[redacted]

FEB 5 4

This material may be subje[redacted] the confidentiality provisions of Clayton Section [redacted] under the [redacted]

February 5, 1985

Re: Proposed Acquisition of [redacted]

Dear Mr. Kaplan:

This letter is to confirm our telephone conversation of February 4, 1985 regarding whether a filing is required under the Hart-Scott-Rodino Act of 1976 for the proposed acquisition by [redacted] from [redacted] together [redacted] is engaged in the manufacture and sale of [redacted] production machinery. It is our view and we understand that you agree that a Hart-Scott-Rodino filing is not required under the facts as set forth below.

Assume that the transaction to acquire [redacted] will be accomplished in a single contract with [redacted] as follows:

1. [redacted] will sell to [redacted] of the stock of [redacted]

2. [redacted] a wholly-owned subsidiary of [redacted] will sell to [redacted] 85% of the issued and outstanding stock of [redacted] a U.S. firm.

3. [redacted] a wholly-owned subsidiary of [redacted] will sell to [redacted] all of the business and assets [redacted] France").

[redacted]

Assume the following additional facts. [redacted] and [redacted] satisfy the size of person thresholds of the Act. The total price to be paid by [redacted] will exceed $15 million. All of the assets of [redacted] and the entities controlled by [redacted] are located outside the United States. [redacted] (including all entities controlled by [redacted]) did not have individually or together aggregate sales in or into the U.S. of $25 million or more in the last fiscal year. [redacted] owns 15% of the stock of [redacted], which will be indirectly acquired by [redacted] did not have annual net sales or total assets of $25 million or more as stated on its last regularly prepared annual statement of income and expense.

Given these facts, we have first separately considered each of the three components of the transaction to determine whether any of these would by itself trigger the filing requirement. (a) The acquisition of assets [redacted] is exempt from filing under § 802.50 of the premerger notification rules, because [redacted] has not made sales in or into the U.S. of $25 million or more in the most recent fiscal year. (b) Similarly, the acquisition of stock in [redacted] is exempt under that rule, because [redacted] including all entities that it controls) has not made sales of such amount in or into the U.S. in the most recent fiscal year. (c) Since [redacted] has annual net sales or total assets of less than $25 million, the acquisition of the stock of [redacted] (85 percent from [redacted] and 15 percent secondarily by acquiring control of [redacted] B.V.) is exempt under § 802.20 unless [redacted] would hold" as a result of the transaction "an aggregate total amount of voting securities and assets of the acquired person in excess of $15 million." § 7A(C)(3).

In this regard, § 801.15 of the premerger rules provides in pertinent part that an acquisition of stock or assets exempt under § 802.50 is not "held" for purposes of § 7A(C)(3). We assume, however, that all sales in or into the U.S. by any acquired entity must be aggregated for purposes of determining whether the assets or stock of such entities are excludable under § 801.15 because they are exempt under § 802.50. Thus, the portion of the [redacted] transaction price properly attributable to [redacted] is excluded from the § 7A(C)(3) determination, since the combined sales in or into the U.S. of such entities is less than $25 million.

[redacted]

In sum, under these facts, the [redacted] portions of the transaction are exempt under § 802.50. Accordingly, assuming the Board of Directors or its delegate determines in good faith pursuant to § 810.10(c)(3) that the portion of the transaction that cannot be excluded from the § 7A(C)(3) determination under § 810.10 (i.e., Arcotronics, Inc.) is valued at $15 million or less or that the parties have in good faith allocated such value in the purchase contract to the nonexcludable portion of the transaction, there is no obligation to file under the Act.

Based on the analysis outlined above, it is our intention not to file a premerger notification for the transaction as described. If you see an error in our analysis, please let us know as soon as possible, and in no event, later than next Wednesday, February 13, 1985.

Sincerely yours,

[redacted]

Wayne Kaplan, Esq.
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HAND DELIVERY

I notified [redacted] secretary on 2/8/85 that the letter is inaccurate and that a filing is required by both parties. See attached note on yellow sheet

Discussed on basis of 802.20 not w/in 801.15 ; suggests parties file.

TO PNO Staff: 2/6/85:

Please read the attached letter and preface to discuss after MSC meeting Tomorrow.

Thanks.

Wayne.

- meeting held 2/8/85 - John, Pat, Andy, Suzanne, Addie, + Wayne.

