.) ("ABA Premerger Manual"), Interpretation No. 262. In that case, the purchaser, A, a U.S. person, sought to acquire assets located in Hong Kong that had $32 million in sales to U.S. customers. The Hong Kong company used an agent located in New York to solicit U.S. customers. The customers then would travel to Hong Kong to view the products, negotiate prices and submit

[redacted]

purchase orders. The products next would be delivered to U.S. customers in Hong Kong, Bangkok or Taiwan, at which time title and the risk of loss would pass to the customer. The customer was responsible for transporting the product and clearing customs. The Premerger Notification Office concluded that these were not sales related to the acquired assets "in or into" the U.S. under Rule 802.50(a) (which deals with acquisitions of non-U.S. assets). As in Interpretation No. 262, [redacted]'s sales of appliances to [redacted] should not be considered sales by [redacted]c "in or into" the U.S. for purposes of Rule 802.50(b). See also ABA Premerger Manual, Interpretation No. 261 (acquisition by U.S. person of assets of foreign natural gas producer, virtually all of whose gas was purchased by foreign government agency and resold into the U.S., exempt because producer's sales were not "in or into the United States.").

Please review this letter and call me as soon as is convenient to let me know whether you agree with my description of your advice.

Sincerely,

[redacted] /ASL

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AGREE THAT [redacted] SALES DO NOT CONSTITUTE SALES IN OR INTO THE U.S. (N. OVUKA CONCURS)

B. Michael Verne
3/15/02