802.20(b)
801.1(b)

[redacted]

[redacted]

[redacted]

May 13, 1992

Ms. Nancy Ovuka
Federal Trade Commission
Premerger Notification Office, Bureau of Competition
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

via telecopy
original to follow
by regular mail

Dear Ms. Ovuka:

I am writing this letter to confirm and clarify our discussions of May 7, 1992, concerning exemption of the following described transaction from filing under the Hart-Scott-Rodino Act of 1976, as amended (the "Act").

The transaction is as follows: Corporation "A" is the ultimate parent entity of subsidiary "X"; individual "B" is (indirectly) the ultimate parent entity of corporation "Y". A has total assets (for purposes of the Act) in excess of $100,000,000, and B has total assets in excess of $10,000,000. Pursuant to a merger agreement, Y will merge with and into X, with X as the surviving corporation. As a result of the merger, A and B will receive the following securities of the surviving corporation (B is actually the majority shareholder of an intermediate corporation that owns all of the voting securities of Y and will actually receive the securities of X, and B is deemed to acquire the securities below for purposes of the Act):

Issued to:	Class of Stock	Voting	No. of Shares	Total Value
B	Class A Common	Yes	[redacted]	[redacted]
A	Class B Common	Yes	[redacted]	[redacted]
A	Class C Common	No*	[redacted]	[redacted]
A	Preferred	No*	[redacted]	

*Except as required by law.

[redacted]

[redacted]

If this is right, any holder (not just B) can appoint - seems to A. suggest that Class A stock has right to appoint trust to appoint it!

In addition, although the shares of Class A Common Stock and Class B Common Stock would each have a single vote per share (meaning that A would initially hold approximately 75% of the voting securities of the surviving corporation), the parties will execute a Stockholders' Agreement providing that the holders of the Class A Common Stock (deemed to be B, for purposes of the Act) will have the right to elect a majority of the directors of the surviving corporation. Upon the occurrence of certain events of default, however, the holders of the Class B Common Stock or the Preferred Stock (in each case, A) will have the right to elect a majority of the directors of the surviving corporation.

The acquisition of securities by B as a result of the merger and the contractual right under the Stockholders' Agreement will not be coupled with an option or contractual right of B to acquire other shares of stock to which the voting rights relate; the voting right is strictly contractual. Although the Stockholders' Agreement provides that the Class B Common Stock, Class C Common Stock and Preferred Stock held by A will be redeemable by the surviving corporation at its option over a period of twelve years, eventually leaving the holders of Class A Common Stock (deemed to be B, for purposes of the Act), as the majority or sole shareholder(s) of the surviving corporation, this redemption provision should not alter the analysis of the current transaction for purposes of the Act.

In our discussion, you stated that the position of the FTC staff is that the transaction would be analyzed as follows. With respect to A, A would be viewed as acquiring approximately [redacted] of securities of Y, and the transaction would be exempt under Rule §802.20 under the Act provided that Y (and any entities controlled by Y) had neither net sales nor total assets of $25 million or more, which we understand to be the case, based upon the most recent regularly prepared financial statements of Y provided to us (as of the end of fiscal year 1991). Similarly, with respect to B, because B would not receive *voting securities* in the transaction that conferred control of the surviving corporation, the transaction would be exempt under Rule §802.20. The possibility of later events of default giving A the right to elect a majority of the directors of the surviving corporation would not affect this analysis.

no! VS do confer control

Finally, you stated that it is the position of the FTC staff that, under the language of Rule §801.40, a corporation resulting from a merger or consolidation will not be treated as the formation of a joint venture for purposes of the Act.

[redacted]

[redacted]

If the analysis stated above does not correctly state the position of the FTC staff, please advise me immediately. If I have not received a response to the contrary from you within ten days of the date of this letter, I will assume that the analysis stated above is correct.

Very truly yours,

[redacted]

[redacted]

cc: [redacted]

5/14

Called [redacted] & advised him that based on this letter, B has a filing obligation because the contractual power to appoint is connected to the voting stock being acquired - not exempt under 802.20(b)

[redacted]