801.1(b)
802.30

[redacted]

[redacted]

January 26, 2006

VIA E-MAIL

B. Michael Verne, Esq.
United States Federal Trade Commission
Premerger Notification Office
Bureau of Competition, Room 303
6th Street & Pennsylvania Avenue NW
Washington, DC 20508-0001

Re: Reportability of Like-Kind Exchange of Assets

Dear Mike:

Thank you for speaking with me on the telephone last week about the HSR implications of a transaction in which P, a manufacturer, will sell one of its plants to Buyer and will acquire a plant and related assets of G, a manufacturer. The transactions will effectuate a like-kind exchange of manufacturing assets. As we discussed, and for reasons explained in detail within, P's acquisition of G's plant will not be HSR-reportable but Buyer's acquisition of P's plant will require a filing.

I. The Framework of the Acquisition

The like-kind exchange of manufacturing assets takes place within the framework of P's acquisition of all of G's securities pursuant to a Stock Purchase Agreement ("SPA").[1] Each step of the transaction is discussed in turn below.

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[1] The SPA contemplates the acquisition by P of all securities of two pre-existing companies, G and S, from common shareholders, none of whom controls either company. Neither acquisition is HSR-reportable because the value of the voting securities of each of the two companies to be acquired by P is less than $50 million, as adjusted. In addition, the parties intend to conduct the same like-kind exchange of manufacturing assets for S as they will for G. Because the mechanics of each like-kind exchange will be identical, for purposes of simplicity this letter discusses only the acquisition by P of G and the corresponding like-kind exchange related to G's plant, with the assumption that the analysis within applies also to the acquisition by P of S and the corresponding like-kind exchange related to S's plant.

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Step 1

P will form a wholly-owned subsidiary ("G LLC"). A pre-existing, independent third party financial institution ("Institution") will use its existing Exchange Accommodation Titleholder ("EAT") to form a special purpose single-member LLC ("LLC"). A Qualified Exchange Accommodation Arrangement ("QEAA"), explained in relevant part below, will be executed among P, Institution, EAT, and LLC. Institution also owns a pre-existing special purpose entity called a Qualified Intermediary ("QI"), a sister entity to EAT.

Step 2

P will loan LLC money to be used as part of the purchase price for the purchase of G's plant. LLC will issue to P a corresponding note on the debt ("P Note"). The rest of the purchase price for G's plant will be financed by G in return for a note from LLC to G ("G Note"), which will be secured by a senior lien on all of the assets of LLC. An Asset Purchase Agreement ("APA") will be executed between LLC and G for the purchase of G's plant by LLC. The APA will provide that if the SPA fails to close, G will have a call right to re-acquire LLC's assets, and LLC will have a right to put its assets to G. By virtue of the lien and the call right, therefore, G will have the right to the assets of LLC upon dissolution.[2]

LLC and G will also execute a Management Agreement under which G will manage the G plant for LLC. In return, G will receive all of the revenues earned from the G plant but must pay LLC a fee equal to the sum of debt servicing payments, real estate taxes, common area expenses, and insurance costs. Under the Management Agreement, therefore, G will have the right to all of the profits of the G plant and LLC.

As we discussed, because G will have the right to all of the profits of LLC and the right to its assets upon dissolution, G controls LLC within the meaning of 16 C.F.R. § 801.1(b)(1)(ii), even though Institution will own the interests of LLC indirectly through EAT. From LLC's formation, therefore, LLC and the G plant are within the person of G under § 801.1(a)(1).

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[2] The QEAA provides that if a later transaction between P and Buyer fails to close, then P will have a call right to re-acquire the G plant. However, when and if P's call right accrues, G will be within the person of P, as described below. P will have assigned its right to G LLC, a sister entity to G. Accordingly, either G or the person of which G is a part will at all times be the only persons with the right to the assets of LLC upon dissolution.

[redacted]

Step 3

P will acquire the voting and non-voting securities of G under the SPA, whereby G will become a wholly-owned subsidiary of P. Because G controls LLC, LLC and the G plant will then be within the person of P.

Step 4

In preparation for the completion of the transaction, P and QI will execute an Exchange Agreement that will assign to QI the purchase price paid by the Buyer of P's plant, and will specify that QI will subsequently transfer that amount to LLC.[3]

Step 5

In this step P will sell its plant to Buyer under an Asset Purchase Agreement ("APA"). The fair market value of the plant will be approximately $65.5 million. As specified in the Exchange Agreement between P and QI, Buyer will transfer $65.5 million to QI in return for the plant.[4]

Step 6

As set forth in the QEAA and Exchange Agreement, QI will transfer the P plant purchase price ($65.5 million) to LLC. As consideration for the P plant purchase price, LLC will transfer title to the G plant to G LLC.[5] LLC will use the money to pay both the G Note and the P Note in full. P will thus hold title to the G plant unencumbered by debt.

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[3] If requested, LLC will also grant a security interest to an independent Lender to secure the covenants under the Management Agreement. The grant of the security interest has no HSR implications.

[4] If the APA between P and Buyer fails to close, then under the QEAA, G LLC will exercise its call right (assigned to it by P) for the G plant, in return for nominal consideration and transactions fees. *See supra* n.2.

[5] As noted *supra*, for purposes of HSR analysis, P, the UPE of both G and G LLC, already controls LLC (and thus the G plant) by virtue of G's right to all of the profits of the G plant and LLC.

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II. HSR Analysis

As we discussed, only Buyer's acquisition of P's plant triggers an HSR filing obligation, assuming the relevant size thresholds are met and no exemption applies. Because the Management Agreement gives G the right to the profits of LLC and because G and/or P (including G) has the right to LLC's assets upon dissolution, G controls LLC upon formation notwithstanding EAT's ownership of the LLC interests.[6] In addition, once P has acquired the voting securities of G in Step 3, P, G, and G LLC will be within the same person. Thus, both the acquisition by LLC of the G plant in Step 2, and the acquisition of the G plant by G LLC in Step 6, are exempt as intra-person acquisitions under 16 C.F.R. §802.30. In both acquisitions, the acquiring and acquired persons are the same by virtue of G's right at all times to the profits of the G plant and LLC, and its right to LLC's assets (i.e., the G plant) upon dissolution.[7] Accordingly, neither LLC's nor G LLC's acquisition of the G plant will be separately reportable.

I would appreciate your confirmation of the analysis set forth in this letter, Mike. Thank you again for your attention to this matter.

Sincerely,

[redacted]

AGREE - CONCURS.
N. OVUKA
B Verne
11/26/06

[6] As described *supra*, P's call right for the G plant will not affect the analysis because it only weighs in favor of P having a claim to control LLC, and P's call right will accrue only after G is within the person of P.

[7] 16 C.F.R. § 802.30 provides that "[a]n acquisition . . . in which the acquiring and at least one of the acquired persons are, the same person by reason of §801.1(b)(1) of this chapter . . . is exempt from the requirements of the Act."

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