[redacted]

November 20, 1990

[redacted]

Re: Request for Advice Under
Hart-Scott-Rodino Act

Dear Mr. Cohen:

I am writing pursuant to our recent telephone conversation to request the advice of the FTC Premerger Notification Office as to whether a second filing is required under the Hart-Scott-Rodino Act (the "H-S-R Act") when a transaction previously reported as a voting securities acquisition has been restructured as an asset acquisition.

The relevant facts are as follows:

Earlier this year Company A, a $100 million person, and Company B, a $10 million person, entered into a definitive purchase agreement for the acquisition by Company A of 100% of the voting securities of Company B for $18 million in cash (plus the assumption of $7 million in debt). The agreement was subject to certain conditions, including a detailed inspection of the facilities.

Both parties have previously made H-S-R filings with respect to this transaction and have received notification that the H-S-R waiting period has been terminated pursuant to a grant of early termination. In their H-S-R filings both parties described the transaction as an acquisition of voting securities and indicated that they intended to cross the 50% notification threshold.

Company B is a closely held corporation with only one manufacturing plant. It is engaged in no other business -- and has no other assets -- except for the business which it is selling to Company A. Under the transaction as originally structured, Company A would -- as a matter of law -- have acquired control over 100% of Company B's assets, including its manufacturing plant, goodwill, and intangible assets, when it acquired 100% of Company B's voting securities.

Since the time of the initial H-S-R filing, the parties have decided to restructure the transaction because Company A does

not wish to take title to Company B's land and building. The transaction has thus been restructured as an asset acquisition. Under the new structure, Company A will acquire, by value, not less than 90% of the assets of Company B for approximately $25 million. The assets to be acquired consist mainly of the intangible assets of Company B (i.e., customer lists, trademarks, trade secrets, product registrations, knowhow and the like), as well as goodwill. In addition, Company A will assume performance of Company B's existing distribution agreements and customer contracts. Company A will also lease space from Company B for use as an office and warehouse. Company B will retain its manufacturing plant for a period of at least two years, and as part of the transaction has agreed to supply Company A's requirements on a cost-plus basis during that time. It is presently contemplated that Company A will contract with Company B for the manufacture of 100% of Company A's requirements for the next two years. At the end of the two-year period, Company A will have the option to acquire Company B's manufacturing equipment for its then book value (which is estimated to be less than $500,000). If the option is exercised, it is contemplated that Company A will move the equipment to a new "greenfields" site.

The only assets that will not be transferred under the revised structure are the shell of Company B's manufacturing plant and the land on which the plant is located -- assets which have

generally not been thought to have competitive significance for H-S-R purposes. In all other respects, the restructured transaction is basically the same as the original transaction. Indeed, it may be that the restructured transaction is better from a competitive standpoint. Because the manufacturing equipment will not be transferred for a period of at least two years, and because Company B is not prevented during that time from manufacturing for others, the restructured transaction offers the possibility of greater competition than if Company A had acquired Company B's manufacturing equipment along with its other assets as originally contemplated. No new competitive analysis will thus be required as a result of the restructuring of the transaction. Compare ABA Premerger Notification Practice Manual 126-27 (1985) (Interpretation No. 174).

We believe that, on these facts, no new filing is required. Section 803.7 of the H-S-R rules permits an acquiring person within one year following the expiration (or termination) of the H-S-R waiting period to increase its holdings up to "the notification threshold with respect to which the notification was filed." There is no requirement in Section 803.7 that the form of the transaction be the same as that described in the initial filings. Under Section 803.7, if Company A had filed to acquire in excess of 50% of the voting securities of Company B, it could acquire 100% of Company B's assets without the need to refile. See

Axinn, Fogg, Stoll & Prager, Acquisitions Under the Hart-Scott Rodino Antitrust Improvements Act § 7.06[3] at 7-41-42 (1988). Similarly, if it had filed to acquire 100% of Company B's assets, it could acquire more than 50% of Company B's voting securities without making a second H-S-R filing. Id. Given these precedents, we believe that where, as here, the acquiring person has filed to acquire in excess of 50% of the acquired person's voting securities, and where, as here, the substance of the transaction has not changed, it should be permitted to acquire 90% of that person's assets without the need to make a new H-S-R filing. This is particularly so where, as here, a principal competitive asset (the manufacturing plant) is being retained at least temporarily by the seller and the parties previously received a grant of early termination that would have permitted the buyer to acquire control over 100% of the seller's assets.

We believe that, since the antitrust implications of both the original and restructured transactions are essentially the same, a second H-S-R filing (and the payment of a second $20,000 filing fee) is unnecessary, and we ask that you confirm to us that, on these facts, no new filing is required.

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If you have any questions, or if you require further information, please feel free to call me at [redacted]

Sincerely,

[redacted]

Victor L. Cohen, Esq.
Premerger Notification Office
Bureau of Competition - Rm. 301
Federal Trade Commission
Washington, D.C. 20580

cc: John M. Sipple, Jr., Esq.

BY HAND

Called on 11-26-90.
Agreed that a new filing is not required.
PNO has taken the position over the last year or so that a new filing is not required if a person files to acquire all of a company's assets and subsequently, after the waiting period has expired, modifies the transaction to acquire less than all of the assets of the company. The rationale for this interpretation is that the enforcement agencies analyzed the acquisition of all of the ~~assets~~ company's assets in the original filing and the acquisition of less ~~than~~ than all of the assets originally filed for does not raise new antitrust concerns. If additional or different assets, however, are to be acquired, a new filing is required. Here, even though the transaction is changing from voting securities to assets, the acquisition was for 50% or more of the voting securities and the antitrust analysis there involved the acquisition of all of the company's operations. Acquiring less of the company's operations through falls within the PNO's prior interpretation.