802.20(b)

[redacted]

March 15, 1994

VIA FAX: 1-202-326-2050
Mr. Patrick Sharpe
Compliance Officer Specialist
Pre-Merger Notification Office
Bureau of Competition
303 Federal Trade Commission
Washington, D.C. 20580

Dear Mr. Sharpe:

Last week, I called and spoke with you seeking informal confirmation by the staff of the Pre-Merger Notification Office of my view that an acquisition contemplated by one of my firm's clients does not require a "pre-merger" filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act"). During our conversations, you indicated that it would assist you in reaching a conclusion on this issue if I would set out in writing the facts I had conveyed to you over the telephone. This letter is intended to do so.

The contemplated transaction is the purchase by my client ("Company A") of 100% of the stock of the target company ("Company T") for a purchase price of $11.1 million. Both companies are manufacturing companies engaged in [redacted] in at least one of the same lines of business. Company A has annual sales in excess of $100 million, and Company T has annual sales of approximately $22 million. The assets of Company T are also less than $25 million. exempt under § 802.20

The principal customer of Company T ("Customer") has a contract with Company T under which Customer is obligated to purchase from Company T approximately 27% of Customer's requirements for certain products. This contract currently accounts for approximately 80% of Company T's total sales. Company A currently has limited sales to Customer and is interested in acquiring Company T primarily because of the increased access to Customer that the acquisition affords. Because of the limited

[redacted]

Customer? Yes

production capabilities of Company T, it has been unable to increase the percentage or range of products covered by its existing requirements contract with Company T. However, if the contemplated acquisition occurs, Company A (together with Company T) would be able to provide significantly more of Customer's requirements, and Customer would be willing (for the consideration described below) to obtain such increased requirements from Company A and Company T.

In this regard, it is expected that, in connection with its acquisition of Company T, the existing requirements contract with Customer will be replaced or amended such that, after the acquisition, Customer would be obligated to purchase from Company A and Company T (by then a subsidiary of Company A) approximately 45% of Customer's requirements for the products covered by the existing contract and additional products, in consideration for payment to Customer by Company A of $4.5 million in cash. Entry into the new or amended contract would be a precondition to Company A's obligation to consummate the acquisition, and the new or amended contract would become effective at or shortly after the time of the acquisition, upon payment of the $4.5 million to Customer. Company A estimates that the new or amended contract will result in annual sales of approximately $40 million over a six-year term.

Robinson Patman Act issues

The $4.5 million to be paid to Customer effectively amounts to an up-front payment of a portion of the aggregate purchase discount that Customer otherwise would expect to receive over the contract term in light of the increased volume of business anticipated. (While such an up-front payment initially may seem somewhat unusual, I have been assured by my client that such payments are not uncommon in the industry involved, having initially been introduced by [redacted] competitors, and that several contracts my client already has with other customers also involved such payments.) The $4.5 million payment would be amortized over the contract term in Company A's consolidated financial statements and, having effectively received that portion of its discount up front, Customer would only be entitled to a proportionately smaller discount for products subsequently purchased under the contract. Except for its existing customer-supplier relationship with Company T, Customer has no relationship whatsoever with that company or any of its owners, none of whom would receive any portion of the $4.5 million payment.

[redacted]

Under the facts and circumstances described above, the acquisition would be exempt from the Act's pre-merger filing requirement by the "minimum dollar value" exemption in §802.20 of the pertinent FTC rules, unless the $4.5 million payment to Customer is considered as part of the consideration being paid to acquire Company T. If that payment is considered part of the acquisition price, the aggregate acquisition consideration would exceed $15 million, the minimum dollar exemption would be unavailable, and, I believe, a pre-merger filing would be required.

The issue, then, is whether the $4.5 million payment should be considered part of the acquisition consideration for purposes of the Act. I believe that it should not be so considered. As indicated above, no portion of the $4.5 million dollar payment will be paid, directly or indirectly, to any of the existing owners of Company T or to any person that could be considered "included within" the same person as any of those owners (or Company T) for purposes of the Act. Instead, the entire $4.5 million will be paid to Customer, an unrelated party, as an up-front discount on the anticipated increased volume of business Company A expects to receive from Customer after the acquisition occurs--a volume increase that Company T is unable to achieve as an independent entity due to its limited production capabilities. Under these circumstances, there seems to me to be no basis whatsoever for characterizing any portion of the $4.5 million payment as consideration for the acquisition of Company T, rather than what it actually is--a concession to a customer, not unusual in the industry, to obtain additional orders.

Accordingly, for the reasons discussed above, I believe that the $4.5 million should not be considered part of the acquisition consideration for purposes of the Act and that the minimum dollar value exemption therefore exempts the acquisition from the Act's filing requirement. My client and I would appreciate it if you will confirm by telephone call to me that the staff agrees with these conclusions.

[redacted]

When we last discussed this matter, you thought you would be in a position to provide me with the staff's views within a day or two after your receipt of this letter. If you have any questions, or require anything further before responding, please feel free to contact me. Thank you in advance for your continued prompt assistance and attention to this matter.

Very truly yours,

[redacted]

[redacted]

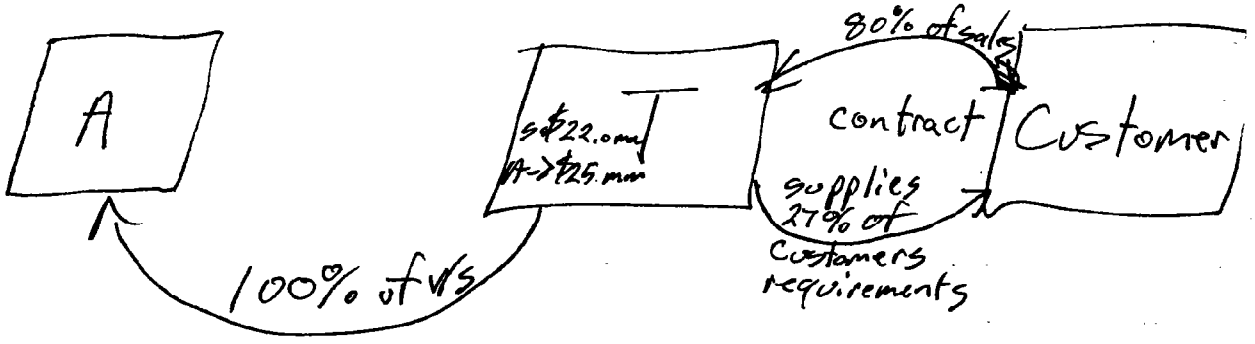
I concur with this letter.

We are not giving advice on the Robinson Patman Act or other antitrust laws. The PMN office gives advice on the H-S-R Act.

As long as the V/S of T are valued in accordance with Section 801.10 and the upfront payment of $4.5 mm is not consideration, this transaction is exempt under ~~§~~ 802.20(b).

called [redacted] 3-17-94 and informed her of the above. BS

(RS - concurs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T
80% of sales
contract
Customer
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27% of
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requirements
100% of V/S