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January 23, 1992

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

OUR FILE NUMBER

BY TELECOPY (202-326-2050)

Mr. Patrick Sharpe
Federal Trade Commission
Premerger Notification Office
Sixth Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Availability of Exemption Under Section 7A(c)(10) of the Hart-Scott-Rodino Act

Dear Mr. Sharpe:

In reference to our conversations Tuesday and last week, this letter will describe the contemplated transaction we discussed in order to assist you in your and your colleagues' analysis of whether the exemption from filing a Notification and Report Form provided by Section 7A(c)(10), 15 U.S.C. § 18a(c)(10), of the Hart-Scott-Rodino Act applies to the transaction.

The Proposed Transaction

A company ("Holding") which is capitalized with common stock and nonvoting preferred stock is the sole stockholder of an operating subsidiary (the "Company"). The purpose of the transaction, as set forth below, is to eliminate the holding company structure and recapitalize

the operating company in a manner that would dilute the voting interests of the large shareholders. To this end, Holding and Company are contemplating a reorganization (the "Reorganization") consisting of three steps, each of which is contingent on the consummation of the other two steps and none of which will occur as an independent transaction.

Step One. In the Reorganization, Holding will first be merged (the "Merger") into the Company and the Company will be the sole surviving corporation. Under the Merger Agreement, each outstanding share of common stock of Holding will be converted into 1.5 shares of common stock of the Company, and each outstanding share of nonvoting preferred stock of Holding will be converted into approximately 1.3 shares of nonvoting preferred stock of the Company. Thus, under Step One, no shareholder of Holding will achieve a larger percentage share of Company.

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Step Two. On the same day as the Merger, the Company will make an initial public offering (the "Offering") of common stock that will constitute about 40 percent of the Company's outstanding common stock after completion of Step Three. The effect of this will be substantially to dilute the holdings of the two entities that are principal shareholders of Holding (and then the Company). These entities (the "Entities") now respectively have approximately 49 and 33 percent of the outstanding voting securities of Holding and under Step One will have the same percentage of voting securities in the Company as they now have in Holding. These entities will not be purchasing any of the stock in the Offering. Thus, as a result of Step Two, the Entities' percentage of voting shares will be substantially diluted -- to approximately 22 and 15 percent respectively.

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Step Three. Finally, prior to and contingent upon consummation of the Offering, the Company will offer to its preferred stockholders the opportunity to exchange (the "Exchange") each outstanding share of nonvoting preferred stock of the Company for a number of shares of the Company's common stock equal to a number obtained by dividing the liquidation value of $100 per share of the preferred stock by the market value of the common stock of the Company. Preferred stockholders who accept the

exchange offer at any time within 60 days will be irrevocably commited to make the Exchange. It is contemplated that the Entities will commit themselves prior to the Offering to take advantage of the Exchange, which will result in their ownership of approximately 27 and 19 percent of the Company's voting securities respectively.

Reportable

The Effect of the Transaction

The Reorganization will not result in the Entities' obtaining a greater percentage ownership of the voting securities of the Company, as the surviving corporation in the Merger, than its percentage of voting securities of Holding prior to the Reorganization. Indeed, because of the dilutive effect of Step Two -- the Offering -- each of the Entities will end up with a substantially lower percentage of the Company than they had of Holding immediately prior to the Reorganization. As I discussed with you, at least one of Entities during Step Three's conversion process will obtain additional voting securities of the Company valued in excess of $15,000,000 in the Exchange (Step Three) and both will have more than 15 percent of the Company's voting securities. However, looking at the Reorganization as an integrated whole, each Entity will in fact have a resulting percentage ownership of voting securities that is significantly less than its percentage ownership prior to the Reorganization. For this reason, the language and policy of the (c)(10) exemption for "acquisition of voting securities [that] do not increase, directly or indirectly, the acquiring person's per centum share" would appear applicable to the Entities' conduct.*

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* With respect to the swap of voting shares in Step One, we continue to believe, as discussed with you, that the Entities' acquisition of Company's shares is also exempt under (c)(10). See Axinn, Fogg, Stoll & Prager, <u>Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act</u>, § 6.08[2] (1991 rev.).

The Reorganization will take effect if and only if each of its components is consummated (i.e., the public offering is contingent on the Merger and vice versa, and is also contingent on the preferred stock exchange offer and vice versa.) Thus, we believe that the three steps should be analyzed as a single transaction. As a result of the Reorganization, none of the Entities will receive voting securities that increase, directly or indirectly, its percentage ownership of the voting securities of the Company, relative to its ownership of Holding's voting securities. We therefore believe that the exemption should be deemed available and that no Notification and Report Forms would be required to be filed by the Entities or by the Company.*

As an overall matter, when the Entities receive all the contemplated voting securities in the Company pursuant to the Reorganization, each will be no closer to control of the Company than it was beforehand.** Indeed, each of their per centum shares of the Company will be significantly less than their respective shares of Holding, even after one considers the acquisition of shares in Step Three of the transaction. The plain purpose and language of exemption (c)(10) is to exempt otherwise covered transactions that meet either the 15 percent test or $15 million test. Thus, it would appear that even focusing just on Step Three would permit an exemption under (c)(10) on the ground that the acquisition of voting securities in Step Three does not increase either Entity's pre-transaction percentage of voting securities in the relevant corporation with outside shareholders.

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* This request does not apply to any other acquisition of securities in the Company by any other person that exceeds the 15 percent or $15 million threshold.

** This logic of course is incorporated in 16 C.F.R. § 802.21.

Mr. Patrick Sharpe
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Please let me know if you would like any additional information in order to assist your review. I look forward to speaking with you in the next few days.

Very [redacted]

cc: [redacted]

called [redacted]
1-30-92.
The First and second steps are exempt under C-3 & C-10. The last step (3rd) is reportable for both shareholders for the conversion.
(JS) & (RS)
Concur