02/24/98 17:30 [redacted]

801.40; 802.31; 802.20

Revised February 24, 1998

[redacted]

February 20, 1998

Via Facsimile

Richard B. Smith, Esq.,
Premerger Notification Office,
Federal Trade Commission,
Bureau of Competition,
Sixth Street and Pennsylvania Avenue, N.W.,
Room 306,
Washington, D.C. 20580.

Re: Request for Informal Interpretation Pursuant to 16 C.F.R. § 803.30 under the Hart-Scott-Rodino Antitrust Improvements Act of 1976

Dear Mr. Smith:

I write to follow up on our telephone conversation on the afternoon of February 18, 1998. During that discussion, I described the following transaction without identifying any of the parties to the proposed acquisition:

[redacted]) currently holds all of the voting securities of [redacted]). [redacted] a foreign issuer within the meaning of 16 C.F.R. § 801.1(e)(2)(ii) and the ultimate parent entity of the person within which it is contained. [redacted] a foreign issuer and has no sales or assets in the United States. [redacted] is engaged in an effort to develop a new multi-purpose digital recorder system for data storage (the "Product"). However, that effort has proven costly and has yet to result in

the development of the Product in commercially salable form. As a result, [redacted] has attempted to attract other investors for the project.

[redacted] has now reached agreement with various investors (the "Investors") to invest in the project and reimburse[redacted] for some of the expenses that [redacted] has incurred through [redacted]. Pursuant to that agreement, it is contemplated that a new corporation ("Newco") would be created to which [redacted] would contribute all of the voting securities of [redacted] in exchange for non-voting securities of Newco that would be convertible into voting stock of Newco if that conversion receives clearance under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act"). Newco would be a United States issuer within the meaning of 16 C.F.R. § 801.1(e)(1)(ii). Contemporaneously with the Newco formation, the voting securities of Newco would be sold to the Investors. The Investors include a major multi-national corporation headquartered and incorporated in the United States, and various investment partnerships and individuals.

The Investors' acquisition of Newco stock would occur in three stages. The first stage would occur in two parts. In the first part, which would transpire at the time of the closing of the Newco formation, the Investors would contribute in the aggregate $12.5 million in exchange for Newco voting securities. In the second part, which would occur in quarterly fundings shortly thereafter, the Investors would contribute an additional $12.5 million (in total) to Newco and would receive additional Newco voting securities. This contribution obligation is conditioned on the absence of a material adverse change in the business or condition of Newco.

In the second stage, the Investors would contribute an aggregate of $15 million in quarterly fundings to Newco and, in the third stage, they would pay in a total of $10 million in further quarterly fundings. In both of these stages, the Investors would receive additional Newco stock. These subsequent funding obligations are subject to a number of significant conditions, including the Product's achieving certain predetermined performance and Product shipment benchmarks. While [redacted] expects that the Product and Newco would achieve those standards within the prescribed period, there is no certainty that they will. If the Product and Newco do not achieve the designated benchmarks for either the second or third stage or certain other conditions are not satisfied, the Investors would not be required to pay the required funding amount, but would nonetheless receive the additional Newco

stock to be distributed in that stage. [redacted] would not receive any additional Newco stock in any of the stages.

As we discussed during our telephone conference, the parties wish to consummate the transaction promptly in order to provide the future funding for Newco. As a result, I raised with you the possibility that the transaction could be consummated prior to satisfaction of the notification and waiting period requirements (the "Requirements") of the Act and would thereafter be subject to the Requirements. You concurred that, although the transaction would be considered the formation of a corporate joint venture pursuant to 16 C.F.R. § 801.40, the formation of Newco could proceed without compliance with the Requirements in the following circumstances:

The Newco stock that [redacted] would acquire would not entitle [redacted] to vote for directors of Newco unless and until the Requirements have been satisfied with respect to [redacted]' acquisition. Rather, upon formation of Newco, [redacted]' Newco shares would be considered convertible into voting stock upon receipt of clearance under the Act. Thus, that stock would constitute "convertible voting securities" within the meaning of 16 C.F.R. § 801.1(f)(2) and its acquisition would be exempt from the Requirements under 16 C.F.R. § 802.31. Under this approach, [redacted] Newco shares would be treated in accordance with the treatment of "white squire" preferred stock in Interpretation No. 98 of the American Bar Association, *Premerger Notification Practice Manual* (1991 ed.) (the "*Manual*").

The Investors' acquisitions of Newco stock would be exempt from the Requirements under 16 C.F.R. § 802.20 because none of the Investors would acquire at least 50%, or more than $15 million, of those securities. In making this determination, the Investors would be considered to have acquired their interests in Newco for an aggregate amount of $25 million (the payments made in both parts of the first stage). The funding obligations in the second and third stage are conditional and, thus, excluded from the determination of the acquisition price of the Investors' stock. *See Manual*, Interpretation No. 202.

In addition, inasmuch as, under 16 C.F.R. § 801.40, a joint venture corporation is treated as only an acquired person, Newco would not be obliged to comply with the Requirements for [redacted] contribution of the [redacted] securities to Newco in connection with Newco's formation. Thus,

it would not be necessary for any party to comply with the Requirements prior to consummating the formation of Newco.

Instead, [redacted] would file a Premerger Notification Report form and comply with the applicable waiting period in connection with the conversion of [redacted] Newco shares to voting securities. In that connection, [redacted] would file as the acquiring person and Newco would file as the acquired person. The conversion would not occur until the waiting period had expired in accordance with the Act and the rules promulgated thereunder.

Similarly, each Investor would have to determine whether its respective acquisition of additional Newco shares in the second and third stages would be subject to the Requirements. Again, to the extent that an Investor's additional acquisition did not raise the Investor's holdings of Newco stock to an aggregate of at least 50% or more than $15 million of Newco securities (valued in accordance with 16 C.F.R. § 801.10(a) and 16 C.F.R. § 801.10(c)(3)), that Investor's new acquisition would be exempt from the Requirements under 16 C.F.R. § 802.20. If an Investor's holdings would exceed those limits as a result of the new acquisition (and all other jurisdictional requirements are met), the Investor would be required to comply with the Requirements prior to proceeding with the acquisition.

Although we did not discuss the matter during our telephone conversation, it would appear that the same result should apply even if [redacted] were to receive the right to designate one of Newco's five directors pursuant to a stockholders' agreement. Inasmuch as all of the Newco stock is voted as a single class for purposes of the election of directors, [redacted]' contractual right would provide the equivalent of 20% of the voting power of Newco's securities. However, [redacted]' holding of Newco shares would initially have no voting power (because [redacted] shares would not carry the right to vote for Newco directors at the time of Newco's formation) and would increase to (i) 77% if the conversion of [redacted] shares occurred before the second step of the first stage, and (ii) 63% if that conversion occurred after the second step (but before the second stage). As a result, there would not be the one-to-one correlation between [redacted] contractual voting power and the voting power resulting from [redacted] conversion of its Newco shares necessary to deem [redacted] Newco holdings "voting securities" for purposes of the Act.

Inasmuch as time is very much of the essence in connection with the contemplated transaction, I would appreciate your informing me promptly as to whether you concur in the conclusions set out in this letter.

As always, we appreciate your attention and consideration.

Best regards.

Very truly yours,

[redacted]

2/25/98 Advised writer that I agreed with the analysis and the conclusions contained in his letter.

RBSmith