Decided that the transaction ~~is not~~ must be filed since there is sufficient nexus w/ U.S. (sales of all three acquired entities in or into U.S. in excess of $25 MM to require aggregation pursuant to 801.15 b +; since whole transaction over $15 MM it is not exempt.

We can't clearly say 801.15 permits exclusion of the foreign parts of transaction.

113.

Applicable subsection of the rules: §§ 801.14, 801.15(b).

Brief statement of the question or problem: A U.S. person is purchasing U.S. assets from a foreign corporation. In addition, the U.S. person is also purchasing voting securities of a foreign subsidiary of the same foreign corporation. The issuer did not have $10 million of sales in or into the United States in its most recent year. Neither acquisition is separately valued in excess of $15 million, but their combined value exceeds that figure. Is any notification required?

Interpretation and discussion: The purchase of U.S. assets by a U.S. purchaser is not exempt under any circumstances, although it is not reportable unless the size-of-transaction test is met. The purchase of voting securities of a foreign issuer is exempt under § 802.50(b) unless the issuer's U.S. assets have a book value of at least $25 million (§ 802.50(b)(1)) or the issuer made aggregate sales of at least $25 million in or into the U.S. in its most recent fiscal year (§ 802.50(b)(2)). It is the issuer's sales in or into the U.S., not the parent's, which determines whether the sales test in § 802.50(b)(2) is met. If the assets and sales tests in subparagraphs (b)(1) and (b)(2) are both satisfied, the exemption applies, and no notification is required.

Documents pertaining to this issue: Letter to Mr. Andrew M. Scanlon dated November 3, 1982.

Commentary: The above cited letter goes on to state that for purposes of § 802.50(b) the sales of the U.S. assets being acquired are not aggregated with the sales of the foreign entity (it is not clear whether the parent or the issuer is meant). That statement is correct in this case but will not always be so. For example, if the foreign issuer had purchased the U.S. assets, and the U.S. person had then acquired shares of the foreign issuer, the exemption in § 802.50(b) might not have been available.

Suppose that the U.S. person were here purchasing from the same acquired person (1) voting securities of a foreign issuer having less than $10 million in U.S. sales in its most recent year and (2) assets located outside the U.S. to which sales in or into the U.S. were attributable. Under § 802.50(b), the former is, by itself, exempt. By itself, the latter is also exempt, by reason of §802.50(a)(2). But taken together, does § 801.15(b) require that the U.S. sales of the issuer and those attributable to the assets be aggregated? Does § 802.50(a)(2) suggest that the answer may depend upon whether the U.S. person is acquiring control (rather than just shares) of the foreign issuer? We are not aware that the FTC staff has issued any interpretations on these questions.

151.

Applicable subsections of the rules: §§ 802.50(b), 801.15(b).

Brief statement of the question or problem: Whether aggregation is required for purposes of determining reportability of a U.S. company's purchases of U.S. assets and foreign voting securities of separate subsidiaries of a foreign parent, which itself made substantial sales in or into the U.S.

Interpretation and discussion: Certain U.S. assets owned by the subsidiary of a foreign ultimate parent entity were being purchased; while no exemption applied to that transaction, its size was not large enough, by itself, to require reporting. In addition, all of the voting securities of a foreign subsidiary of the same foreign parent were also being purchased. The issuer of those securities did not have as much as $10 million worth of U.S. assets and did not make sales in or into the U.S. of $10 million or more. The foreign parent made substantial sales in or into the U.S.

The FTC staff correctly noted that the acquisition of securities, by itself, would be exempt from reporting by reason of § 802.50(b), which exempts acquisitions of voting securities of a foreign issuer by a U.S. person, provided the issuer has neither U.S. assets nor sales in or into the U.S. exceeding certain stated limits. (As of the amendments effective at the end of August 1983, those stated limits are $15 million and $25 million respectively.)

Section 801.15(b) states that purchases exempt under § 802.50(b) are not "held as a result of an acquisition" and therefore are not aggregated with other holdings of the acquiring person "unless the limitations contained in [that section] do not apply or as a result of the acquisition would be exceeded." Since the acquisition of voting securities of the foreign issuer would not in this situation increase the issuer's U.S. assets or its sales in or into the U.S., the "limitations" contained in § 802.50(b) would not be exceeded, and the acquisition was therefore analyzed without being aggregated with any other holdings of the acquiring person.

The U.S. sales of the foreign ultimate parent entity were irrelevant under both § 802.50 and § 801.15(b).

Documents pertaining to this issue: letter to Mr. Andrew M. Scanlon dated November 3, 1982.