[redacted]

801.10(c)(1)(ii) June 25, 1999

[redacted]

Via Facsimile

Richard B. Smith, Esq.
Federal Trade Commission
Premerger Notification Office -
Bureau of Competition - Room 303
Sixth Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Dick:

I am writing to confirm the advice you provided in our telephone conversation earlier today that the transaction described below does not satisfy the size-of-transaction test of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") and the regulations promulgated thereunder (the "Rules").

Company A, a publicly traded company, proposes to acquire by merger Company B, a private company. On May 5, 1999, Company A and Company B entered into a Letter of Intent contemplating an aggregate merger consideration of $25 million consisting of $15 million in cash and $10 million in stock of Company A. The ultimate parent of Company B is C, a natural person who holds 59% of the common stock of Company B. After signing the Letter of Intent, Company A, as acquiring person, and C, as ultimate parent of Company B, filed notification under the Act and the applicable waiting period has now expired.

The parties since then mutually agreed that the consideration to be paid

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for the shares of Company B will now consist solely of stock of Company A and the shareholders of Company B (including C) will be receiving fixed number of shares of Company A. The parties propose to sign a definitive agreement and to consummate the merger simultaneously on or before June 30, 1999. C does not currently own any voting securities of Company A.

The value of the voting securities to be acquired in this instance is the market price as determined pursuant to Rule 801.10(c)(1)(ii) which provides that:

> "The market price shall be the lowest closing quotation ... within the forty-five or fewer calendar days which are prior to the consummation of the acquisition but not earlier than the date prior to the execution of the contract, agreement in principle or letter of intent to merge or acquire."

You have advised that in instances where a letter of intent is followed by a definitive agreement, Rule 801.10(c)(1)(ii) allows the 45-day (or shorter) period prior to closing to run back to the earlier of (i) the date prior to the signing of the letter of intent or (ii) the date prior to the signing of the definitive agreement.

The closing quotation on the NASDAQ National Market for the common shares of Company A on May 17, 1999 (a date within 45 days prior to the closing date of the proposed transaction) multiplied by the number of shares to be received by C equals approximately $14,095,000. Thus, the acquisition by C of voting securities of Company A does not meet the size-of-transaction test of the Act.

If the foregoing in any way fails to accurately reflect your advice, please call me at [redacted] soon as possible.

Very truly yours,

[redacted]

6/28/99 Advised writer that advice given was based upon
7/31/78 SBP at 33470 where Commission states that clause (ii) applies
to the day before execution of "any" contract, agreement in principle
or letter of intent to merge or acquire. RBSmith

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