



July 30, 1992

the confidentiality provisions of
Section 7A (b) of the Clayton Act
which restricts release under the
Freedom of Information Act

Jul 30 1 28 PM '92

FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

VIA MESSENGER

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

Re: Follow-up to Request for Informal Interpretation

Dear Mr. Rubenstein:

This letter is intended to memorialize certain conclusions expressed by you and your colleague Richard Smith regarding the proposed transaction described in my July 27, 1992, letter to you (the "July 27 letter").

After reviewing the July 27 letter with other FTC staff, you expressed three concerns about the proposed transaction. First, you were concerned -- despite the general rule in voting securities acquisitions that assumed liabilities are not taken into account in determining the size of the transaction -- that the promissory note to be issued as part of the recapitalization could be additional consideration, which would push the transaction over the \$15 million threshold.

Second, you were concerned that the indemnification payments described in the first full paragraph on page 4 of the July 27 letter might be a subterfuge for paying additional consideration, which also would push the transaction over the \$15 million threshold. Finally, you wanted us to reaffirm that the target company, together with all entities which it controls, does not have annual net sales or total assets of \$25 million or more, as required by Rule § 802.20.

[REDACTED]

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The parties to the transaction have represented to me that each of your concerns has been addressed as follows. To eliminate your first concern, the proposed transaction has been restructured so that no promissory note will be issued by the target corporation as part of the recapitalization. Instead, the recapitalization will involve the distribution solely of cash and accounts receivables.

This result is achieved by taking cash that would have been used by the target corporation ("T") to pay its share of the consolidated tax liability of the selling corporation ("S") and distributing this cash, rather than a promissory note, in the recapitalization. (As you may recall, the payment by T of its share of S's consolidated tax liability was discussed in the July 27 letter as a post-closing adjustment. Your conclusion has been that payment of this tax liability does not constitute additional consideration because it is payment of a liability arising in the normal course of T's business.) Because the cash will no longer be available to pay the tax liability at the time originally contemplated, the payment of the tax liability is being deferred (without interest) by agreement of the parties for about 15 days. This deferral will allow T to generate sufficient cash flow from its business operations to pay the tax liability.

In response to your second concern, the parties to the transaction have represented to me that none of the indemnification payments will be a subterfuge for paying additional consideration.

Finally, the parties have reaffirmed their earlier representation that the transaction otherwise satisfies the minimum dollar exemption in Rule § 802.20 and, more specifically, that the target company, together with all entities which it controls, does not have annual net sales or total assets of \$25 million or more.

In telephone ^{with} conversations with me yesterday afternoon and this morning, Mr. ~~Sharp~~ and you expressed your conclusion that no premerger notification filing is required for the proposed transaction as modified in the manner described above. Although this letter is intended merely to provide a written record of our conversations, I will call you to confirm your conclusion and to make sure that you do not have any further questions or concerns about the proposed transaction based on this letter or the July 27 letter.

[REDACTED]
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Thank you again for your consideration of this proposed transaction.

Sincerely,

[REDACTED]

cc:

[REDACTED]