801.1(c); 801.2

[redacted]

August 18, 1995

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: Mr. Richard Smith

Re: Three party asset transaction

Dear Mr. Smith:

Our firm represents a party in a transaction that was recently discussed with you by [redacted] and [redacted] at [redacted]. Our analysis of the filing requirements differs slightly from theirs, and I would appreciate the opportunity to discuss the issues with you.

[redacted] Our client A has entered into a definitive agreement with [redacted]lient B, to acquire more than $50 million of assets of B. A is a $100 million person and B is a $10 million person. The acquisition agreement contains the following provision:

> This Agreement may be assigned, in whole or in part, by [A] without the prior written consent of [B] in accordance with the terms and conditions set forth in the Agreement attached as Exhibit 9 (the "Assignment Agreement"); provided, however, in no event shall any assignment by [A] ... release [A] from its liabilities and obligations hereunder; provided, further, however, that no such assignment shall be effective until the Closing; provided, further, however, that *the Assignment Agreement is strictly between [A] and the assignees named therein, and [B] shall have no liability or obligations under and shall not otherwise be bound by any of the provisions of the Assignment Agreement.* If all or a portion of this Agreement is assigned by [A], [A] shall notify [B] of such assignment in writing and shall specify which of the [assets] is being purchased by an

[redacted]

> assignee, whereupon *the assignee or assignees shall succeed to [A]'s rights under the Agreement to purchase those [assets] as may be designated by such assignment.*

(italics mine). Although the first italicized phrase denies privity between B and the assignee, the second arguably may create it.

Pursuant to the above provision, our client A has now entered into a definitive agreement with C whereby C has agreed to acquire more than $15 million of the B assets. B has been notified of A's assignment to C of A's purchase rights as to those assets. C is not related to A or B, and we assume it is at least a $10 million person. Virtually all of the assets of B are within a single SIC Code.

Here is our analysis of the filing requirements:

1. A must file and wait with respect to its acquisition of more than $50 million of assets of B (and B files as the acquired person). Although A does not expect to buy all of those assets, in order to be in a position to fulfill its agreement with B, A must file with respect to the whole bundle in the event C defaults, goes out of business or some other unforeseen circumstance occurs.

2. If C is a $100 million person, C must file and wait with respect to its acquisition of more than $15 million of assets of B (and B files as the acquired person).

3. If C is not a $100 million person, then C and B need not file and wait, since neither of them is a $100 million person.

Whether as a technical matter there is privity of contract between B and C seems to be irrelevant. Absent an exemption, the Hart-Scott-Rodino Act prohibits a person engaged in interstate commerce who is sufficiently large from acquiring more than $15 million of assets of another large person unless both the "acquiring person" and the "acquired person" file and wait. In the transaction where C is the acquiring person, B should be the "acquired person" under Rule § 801.2(b), since it is the entity whose assets are being acquired (and it will have the relevant information on dollar revenues and geographic markets). The only thing that C is acquiring from A is an assignment of a purchase right, which is for nominal consideration (if any). Assuming C fulfills its contractual obligations, A will not at any time have title (transitory or otherwise) to the assets of B to be acquired by C.

As to the manner in which C and B should respond to item 2(d) of the notification and report form, I assume B can furnish

its contract with A (since that is the document that describes the assets that C will acquire), and perhaps can furnish the notice from A that specifies the assets that C will acquire. In its filing, C can furnish its agreement with A and the contract between A and B (to which it will succeed, in part, as of the closing).

We understand [redacted] has suggested that the second transaction should be [redacted] an acquisition between A and C, since B and C have never had face-to-face negotiations, and probably never will have them. All negotiations with C were conducted by A, which had the contractual power to acquire the assets of B. Even so, our reading of the Hart-Scott-Rodino Act and Rule § 801.2 leads us to believe that under these circumstances (if B and C are large enough) the Act and Rules require filings by parties who in effect are strangers to each other.

I would greatly appreciate the opportunity to discuss this transaction with you when you have a free moment (and I can arrange for someone [redacted] to participate as well). My direct number is [redacted] Thank you.

Very truly yours,

[redacted]

[redacted]

cc: [redacted] (by facsimile)

8/22/95 - Discussed with writer and other. Advised that as long as A does not "hold" the assets to be purchased by C from B, [redacted] under the assignment from A to C then C and B must file if jurisdictional tests are met. (B + C can use agreement between A & B and assignment to C.) Writer advises that, if C does not default on assignment, A will not take beneficial ownership of assets going from B to C. Agreed that A + B (to protect themselves) could file for all the assets (in case C defaults) and A could take less than all and not refile. However, note in filing as to what's going on would be useful.

[redacted]