[redacted]
ATTORNEYS AT LAW
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801.40
802.50(b)
802.51(b)
801.11(e)

September 23, 1999

Via Telecopy

Federal Trade Commission
Premerger Notification Office
Bureau of Competition
(Attn: Mr. Michael Verne)
6th & Pennsylvania Avenue, N.W., Room 303
Washington, D.C. 20580

Re: Application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390 (1976) (codified as amended at 15 U.S.C. Sec. 18A) (the "**HSR Act**") to the Formation of a Foreign Issuer followed by an Acquisition of Voting Securities

Dear Mr. Verne:

On behalf of our clients that are participating in the formation of "Foreign NewCo" as described below, we are writing to confirm that the staff of the Federal Trade Commission's Premerger Notification Office concurs with our analysis that the below-described transactions are not reportable under the HSR Act.

This letter pertains to the transactions that we discussed in our telephone calls on September 20 and 21, 1999. The facts described during our telephone calls, with the addition of some specific dollar amounts for clarity, are as follows:

Description of the Factual Circumstances

A. The Parties: The following parties are participating in the two transactions depicted on the two charts attached to this letter:

"**Foreign NewCo,**" which is a newly formed foreign issuer that will have four shareholders, Companies A, B, C and D. Foreign NewCo does not have a regularly prepared balance sheet.

"**Companies A, B, C and D,**" which comprise various investment funds, each of which is its own "ultimate parent entity," and some of which are non-U.S. entities. Companies A, B, C

and D each has assets in excess of $10 million, and at least one has assets in excess of $100 million.

"**MergerSub,**" which is a wholly-owned subsidiary of Foreign NewCo.

"**OwnerCorp,**" which has assets in excess of $100 million and holds all of the voting securities of "**Target.**"

B. The Pending Transactions:

1. Formation of Foreign NewCo. Companies A, B, C and D have agreed to subscribe to voting securities of Foreign NewCo for capital contributions aggregating $120 million. Each company will hold between 20% and 35% of Foreign NewCo's voting securities and contribute its pro rata share of the $120 million of equity to Foreign NewCo. Foreign NewCo will use all of the contributed capital, except for $2 million, in consummating the second transaction.

2. Merger of MergerSub and Target. Foreign NewCo and MergerSub have entered into an agreement with OwnerCorp and Target by which MergerSub will merge into Target with Target being the surviving corporation. Upon the merger, Foreign NewCo will receive 85% of voting securities of the surviving corporation with OwnerCorp retaining 15%. In addition thereto, OwnerCorp will receive $200 million, comprising $118 million contributed by Foreign NewCo and an additional $82 million borrowed by Target, as the surviving corporation and an 85% subsidiary of Foreign NewCo, and distributed to OwnerCorp.

The parties have not consummated the above proposed transactions.

Application of the HSR Act

During our telephone conversations, we discussed the above transactions and the reporting obligations of the parties under the HSR Act and the Commission's rules. Based upon the following analysis, with which you concurred, the two transactions would not be reportable:

1. Formation of Foreign NewCo. The formation of Foreign NewCo must be analyzed in accordance with § 801.40 of the Commission's rules. The formation of Foreign NewCo meets the criteria set forth in both subsections (1) and (2) of § 801.40(b) because (A) one of Companies A, B, C and D has total assets in excess of $100 million and the others have total assets in excess of $10 million, (B) Foreign NewCo will have assets in excess of $100 million, and (C) Companies A – D will each acquire more than 15% and more than $15 million of Foreign NewCo's voting securities. The issue thus becomes whether the transaction is exempt under Part 802 of the Commissions' rules.

§ 802.50(b) describes the criteria for an exemption with respect to the acquisition of voting securities of a foreign issuer by a U.S. person. The acquisition of voting securities of Foreign

NewCo by Companies A – D meets the criteria set forth in that section for an exemption because Foreign NewCo (i) holds no assets located in the United States, other than cash which is an "investment asset," and (ii) has no sales in or into the United States. Similarly, the acquisition of voting securities of Foreign NewCo by the foreign persons included in Companies A – D would be exempt under Section 802.51(b). Accordingly, the formation of Foreign NewCo would not be reportable. (This conclusion is also supported by Interpretations #206 and #209 of the *Premerger Notification Practice Manual* (2nd ed., 1991), published by the ABA Section of Antitrust Law (the "***ABA Manual***"). Per Interpretation #209, the pending transaction with OwnerCorp and Target, neither of which is contributing to the formation of Foreign NewCo, has no impact upon § 802.50(b) analysis, but is analyzed separately as an acquisition by a newly formed entity.)

