[redacted]

801.11(e)

March 2, 2005

[redacted]

Mr. B. Michael Verne
Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: HSR Treatment of Newco Formation and Acquisition

Dear Mike:

This is to confirm my understanding of the position of the Premerger Notification Office ("PNO") as to the application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act"), to a transaction being contemplated by our client ("Buyer"). I have set forth below the facts I provided during our initial February 23, 2005 telephone call with [redacted] counsel for the target company ("Target") and its shareholders.

- A newly formed entity ("Newco III") will be merged with and into Target and, as a result, the separate corporate existence of Newco III will cease and Target will continue as the surviving corporation (the "Merger"). Prior to the Merger, Newco III will acquire all of the equity of Target (other than the Contributed Equity (as defined below)).

- The Merger is valued at more than $50 million, but not more than $200 million.

- Newco III will be wholly owned by another newly formed entity ("Newco II"), and Newco II will in turn be wholly owned by another newly formed entity ("Newco I").

- As of the time of the Merger, Newco I will not have a regularly prepared balance sheet, and will not have any assets other than those to be used in connection with the Merger.

- Several individuals and entities will hold the voting securities of Newco I.

[redacted]

- The individuals who will hold voting securities of Newco I are unaffiliated with Buyer and include current management and two of the current shareholders of Target (such two shareholders being the "Contributing Shareholders").

- Prior to the Merger, the Contributing Shareholders will contribute certain voting securities held in Target (the "Contributed Equity") to Newco I in exchange for voting securities of Newco I.

- The entities that will hold voting securities of Newco I are five limited partnerships affiliated with Buyer (the "Investment Funds") and a sixth entity not affiliated with Buyer.

- No person or entity will hold 50 percent or more of the voting securities of Newco I, nor will any person or entity have the contractual power to designate 50 percent or more of the directors of Newco I. However, the Investment Funds, if taken together, would hold more than 50 percent of Newco I's voting securities.

- Each of the Investment Funds is its own ultimate parent entity under the Act because, for each of the Investment Funds, no person or entity is entitled to 50 percent or more of its profits, or 50 percent or more of its assets in the case of dissolution.

- Each of the Investment Funds has a general partner that directs its investment decisions.

- Several of the Investment Funds may have common general partners, or have general partners that are ultimately controlled by a common entity.

Based on these facts, we concluded that Newco I will be its own ultimate parent entity under the Act and will not satisfy the size-of-person test set forth in Section (a)(2)(B)(III) because Rule 801.11(e) excludes cash to be used by the acquiring person as consideration in the acquisition of voting securities and any securities of the acquired person from the acquiring person's total assets. Thus, we concluded that the Merger is not subject to the Act as it does not satisfy section (a)(2)(B), and you expressed your concurrence with our conclusion.

Messrs. [redacted] inquired as to whether the result would be different if, hypothetically, the Investment Funds were managed by a common person or entity other than the general partner of any of the Investment Funds but that is nevertheless under common control or otherwise affiliated with all of the general partners of the Investment Funds, and whether such an arrangement would vest in the manager the contractual

power to designate 50 percent or more of the directors of Newco I under Rule 801.1(b)(2), and you advised that the PNO would not view such an arrangement as conferring control of Newco I.

Messrs. [redacted] further inquired as to whether a shareholders agreement, if entered into between the shareholders of Newco I, could confer control of Newco I under Rule 801.1(b)(2), and you advised that it could if the shareholders agreement vested in any person or entity the contractual power to designate 50 percent or more of the directors of Newco I.

In a follow up call on March 1, we further discussed the shareholders agreement and its terms. We explained that under the shareholders agreement to be executed at closing, all of the parties to the shareholders agreement, including the Contributing Shareholders and the Investment Funds, will agree to vote their shares in favor of board representatives selected by the Investment Funds. However, because no one Investment Fund acting independently would have the contractual power to designate 50 percent or more of the directors, you advised that Newco I would remain its own ultimate parent. You further advised that your position would not be different even if the Investment Funds would in all likelihood be acting together.

Thank you for taking the time to discuss this transaction with us. Please let me know if you do not agree with any of the conclusions I have set forth above, or if your understanding of the facts differs in any way from those I have provided in this letter.

Sincerely,

[redacted]

cc: [redacted]

Agree -
B
3/2/05