801.1(b); 802.50(b); 802.1(a); 801.11(b)(2)

[redacted]

July 27, 1994

VIA FACSIMILE TRANSMISSION

Mr. Richard Smith, Esq.
Assistant Director
Federal Trade Commission
Premerger Notification Office
Bureau of Competition, Room 303
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Smith:

In accordance with our phone conversation on July 21, 1994, provided below are pertinent facts relating to the acquisition of voting securities of certain direct and indirect subsidiaries by one corporate entity (referred to herein as "Company B") from another corporate entity (referred to herein as "Company A"), both of which are owned by essentially the same group of stockholders (the "Reorganization"). With one exception, all of these stockholders are individuals (or trusts therefor), some of whom are resident outside of the United States. None of the stockholders has "control"[1] of either Company A or Company B as

[1]"Control" exists if a person "holds" 50 percent or more of the outstanding voting securities of an issuer. In the case of an entity that has no outstanding voting securities, control exists if a person has the right to 50 percent or more of the profits, or the right, in the event of the dissolution, to 50 percent or more of the assets of the entity. Control also exists if the person has the contractual power presently to designate 50 percent or more of the board of directors of a corporation, or 50 percent or more of the individuals exercising similar functions in an unincorporated entity. See Rule 801.1(b).

that term is defined in 16 C.F.R. §801.1(b). As described in the Introduction below, it is contemplated that the Reorganization will be completed before consummation of a merger transaction between Company A and a third party, Company X.

INTRODUCTION

The stockholders of Company A have reached an agreement with Company X pursuant to which Company A will effectively be sold to Company X. The transaction is being structured as a tax-free reorganization in the form of a "reverse triangular merger" and will entail (i) the formation by Company X of a new subsidiary, and (ii) the merger of the new subsidiary with and into Company A, so that Company A is the surviving company and also a wholly-owned subsidiary of Company X (the "Merger"). As consideration for the transaction, the stockholders of Company A will receive shares of voting common stock of Company X. Since the Merger satisfies the commerce test, size-of-the-transaction test and the size-of-the-parties test, the Merger is reportable under, and will be reported in accordance with, the Hart-Scott-Rodino Antitrust Act of 1976 (the "Act").

STRUCTURE OF THE REORGANIZATION

As you know, the legal import of a merger dictates that all direct and indirect subsidiaries of Company A will also be transferred to Company X in conjunction with the Merger; however, Company X does not want certain of the direct and indirect subsidiaries of Company A. Collectively, referred to as the "Unwanted Assets", these direct and indirect subsidiaries include a [redacted] corporation (the [redacted] Corporation"), an [redacted] corporation (the [redacted] Corporation"), a [redacted] corporation (the [redacted] Corporation"), and a [redacted] corporation (the [redacted] Corporation") which directly owns all of the outstanding voting securities of two [redacted] corporations (the [redacted] Corporations"). The [redacted] Corporations hold assets having an aggregate book value of approximately $10 million and have not made sales in or into the United States of more than $25 million.

To accommodate Company X's desire to exclude the Unwanted Assets from the Merger, the stockholders of Company A have arranged for Company B to purchase the voting securities of the [redacted] (the [redacted] described above. To effect this portion of the Reorganization, Company A and Company B will enter into a stock

purchase agreement pursuant to which Company B will acquire from Company A the Unwanted Assets for an approximate purchase price of $40,000,000.

Prior to consummation of the Merger, Company B will form and own all of the outstanding voting securities of a shell corporation ("Newco"). Immediately after the acquisition of the [redacted] by Company B from Company A, Company B will make a capital contribution to Newco of all of the capital stock of the [redacted] Corporation, the [redacted] Corporation and the [redacted] corporation. The [redacted] Corporations will remain subsidiaries of the [redacted] corporation. The [redacted] Corporation will remain a direct subsidiary of Company B and a "sister" company of Newco.

Also, on May 31, 1994, Company A sold to Company B all of the voting securities of one of its other subsidiaries, a real estate holding company organized under the laws of a state in the United States ("Company C") that owns directly and indirectly two other domestic corporate entities that hold only unimproved realty (the "Real Estate Company Transaction"). The purchase price for the voting securities of Company C was $1,000; however, one of the subsidiaries of Company C owes approximately $3.7 million on an outstanding mortgage note to a bank. Although Company A and Company B have already effected the Real Estate Company Transaction, this transaction might be viewed by the FTC as a part of the overall plan of reorganization to divest certain subsidiaries that are not wanted by Company X.

ANALYSIS

located in the U.S.

The proposed acquisition of the voting securities of the [redacted] is entitled to an exemption under the Federal Trade Commission's rules and regulations promulgated under the Act. 16 C.F.R. §802.50(b) exempts an acquisition of voting securities of a [redacted] by a U.S. person from the requirements of the Act unless the [redacted] (including all entities controlled by the issuer) either: (1) holds assets (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to 16 C.F.R. §801.40(c)(2)) having an aggregate of $15 million or more; or (2) made aggregate sales in or into the United States of $25 million or more in its most recent fiscal year.

both made

As noted above, the [redacted] Corporation owns all of the outstanding voting securities of the [redacted] Corporations.

Although the [redacted] Corporations are considered to be United States companies for purposes of the Act, the aggregate book value of the [redacted] Corporations is approximately $10 million and they have made sales in or into the United States of approximately $13 million in 1993. Moreover, the [redacted] Corporation has not itself made sales in or into the United States. Furthermore, other than the [redacted] Corporation (which holds assets only through the [redacted] Corporations), none of the [redacted] holds assets in the United States or has made sales in or into the United States. Consequently, we believe that the [redacted] exemption would apply in connection with the Reorganization.

With respect to the Real Estate Company Transaction, Company C and its two subsidiaries are entities whose assets consist solely of real property and assets incidental to the ownership of real property. Even if the dollar value of this transaction invoked a duty to report under the Act, the [redacted] consists of [redacted] therefore, we believe that the exemption promulgated under § 7A(c)(1) of the Act in conjunction with 16 C.F.R. §802.1(a) applies to the Real Estate Company Transaction.

CONCLUSION

It is our understanding that the sale of the Unwanted Assets qualifies for the [redacted] exemption and that the Real Estate Company Transaction qualifies for the transfer of [redacted] in the ordinary course of business exemption. Therefore, in view of the foregoing, we do not plan to report the transactions involving the Unwanted Assets or the Real Estate Company Transaction under the Act. Please contact us in the event you or the FTC staff take a contrary view.

Very truly yours,

[redacted]

[redacted] 7/29/94 - called writer - he said share (or trade therefor) on pg. 1 has included [redacted] trust holdings with those of stockholder settlor or beneficiary. On pg. 2, there are no portfolio voting stock acquisitions of Company X by stockholders of Acquiring [redacted] the merger. References FTC mean "the PHN office." On pg 4, the financials for the [redacted] operations are for 1993 and the balance sheets are of a date within 7 months the proposed closing. I advised that the "reorganization" and the sale of the Real Estate Company were exempt.

PTB Smith