[redacted]

April 27 1998

Richard Smith, Esq.
Premerger Office
Federal Trade Commission
Six Pennsylvania Avenue
Washington, DC 20580

Re: Exemption From Filing Requirement
<u>(Other Than Initial "Formation Stage" 801.40 Filings)</u>

Dear Dick

This letter sets out the facts of a transaction which you and I discussed on Thursday, April 23, 1998 and which was the subject of our further conversation on April 24, 1998, resulting in the conclusion that no HSR filings were required, other than 801.40 joint venture filings in connection with the establishment of Newco, prior to the Merger.

Facts. The proposed transaction I outlined to you involves the acquisition (the "Proposed Acquisition") of a corporation ("Target") engaged in manufacturing which has annual net sales in excess of $100,000,000.

To effect the Proposed Acquisition, a newly formed corporation ("Newco") will be formed and then merged with and into the Target (the "Merger"), with the Target being the surviving corporation following the Merger.

As discussed, there would be three (3) stockholders of Newco: Stockholder A, Stockholder B and Stockholder C (each an "Investor Stockholder" and collectively, the "Investor Stockholders"). Both Stockholders A and B are large institutional investors with assets in excess of $100,000,000 and would each hold under 50% -- approximately 49% -- of the voting common stock of Newco[1] ("Newco Common Stock") and 49% of the nonvoting preferred stock of Newco[2].

Stockholder C is an individual with comparatively nominal assets and would hold 2% of each of the Newco Common Stock and the Newco Preferred Stock.[3]

Each of Stockholders A and B will hold more than $15 million of voting stock of Newco.

In connection with the Merger, in exchange for their Newco Shares, each of the Investor Stockholders will receive voting common stock of Target ("Target Common Stock") and non-voting preferred stock of Target ("Target Preferred Stock") in amounts in each case equal to (or less than) such Investor Stockholder's percentage ownership of voting stock of Newco and percentage ownership of preferred stock of Newco, respectively. Following the Merger each of Stockholder A and Stockholder B will own 49% (or less) of the Target Common Stock, which is the only voting stock.

It is also contemplated that they will own 49% or less of the Target Preferred Stock, but that percentage is not relevant to the HSR analysis.

Analysis

1. The acquisition of Newco Shares by Stockholders A and B would be subject to HSR Act filing requirements under HSR Rule 801.40 because they will each hold more than $15 million of voting securities of Newco (and Newco will have assets of over $10 million). Thus, the initial step involves HSR filings under 801.40.

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[1] I had not mentioned the preferred stock in our phone conversation as it has no vote. In addition, it is not convertible. If it were convertible, that would not change the conclusion that no filings are required for the transaction. There might be a later HSR filing prior to conversion of the preferred stock.

[2] It is possible that there may be more initial investors in Newco stock, with lesser investments than Stockholders A and B, which would not affect the conclusion.

[3] Stockholder C is not discussed herein since he/she would not meet the "size of party" test contained in the HSR Act and therefore no transaction with such person could be subject to the filing requirements of the HSR Act.

(Note: If Newco were a partnership or an LLC treated like a partnership for HSR purposes, there would be no need for a Rule 801.40 inquiry, but since Newco is a corporation, the analysis is required, and in this instance such filings are required.)

2. The second part of the transaction -- the Merger -- is exempt from filings. The Merger does not meet the size-of-parties test under 801.11(e) because Newco is its own ultimate parent and has no net sales and has under $10 million in assets (excluding the substantial cash used to do the deal), and Newco is eligible under the rest of Rule 801.11(e). This rule applies whether or not the Target survives the Merger (as here) or whether Newco survives the Merger.

The transformation of Newco Common Stock (voting stock) into Target Common Stock (voting stock) in the Merger, which happens automatically under the corporate merger statutes, does not require an HSR filing under (c)(10) of the HSR Act since Target is viewed for this purpose as the same issuer as Newco (which is in essence the acquiring person although not the technical corporate survivor) and since the percentages of voting stock held by Stockholders A and B in the surviving corporation in the Merger will not be increased above their percentages of voting stock held by each of Stockholders A and B in Newco (which disappears in the Merger).

From the point of view of HSR and a number of other purposes, it is fortuitous that Target survives, and if Newco had survived, the fact that the Stockholders' investments in Newco's voting shares were the same percentage (or less) than prior to the Merger, but were a larger dollar amount after the Merger (as valued for HSR purposes), does not create any HSR filing obligations.

I believe that I have accurately stated the conclusion you and I reached last week that no HSR filings are required under the circumstances described above (other than the 801.40 joint venture filings in connection with the formation of Newco). I would appreciate your calling me if I have not accurately reflected this conclusion.

Sincerely yours,

[redacted]

[redacted] 4/30/98 - Confirmed with writer that an 801. filings would be required from A + B. The merger is not reportable and, since Target can be viewed as a successor to Newco and the % holdings in Newco are the same (or less) in Target, that (c)(10) would exempt such transaction. (This position is consistent with that taken by this office in response to the 4/21/98 letter from the same author.) RBSmith