7A(c)(9) · 8029 NMN

[redacted]

April 4, 1996

VIA FACSIMILE AND U.S. MAIL

Melea Epps, Esq.
Premerger Notification Office
Federal Trade Commission
Room 303
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Request for an Informal Interpretation of the "Acquisition Solely for the Purpose of Investment" Exemption, 16 C.F.R. § 802.9, of the Hart-Scott-Rodino Act

Dear Ms. Epps:

Pursuant to our telephone conversation of April 4, 1996 and 16 C.F.R. § 803.30, I am sending this letter requesting an informal interpretation of the "Acquisition Solely for the Purpose of Investment" Exemption, 16 C.F.R. § 802.9, of the Hart-Scott-Rodino Act.

The factual background from which my request arises is as follows:

1. Company A intends to acquire 9.9% of Company B's voting securities. The purchase price of the acquisition will exceed $15 million. Company A is a $100 million person and Company B is a $10 million person.

2. Company A and Company B are [redacted] companies. The products of each company are used t[redacted]ifferent stages of the same business process. More specifically, the companies view the business process in three steps. Company A is the leading vendor of [redacted] of Step 1. A third-party company, Company C, is, by far, the leading vendor o[redacted]f Steps 2 and 3. Company C's integrated produc[redacted] both steps. Company A has recently announced its intention to develop and market a product for [redacted]f Step 2. Company B sel[redacted]of Step 3. Company B needs to work closely wit[redacted]endors with Step 2 solutions to integrate their products with Company B's product, in order to better compete with Company C's combined product.

3. Simultaneous to its investment in Company B, Company A and Company B intend to enter into a Collaboration Agreement, the object of which is to define a[redacted] for integrating Company A's new Step 2[redacted]with Company B's Step 3[redacted]he Collaboration Agreement is also expected to include provisions for joint marketing. The

[redacted]

[redacted]

Collaboration Agreement also is expected to have several provisions to protect Company A from changes in control of Company B, including: (i) Company B must give Company A notice and five days to make a counterproposal prior to accepting a proposal for a change in Company B control; (ii) upon a change in control of Company B, Company A will have numerous options to ensure continuing support for its existing customers and its ability to develop a product to replace the collaboration product, including acquiring a limited, non-exclusive license to the collaboration produc[redacted] and setting up a new company to service its customers.

4. Apart from insisting that Company B perform its contractual obligations under the Collaboration Agreement, I have confirmed that Company B does not have a subjective intention to participate in the formulation, determination, or direction of Company B's basic business decisions. In particular, I have confirmed that: (i) Company A has no intention to, and in fact will be contractually prohibited from, increasing its investment in Company B beyond 9.9%; (ii) Company A has no right to a Company B board seat and has no intention to nominate a director to Company B's board; (iii) Company A has no intention to solicit proxies from Company B shareholders; and (iv) Company A has no intention to make proposals to Company B shareholders.

We believe that Company A should be able to rely on the exemption for acquisitions made solely for the purpose of investment. 16 C.F.R. § 802.9. As a threshold issue, Company A is acquiring less than ten percent of Company B's voting securities. Accordingly, the exemption is potentially applicable.

The remaining element required for the exemption to be applicable focusses on the acquiring person's subjective "intention." 16 C.F.R. § 801.1(i)(1). Company A has confirmed that it does not have a subjective intention to participate in the formulation, determination, or direction of Company B's basic business decisions. Nonetheless, certain conduct may be considered irreconcilable with an investment only intention. The Statement of Basis and Purpose to section 801.1(i)(1) identifies:

> (1) Nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the issuer; (5) being a competitor of the issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer.

42 Fed. Reg. 33465 (July 31, 1978).

In our telephone conversation we agreed that a contractual relationship, such as the collaboration agreement, is not, without more, irreconcilable with an investment only intention.

[redacted]

[redacted]

In addition, I confirmed that Company A had no plans to engage in the conduct described in items 1-4 of the Statement of Basis and Purpose.

Your sole concern was whether Company A and Company B should be viewed as competitors. First, it is not clear that this factor should be determinative. Unlike the other forms of conduct enumerated in the Statement of Basis and Purpose, it is conceivable that a company could make an investment in its competitor while subjectively having no intention to influence the issuer's management and objectively taking no steps to influence the issuer's management.

Second, Company A and Company B's products are complementary, not directly competitive. In order t[redacted]he entire business process at issue, a consumer must license [redacted]Steps 1, 2 and 3. A consumer could purchase both Company A's product for Step 1 and Company B's product for Step 3, but there is no scenario where a consumer would view Company A's product as an alternative to Company B's product.

I appreciate your attention to this informal request. Please contact me directly if you have any questions or need additional information before responding.

Sincerely,

[redacted]

NN/nmn

4/9/96 Advised writer that the PMN Office evaluates the extent of the competitive relationship existing between the acquiring and acquired person. While A + B both produce [redacted] for the same customers, their respective [redacted] is used in different processing steps. As such, the products can be viewed as more complementary than directly competitive. Such situation appears not inconsistent with claiming § 802.9 exemption for the less than 10% voting stock purchase. Competition test is merely a presumption which seems to have been rebutted on these facts.

R.B. Smith

[redacted]