



April 16, 2001

VIA MESSENGER

Michael Verne
Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

2001 APR 16 PM 19:50

Re: Hart-Scott Informal Interpretation

Dear Mike:

As you may recall, we spoke on Wednesday and Thursday, April 4 and 5, concerning the application of the "current supplies" exemption of 16 C.F.R. § 802.1(c) in the context of a particular transaction. You advised that the current supplies exemption would apply to the acquisition of 100% of a wholesaler's inventory in this transaction because the acquisition would not occur in connection with the acquisition of all or substantially all of the assets of an operating unit. I wanted to write to ensure that my understanding of your advice was correct, and to ensure that you were fully apprised of the facts of the transaction.

The facts of the proposed transaction are as follows:

Company A is leasing (but not acquiring) from Company B the storage facilities and related hard assets (such as equipment, vehicles, computers, etc.) associated with a wholesaling business. The leased assets are located in various geographic areas. Company B is exiting the business (although it is continuing to operate other lines of business). Company A will operate the leased assets and will use Company B's name (on a non-exclusive license basis) in conjunction with its own. Company A is not acquiring (or leasing/subleasing) any of Company B's sales offices.



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The leases for the hard assets are operating leases (as opposed to capital leases or installment purchase contracts) that conform to accounting standards for operating leases. The leases have an initial term of five years. The lessee has the right to exercise four five-year renewal options, but the renewals are neither automatic nor economically inevitable and will depend upon future business conditions. The leases contain a purchase option at the end of the last renewal term. The lease payments to be paid by Company A will consist of a fixed portion and a variable portion. The variable portion will represent 50% of whatever earnings may be derived from the operation of the assets.

Company A will collect the existing accounts receivable of the business as the collection agent for Company B, but will not acquire the accounts receivable.

Company A is acquiring from Company B the inventory of the business, as well as the existing supply and sales agreements related to the inventory. The inventory is valued at more than \$50 million, but the related contracts and any other assets to be acquired are valued at less than \$50 million.

The leased assets, accounts receivable and other non-acquired assets together represent a very significant percentage (estimated to be 25-50%) of the total assets of the wholesaling business.

Given these facts, and based upon our conversations last week, we would like to reconfirm that, for purposes of calculating the size of the proposed transaction, the parties do not need to count (i) the inventory to be acquired and the consideration paid for the inventory; or (ii) the leased assets and the lease payments to be made.

With respect to (ii) above, we understand that an operating lease is not treated as an acquisition of assets under Hart-Scott. With respect to (i) above, we understand your advice to be that, because Company A is not acquiring "all or substantially all" of the assets of an operating unit within the meaning of 16 C.F.R. § 802.1(a), the acquisition of the inventory is exempt as the acquisition of current supplies under 16 C.F.R. § 802.1(c). You indicated that, although the FTC did not have a "bright-line rule" for what percentage of assets constituted all or substantially all of an operating unit, the percentage of assets must be "approaching 100%." You also indicated that the fact that Company B would be exiting the relevant business, although raising a "red flag," was not determinative because, again, Company A would not be acquiring all or substantially all of the assets of the business.

As an aside, you should be aware that Company A and Company B are also entering into a transaction involving a different business that will close at or about the same time as the transaction described above. This transaction will involve the acquisition by Company A, for approximately \$5 million, of all of the membership interests in an LLC wholly owned by Company B, and thus would be deemed to be an assets acquisition under Hart-Scott. Assuming that the assets to be acquired constitute all of the assets of an operating unit, we assume that this acquisition would not affect the application of the current supplies exemption described above,

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because the inventory to be acquired in the first transaction relates to a wholly separate operating unit, not the operating unit represented by the LLC. Even with the value of the LLC acquisition, the total value of all assets to be acquired from Company B in both transactions, excluding the value of the inventory and the leased assets, is less than \$50 million.

Please call if you have any questions or if you disagree with the conclusion expressed above, based on our discussions last week, that a Hart-Scott filing is not required in connection with the described transaction. As always, I greatly appreciate your time and assistance.

Very truly yours,

[REDACTED]

AGREE. M. BAUNO, K. BENG & N. DVUKA CONCUR.
THIS DOES NOT CONSTITUTE THE ACQUISITION OF
SUBSTANTIALLY ALL OF THE ASSETS OF AN
OPERATING UNIT.

Bruno
4/20/01