801.1(b); 802.51(b)

[redacted]

March 2, 1998

VIA FACSIMILE

Mr. Richard Smith
Attorney
Federal Trade Commission
Premerger Notification Office
Room 300
5th and Pennsylvania Avenue, N.W
Washington, D.C. 20580

Dear Mr. Smith:

This will confirm our conversation on February 17, relative to the control provisions of the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act") and the regulations promulgated thereunder (the "HSR Regulations").

We discussed the following hypothetical situation: Company A, a foreign issuer, has several billion dollars of sales and assets in the United States. Company A owns 30% of the issued and outstanding voting securities of Company B, another foreign issuer. Company B has no assets in or sales in or into the United States. However, Company B owns 40% of Company C, another foreign issuer, which has approximately $500 million dollars of non-manufacturing sales in or into the United States. Company A proposes to acquire the remaining voting securities of Company B which it does not currently own.

Under the laws of the country in which Company A, Company B and Company C are organized, Company B is deemed to have de facto control of Company C by reason of the fact that the votes cast by Company B at recent meetings of Company C's shareholders have constituted over 50% of the total votes cast by Company C shareholders present and voting at the shareholder meeting. This *de facto* control results from the fact that many of Company C's shareholders have not attended and voted at Company C's meetings of it's shareholders.

We discussed the question whether the HSR Act and the HSR Regulations would require Company A to file a premerger notification filing in connection with its acquisition of the

[redacted]

outstanding voting securities of Company B that Company A does not currently own. As we discussed, the answer to this question would turn, in part, on the answer to another question, *i.e.*, whether Company B controls Company C.

As I understood your response, you stated that the Federal Trade Commission Premerger Notification Office interprets 16 C.F.R. § 801.1(b) as establishing a bright line rule of United States law for resolution of questions of control under the HSR Act and HSR Regulations. Under this rule, control by one entity over another entity will be conferred in one of the following three ways: (1) direct ownership by one entity of 50% or more of the issued and outstanding voting securities of the other entity; (2) possession by the first entity of the contractual right to designate 50% or more of the members of the board of directors of the second entity; or (3) a combination of sufficient voting rights and contractual power to vote the shares owned by third parties to give the first entity the right to elect 50% or more of the board of directors of the other entity.

In terms of contractual rights to vote, you stated that an irrevocable proxy would be the most obvious form of such a contractual right and that such contractual rights could not be inferred from patterns of conduct or relationships existing between the parties. You emphasized that there must be a very clear-cut agreement reflecting the power to vote the shares in question. The fact that the laws of the country where the issuers were organized deemed the first entity to have de facto control of the other entity was not relevant for purposes of the HSR Act and the HSR Regulations.

Thus, as Company B owned only 40% of the voting securities of Company C and did not have any contractual rights to vote the other shares of Company C, you concluded that Company B did not control Company C. As such, you concluded further, for purposes of Company A's acquisition of Company B, that the sales of Company C in or into the United States would not be imputed to Company B in determining Company B's total sales in or into the United States. If Company B does not have the requisite sales or assets in or into the United States, the acquisition of its voting securities by Company A would not be reportable under the HSR Act. Please call me at (202) 672-5378, if I have misstated your interpretation of the HSR Act and HSR Regulations to this possible acquisition of Company B by Company A.

Sincerely yours,

[redacted]

cc: [redacted] 3/3/98 - By phone mail message advised counter that, under 802.51(b) control rules B (foreign issuer) does not control C (foreign issuer), even though foreign jurisdiction says B has de facto control of C. But even if B controlled C, since there are no U.S. assets involved, C's sales into the U.S., & it has no assets in the U.S., would not make A's purchase of 70% of B reportable since only test under 802.51(b)(1) is assets in U.S. RJS