801.90
801.1(b)

[redacted]

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[redacted]

October 7, 2005

VIA ELECTRONIC MAIL

Mr. B. Michael Verne
Compliance Specialist
Premerger Notification Office
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Applicability of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "Act")

Dear Mike:

Thank you for taking the time to speak with [redacted] and me yesterday afternoon. I am writing to confirm the advice you provided us on two issues. The factual background we provided you with is as follows:

Background

Company A is a $106.2 million person, and intends to acquire by way of a merger all of the outstanding voting securities of Company B, which is not engaged in manufacturing. The purchase price will be greater than $53.1 million but less than $212.3 million.

Issue 1 (Accelerated Payments)

Until recently, Company B had slightly more than $10.7 million in assets. Recently, Company B made certain payments on an accelerated basis so that its assets would be less than $10.7 million as of the date of its next regularly-prepared balance sheet (the most recently regularly prepared balance sheet as of the consummation of the merger) so as to fail the size-of-person test. These payments included (i) quarterly dividends paid to shareholders before the usual payment date; (ii) payments of accrued interest due on notes prior to the usual payment date; (iii) accelerated payments of accounts payable (for example, paying invoices in 10 days

that would have otherwise been payable in 30 days); and (iv) accelerated bonuses paid to owners/managers of Company B (mid-year, when they ordinarily would have been paid at year-end). Company B also wrote off of a prepaid expense for work that had been carried as an asset because management now believes that the work will never be performed.

You confirmed that it was not a Section 801.90 avoidance issue for Company B to make the above-described payments on an accelerated basis or to write off the above-described asset in order to fail the size-of person test. Your advice was that Interpretation 195 of the ABA Premerger Practice Manual controls even though that Interpretation dealt only with accelerated dividend payments.

Issue 2 (Identification of UPE)

Husband and Wife, the founders of Company B, directly each hold approximately 22% of Company B's outstanding voting securities. In the aggregate, therefore, they directly hold less than 50% of the outstanding voting securities of Company B, even after accounting for the aggregation required by 16 C.F.R. 801.1(c)(2).

Prior to 2000, however, Husband and Wife held more than 50% of Company B's voting securities. In 2000, Husband and Wife each established a grantor retained annuity trust ("GRAT") (for a total of 2 GRATs), and each placed just under 10% of Company B's voting securities in their respective GRAT. Husband was named as the trustee of Wife's GRAT, and Wife was named as the trustee of Husband's GRAT. In each case, the beneficiaries of the GRAT were the couple's two minor children (one of whom is still a minor).

In December 2004, Husband and Wife each established another GRAT (bringing the total number of GRATs to four), again with the other spouse named as trustee and the couple's two children (one of whom was a minor at the time) as beneficiaries. Husband and Wife each gave their respective GRAT approximately 18% of Company B's outstanding voting securities. Accordingly, after the creation of the four GRATs, the ownership of Company B's outstanding voting securities is approximately as follows:

Husband	22%
Wife	22%
GRAT 1 (settled by Husband, 2000)	10%
GRAT 2 (settled by Wife, 2000)	10%
GRAT 3 (settled by Husband, 2004)	18%

GRAT 4 (settled by Wife, 2004)	18%

The term of each GRAT is approximately 10 years. If Husband or Wife dies during the trust term and the other survives the trust term, the surviving spouse is entitled to a life estate in the corpus of the GRATs of which he or she is not the settlor. In each case, the settlor lacks the power to remove or replace the designated trustee.

You confirmed that the potential life interest in the corpus of the non-surviving spouse's GRAT does not constitute a reversionary interest within the meaning of 16 C.F.R. § 801.1(c)(4), since it does not accrue to the settlor (but rather to the settlor's surviving spouse). Therefore, each GRAT is deemed to hold the voting securities contained within it, and none of the GRAT holdings must be aggregated with those of any other GRAT or Husband or Wife's individual holdings of Company B's stock, notwithstanding the fact that Husband and Wife serve as trustee of two GRATs each.

Since the largest shareholder of Company B is thus Husband + Wife (44%, aggregated as required by 16 C.F.R. § 801.1(c)(2)), and no person has the contractual power to designate 50% or more of Company B's directors, Company B is therefore its own UPE. Along with the conclusion discussed above under Issue 1 regarding Company B's total assets, the potential acquisition by Company A of all of the outstanding voting securities of Company B by way of a merger is thus not reportable under the Act.

Thank you again for your consideration and assistance in this matter. If you do not believe this letter reflects the facts discussed on our telephone conversation, or if I have misstated the advice you gave, please contact me as soon as possible.

Sincerely,

[redacted]

cc: [redacted]

AGREE -
B
10/7/05