Item 4(c)

[redacted]

May 24, 1999

VIA HAND DELIVERY

Richard Smith, Esq.
Premerger Notification Office
Room 303
Federal Trade Commission
6th & Pennsylvania Avenue, NW
Washington, DC 20580

Re: Scope of Item 4(c) In Multi-Step Transaction

Dear Dick:

This letter will confirm our telephone conversation earlier today, and your concurrence with our conclusions as to the scope of the Item 4(c) response to be made by our client in its report and notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, as amended.

Summarizing the transactions:

Our client is planning to engage in two HSR reportable transactions with the same target company ("Target"). The first report is being prepared now with respect to the first transaction, in which our client is acquiring 9.5% of the voting securities in Target through a cash tender offer ("9.5% CTO") and will seek clearance only for the $15 million threshold.

Meanwhile, Target is in the process of acquiring another company ("X"). Target's acquisition of X has already cleared the HSR process and is awaiting other federal and state non-antitrust regulatory approvals.

Our client's second reportable transaction is a merger with Target ("Merger"), which will take place only if and when Target's acquisition of X is completed. In essence, then, the Merger will result in a combination of three companies: Client + Target + X. An HSR

notification and report form will be filed on the Merger, which will afford the antitrust agencies an opportunity for review of that transaction at that time.

Note that if the Merger fails to take place (e.g., because regulatory clearances are not obtained for Target's acquisition of X) and the 9.5% CTO has already closed, our client retains its financial investment in Target. The 9.5% CTO is not contingent upon Target's acquisition of X.

Our client does not feel that notification of the Merger is appropriate at this time, given these uncertainties, and particularly given the possibility that Target's acquisition of X will encounter regulatory delays longer than the one-year HSR closing deadline imposed by Rule 803.7.

The scope of the 4(c) response:

Our question goes to the scope of the response to HSR Item 4(c) in connection with the 9.5% CTO. The Merger of our client and Target (which then will include X) has, as you might imagine, spawned "analyses and reports" during the planning process. These documents will be submitted in response to the HSR notification of the Merger, assuming that various contingencies permitting that deal to go forward are met.

Our client is in the process of searching for documents responsive to HSR Item 4(c) with respect to the filing for the 9.5% CTO. It has discovered that the documents fall into two categories: those which directly evaluate the 9.5% CTO and those which discuss the Merger, without any separate analysis of the 9.5% CTO.

We believe that documents analyzing the Merger without any separate discussion of the 9.5% CTO are not 4(c) documents with respect to the HSR filing for the 9.5% CTO currently being prepared. Documents evaluating the Merger were not "prepared for the purpose of evaluating or analyzing" the 9.5% CTO, and we believe are not 4(c) documents at this time. Of course, we will produce any documents generated for the purpose of evaluating the 9.5% CTO itself or any documents that separately evaluate both the 9.5% CTO and the Merger.

We believe this is the correct conclusion for two principle reasons. First, we (and presumably the premerger notification offices as well) would wish to avoid an unnecessarily duplicative production of documents. Such duplication will occur if our client produces the same documents analyzing the Merger twice. There is no question that documents analyzing the Merger will be responsive 4(c) documents when the the Merger is reported .

More importantly (remembering that the Merger is contingent upon and thus can occur only after the Target has completed its acquisition of X, an event still subject to regulatory

approval and the usual vagaries that can beset any corporate transaction), we are concerned that production of Merger-related documents would be premature at this time, and could possibly prompt the antitrust agencies to evaluate a Merger that may not occur.

Our conclusion:

We believe that our client is only required to produce documents related to the filing before the agencies, and that due to the uncompleted contingencies that must occur before the Merger takes place, the 9.5% CTO stands on its own as a separate transaction. As noted before, it is entirely conceivable that the contingencies might not occur, so that no merger would ever take place, and our client would simply hold a 9.5% interest in Target.

In our conversation, you provisionally agreed that documents relative to the Merger would not need to be produced now in response to Item 4(c) of the HSR filing with respect to the 9.5% CTO -- given that a separate HSR filing will take place with respect to the Merger (if and when it occurs), as to which all such documents will be responsive.

When I spoke with you earlier, I was not aware of the urgent need for a prompt response. The HSR report regarding the 9.5% CTO is to be filed immediately, and my client needs guidance on what documents to include with the filing. I would very much appreciate your contacting me to confirm your advice before this HSR is due to be filed.

As always, many thanks for your time and attention.

[redacted]

cc: [redacted]

5/25/99 - Discussed letter with MV, TH and MB. We concluded that, in this particular fact situation, the CTO filing should include only those 4(c)s relating to the CTO transaction, at the 15MM threshold. For the later merger, if and when a filing is made, all 4(c)s dealing with the merger, i.e. the 50% threshold, would need to be included. The uncertainty and timing of the merger filing, due to events beyond the control of the acquiring person, supports the two-pronged 4(c) document production.

RBSmith