801.11(c)(1)

[redacted]

[redacted]

February 16, 1994

VIA FAX

Richard B. Smith, Esq.
Premerger Notification Office
Federal Trade Commission
6th Street and Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Dick:

I am writing to confirm our telephone discussion of this morning regarding the applicability of the Hart-Scott-Rodino Act ("HSR") to the following proposed transaction. Company A currently owns 100% of the voting securities of Subsidiary B (B does not control any other entity). Company A proposes to sell all of B's voting securities to Company X. The proposed purchase price, payable in cash, is less than $15mm (assume, for this purpose, $14.9mm). Companies A and X satisfy the "size of person" test.

The question that we discussed this morning is whether the exemption set forth in Section 802.20(b) applies to this transaction. The total assets of Subsidiary B are less than $25mm. With regard to Subsidiary B's net sales, I told you the following. Subsidiary B commenced operations in 1992, at which time Company A and Subsidiary B reported on a calendar year basis. In calendar year 1992, Subsidiary B had net sales of approximately $8mm (all of which were in the September - December time frame). After calendar year 1992, Company A and Subsidiary B switched their accounting to a fiscal year reporting basis, with each fiscal year running from April 1 through March 31. To accommodate this change, Company A and Subsidiary B had a one quarter (January 1, 1993 through March 31, 1993) stub fiscal year. In this "stub" fiscal year, Subsidiary B had net sales of approximately $15mm. Subsidiary B is currently in the 11th month of its next fiscal year, which runs from April 1, 1993 through March 31, 1994. Therefore, for the current fiscal year, there is not yet a "regularly prepared annual statement of income" (see Section 801.11(c)(1)). I told you, however, that in the first ten months of the current fiscal year, Subsidiary B has generated net sales of approximately $83mm. I also told you that if the fiscal year reporting was ignored, and Subsidiary B's sales were recomputed for the calendar year 1993, Subsidiary B would have had annual net sales of approximately $85mm.

With the foregoing facts in mind, you and I agreed tentatively that the proposed transaction was exempt from the HSR Act's requirements by application of Section 802.20(b). We agreed that the reference to the $25mm in net sales in Section 802.20(b) was governed by the "last regularly prepared annual statement of income" test of Section 801.11. We further agreed that the last annual statement of income for Subsidiary B would be either the statement covering the quarter stub fiscal year or the statement covering calendar year 1992, both of which were prepared in accordance with accounting principles normally used by Company A and both of which are of a date not more than 15 months prior to the proposed date of consummation of the transaction. Thus, we concluded that based on either (or both) of these annual statements of income, Subsidiary B would not be deemed to have $25mm in net sales for HSR purposes, and that therefore -- notwitstanding that Subsidiary B's annual sales in the time period January 1-December 31, 1993 exceeded $80mm and that its sales for the fiscal year that will end on March 31, 1994, are projected to exceed of $80mm -- the proposed transaction was exempt from the requirements of the HSR Act pursuant to Section 802.20(b). In reaching this tentative conclusion, we referred to Interpretations 154 and 155 of the ABA's Premerger Notification Practice Manual.

We agreed that I would set forth the foregoing in writing so that you could reflect further on this question and consult with colleagues regarding our tentative conclusion. I look forward to hearing your final views, and very much appreciate your assistance.

Very truly yours,

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[redacted] 2/17/94 - writer advised that change to a fiscal year basis had not been done to avoid filing for sale of Subsidiary B. I advised that, since B had opted to switch to a fiscal year basis, the PMN Office was of the view that the financial statements for the last 9 months of 1992 and the first three months of 1993 should be added together to reflect B's last regularly prepared statement of income (result is to give it $23MM in sales). Of course, if a financial statement for B's new fiscal year is issued before X purchases B, B will then meet the size-of-person test and a filing must be made. The writer agreed.

RBSmith