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801.1(b)

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Writer [redacted]

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June 16, 2004

VIA FACSIMILE
PreMerger Notification Office
Bureau of Competition
Federal Trade Commission
Room 303
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Ph: (202) 326-3100
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Attention: James Ferkingstad, Esq.

Re: Confirmation of Informal Advice on Hypothetical from Conference Call of June 15, 2004

Dear Mr. Ferkingstad:

I wanted to confirm the advice you provided to me on our conference call yesterday and the voicemail follow-up message that you left for me for this morning. In our telephone call yesterday, I presented the following hypothetical transaction to confirm my understanding from a review of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act") and accompanying rules and regulations and related treatises that a filing under the HSR Act would not be required.

Hypothetical

Corporation A is a publicly-traded company and Corporation B is a private company, both working in the same NAICS 6-digit industry. Corporation A is to form a wholly-owned subsidiary that would merge with and into Corporation B, with Corporation B as the surviving corporation and thus a wholly-owned subsidiary of Corporation A. In the merger, each share of Capital Stock of Corporation B will be exchanged for 2 shares of publicly-registered Voting Common Stock of Corporation A. Corporation B's capitalization is divided into two classes of stock: Class A Voting Common Stock, of which 530,000 shares are outstanding and Class B Nonvoting Common Stock, of which 6,500,000 shares are outstanding. Based upon a closing market price of $20 per share for Corporation A's Common Stock on the date that the Merger Agreement is executed, the holders of Corporation B's Class A Voting Common Stock would receive 1,060,000 shares of Corporation A's Voting Common Stock valued at $21,200,000 and the holders of Corporation B's Class B Nonvoting

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Common Stock would receive 13,000,000 shares of Corporation A's Voting Common Stock valued at $260,000,000.

Although a few holders of Corporation B's Class A Voting Common Stock could receive total shares of Corporation A's Voting Common Stock (for both their Corporation B Class A Voting Common Stock and Class B Nonvoting Common Stock) valued in the aggregate at $50,000,000 or more, neither Corporation A nor any such former shareholders of Corporation B would have annual net sales or total assets of $100,000,000 or more, and thus the Size-of-the-Parties test is not satisfied and no HSR filing for any of these additional acquisitions of voting securities needs to be made.

In our telephone call you agreed that in determining whether or not the Size-of-the-Transaction is met, only the aggregate market price of Corporation A's publicly-traded Common Stock issued to the former holders of the Class A Voting Common Stock of Corporation B needs to be considered; and thus since the value of the Corporation A Voting Common Stock issued in exchange for the Corporation B's Voting Common Stock is less than $50,000,000, the Size-of-the-Transaction test is not met. You also stated that it does not matter (i) that the aggregate market price for Corporation A's Voting Common Stock issued to the holders of Corporation B's Nonvoting Common Stock would total in excess of $200,000,000, since the acquired shares in the exchange were "nonvoting" stock without the right to elect directors or (ii) that the value of Corporation A's Common Stock exchanged for Corporation B's Class B Nonvoting Common Stock is well above the $200,000,000 threshold, even is there were former Corporation B shareholders who receive Corporation A's stock in exchange for both Class A Voting and Class B Nonvoting Common Stock of Corporation B.

You noted that it is only the value (i.e., applicable "market price") of Corporation A's Common Stock exchanged for Corporation B's Class A Voting Common Stock that needs to be considered in determining if the Size-of-the-Transaction test is satisfied. You did note that since Corporation A's Common Stock is publicly traded, care would need to be taken to ensure that the "market price" for this stock does not rise to such an amount within the HSR Act's prescribed 45-day time period prior to closing.

You further cautioned about the possibility of a separate reportable transaction for any shareholders of Corporation B receiving such number of shares of Corporation A's Voting Common Stock that satisfy the HSR Act's reporting requirements. I did note that in the hypothetical case, there may be a few shareholders that own Corporation B's Class A Voting Common Stock and Class B Nonvoting Common Stock that will receive a total amount of Corporation A's voting Common Stock with an aggregate market price in excess of $50,000,000. However, I noted that in all of these cases, the amount in question would not be $200,000,000 or more and the Size-of-the-Person test would not be satisfied. Neither Corporation A nor any such former shareholder of Corporation B would separately have annual net sales or total amounts of $100,000,000 or more in the most recent year. In summary, you acknowledged that the result may seem strange given that after the merger Corporation B would be a wholly-owned subsidiary of Corporation A, but that since the value of Corporation A's Voting Common Stock

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exchanged for only the Class A Voting Common Stock of Corporation B is well below the $50,000,000 jurisdictional threshold, no filing would be required.

In a follow-up voicemail message to you, I asked if you would confirm that the fact that Corporation B's Class B Nonvoting Common Stock is entitled under the corporate law of its state of incorporation to vote on the proposed merger does not mean that such shares are "voting securities" under the HSR Act, since the term "voting securities" under the HSR Act is defined as meaning "any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect of unincorporated issues, persons exercising similar functions." You subsequently returned my call and left me a voicemail message confirming that as long as the Class B Nonvoting Common Stock do not have a right to vote in the election of directors of Corporation B, such stock would not be considered "voting securities" under the HSR Act, even if the holders of such stock do have the right to vote on the approval of the merger under applicable state corporate law.

Please confirm the advice that you provided as stated herein, based upon the facts stated herein, or provide me with any required additional information regarding the applicability of the HSR Act to the hypothetical situation detailed herein, particularly if there is a particular factual assumption that does not appear to have been discussed that could have the potential of impacting the need for the making of a pre-merger notification filing for the hypothetical transaction described herein.

Thank your for all of your prompt assistance in this matter.

7/1/04
AGREE
JF

Very truly yours,

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