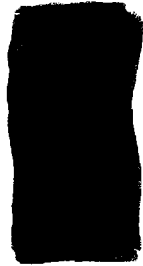


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FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION OFFICE
WASHINGTON, D.C. 20580

November 6, 1992

BY FAX

Richard B. Smith, Esq.
Federal Trade Commission
Premerger Notification Office
Bureau of Competition
Room 301
Sixth Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Financial Information Required by Item 4(b)
of Premerger Notification and Report Form

Dear Dick:

Pursuant to our telephone conversation of October 23, 1992, this letter is intended to supply the factual background necessary to enable you and the staff of the Premerger Notification Office to assist us in determining whether the submission of certain financial documents in response to Item 4(b) of the Notification and Report Form For Certain Mergers and Acquisitions (the "Form") would constitute substantial compliance with respect to Item 4(b) under the facts presented below.

Our client is a privately held corporation (the "Company") that is not required to make any filings with the Securities and Exchange Commission (the "SEC"), including a Form 10-K. No certified or audited financial statements were prepared for any period with respect to the year in question. Nor was any "annual report" (i.e., a document customarily distributed to shareholders, which typically includes financial statements, a description of the business, management's discussion of the year's results, etc.)

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prepared for or distributed to the Company's shareholders. For the year in question, uncertified and unaudited year-end consolidated financial statements, which included a balance sheet, statement of earnings, statement of changes in financial position and related notes, were prepared by an independent accounting firm primarily for internal use at the Company; such financial statements were not distributed to the Company's shareholders.

Item 4(b) requires the most recent annual report, the most recent annual audit report and the most recent regularly prepared balance sheet (if different) of the person and each unconsolidated U.S. issuer. We believe that for purposes of Item 4(b), the Company does not have an "annual report" or an "annual audit report" and, accordingly, is required to file only its most recent regularly prepared balance sheet.

First, we believe that the Company's year-end financial statements as described above do not constitute an "annual audit report" within the meaning of Item 4(b). In connection with the preparation of the financial statements, the independent accountants did not conduct an "audit" of the Company's operations and financial condition in accordance with generally accepted auditing standards but rather performed a "review" of such financial statements, which consists principally of inquiries of the Company's personnel and analytic procedures applied to financial data and is substantially less in scope than an "audit" performed in accordance with generally accepted auditing standards. For example, there are no independent confirmation, substantiation or other audit procedures performed in connection with a "review." Additionally, no opinion was rendered by the accountants with respect to any of the Company's financial statements prepared pursuant to a review of this type. In fact, the independent accountants specifically disclaimed an opinion on the Company's financial statements. Accordingly, we do not believe that such uncertified and unaudited financial statements constitute an "annual audit report" for purposes of Item 4(b) or that such financial statements would be acceptable annual audited financial statements for SEC and other regulatory purposes.

Second, we believe that the Company does not have an "annual report" within the meaning of Item 4(b). Bare

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financial statements which have merely been reviewed by an independent accounting firm and contain no additional information or analysis regarding the Company's results of operations for the year in question are not an "annual report" that is required to be filed in response to Item 4(b). We have searched the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act"), the Hart-Scott-Rodino regulations, 16 CFR §§ 801.1 et seq. (the "Rules") and the Statement of Basis and Purpose ("SBP") for guidance, but the term "annual report" is nowhere defined in these sources.

A survey of analogous regulatory frameworks suggests that an "annual report" consists of significantly more than a year-end balance sheet and income statement. For example, the Securities Exchange Act of 1934, as amended, and applicable rules promulgated thereunder require a publicly traded company's annual report to include detailed descriptions of the company's business, properties, legal proceedings, executive compensation, dividend policy, selected financial data and a "management's discussion and analysis" thereof, etc. In the insurance industry, a regulated insurance company must submit an annual statement or report to the applicable state insurance commissioner which, in addition to a balance sheet and income statement, must contain considerable (and typically voluminous) information relating to reserves, operations by lines of business and schedules of investments held. Similarly, the Federal Reserve's annual report for bank holding companies also requires substantial information in addition to a mere balance sheet and income statement. Further, under recently proposed rules promulgated by the Federal Deposit Insurance Corporation ("FDIC"), insured depositary institutions having assets greater than \$150 million are required to provide an "annual report" to the FDIC, the appropriate federal banking agency, and any appropriate state bank supervisor. This annual report must contain (i) annual financial statements; (ii) a statement of management's responsibility for preparing the financial statements and establishing and maintaining adequate internal controls; (iii) procedures for financial reporting and for legal compliance with certain safety and soundness standards; and (iv) management's assessment of the effectiveness of the internal controls on financial reporting and compliance. In addition, the financial statements required to be filed in the FDIC annual report must be audited by independent auditors. Finally, regulated public

