802.5(c)(1)
801.21

[redacted]

October 25, 1994

VIA FACSIMILE

Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
Sixth Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Attention: Patrick Sharpe, Compliance Specialist

Re: Notification Requirements for Successive Acquisitions

Dear Mr. Sharpe:

Our firm represents a person which intends to effect successive acquisitions of assets and voting securities of entities included within the same ultimate parent entity. We are sending you this letter outlining the relevant facts, and would like an opportunity to discuss the staff's view of the notification requirements for the successive transactions under The Hart-Scott-Rodino Antitrust Improvements Act of 1976. You should assume that all relevant parties are of sufficient size to satisfy the size-of-person tests.

The facts are as follows:

1. The acquiring person first will acquire all of the operating assets of a U.S. corporation ("U.S. Issuer") with more than $25 million in sales in its most recent fiscal year. The acquiring person will make payments and assume liabilities of the U.S. Issuer in excess of $15 million, and the parties will therefore observe the notification and waiting period requirements under the HSR Act. The only consideration being paid to the U.S. Issuer will be cash and assumption of indebtedness.

2. Following the consummation of the first transaction, the acquiring person will purchase 100% of the stock of the parent company of the U.S. Issuer, which is a foreign corporation (the "Foreign Parent"). That acquisition could happen at any time in the five business days after the asset acquisition. The Foreign Parent has no assets in the United States, and has made no sales into the United States. The only entity controlled by the Foreign

Parent is the U.S. Issuer, which will have disposed of all of its assets and will hold only cash (and incidental assets such as minute books, tax returns, some financial records and the like).

Our question is whether the parties must file notification and observe the waiting period in the second transaction. Rule §802.50(b) provides:

> (b) *Voting Securities.* An acquisition of voting securities of a foreign issuer by a U.S. person shall be exempt from the requirements of the act unless the issuer (including all entities controlled by the issuer) either:
>
> > (1) Holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(c)(2)) having an aggregate book value 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.

Read literally, this exemption would be unavailable, solely because of the sales of the U.S. Issuer in its most recent year. In fact, however, the second transaction has little connection with the United States, since the business of the U.S. Issuer was disposed of in the first transaction, and since the cash held by the U.S. Issuer is not considered an "asset" under Rule § 801.21. We believe it makes little sense to impose a second filing requirement where the U.S. Issuer has already been acquired in a transaction in which the parties observed the HSR Act's requirements.

We bring your attention to a similar fact pattern contained at interpretation number 268 in the Premerger Notification Practice Manual, where the staff concluded the exemption was nevertheless available. Although we infer from that interpretation that the acquiring persons in the first and second transactions were not the same, we believe the same rationale should apply.

Although the transactions described above must occur sequentially for tax purposes, another possibility would be to treat both of the transactions as a single acquisition (of both assets and voting securities of entities within the same ultimate parent entity) for purposes of the HSR Act, and file one notification and report form covering both transactions. While this would be slightly more burdensome than filing only as to the asset acquisition, we believe the parties would prefer this alternative to filing and waiting on both acquisitions.

We would appreciate an opportunity to discuss the staff's position on this issue with you by telephone later this week. Thank you for your attention to this matter, and feel free to contact me at [redacted] if you have any questions.

Very truly yours,

[redacted]

By [redacted]

REH/reh

I disagree with the PMN Office approach in #269. ←(RS concurs) Have advised to file as one transaction, because of nexus with the U.S., 802.50 does not apply to the second part.

called [redacted] 10-25-94 (ES)