

801.11(e)

[REDACTED]

[REDACTED]

[REDACTED]

JUN 13 9 23 AM '94

TRADE
REGISTRATION
OFFICE

June 10, 1994

VIA HAND DELIVERY

Ms. Nancy Ovuka
Compliance Specialist
Federal Trade Commission
Bureau of Competition
Pre-Merger Notification Office
Room 301
6th and Pennsylvania Aves., N.W.
Washington, D.C. 20580

Dear Nancy:

This is to confirm our telephone conversation earlier today. The facts are as follows:

Company B currently has a wholly owned subsidiary, [REDACTED] which it intends to sell (in a voting securities transaction) to Company A for \$20,500,00 in cash, plus a \$1.5 million subordinated convertible promissory note. The promissory note provides Company B the option to purchase 35% of Company A's stock should Company A's default in the payment the note. Assume for these purposes that Company B and the entities it controls have gross assets or net sales of \$100 million or more and that [REDACTED] has net sales of \$25 or more. Company A is a newly formed company. It currently has almost no assets (i.e., less than \$200,000) and has no income. There is no regularly prepared annual statement or balance sheet for Company A. Sometime prior to the consummation of this transaction, the acquisition funds for this transaction will be raised by Company A as follows: shareholders of Company A will contribute \$1 million in return for stock in Company A; \$16 million will be borrowed from a bank; \$2,250,000 will be provided

[REDACTED]

[REDACTED]

Ms. Nancy Ovuka
June 10, 1994
Page 2

under a term loan from Investor, one of the shareholders of Company A; and \$1,500,000 will be raised through an amortizing loan from Investor. Investor will not be guaranteeing the payment of the \$16 million loan; the loans from Investor to Company A are at commercially reasonable terms.¹

Investor will own 45% of Company A; the remainder of the shares of Company A will be held by members of the current management of [REDACTED]. None of these management shareholders will own 50% of the shares of [REDACTED], none of the management shareholders have assets of more than \$5 million. Although pursuant to a shareholder's agreement, Investor will retain certain supermajority rights regarding such extraordinary situations as sale of the business, mergers, and borrowing out of the ordinary course of business for Company A, Investor will not have the right to designate 50% of the Board of Directors of Company A.

First, as we discussed, it is my understanding that consistent with the definition of "control" at 16 C.F.R. 801.1(b), Company A will be considered its own ultimate parent entity. Under 16 C.F.R. § 801.11(e), the total assets of a person that does not have a regularly prepared balance sheet is calculated by taking the assets held by the acquiring person at the time of the acquisition, less all cash that will be used by the acquiring party as consideration in an acquisition of voting securities, and less all cash that will be used for expenses incidental to the acquisition. It is my understanding that after the cash portion of the purchase price and the expenses incident to the transaction are deducted from the initial funding, there will be less than \$500,000 in assets attributable to Company A. Accordingly, it is my understanding that no filing need be made under the Hart-Scott-

¹While Investor may have net sales and total assets in excess of \$100 million, it is my understanding that it will not have any Hart-Scott-Rodino reporting obligations in connection with the formation of Company A. As we discussed, Investor will not have control of Company A and Company A does not have any net sales and only about \$200,000 in assets prior to this formation. Furthermore, the value of Investor's stock prior to the obtainment of the acquisition funding will only be \$450,000. Therefore, the formation of Company A is not a reportable event for Investor under 16 C.F.R. §§ 801.40 and 802.20 even though Company A may meet the size of the parties test. Furthermore, none of the management shareholders of Company A will have control of Company A, nor satisfy the size of the person test.

[REDACTED] If \$16 MM from bank is not guaranteed by other investors (and bank not getting voting stock), then Company A appears to have assets of only \$4.95 MM - Not Reportable

Ms. Nancy Ovuka
June 10, 1994
Page 3

Rodino Antitrust Improvements Act in connection with the purchase of Target by Company A.

Please let me know as soon as possible whether I have in anyway misunderstood the position of the FTC Premerger Notification Office staff. As always, I appreciate your assistance in this matter. Best regards.

Sincerely,

A large black rectangular redaction covering the signature of the sender.

6/15/94

Neither formation or subsequent acquisition is reportable.

A small black rectangular redaction at the bottom left of the page.