801.11(b)(2)

RS

[redacted]

October 30, 1990

[redacted]

This material may be subject to confidentiality provision of Section 7A (h) of the Clayton Act which restricts release under the Freedom of Information Act

Richard Smith, Esq.
Room 312
Federal Trade Commission
6th and Pennsylvania Ave., N.W.
Washington, DC 20580

Re: Coverage Under the Hart-Scott-Rodino Act

Dear Mr. Smith:

As we discussed several weeks ago, our client is a foreign corporation that plans to acquire a United States corporation. There is a question, however, whether the foreign company's annual net sales derived primarily from advertising are in excess of $100 million due to its accounting practices and thus, whether the transaction is covered under the Hart-Scott-Rodino Antitrust Improvements Act (the "Act") and Federal Trade Commission regulations. 15 U.S.C. § 18a; 16 C.F.R. §§ 801.1-803.90.

Under the regulations implementing the Act, "annual net sales" are determined from financial "statements . . . prepared in accordance with the accounting principles normally used by such person." 16 C.F.R. § 801.11(b)(2). It is our understanding that under Generally Accepted Accounting Principles ("GAAP") normally used by U.S. firms engaged in the same business, the financial statement of the foreign company would not show annual net sales in excess of $100 million, whereas it would under the accounting practices of the country in which it is organized. This is apparently the result of the accounting conventions of the foreign country, which account for advertising revenues as inclusive of the cost of placing advertisements for clients, whereas GAAP accounts for these same revenues as exclusive

of such costs. Thus, depending upon the accounting methodology, the foreign company may or may not be covered under the Act.

Our question is whether the accounting methodology in a foreign country which is substantively different than GAAP should be the determining factor in whether or not a transaction is covered by the Act. In this case, if the foreign company were a U.S. company and used GAAP, it would not be covered. Therefore, it does not seem appropriate to require a foreign company to file under the Act simply because the accounting methodology of the foreign country treats the same advertising revenues differently. In terms of the prophylactic purposes of the Act, nothing is gained by subjecting this transaction to review.

Thank you for your time and attention in considering this matter. If I can provide any further information, please let me know.

Very truly yours,

[redacted]

11/2/90 Called [redacted] Advised that foreign company must use its regularly prepared financials, if prepared within 12 months of filing or acquisition, to determine its size. It cannot reverse such financials to accord with GAAP. The size-of-person test is a bright-line test and we cannot and will not change the requirements of Rule 801.11(b)(2). He stated his understanding P.R. Smith