802.10 ; 802.51 (b)

[redacted]

February 22, 1994

VIA FACSIMILE

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

Re: Application of HSR Act to [redacted]

Dear Dick:

I am writing to review with you the [redacted] transaction we discussed on the telephone last week, and to review the conclusion my colleagues and I have reached that the transaction would not and should not require notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act").

We have discussed and assumed the following facts:

A and B are each 50% holders of the voting securities of C. A and B are both [redacted] persons, and C is a [redacted] issuer. A and B intend to form a new corporation, D, by contributing their shares of C to D, resulting in D being the new parent corporation of C. D will be a [redacted] issuer. A and B each have total assets or annual net sales exceeding $100 million, and the shares of C to be contributed by each have a value in excess of $15 million. C holds assets located in the United States with an aggregate book value of somewhat more than $15 million, although the vast majority of such assets consist of accounts receivable and inventory.

Analysis

We have discussed whether this [redacted] requires a filing under the HSR Act. Analyzed under Rule 801.40, both the "size of person" test and "size of transaction" test would be met by the formation of D. As we discussed, the Rule 802.30 intra-person exemption does not apply by its terms to the formation of D, although the spirit of that exemption clearly is met by this transaction, a mere internal [redacted] in which no new parties are brought to the corporation. Similarly, the formation of D does not fall within the letter of the Section 7a(c)(10) exemption (as shares of a different "issuer" are being acquired), although the spirit of that exemption is met by the transaction. It therefore may be appropriate to conclude on these facts and under the intent of these exemptions that no filing should be required.

This would be consistent with the position the Premerger Notification Office apparently has taken in certain other [redacted] transactions. For example, I understand that your office does not require a filing where a corporation reincorporates in another state, distributing shares of the "new" corporation to its shareholders. See Interpretation 38 of the Premerger Notification Practice Manual. Although that transaction does not necessarily fall within the letter of the Section 7a(c)(10) exemption (again as shares of a different "issuer" are being distributed), it certainly falls within its spirit. A similar internal [redacted] is occurring here. In addition, I understand that your office has not required filings for the formation of a new wholly-owned subsidiary by a corporation with two ultimate parent entities, again applying the spirit of the HSR Act rather than, perhaps, its letter. See Interpretation 253 of the Premerger Notification Practice Manual.

Additionally, this transaction should be exempt under the language (and certainly the spirit) of the Rule 802.51(b) exemption. That exemption provides that an acquisition by a [redacted] of the voting securities of a [redacted] issuer is exempt if it will not confer control of an issuer which holds assets located in the United States having an aggregate book value of $15 million or more. In this transaction, the formation of D and the acquisition of its voting securities by A and B will not itself "confer control" over any U.S. assets that are not already controlled by A and B through C, and thus the Rule 802.51 exemption should still be available.

Exemption under Rule 802.51 would be consistent with its purpose to exempt transactions with a "minimal relationship to United States commerce." Statement of Basis and Purpose to § 802.51, 43 Fed. Reg. 33498. Most [redacted] persons who are

parties to [redacted] such as that described above would likely never suspect that the HSR Act could require parties to make any filings. To require filing under these circumstances would impose an unnecessary burden on [redacted] transactions that do not result in any underlying change in the holding of U.S. assets.

For the reasons outlined above, we believe the transaction would be and should be exempt under both the letter and the spirit of the HSR Act. Should you or your office be of a different view, please notify me as soon as possible, as the parties intend to proceed with the [redacted] in the very near future. Thank you for your assistance, and please do not hesitate to call me at [redacted] if you have any questions or require any additional information.

Very truly yours,

[redacted]

2/25/94 - advised writer that no filing is required. Exempt under interpretations the PNO Office has given regarding "re-incorporations" under 802.10 or the fact that the acquiring persons already controlled the subsidiary of the [redacted] other under 802.51(b)

R B Smith