2. Merger of Target and MergerSub. The pending merger between MergerSub and Target must be analyzed as an acquisition of voting securities with customary size-of-transaction and size-of-person analyses. Because OwnerCorp will receive $200 million for 85% of the voting securities of Target, the size-of-transaction test is met.

Regarding the size-of-person test, OwnerCorp's assets exceed $100 million so the issue becomes whether Foreign NewCo's assets equal or exceed $10 million. Since Foreign NewCo is its own "ultimate parent entity" and, as a newly form entity, does not have a regularly prepared balance sheet, § 801.11(e) of the Commission's rules is applied to determine the size-of-person of Foreign NewCo. The assets of Foreign NewCo must be determined as of the time of merger with all cash to be used by Foreign NewCo as consideration in the merger being disregarded. Under the above-described facts, Foreign NewCo's size will be $2 million, thus less than $10 million. Accordingly, the size-of-person test would not be met and the merger transaction would not be reportable. (Interpretations #167 and #169 of the ABA Manual are instructive.)

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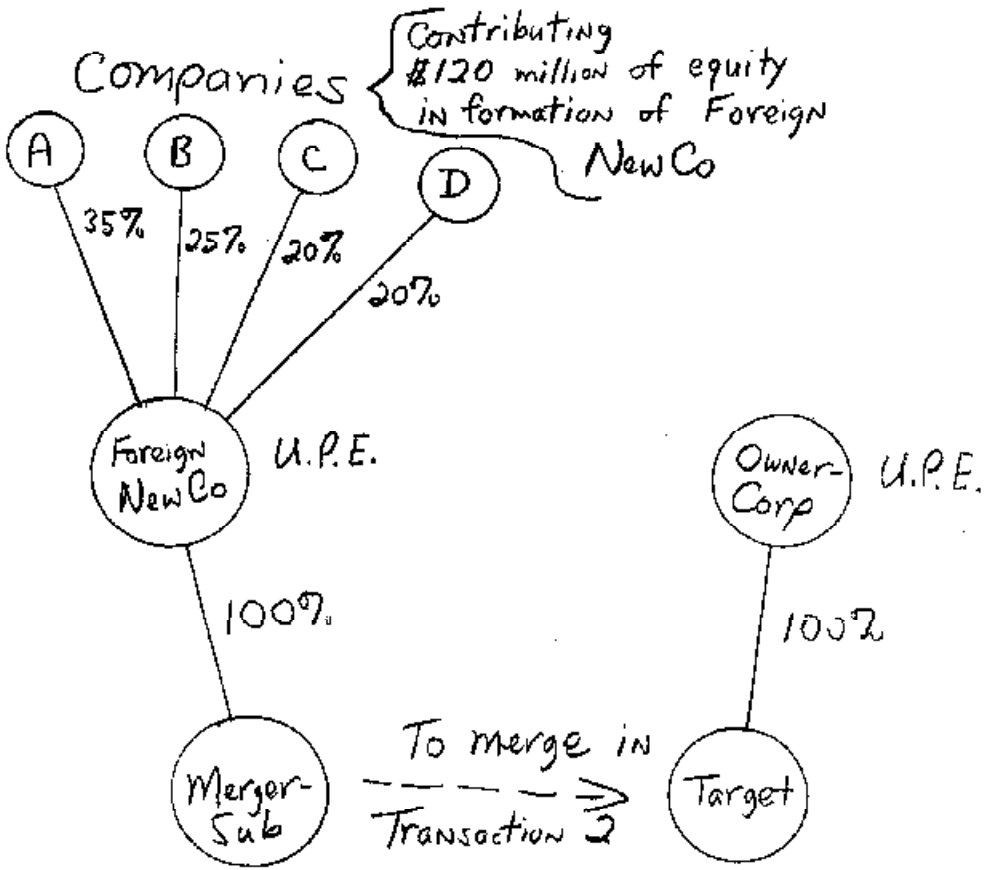
If this letter in any way misstates the substance of our conversation or the views of the Premerger Notification Office, please let me know promptly. Unless I hear from you to the contrary, we, as counsel to Foreign NewCo, will continue to advise our clients that they may rely on the conclusions set forth herein. Thank you for your assistance in this matter.

Very truly yours,

[redacted]

SEE NOTES ON ATTACHED DRAFT.

Transaction 1



Transaction 2