7A(c)(3); 7A(c)(10); 802.21

[redacted]

June 11, 1998

Richard B. Smith, Esq.
Premerger Notification Office
Federal Trade Commission
Sixth & Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Dick:

As you requested, this letter summarizes a unique fact pattern and issues of interpretation under the Hart-Scott-Rodino Act and its implementing regulations. After you and your colleagues have an opportunity to review it, I would appreciate it if you would confirm that no filing is required.

Background

Company A, a corporation that is a $100 million person, formed a wholly-owned subsidiary ("Sub") and contributed to it a line of business. Subsequently, Company A sold a 20% equity interest in Sub to Company B, also a corporation that is also a $100 million person. Company B's interest in Sub took the form of preferred stock that included the right to vote for directors. The acquisition was subject to the HSR Act, filings were made, and the waiting period expired without the issuance of a second request. As a result of this transaction, Company A held a 80% equity interest in Sub (in the form of common stock) and Company B held a 20% equity interest in Sub (in the form of preferred stock).

For business reasons that are not germane to the issues before you, Company A and Company B wished to allocate the first $20 million of the losses of Sub entirely to Company B. Profits would be allocated 80/20 subject to the rights of Company B as a preferred stockholder. Unfortunately, after consideration of applicable accounting rules, it was determined that losses could not be allocated merely by contractual agreement. A partnership form, however, would allow the parties to achieve their accounting objectives. In order to achieve their accounting objectives, Company A and Company B contributed their respective interests in Sub to a newly formed partnership (the "Partnership"). Because a partnership does not issue voting securities, no HSR filing was required under 801.40.

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To further complicate matters, Company A and Company B later determined that a limited liability company would be preferable to a partnership as a vehicle for holding the Sub stock and achieving the parties' accounting objectives. Accordingly, Company A and Company B formed a limited liability company (the "LLC") by directing the Partnership to contribute their respective interests in Sub to the LLC. Because the LLC did not issue voting securities, no HSR filing was required under 801.40.

The terms of the LLC agreement are unique and are tailored to meet the parties' accounting objective of allocating the first $20 million of the losses of Sub entirely to Company B. The LLC is as much as possible structured as a pass-through entity. Company A and Company B retain all four indicia of beneficial ownership of their respective interest in Sub stock.

1. *Right to Vote*. Company A retain the right to direct the voting of the common stock of Sub and Company B retain the right to direct the voting of the % preferred stock of Sub.

2. *Right to Dividends*. All common stock dividends are passed through to Company A and all preferred stock dividends are passed through to Company B.

3. *Risk of Gain or Loss*. All proceeds from the disposition of the common stock are passed through to Company A. All proceeds from the disposition of the preferred stock are passed through to Company B.

4. *Investment Discretion*. Company A effectively retains the power to control disposition of the common stock and Company B effectively retains the right to control the disposition of the preferred stock. The disposition by either Company of its interest in Sub can only be achieved by disposition of that company's interest in the LLC, which is subject to a right of first refusal in favor of first, the LLC and second, the other member of the LLC. The LLC may dispose of its holdings in Sub but only with the unanimous written consent of Company A and Company B.

Present Circumstances

Company A and Company B now wish to dissolve their relationship and have Company A buy out Company B's preferred stock interest in Sub. The precise form of this transaction has not been determined but could involve: (1) an acquisition of Company B's LLC interest by Company A; (2) the dissolution of the LLC, distribution of the Sub common stock to Company A and Sub preferred stock to Company B, and the

sale of the preferred stock by Company B to Company A; or (3) some other transaction or transactions that will result in Company A holding 100% of the outstanding voting securities of Sub.

HSR Analysis

I am seeking confirmation that the transaction described above will not be reportable regardless of its form.

In Scenario #1 above, the acquisition of Company B's interest in the LLC by Company A should not be reportable. Because the LLC interests are not assets or voting securities for HSR purposes, their acquisition is not reportable. By virtue of the acquisition from Company B, Company A will hold 100% of the outstanding LLC interests which is deemed to be an acquisition of the assets of LLC. This asset acquisition is potentially a reportable event. In this case, however, because (1) the only assets of the LLC are voting securities of Sub and (2) Company A is already deemed to hold 100% of the outstanding voting securities of Sub by virtue of its 80% controlling interest in the LLC, the deemed asset acquisition should be exempt pursuant to 15 U.S.C. § 18a(c)(3).

In Scenario #2 above, the distribution of Sub common stock to Company A should be exempt under 15 U.S.C. § 18a(c)(3) for the reasons noted above. The distribution of Sub preferred stock to Company B should be exempt under 16 C.F.R. § 802.21 since Company B will not be exceeding the notification threshold for which it was cleared less than five years earlier. Alternatively, Company A and Company B's acquisition of Sub stock in the dissolution could be regarded as not even subject to the HSR Act. Given the unique structure of the LLC and the partnership that preceded it, the transfer of the Sub common and preferred stock to the Partnership and later the LLC should not be regarded as divesting Company A and Company B respectively of beneficial ownership of their common and preferred stock interests in Sub. If Company A is regarded as maintaining beneficial ownership of its 80% equity interest in Sub and Company B is regarded as maintaining beneficial ownership of its 20% equity interest in Sub, then the dissolution of the LLC will not transfer the beneficial ownership of any assets or voting securities and therefore will not be subject to the HSR Act.

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After you have had an opportunity to consider these issues, I would appreciate it if you could confirm the analysis above. In the meantime, I would be happy to provide further information or clarification if that would be useful. I look forward to speaking to you soon.

Best regards,

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6/12/98 - Writer confirmed that LLC formation referred to at top of pg. 1 was non-reportable under present PMN interpretations dealing with LLC formation. Since A controlled LLC, it is deemed to hold 100% of Sub's voting stock. Accordingly, its purchase of the entire LLC's interest in the 20% of Sub's voting stock from B after the distribution by the LLC would be non-reportable under 7A(c)(3) and/or 7A(c)(10). Since B filed for the purchase of Sub's voting stock at the 15% threshold and reached such threshold during the year after filing (confirmed by writer), it could use 802.21 to return to or above such threshold (but not reaching the 25% threshold) within five years of the original filing, which is the case here. Accordingly, the beneficial ownership issues are not needed and not addressed for the resolution of these issues.

R B Smith