8D1.10

This material may be subject to the confidentiality provision of ... of the Clayton Act which restricts release under the Freedom of Information Act

July 27, 1992

FEDERAL TRADE COMMISSION PREMERGER NOTIFICATION OFFICE
JUL 27 4 10 PM '92

VIA MESSENGER

Hy Rubinstein, Esquire
Premerger Notification Office
Room 303
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Request for Informal Interpretation

Dear Mr. Rubinstein:

Beginning Thursday morning, June 18, and continuing over the last few weeks, you have discussed with me and, on one occasion, [redacted] the application of section 7A of the Clayton Act (the "Act") to the situation described below. It has been your conclusion that no valuation is required by the acquiring person's board of directors and that no premerger filing is required for the transaction. The purpose of this letter is to present the facts in writing and to obtain informal confirmation by the FTC staff of your previous conclusions.

Facts

The parties to the transaction have represented the facts to me as follows. The transaction meets the commerce and the size-of-the-parties tests of Act section 7A(a)(1) and (a)(2). The transaction also satisfies the 15 percent size-of-the-transaction test of Act section 7A(a)(3)(A). Finally, the transaction would satisfy the minimum dollar value exemption in Rule § 802.20, provided that the transaction fails to exceed the $15 million size-of-the-transaction threshold of Act section 7A(a)(3)(B). Therefore, the central issue is whether the transaction fails to exceed the $15 million size-of-the-transaction threshold.

802.20 (b) - No. Sales/Assets of T < $25mm

Pursuant to the proposed acquisition agreement (the "Acquisition Agreement"), the acquiring corporation ("A") will acquire 100% of the voting securities of the target corporation ("T") from T's sole shareholder ("S") for the following consideration:

(a) $1,000,000 in cash to be paid by A to S at closing;

(b) Contingent earn-out payments to be paid by A to S after the closing in amounts equal to the excess, during a three-year period following the closing, of: (i) certain T-related revenues (including the revenues of T and its successors and assigns and the revenues of other entities within the acquiring person to the extent derived from sales of the products and services of T), over (ii) certain minimum revenue levels to be retained by T; and

(c) The total consideration in (a) and (b) above is subject to a contractual limitation that it shall not exceed $15,000,000 in the aggregate.

S will warrant that the stockholders' equity of T will be not less than $1,000,000 as of the closing. The Acquisition Agreement provides that T may undertake a recapitalization prior to closing to reduce its stockholders' equity to the required $1,000,000 level. The stockholders' equity of T is currently approximately $3.7 million dollars. It is contemplated that the recapitalization will occur immediately prior to the closing. As part of the recapitalization, T will issue and distribute to S prior to the closing cash, accounts receivable and (if necessary) a promissory note of T. Also as part of the recapitalization, T will distribute to S 180 days after the closing certain amounts accrued or placed in reserves prior to the closing, but only to the extent such amounts have not been used to pay the pre-closing liabilities for which the amounts were set aside. It is anticipated that the amounts distributed and issued by T to S as part of the recapitalization will equal, in the aggregate, $2.7 million dollars or such other amount as shall represent the excess of the stockholders' equity over the $1,000,000 minimum amount.

For 180 days after the closing, T will collect the transferred accounts receivable for S as S's agent and pay over any collected amounts to S. T must indemnify S for any accounts

receivable that cannot be collected because the customer has applied the account as a set-off for claims arising from actions taken by A or T after the closing. During the 90 days after closing, T will pay interest to S on any uncollected accounts receivable, subject to S's obligation to reimburse T at the end of 180 days after closing for interest paid by T on any transferred accounts receivable that are not fully collected. Thus, S remains fully liable for any uncollected amounts on the transferred accounts receivables, unless such amounts are not collectible by reason of actions taken by A or T after closing.

T will also pay interest on any promissory note issued to S as part of the recapitalization.

The recapitalization is occurring for the following reasons. In the negotiation of the transaction, A proposed to S and T that the recapitalization be part of the transaction since A did not want to pay more than $1 million cash at closing. A's business justification for not wanting to pay more than $1 million at closing is that this sum is easier to generate internally than the full $3.7 million which approximates the current stockholders' equity in T. In addition, A's ultimate parent is a publicly traded company that has approved the transaction based on certain assumptions reflected in the current structure of the transaction, and any substantial change in that structure would require A to invoke the cumbersome procedures attendant to obtaining additional approval from a Board of such a publicly traded company. S, of course, was unwilling to sell the stock of T to A unless it received cash or other property at closing at least equal to T's stockholders' equity at closing. The structure of the transaction permits A to accomplish its business purpose of paying no more than $1,000,000 in cash at closing and permits S to accomplish its business purpose of receiving cash or other property at closing at least equal to the stockholders' equity of T at closing.

In sum, pursuant to the Acquisition Agreement, S will receive approximately $2.7 million from T in a recapitalization and $15 million from A as consideration for the voting securities of T.

The Acquisition Agreement also contemplates that there may be two post-closing adjustments. First, in recognition of the fact that S will be required to file consolidated federal and state tax returns for 1992 including the income of T through the

closing date, T will pay to S an amount equal to the accrued federal and state income taxes of T as of the end of the month preceding the closing plus an estimated amount of taxes for the month of closing.

The second post-closing adjustment contemplated by the Acquisition Agreement is that S will make certain indemnification payments to A in the event that certain of the representations and warranties of S relating to T including warranties relating to liabilities, financial statements, accounts receivable and other business matters, are inaccurate. Likewise A will make certain indemnification payments to S in the event certain representations and warranties of A are inaccurate. These may be additional compensation!

In addition to describing the consideration, the recapitalization and the post-closing adjustments, the Acquisition Agreement also provides for continuing an existing lease agreement between T, as lessee, and S, as lessor, for the business premises to be occupied by T after closing. The current lease agreement was negotiated by S and T without the involvement of A and before A and S had begun to negotiate the sale of T. The current lease expires in about 18 months; under the Acquisition Agreement, the lease will be extended under substantially the same terms, except that the rent (per square foot) will increase to a level that is no greater than the fair market rental value of the leased premises.

Finally, with respect to any liability of T to S extending after the closing (such as T's liability to S for T's share of the pre-closing consolidated tax liability) or any action contemplated as being carried out by T after the closing (such as T's collecting and paying over to S the transferred accounts receivable), A is obligated under the Acquisition Agreement to cause T to satisfy such liabilities and to take such actions. Similarly, the obligations of A under the Acquisition Agreement are to be guaranteed by A's ultimate parent entity.

Discussion

Based on a general outline of the foregoing facts as discussed over the past few weeks beginning on June 18, it has been your conclusion that no board of directors' valuation is required because the consideration is capped at $15 million and because the recapitalization, the post-closing adjustments and

the lease payments will not be considered part of the acquisition price. Further, it has been your conclusion that no filing is required because the transaction does not exceed the $15 million size-of-the-transaction threshold, thereby enabling the transaction to avail itself of the minimum dollar value exemption provided in Rule § 802.20.

Thank you again for all the time and effort you have devoted, and continue to devote, to the consideration of this proposed transaction. Please call me at your earliest convenience to confirm informally your previous conclusions. I may be reached at

Sincerely,

cc: