801.40(c)

[redacted]

July 12, 1991

I am not an attorney

Patrick Sharpe, Esq.
Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
Washington, D.C. 20580

Re: Hart-Scott-Rodino Inquiry

Dear Mr. Sharpe:

Thank you for your advice and counsel on the inquiry we discussed over the past two days.

The question arose under § 801.40 of the FTC Rules and Regulations interpreting the HSR statute, as reported in Chapter 16, Code of Federal Regulations. In particular, our client was unclear whether § 801.40(c)(1) encompassed assets which may be contributed in the future to the new corporation, subject to certain contingencies. Your answer was "no."

I thought it might be helpful to describe the situation more carefully, in writing, in the event that any further thoughts on this issue occur. In a nutshell, our client, Company A, will be contributing $4 million in cash for 13.8 percent of the equity in a New Corporation. Company B will be contributing at the outset an additional $2.5 million, for 11 percent of the voting securities. Company A does have sales or assets in excess of $100 million, and Company B has sales or assets in excess of $10 million.

The agreement to be signed contemplates the possibility of further contributions by Company A to New Corporation, totalling up to $12 million, <u>if</u> certain technical milestones in product development activities are met. The first milestone requires the completion of a mechanical specification agreed to both by the new company and a qualified industrial designer; the second milestone contemplates completion of the mechanical design for tooling purposes. The third contingency/milestone is commencement of the manufacture of the first pre-production prototype of the product to be developed by New Corporation.

The agreement provides that the additional equity purchases by Company A must be made upon satisfaction of these contingencies. It is, nevertheless, not at all certain that these milestones will be met. Our reading of the statute and interpreting rules would therefore suggest that the possible future contributions are not "assets" to be counted in determining whether the $10 million threshold has been met under § 801.40(b)(1)(ii). As I understand your view, any contingency -- as distinct from a current commitment to make contributions at a future time -- should not be counted as "assets" of the new corporation or joint venture.

If any of this additional detail changes your view, or if you have additional thoughts that might be helpful on this issue, please give me a call. Otherwise, we thank you again for your assistance, recognizing that you have not purported to offer any formal "official" position of the FTC on this issue.

Very sincerely yours,

[redacted]

[redacted]

I agree with this letter, (BS)

(RS) (TH) concur

See #202 new BMPM

[redacted]