[redacted]

March 31, 1988

Re: Request for Interpretative Advice under the Hart-Scott-Rodino Act

Dear Wayne:

In accordance with our telephone conversation this morning, I am writing to request the views of the Premerger Notification Office on the applicability of the Hart-Scott-Rodino Act (the "H-S-R Act") to the transaction described below.

Our client, Corporation X, is a $100 million person that operates both in the private sector and as a government contractor. Corporation Y is also a $100 million person. Corporation Y has entered into a fixed-price contract to manufacture a specified number of widgets for the government for $150 million. Y believes that it cannot perform under this contract and make a profit, and has concluded that the contract is a liability to it. It has approached X and other firms and has offered to pay X (or any of those other firms) $25-30 million in cash if X would assume Y's obligations to perform under the contract. Under the applicable government regulations, there would be a novation of the contract between Y and the government, and X would become principally liable for performance; Y would remain secondarily liable as a guarantor. Assuming satisfactory performance by X, the government would pay X $150 million when the widgets were delivered.

X believes that it is more efficient manufacturer than Y and can possibly perform under the contract at close to breakeven; in other words, X believes that its cost of performance will be approximately $150 million, which will be offset by a payment in the same amount from the government under the contract. The profit to X from assuming the contract will thus be the $25-30 million cash payment from Y. If X is able to perform the contract for less than $150 million, it could also conceivably make an additional profit based on the difference between its cost of performance and the agreed-upon contract price.

You and I both agreed that, in these circumstances, the H-S-R Act would apply -- and the transaction would be reportable -- only if it could be said that X was acquiring an "asset" from Y valued at more than $15 million. I suggested that on these facts, there was no "asset" being transferred, because Y's obligation to perform under the contract was a liability of Y, not an asset. You and I agreed that the contractual obligation to perform Y's contract was a liability of Y, and that the transaction could properly be characterized as the assumption by X of a liability of Y in exchange for a payment to X from Y. The acquisition by X of $25-30 million in cash from Y is not reportable, since cash is not considered an asset of the person from which it is acquired. See Section 801.21 of the H-S-R rules. The government's obligation to pay $150 million to Y (or any successor under the contract) in return for widgets not yet manufactured would not seem to be an asset either. Because no identifiable asset is being acquired by X, and because Y would be paying X to assume a liability, we agreed that there would be no reporting obligation under the H-S-R Act.

As I indicated on the telephone, there is a possibility that X and Y may sign a contract for X's assumption of Y's contractual obligations within the next week or so, and X contemplates that it would commence performance under Y's contract 30 days thereafter. As we agreed, I will assume that the transaction is not reportable unless I hear from you to the contrary by April 11, 1988.

If you have any questions or require further information regarding this transaction, please feel free to call me.

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Thank you for your cooperation in this matter.

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Wayne Kaplan, Esq.
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