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801.40

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PREMERSON
COMMUNICATIONS

March 20, 1996

[REDACTED]

[REDACTED]

Patrick Sharpe
Compliance Specialist
Federal Trade Commission
6th St. St. and Pennsylvania Avenue N.W.
Washington D.C.

BY FAX

Dear Mr. Sharpe:

As I mentioned over the telephone, I have been asked by a client to give advice concerning its responsibilities under the pre-merger notification provisions of the Hart-Scott-Rodino Act in connection with a transaction that my client is contemplating.

I have reviewed the Act and its regulations, as well as Axinn, et al., and have several remaining questions as to the application of the size-of-transaction threshold regulations in the circumstances of this case. I suspect that your office has ready answers to these from its previous experience in handling similar questions.

Because the transaction is slightly complicated, I have prepared the attached description of it. The questions that I may need to answer are at the end of the description.

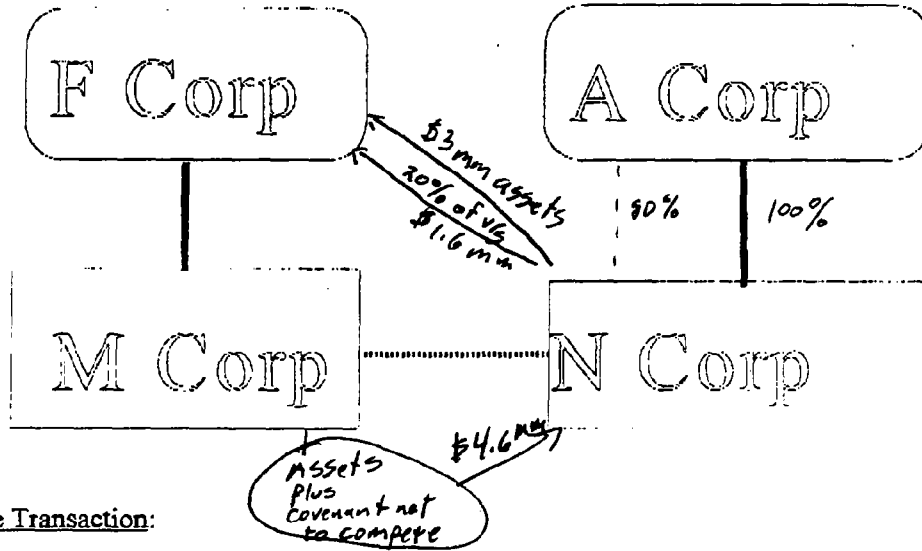
I appreciate any assistance you can give me in this matter.

Very truly yours,

[REDACTED]

[REDACTED]

✓



Before Transaction:

Assume ultimate parent entities, F Corp and A Corp, have sales in excess of, respectively, \$100 million and \$10 million annually.

A Corp owns 100% of the stock of N Corp. N Corp is an operating company (not a corporation newly created for purposes of the transaction). N Corp's going concern value is no more than \$8 million.

what does this mean fair market value

F Corp controls M Corp, which engages in several lines of business.

F Corp has several facilities, one of which has a fair market value of \$20 million.

Summary of Transaction:

F Corp will joint venture with A Corp to establish a new operating plant, using N Corp as the vehicle for the joint venture.

For F Corp's transfer of one of its subsidiary M's line of business to N Corp, F Corp will receive from A Corp 20% of N Corp's stock. A Corp will continue to hold the remaining 80% of N Corp's stock. The stock of N Corp is not publicly traded.

F Corp will lease 40% of its \$20 million facility to N Corp. F Corp will purchase N Corp's old facility for \$3 million.

Details of the Transaction:

1. Asset Transfer for Stock. F Corp will cause M Corp to transfer one of its existing

lines of business to N Corp, including goodwill, equipment and a covenant not to compete against N Corp in that line of business. For these transfers, F Corp will receive 20% of the stock of N Corp from A Corp. A Corp will also covenant not to compete against N Corp.

*Is this the useful life of the plant?
NO*

- 2. Lease of Facility for New Plant. F Corp will lease 40% of the space at its \$20 million facility to N Corp, which will be converted to a new operating plant. The lease is for 30 years, with a two 10 year renewal options. The rental payments are at fair market value. The nominal value of the rental payments over the 30 year lease term will amount to \$27 million.

*Is a premium being paid?
NO*

- 3. Service Contracts. M Corp will supply support services to N Corp at the new plant, receiving compensation at the regular fair market value for such services. A Corp will supply management services to N Corp at the new operating plant, receiving compensation at fair market value for such services.

not repair

- 4. Disposition of Old Facility. N Corp will sell its old facility to F Corp for \$3 million. F Corp will use the facility for unrelated lines of business.

acquirement with v/s purcha

Questions:

In considering whether A Corp (as the ultimate parent entity of N Corp) will, as a result of an acquisition, hold more than \$15 million of the assets of F Corp,

- 1. Will A Corp "hold" the leased portion of the facility from F Corp as a result of an "acquisition"? If so, how is the asset to be valued. if the leased portion of the facility has a current fair market value of \$8 million, but the lease payments over the 30 year term nominally amount to \$27 million?
- 2. Given that N Corp prior to the transaction has a going concern value of \$8 million, and that the parties have reached an arms-length agreement that 20% of N Corp's stock represents the fair value of M Corp's business and covenant not to compete that will be conveyed to N Corp, can the business of M Corp (including the covenant not to compete) acquired by A Corp in the transaction be valued at 20% of \$8 million?

what is the va.

3.2.

- Assuming that A Corp's subsidiary N Corp is paying fair market value for the support services to be rendered to it by F Corp, can the services under the contract be excluded from the valuation of what assets or stock A Corp will hold as a result of the acquisition?

yes if legit. in contra

Given that N Corp is an existing and operating company prior to the transaction, and not created as a new entity for purposes of a joint venture,

- 1. Are the provisions of 16 C.F.R. 801.40 relating to joint ventures inapplicable? If

yes

the joint venture regulations are applicable, is F's lease of its facility to N to be valued as the difference, if any, between the fair market value of the leasehold interest conveyed, and the present value of the income stream of lease payments? [Assuming that the lease is at fair market value, there is no difference].

called [REDACTED]

3-20-96

This does not meet
the size-of-Transacti.
test - comments and
questions noted

PS