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December 17, 1991

VIA TELECOPIER

Richard Smith, Esquire
Federal Trade Commission
Premerger Notification Office
Bureau of Competition
Room 303
Sixth Street and Pennsylvania Avenue N.W.
Washington, DC 20580

Dear Mr. Smith:

I am writing to follow up on our telephone conversation last week regarding the question whether a possible transaction would be subject to the notification requirements of the Hart-Scott-Rodino Act. At your suggestion, I am submitting this request in writing for an informal Commission staff interpretation regarding the following possible transaction:

Possible Transaction

Company A and Company B are corporations incorporated under the laws of Foreign Country F, with their principal offices in Country F. A and B both are engaged in the manufacture and sale of products X and Y in various countries, and both A and B sell both products X and Y in or into the United States, either by direct export from outside the United States or through United States subsidiaries. A also sells other products in or into the United States, but B sells only products X and Y.

A joint venture would be formed to take over the business operations of A and B relating to products X and Y. The joint venture company (JV) would be incorporated under the laws of Country F and would have its principal offices in that country. A and B each would contribute all of its business assets relating to products X and Y to JV. The joint venture, however, never would be operated under the ownership of A and B. Rather, immediately upon the formation of JV, the ownership of JV would be "spun off" to the shareholders of A and B, based upon the value of the assets to be contributed by each company to JV and in proportion to the respective shareholdings of those companies. Thus, the shareholders of A would receive, in the aggregate, approximately 40% (but, in any event, less than 50%) of the voting securities of JV, while the shareholders of B would receive, in the aggregate, approximately 60% (but, in any event,

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more than 50%) of the shares of JV. Neither A or B, nor any of their shareholders, would have the contractual power to designate 50% or more of the directors of JV. After the transaction, A would continue to conduct its business operations relating to products other than products X and Y, but A would have no ownership interest in JV and A no longer would sell products X and Y. B would cease operations, because all of its business operations consist of operations relating to products X and Y, which would be conducted by JV after the transaction.

A's most recent regularly prepared financial statements reflect annual net sales of product X in or into the United States of $48,000,000 and annual net sales of product Y in or into the United States of $29,000,000, for a total of $77,000,000. (As noted above, A also has sales of other products in or into the United States.) A's assets in the United States relating to product X total $4.3 million, and A's assets in the United States relating to product Y total $7,000,000, for a total of $11.3 million of United States assets that would be contributed by A to JV. (Again, A also has other assets in the United States relating to its operations regarding other products, which would not be contributed to JV.) B's sales of products X and Y in or into the United States total $58,000,000. The precise amount of B's assets in the United States is unknown, but presumably is in excess of $4,000,000 but may not be in excess of $15,000,000.

A and B each are widely-held companies. No shareholder of A or B would hold 15% or more of the outstanding voting securities of JV, and no shareholder of A or B would acquire voting securities of JV valued at $15,000,000 or more, as a result of the transaction.

Questions Presented

As we discussed, I would like an informal Commission staff interpretation of the applicable premerger notification regulations regarding this possible transaction. In this regard, it appears that notification would not be required in connection with this transaction for several reasons. Initially, although the transaction theoretically involves two sets of acquisitions (first, the formation of JV by A and B, and, second, the acquisition of shares of JV by the shareholders of A and B), the formation of JV is merely an intermediate step in a transaction that is designed ultimately to vest ownership of JV in the shareholders of A and B; in other words, A and B in effect are merely conduits for the acquisition of shares of JV by the shareholders of A and B. Accordingly, if the formation of the joint venture by A and B can be disregarded for notification purposes, the transaction would not meet the statutory size-of-transaction test (15 U.S.C. § 18a(a)(3)) because no person (i.e., none of the

shareholders of A or B) would be acquiring 15% or more of the voting securities of JV, nor would any person be acquiring voting securities of JV valued at more than $15,000,000. (Of course, certain exemptions, including the "acquisitions by foreign persons" exemption (section 802.51), also might apply to this aspect of the transaction even if the size-of-transaction test were met.)

