801.40; 802.51(b)

[redacted]

SPECIAL COUNSEL

*NOT ADMITTED IN THE DISTRICT OF COLUMBIA

Writer's Direct Dial [redacted]

March 6, 1995

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 Foreign Transaction

Dear Dick:

Following up on our conversation of February 21, 1995, I am writing to review with your office whether certain foreign transactions require any filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). My colleagues and I believe the transactions should not require any such filings.

You and I discussed the following hypothetical series of transactions:

> A and B, two foreign corporations, intend to combine their worldwide widget manufacturing operations. The only United States widget operations of either party are two subsidiaries of A, US1 and US2. US1 and US2 together hold assets located in the United States having an aggregate book value of more than $15 million.

> A formed a new foreign corporation, C, on December 15, 1994. C was registered under its jurisdiction's governing law on December 28, 1994. A and B signed a preliminary letter of intent to combine their widget operations on December 23, 1994.[1/] The parties executed a definitive agreement in late February, 1995.
>
> Sometime prior to the closing of the transaction with B, A intends to transfer the voting securities of US1 and US2 to C together with certain other foreign assets and voting securities that constitute its widget operations. Thereafter B will acquire a 21% interest in C in exchange for certain foreign assets and voting securities that constitute its widget operations. The value of B's 21% indirect interest in US1 and US2 will be less than $15 million. B's acquisition of C voting securities is expected to be consummated in late June, 1995.

<u>Analysis</u>

In analyzing whether these transactions require any filings under the HSR Act, we believe it is important to recognize that three legally distinct steps are involved: (1) A's formation of C, (2) C's acquisition of US1 and US2, and (3) B's acquisition of 21% of C. Analyzed separately, each of these steps would be exempt from any reporting requirements under the HSR Act. The first two steps would be exempt under Rule 802.30 as "intraperson" transactions, while the third step would be exempt under Rule 802.51(b), as an acquisition by a foreign person of a non-controlling interest in a foreign issuer.

1/ At the time C was formed, A was negotiating its transaction with B. A formed C and another corporation in accordance with A group policies that require the existence of at least four shell corporations in the A group and the establishment of new shell corporations each time the number falls below four. A could have used a company other than C for its transaction with B, such as D or E, registered on November 30, 1990 and December 3, 1990, respectively. A's decision to use C was therefore arbitrary.

Moreover, the transaction structure was not chosen as a "device" for the avoidance of any HSR Act reporting requirements - the underlying "substance" of the transaction, B's acquisition of indirect 21% interests in US1 and US2 valued at less than $15 million, would be exempt under Rule 802.20. Thus, we believe that the proper approach under the HSR Act would be to treat the steps independently and therefore to determine that each is exempt.

However, as you and I discussed, there is some suggestion that the Premerger Notification Office may treat certain legally distinct steps together as the formation of a joint venture or other corporation and apply Rule 801.40 to that formation. This approach is illustrated in Interpretation 199 of the Premerger Notification Practice Manual, as you and I discussed.

This approach would treat the three steps described above as a single joint venture formation in which A was contributing assets and voting securities (including those of US1 and US2) in exchange for voting securities of C, with B contributing other (foreign) assets and voting securities in exchange for C voting securities. Under this approach, A, B, and C would meet the relevant "size of person" tests in Rule 801.40,[2/] and A's 79% interest in C is valued at more than $15 million. A prima facie filing requirement would thus exist, and, as we discussed, the Rule 802.30 intraperson exemption would not apply by its terms to the formation of C under this approach.

This approach, however, produces an illogical result - A would be filing to acquire a 79% interest in an entity whose only U.S. operations will be those that A already wholly owns. B would not have any filing obligation with respect to its acquisition by operation of Rule 802.51. This result diverges from the underlying purpose of the HSR Act - to enable the reviewing agencies to determine whether any antitrust issues are raised by transfers of assets or voting securities. Here, there is no transfer in the control of US1 and US2, and the only passage of an interest in U.S. operations to another person, i.e. B's acquisition, is exempt. Thus, we believe that it is illogical to require an HSR Act filing from A under these circumstances, particularly where three legally distinct steps are involved and the underlying "substance" of the transaction is exempt.

2/ Both A and B have annual net sales or total assets of over $100 million, and C will have total assets of more than $10 million.

Alternatively, this transaction should be exempt under the language (and certainly the spirit) of Rule 802.51(b). That exemption provides that an acquisition by a foreign person of the voting securities of a foreign 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 C and the acquisition of its voting securities by A will not itself "confer control" over any U.S. assets that are not already controlled by A, and thus the Rule 802.51 exemption should still be available.

To take the position that the acquisition will confer control over C, that C "holds" US1 and US2's U.S. assets for purposes of applying Rule 802.51 (because C will hold US1 and US2 immediately before B's acquisition of C's voting securities), and therefore that the 802.51 exemption is not available is difficult to reconcile with the underlying purposes of the HSR Act and Rule 802.51. To require a filing under these circumstances would impose an unnecessary burden on a foreign transaction that does not result in any underlying change in the control of U.S. assets.

For all of the reasons outlined above, we believe the transaction should be exempt under the HSR Act. In our conversation, you suggested that you would circulate this letter within the Premerger Notification Office and inform me of the view of the Office regarding the HSR Act reportability of the transactions described above. I would appreciate if you would circulate the letter and let me know what your Office determines at your earliest convenience.

As always, I greatly appreciate 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]

3/13/95 - Called writer and advised that, in view of PNO position, A would have a filing obligation for the taking of control of a foreign issuer. The facts here, do not demonstrate that an 801.40 foreign corporation is being formed (and that A has a supportable exempt under 802.51 (b). The fact that A controlled the U.S. issuers it was contributing to the foreign joint venture, which it would also control, did not relieve it of a filing obligation.

R B Smith