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utilities must also file annual reports with the applicable state regulatory agencies and these reports, with exhibits, are voluminous. In each case in which the term "annual report" is used in these regulatory schemes, a great deal more than bare year-end financial statements is required.

Moreover, the language of the SBP, § 801.11 of the Rules and the Instructions to Item 4(b) of the Form suggest that an annual statement of income and expense, which may be useful and, at times necessary, in calculating total annual net sales, is not required to be submitted in Item 4(b) unless it is part of an "annual report". Section 801.11 of the Rules explains the manner in which to compute the annual net sales and total assets of a person for purposes of determining the Size-of-Person within the meaning of the Act. The SBP states that a person need not use the rule to compute precise figures for annual net sales or total assets if the person is certain that the Act either does or does not apply. 43 Fed. Reg. 33472 (July 31, 1978). Based on the Company's total assets, as reflected on its consolidated balance sheet, there is no question that the Size-of-Person threshold is met and the Act does apply in this case. Furthermore, the SBP continues: "None of the items on the notification and report form requires a statement of the annual net sales or total assets of either party" *Id.* This is true even when the statement of the annual net sales is the result of a recomputation required under § 801.11(b).

Thus, even when an annual statement of income and expense may be required to determine whether a reporting threshold is met, the income statement itself is not required to be submitted under Item 4(b) unless it is part of an "annual report". The language of the SBP explicitly distinguishes between a financial statement that need not be submitted, even though it exists, and one that must be submitted because it is part of an "annual report" or "annual audit report". The SBP states explicitly: "Note that neither the financial statements required by [Rule 801.11], nor the restatements directed by paragraph (b) must necessarily be submitted as such in response to the Notification and Report Form. Item 4 of the form explains in detail which documents must be submitted." 43 Fed. Reg. 33473 (July 31, 1978). Accordingly, unless an annual statement of income

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and expense is part of an "annual report" or "annual audit report," it is not required by Item 4(b).

The Instruction to Item 4(b) and the SBP do not explicitly require the submission of year-end financial statements that include an annual statement of income and expense. The Federal Trade Commission could have expressly required the submission of a year-end income statement or year-end financial statements in promulgating the Rules or in establishing the Instructions to the Form. It chose, however, to require only an "annual report" and nowhere sought to explain further its choice of that term. General accounting parlance, other regulatory schema and the language of the Act, Rules and SBP suggest that a bare year-end "reviewed" financial statement that includes a balance sheet and income statement is not an "annual report" for purposes of Item 4(b) of the Form.

For the above reasons, we believe that, in the circumstances described, Item 4(b) requires that the Company submit only its most recent regularly prepared balance sheet since it does not have an "annual report" or "annual audit report" and that by submitting its most recent regularly prepared balance sheet, it would be in compliance with the filing requirement of Item 4(b). While the Company, in its discretion, may submit additional materials to facilitate or expedite review, such additional materials are not required to be submitted by Item 4(b) in the circumstances described herein. Please call me at [REDACTED] to confirm whether or not the staff agrees with this understanding.

[REDACTED]

11/23/92 - called [REDACTED] advised that the PHN office had concluded that the Company's year-end financial statement was an "annual report" and is therefore covered by Item 4(b) and must be submitted with the filing. The financial statements have not been submitted to shareholders but they have been reviewed by auditors. In our view, this was sufficient to have them classified as an "annual report" of the Company, which is *swatch* held.

R.B. Smith