802.51(d)

[redacted]

November 6, 1996

John M. Sipple, Esq.,
Premerger Notification Office,
Bureau of Competition,
Federal Trade Commission,
Washington, D.C. 20580,
USA.

Re: [redacted]

Dear Mr. Sipple:

We represent two foreign banking and finance companies, [redacted] and [redacted], both incorporated in [redacted] in connection with aspects of [redacted] intention to increase its ownership in [redacted] from approximately 49.17 percent to approximately 51.09 percent of [redacted] voting securities. The transaction is to be completed on or about December 16, 1996. We write in regard to our conclusion that the transaction is not subject to notification pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR" or the "Act").

[redacted] are affiliated companies operating primarily in [redacted] and elsewhere in Europe. The transaction has no competitive significance for the United

States, as neither [redacted] is a significant participant in any relevant market in the U.S.

We believe that no HSR notification is required in relation to the transaction because it appears that Rule § 802.51(d), the foreign person exemption, applies. [redacted] are both "foreign persons" and "foreign issuers" under the Act. The aggregate annual sales of the acquiring and acquired persons in or into the United States are less than $110 million, and the aggregate total assets of the acquiring and acquired persons located in the U.S. are less than $110 million.*

Because the proper method of calculating the sales of foreign financial institutions like [redacted] is not set forth by the Act, Rules or Statement of Basis and Purpose ("S.B.P.") with ideal clarity, we wish to confirm our analysis of this issue with you. [redacted] U.S. operations generated $3 million in income in 1995. [redacted] U.S. operations** had $111.1 in income in 1995. Of this, $38.6 million was derived from income from securities. $38.1 million of the $111.1 million total was generated from outside the U.S. Thus, if either investment income or income from outside the U.S. are not included as the relevant "sales ... in or into the United States" for the purposes of 801.51(d), the transaction is exempt from HSR obligations.

Loan and Deposit Income are Sales

[redacted] U.S. operations are in banking. While banking operations encompass a variety of revenue-generating activities, such as the investment of assets for profit, only the businesses of lending and taking deposits appear to generate "net sales" for the purposes of the Act, and thus we wish to confirm that only income from lending and deposits should be included as the sales of [redacted]

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* The aggregate value of [redacted] U.S. assets for HSR purposes in 1995 was $5[redacted]illion. The aggregate value of [redacted] U.S. assets for HSR purposes in 1995 was approximately $11.5 million.

** [redacted] controls a [redacted] bank and a [redacted] bank that maintains a branch in New York.

The S.B.P. defines "net sales" as "sales less (or exclusive of) returns, discounts, excise taxes and the like" and goes on to discuss the situation of persons that do not have sales. S.B.P., Background Information to § 801.10(c)(3), reprinted in Axinn, Fogg et al., Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act at B-45 (hereinafter "Axinn"). Nowhere in the Act, Rules or S.B.P. are "sales" defined.* Black's Law Dictionary defines a "sale" as follows:

> A contract between two parties, called, respectively, the 'seller' (or vendor) and the 'buyer' (or purchaser), by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and the possession of property.

Id. (citations omitted). A loan meets this description -- the lender transfers title and possession to property (i.e. money) to the borrower in exchange for the promise of future repayment of a certain amount of money. A deposit similarly fits within the definition, with the depositor transferring title and possession of money in exchange for the bank's promise to repay the money (with or without interest) in the future. Other bank activity -- for example, deriving income from securities or similar investments -- are not "sales" by any natural understanding of the word. It follows from this that, for HSR purposes, [redacted] should consider income from deposits and loans to be its "sales," but not income from securities and other investments.

This interpretation fits the language of the Act, but more importantly its purpose -- lending and deposits are among the core functions by which the competitive activity

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* Although 802.51(d) refers to "aggregate" sales rather than "net" sales, the S.B.P. makes clear that this variation was not intended to have any substantive effect. See S.B.P., Background Information to §802.51, reprinted in Axinn, infra, at B-78 ("The $110 million threshold was adopted to approximate the criteria of section 7A(a)(2) which provide various combinations of total assets or annual net sales requirements, each totalling $110 million").

of banks and similar financial institutions is typically measured. See, e.g., Irving Bank Corp. v. Board of Governors, 845 F.2d 1035, 1041 (D.C. Cir. 1988).

In the context of the foreign banks, this interpretation also avoids the potentially absurd result that would follow from other possible interpretations of net sales, such as gross income. Gross income includes investment income as well as interest from governmental securities and the like. However, the assets providing the source of this income are specifically exempted from the HSR asset calculation for foreign firms in recognition of their competitive irrelevance in 802.51(d). See S.B.P., Sections 802.50 and 802.51: Acquisitions of and by Foreign Persons, reprinted in Axinn at B-76 ("the purpose of disregarding these assets is to exclude assets that do not reflect a substantial business presence in the United States and generally have little competitive significance") (citation omitted). Thus, any net sales calculation for foreign banking persons that includes investment income takes a linguistically tortured route to reach a result rejected by the Rules.

Income from Non-US Investments are not US Sales

Only sales "in or into" the United States are included in the 802.51(d) calculation. $31.4 million of the income of the New York branch of a [redacted] issuer within [redacted] is derived from investments overseas. As explained above, such investment income should not be included at all under 802.51(d). However, even if investment income is included as "sales" for foreign financial institutions under 802.51(d) as a general matter, the Act simply cannot be read to the include investment income from overseas investment as "sales in or into the U.S."

The crux of any inquiry of whether a sale is "in or into the U.S." must be its potential for impact on competition within the U.S. Investments abroad, and income derived therefrom, do not have such an effect. See S.B.P. Sections 802.50 and 802.51, supra.

It would be appreciated if you might confirm your agreement with our conclusions as soon as possible in order to prevent the unnecessary burden and expense involved in an HSR notification by our clients in respect to a transaction that has no meaningful U.S. connection.

Please do not hesitate to call me in our [redacted] office at [redacted] My fax number is [redacted] [redacted] Please speak to my colleague [redacted]

We are grateful for your assistance.

Yours sincerely,

[redacted]

VIA FACSIMILE AND EXPRESS MAIL

11/8/96 Advised caller's assistant that income from securities and other investments must be included in revenues for 802.51 (d) even though such securities and investments may be in foreign funds. While 802.51 (b)(1) excludes the counting of such holdings as assets, there is no clear exclusion of income therefrom on 802.51(d). However, interest on loans made to foreign persons in foreign jurisdictions, although made into the U.S. is not a sale in or into the U.S. The "sale" was the entering into of the loan which was made outside the U.S. If a default on the loan, it is assumed that action would be taken in the foreign jurisdiction. The interest payments are for a "sale" which has already taken place outside the U.S. and for which the debtor has agreed to make payments (in this case, into the creditor in the U.S.) (This position is consistent with insurance policies issued by a U.S. person to a foreign person and the premiums being sent to the U.S. person by foreign insured or agent.) RLSmith