In addition, even if the formation of JV by A and B must be considered for possible notification, it also appears that this part of the transaction would be exempt under section 802.51 for several reasons. In this regard, it appears that, by implication from the special rule regarding the formation of joint ventures (section 801.40), the annual sales of JV, as a new entity, would not be considered under sections 802.51(b) and (d). (This interpretation is consistent with a prior reported staff interpretation of a similar rule (section 802.20) stating that "[s]ales attributable to assets transferred into [a] new corporation are not attributed to the newly created corporation." ABA Premerger Notification Practice Manual, ¶ 137 (1985).)

Thus, under section 802.51(d), JV would not have any sales to be considered for purposes of the "sales" test in this subsection. In fact, because no sales would be attributed to the new entity, it is not clear that the "sales" part of the section 802.51(d) test should even be considered in the case of a newly formed foreign joint venture. Nevertheless, assuming that the sales test is applied and that each acquisition is viewed separately (that is, assuming that the acquisitions of shares of JV by A and by B each are to be considered separately under section 802.51(d)), then the aggregate annual sales of products X and Y by A and the joint venture in or into the United States would be $77,000,000, and the aggregate annual sales of products X and Y by B and JV would be $58,000,000. (The total assets of A and B in the United States that would be contributed to JV are substantially less than $110,000,000.) Hence, the acquisition of shares of JV by B would not involve an acquiring and an acquired person with aggregate annual sales in or into the United States greater than $110,000,000, and that acquisition thus would be exempt under section 802.51(d). Similarly, A could only satisfy the sales test in section 802.51(d) if its United States sales of products other than X and Y exceeded $33,000,000.

In addition, all or certain aspects of the formation of JV also may be exempt under section 802.51(b). First, because A would obtain less than 50% of the outstanding voting securities of JV, A's acquisition of JV's voting securities would not give A "control" of any issuer and hence would be exempt under section 802.51(b) (regardless of the amount of United States assets or sales attributed to the issuer being acquired (JV)). Although B

briefly would obtain control of JV (until the shares of JV are distributed to the shareholders of B), if the assets of JV located in the United States are valued at less than $15,000,000, or if any "U.S. issuer" that is formed as a subsidiary of JV has assets of less than $25 million, B's acquisition of JV's shares also would be exempt under section 802.51(b)(1) and (2).

In summary, it appears that this transaction would be exempt for several reasons. First, assuming that the formation of the joint venture by A and B can be disregarded, the transaction would not satisfy the statutory size-of-transaction test in connection with the acquisition of JV's shares by the shareholders of A and B. Second, even if the intermediate step in the transaction (the formation of JV by A and B) must be considered for notification purposes, A's acquisition of shares of JV would be exempt under section 802.51(b) because A would not obtain control of any issuer as a result of the transaction. (Depending upon the value of United States assets contributed to JV, B's acquisition of JV's shares also might be exempt under this subsection). B's acquisition of shares of JV would be exempt under section 802.51(d) because neither the United States assets nor United States sales of B and JV in the aggregate would exceed $110,000,000. (A's acquisition of shares of JV also would be exempt under this section if A's total sales in the United States did not exceed $110,000,000.)

I would appreciate receiving an informal staff interpretation regarding the questions raised in this letter as soon as possible. In particular, I would appreciate receiving the staff's views regarding the various interpretations discussed in this letter and the ultimate conclusion that the possible transaction described would not require notification. Please also feel free to contact me at your convenience if I can provide you with any additional information regarding this matter or if you have any other questions in connection with this request.

Thank you for your cooperation and assistance.

Very truly yours,

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[redacted] 1/5/92 called [redacted] - Advised that joint venture by A and B cannot be disregarded and if A or B are themselves not exempt, one or both must file. Position in ABA letter #137 (all back) is still our view and is applicable to 802.20 and 802.51, where a j/v is being formed. Therefore, newly formed issuer, to which only assets are being contributed, has no sales. Since A acquiring less than 50% of j/v's voting stock, and since both are foreign persons, A is exempt under 802.51(b). Under 802.51(d), each acquiring person's sales and assets in the U.S. are looked at alone and not coupled with other acquiring person's U.S. sales or assets. Or first full paragraph on page 4, test for U.S. sales or assets is $110MM or more not equal $100MM. RBSmith