801.10
802.20

[redacted]

Attorneys at Law

[redacted]

November 22, 1999

VIA FACSIMILE
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Premerger Notification Office
Bureau of Competition
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1999 NOV 23 A 8:

FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION OFFICE

Re: Valuations in Simultaneous and Ordered Transactions Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act")

Dear Mr. Sharpe:

I very much appreciate your time and assistance during the telephone conversations you, my colleague [redacted], and I had today concerning the ordering of roughly simultaneous transactions under the HSR Act. As we discussed, I am writing to confirm the substance of those conversations.

Facts

We discussed the following hypothetical.

The players: A, a public company, has a market capitalization of approximately $20 million. C, a holding company, is the ultimate parent entity of B, which has a fair market value of approximately $100 million. D is its own ultimate parent entity.

The transactions: Pursuant to written agreements, the following transactions will occur on the same day but, by the terms of those agreements, in the following order on that day:

1. A issues new voting securities to C, conferring upon C control of A. Prior to that issuance, C and A have made their premerger notification filings, and have observed the applicable waiting period, for this transaction under the HSR Act.

2. A issues to D new voting securities representing approximately 20% of A's total outstanding voting securities. (C still controls A).

[redacted]

Telephone [redacted]

3. D cancels a debt that C has to D.

4. A acquires all of the outstanding voting securities of B. | Intra-person

Issue

You were kind enough to answer the following question concerning the above statement of facts. I have summarized the question and your answer below.

Q: *For purposes of determining the value of the voting securities in the transactions in which A issues new shares to C and to D, may the parties use the value of A prior to consummation of A's acquisition of B, since pursuant to written agreements, A will not yet be deemed to have purchased B?*

A: Yes. You advised that the FTC will treat the transactions as having occurred in the order in which the parties arranged to consummate them and that the parties need not have a tax or other business oriented reason for so ordering those transactions. You further advised that this comports with the FTC's position that the FTC does not view simultaneous transactions to occur at the same time; rather, unless the parties to those transactions mandate the order in which the transactions are consummated, the FTC will determine the order in which the transactions were consummated.

As we discussed, Rule 801.10(a)(1) provides that the value of publicly traded voting securities shall be the greater of the acquisition price, if determined, or the market price. A's total market capitalization, based upon market price (which Rule 801.10(c)(1) defines as the lowest closing bid within the 45 day period prior to consummating the acquisition but not earlier than the day prior to execution of the contract, agreement, or letter of intent to acquire), is approximately $20 million. You kindly confirmed that when A issues new shares to D in the second of the transactions described above, the value of those shares will be equal to 20% of A's total market capitalization (i.e., 20% of $20 million) rather than the number of new shares issued multiplied by the "market price" of A's voting securities prior to the new issuance. This makes sense because A's total market capitalization is $20 million regardless of whether A has 10 shares outstanding valued at $2 million per share or 20 million shares each valued at $1, and the issuance of the new shares will simply dilute all of A's existing shareholders, not increase the market value of A.

Accordingly, because D is acquiring voting securities having a value of approximately $4 million, D will satisfy the requirements of the Minimum Dollar Value Exemption (Rule 802.20), which provides that: acquisitions satisfying the 15% test of 7A(a)(3)(A), but not the $15 million test of 7A(a)(3)(B), will be exempt if as a result the acquiring person would not hold either assets of the acquired person valued at more than $15 million (D satisfies this prong because this is a voting securities transaction) or voting securities which confer control of an issuer which, together with

all entities which it controls, has annual net sales or total assets of $25 million or more (D's 20% holdings would not confer control).

I hope that this letter accurately summarizes the advice we discussed earlier today. If any portion of the above summary is inaccurate, please let me know.

Thank you again for your time and help.

Very [redacted]

[redacted]an

I concur with this letter.

PS

cc: [redacted]