August 25, 1999

Richard B. Smith, Esq.
Pre-Merger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

Re: Request for Confirmation of Hart-Scott-Rodino Exemption Issues

Dear Mr. Smith:

In response to our telephone conversation yesterday, I am writing to revise my letter of August 19, 1999 addressed to you. On August 19, 1999, I wrote to you to confirm my understanding of a telephone conversation we had on Thursday, August 12, 1999. Our August 12, 1999 telephone conversation involved a discussion regarding the applicability of certain exemptions to the pre-notification filing requirements under § 7A of the Clayton Act (the "Act"), 15 U.S.C. § 18a, in connection with the contemplated exercise of certain warrants for shares of common stock of a company.

The general facts of the circumstances considered were as follows:

Company A loaned Company B money in exchange for the issuance of a promissory note. At the same time, Company B issued Company A warrants for shares of common stock in Company B. A stockholders' agreement was also entered into at that time entitling Company A to appoint one of the six directors on the board of directors of Company B. There is no direct correlation between Company A's right to appoint one of the six directors on the board of directors of Company B and the percentage of outstanding common stock to which the warrants are convertible - that is, the warrants are not convertible into one-sixth of the shares of outstanding common stock. Under the terms of the stockholder's agreement, the stockholders' agreement terminates upon an initial public offering of Company B. Company B is about to make an initial public offering. Company A is contemplating exercising its

warrants for shares of common stock of Company B. Other than the warrants, Company A owns no other voting security in Company B.

Assuming the statutory "size-of-the-parties" and the "size-of-the transaction" thresholds are met, I had asked for your clarification as to whether either (i) the "no increase in the percentage of outstanding voting securities" exemption, 15 U.S.C. § 18a (c)(10), or (ii) the "investment purposes only" exemption, 15 U.S.C § 18a (c)(9), may be available in connection with Company A's contemplated exercise of its warrants for shares of common stock of Company B.

Following our telephone conversations, my understanding of the availability (or lack thereof) of each such exemption under the above facts is as follows:

(i) *The "no increase in the percentage of outstanding voting securities" exemption.*

Section 801.12 of the pre-merger notification rules (the "Rules") provides that the calculation of the "percentage of voting securities" under the Act or the Rules is always conducted using the number of votes for directors of an issuer presently entitled to be cast. See 13 C.F.R. § 801.12(b). As such, although options and warrants are included in the definition of "voting securities" under § 801.1(f) of the Rules, see 13 C.F.R. § 801.1(f)(1) to (3), since options and warrants do not entitle an owner or holder thereof to a present right to vote for directors of an issuer, they are not included in calculating any percentage of outstanding voting securities of the issuer.

In light of the fact that there is no direct correlation between Company A's right to appoint one of the six directors on the board of directors of Company B and the percent of outstanding common stock to which the warrants are convertible upon exercise, Company A has no present right to vote for directors of Company B. As such, Company A's exercise of its warrants for shares of common stock of Company B will increase the percentage of outstanding voting securities of Company B held by Company A. Upon Company A's exercise of the warrants, Company A will go from owning zero percent of the outstanding voting securities of Company B to owning some percent of the outstanding voting securities of Company B. The pre-notification filing exemption set forth in § 18a (c)(10) of the Act, 15 U.S.C. § 18a (c)(10), therefore, will not be available to Company A and Company B under these circumstances.

(ii) *The "investment purposes only" exemption.*

Whether the pre-notification filing exemption set forth in § 18a (c)(9) of the Act, 15 U.S.C. § 18a (c)(9), is available under any particular circumstance depends strictly upon the timing of a party's acquisition of voting securities of the issuer. Assuming the acquiring party acquires or holds ten percent or less of the outstanding voting securities of the issuer following the acquisition, at the time of the acquisition the acquiring party may in no way be involved in the formulation, determination, or direction of the business of the issuer. In

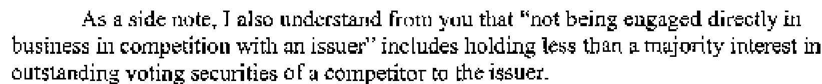
addition, you indicated that at the time of the acquisition the acquiring party may not be engaged directly in business in competition with the issuer.

Company A's original acquisition of the warrants for shares of common stock of Company B was the acquisition of convertible voting securities of Company B. As such, Company A's original acquisition of the warrants for shares of common stock of Company B would have been exempt from the pre-notification filing requirements of the Act pursuant to § 802.31 of the Rules. See 16 C.F.R. § 802.31. Company A's exercise of the warrants for shares of common stock of Company B, however, qualifies as another acquisition of voting securities of Company B to which the pre-notification filing requirements of the Act may be applicable unless another pre-notification filing exemption is available.

For the pre-notification filing exemption provided in § 18a (c)(9) of the Act, 15 U.S.C. § 18a (c)(9), to be available upon Company A's exercise of its warrants for shares of common stock of Company B, assuming Company A acquires or holds ten percent or less of the outstanding voting securities of Company B following the exercise of the warrants, at the time Company A exercises the warrants no current director of Company B may have been appointed by Company A. In addition, at the time Company A exercises the warrants Company A may not have the right to appoint any person to the board of directors of Company B. Further, at the time Company A exercises the warrants Company A may not be engaged directly in business in competition with Company B.

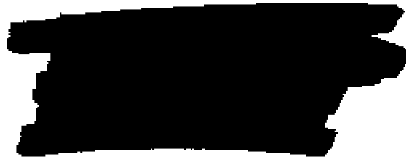
If the stockholder's agreement granting Company A the right to appoint a director to the board of directors of Company B is terminated upon Company B's initial public offering, assuming Company A has no other right to appoint a director to the board of directors of Company B, or otherwise participate in the direction of the business of Company B, and assuming any director of Company B previously appointed by Company A has resigned and no longer is a director of Company B, and assuming Company A is not engaged directly in business in competition with Company B, the exemption from the pre-notification filing requirement set forth in § 18a (c)(9) of the Act, 15 U.S.C. § 18a (c)(9), would appear to be available in connection with Company A's exercise of its warrants for common stock of Company B immediately after Company B's initial public offering. This will be true, however, only to the extent Company A, at the time it exercises the warrants, has no other intent to be involved in basic business decisions of Company B.

As a side note, I also understand from you that "not being engaged directly in business in competition with an issuer" includes holding less than a majority interest in outstanding voting securities of a competitor to the issuer.



Recognizing, of course, that any response you provide is not a formal interpretation, I would appreciate it if you could confirm whether my basic understanding of the matters set forth above appears correct. I sincerely thank you for your assistance with and clarification of these issues and I look forward to receiving your response to this letter in due course.

Very truly yours,



JDN/
Cc: Lawrence D. Bradley, Esq.

9/1/99 - Left phone mail for writer advising that the Premerger Office (NU also reviewed earlier letter) agreed with his conclusions except for last paragraph on page 3. In that paragraph, control of the issuer through the right to appoint half or more of its directors would be - assuming the issuer was a competitor of the company in which the minority stock were held -- also compromise the ability to claim solely for investment. Control of any other entity, such as a partnership, LLC, etc., would, assuming the competitor facts, have the same result.

R B Smith