[redacted]

801.4(a)
801.2(d)(2)(ii)

August 11, 1999

VIA MESSENGER

Mr. Michael Verne
Premerger Notification Office
Federal Trade Commission
6th & Pennsylvania Avenue, N.W.
Washington, DC 20580

Dear Mike:

Thank you very much for your time on August 5, 1999, to discuss with me and [redacted] the informal interpretation of the Premerger Notification Office ("PNO") concerning the applicability of the secondary acquisition requirement as it relates to consolidations. This letter will confirm the substance of our telephone conversation.

As we discussed, [redacted] filed a Premerger and Notification Form on July 30, 1999, in connection with its proposed business combination with [redacted] incorporated [redacted] filed its Premerger and Notification Form on the same day. As described in the filing, [redacted] and [redacted] intend to combine their respective businesses into a newly-formed corporation [redacted] corporated ("Parent").[1]

The transaction between [redacted] and [redacted] is structured as a "merger of equals" and will be consummated in a number of simultaneous steps: (1) SubA, a wholly-owned subsidiary of Parent, will merge with [redacted] and [redacted] will be the surviving corporation and a wholly-owned subsidiary of Parent (the [redacted] Merger"); (2) SubC, a wholly-owned subsidiary of Parent, will merge with [redacted] and [redacted] will be the surviving corporation and a wholly-owned subsidiary of Parent (the [redacted] Merger"); (3) By virtue of the [redacted] Merger and the [redacted] ger, all of the issued and outstanding [redacted] and [redacted] shares will be exchanged for newly issued Parent

[redacted] Incorporated will be the name of the combined entity after the transaction is consummated. See Exhibit C of the Agreement and Plan of Merger, dated July 15, 1999, (the "Agreement") attached as Attachment 3(d) to [redacted]'s Premerger Notification and Report form filed on July 30, 1999. The Agreement refers to [redacted] Incorporated, which is the original and current name of [redacted] Incorporated. [redacted] will be renamed [redacted] Incorporated after the transaction is consummated. For our purposes, the two entities are synonymous and their names interchangeable.

[redacted]

shares, and presently existing [redacted] shares will cease to exist; and (4) Parent's shares of SubA and SubC will be converted into newly issued [redacted] shares. [redacted] shareholders will receive one share of Parent common stock for each share of [redacted] common stock and [redacted] shareholders will receive 0.765 shares of Parent common stock for each share of [redacted] common stock. In addition, each outstanding share of [redacted] preferred stock will be converted into the right to receive one share of Parent preferred stock. As a result of this transaction, [redacted] will be wholly-owned subsidiaries of Parent.

Even though [redacted] will not lose their pre-consolidation identities as a result of this transaction, the FTC has advised parties to transactions of this kind to treat it as a consolidation under section 801.2(d)(2)(iii).[2] As is required by section 801.2(d)(2)(iii) of the HSR Rules, both [redacted] filed as both acquiring and acquired persons, despite the fact that neither [redacted] nor [redacted] is actually acquiring the voting securities of the other.

Although the reportability of the above transaction is not in question, [redacted] questions whether it must file a separate Premerger Notification and Report Form for its "acquisition" of any minority voting security interests currently held by [redacted]. According to Section 801.4(a) of the HSR rules, "[w]henever as a result of an acquisition (the "primary acquisition") an acquiring person *will obtain control* of an issuer which holds voting securities of another issuer which it does not control, then the acquisition of the other issuer's voting securities is a secondary acquisition and is separately subject to the act and these rules." Example 6 under section 801.4(a) describes a scenario that is identical to the transaction contemplated by [redacted]. It assumes that A and B propose through consolidation to create a new corporation, C, and that both A and B will lose their corporate identities as a result. The example states that "[s]ince no participating corporation in existence prior to the consummation is the designated surviving corporation, "A" and "B" are each both acquiring and acquired persons by virtue of §801.2(d)(2)(iii). The acquisition of the minority holdings of entities within each are therefore potential secondary acquisitions by the other." This reasoning, however, does not recognize the fact that neither of the consolidating persons will obtain control of the other, which is required by the express language of section 801.4(a).

[redacted] and I called and spoke with you, relating our view that [redacted] acquisition of minority holdings of [redacted] is not a secondary acquisition because of the fact that [redacted] will not obtain control of [redacted] as a result of the transaction described above and, therefore, section 801.4(a), by its terms, does not apply. As a result of the consolidation, [redacted] will not control [redacted] and [redacted] will not control [redacted]

[2] *See* Axinn, Fogg *et al*, *Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act*, Vol. 1, at 4-59-60 (1988).

[redacted]

It was our position that the secondary acquisition rule is worded in a manner that always makes it inapplicable to a consolidation.

You agreed with our conclusion that a secondary acquisition filing is not required by [redacted] in this case, but based your conclusion on different reasoning. You indicated that the informal interpretation of the PNO regarding consolidations and secondary acquisitions is that a secondary acquisition filing is required in a consolidation only if both consolidating persons have minority holdings in the same third party issuer. Recognizing that this interpretation stands in stark contrast to the language in example 6 under §801.4(a), you explained that the PNO realized that such an approach was far-reaching and would act to overburden parties seeking to consolidate their businesses into a new corporation. You explained that the key question in a consolidation is: "what will Newco hold as a result of the transaction that may be competitively problematic?" This question is answered by requiring secondary acquisition filings when the consolidating persons hold minority interests in the same third party issuer. When both consolidating persons hold minority interests in the same third party issuer, Newco will hold a greater interest in the third party issuer than either consolidating persons held independently. Thus, the PNO would want to evaluate the competitive implications of this event and would require an HSR filing.

Accordingly, our client is not required to make a secondary acquisition filing in this consolidation, because [redacted] and [redacted] do not hold minority interests in the same third party issuer.

If this letter does not accurately summarize the advice that you gave me as the position of the PNO, I ask that you contact me promptly. Many thanks for your guidance and assistance in this matter.

Very truly yours,

[redacted]

AGREE - NO FILING REQUIRED IN THE SECONDARY ACQUISITIONS.
B. Michael Verne
8/11/99

cc: [redacted]

[redacted]