

November 8, 2004

Federal Trade Commission  
6<sup>th</sup> Street and Pennsylvania Ave.  
Room 303  
Washington, DC 20580

**Re: H.S.R. Inquiry**

Dear Sir / Madam:

I attempted to reach your office by telephone but was unable to get through to your office; hence, this letter.

I would sincerely appreciate it if you would confirm my opinion in connection with the following scenario. A client of ours is being acquired for \$47,000,000 with an earn out provision for an additional \$5,000,000. Obviously, the question is whether the \$50,000,000 "floor" has been met which could require a filing under the Act.

In my opinion, since the earn out provision deals with achieving certain "benchmark" earnings for two (2) years in the future, the possible pay out to the sellers of \$5,000,000 should not be taken into consideration in computing the amount of the purchase price for the purpose of the size-of-transaction test.

On reaching my decision, I relied upon Opinion 53 which appears in the 1991 edition of the Premerger Notification Practice Manual. For easy reference, I have enclosed a copy of that opinion.

Would you be so kind as to pass upon my opinion. Since the client is relying upon our announced opinion, and the acquisition is proceeding, I would certainly appreciate it if you were able to confirm my thinking in the near future.

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If you should have any questions or comments, please call me at [REDACTED].

Very truly yours,

[REDACTED]

[REDACTED]  
Enclosure

[REDACTED]

3:26 PM  
11/15/04/PA1 #53 not applicable  
2003 CIR #101 as reference  
If price undetermined then  
use FMV  
w 1991 CIR #116 JF