DEC 17 '96 01:13PM [redacted] P.2/4 801.11 #158 (c) PNPM

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PREMERGER NOTIFICATION OFFICE

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Since the consolidating statement is part of the annually prepared financial statements it should be included in determining the annual sales of the subsidiary to be sold. Together they show net* (gross) sales of less than $25MM + thus, 802.20 applies

December 17, 1996

VIA FACSIMILE

Victor Cohen, Esq.
Staff Attorney
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
6th and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

TH agrees.

Re: Determining Annual Net Sales for Purposes of 16 C.F.R. § 802.20(b)

Dear Victor:

This letter memorializes our discussion of December 16, 1996 regarding the determination of annual net sales for purposes of 16 C.F.R. § 802.20(b).

The transaction is structured as follows. S, a foreign person, is selling a worldwide group (the "T" group) of subsidiaries to C, another foreign person. T has one U.S. subsidiary, TUSA. The remaining companies in the T group are foreign issuers that do not have assets or sales in the U.S.; therefore, the acquisition of these subsidiaries by C is exempt under 16 C.F.R. § 802.51. C is acquiring all of the voting securities of TUSA for $9 million. Therefore, we must look to 16 C.F.R. § 802.20 to determine whether the transaction qualifies for the "minimum dollar value" exemption set forth therein.

16 C.F.R. § 802.20(b) exempts transactions where the acquiring person does not acquire voting securities "which confer control of an issuer which, together with all entities which it controls, has annual net sales or total assets of $25 million or more."

TUSA prepared its last annual financial statements as of December 31, 1995. TUSA's financial statements included a consolidated balance sheet, a consolidated summary of

[redacted] * Net (gross) in this case means the gross sales of TUSA reflecting discontinued operations [redacted]

[redacted]

operations, and a consolidating summary of operations (which breaks out the revenues and expenses of each of TUSA's divisions). The divisions are not separately incorporated, but are separately managed and are viewed as separate "profit centers." TUSA's financial statements were fairly summary in nature, as those of wholly-owned subsidiaries often are; they did not include notes. The financial statements were all prepared soon after the year-end according to the accounting principles normally used by TUSA.

On December 31, 1995, TUSA sold one of its divisions (the "W Division"). The assets of the W Division were transferred to a sister company controlled by S; the voting securities of this sister company were then immediately sold to a third party. This transaction was consummated immediately prior to TUSA's fiscal year-end.

Because the W Division was sold prior to the end of TUSA's fiscal year, W Division's assets were not assets of TUSA at year-end and were thus not included on TUSA's balance sheet. TUSA had earned revenue from W Division throughout 1995, and thus W Division's revenues were not excluded from TUSA's revenues as set forth on the consolidated summary of operations; however, the consolidating summary of operations clearly sets forth the revenues for the W Division.

On its October 31, 1996 balance sheet (TUSA's most recent regularly prepared balance sheet), the assets of TUSA were approximately $14.8 million. Thus, TUSA's total assets are below $25 million and would allow the transaction to be exempted under 16 C.F.R. § 802.20, so long as the "annual net sales" of TUSA are also below $25 million.

On TUSA's consolidated summary of operations, the "gross revenues" for TUSA for the year ended December 31, 1995 were approximately $31.3 million and the "adjusted gross revenues"[1/] of TUSA for the year ended December 31, 1995 were approximately $28.9 million. The consolidating summary of operations shows that W Division's "gross revenues" for the year ended December 31, 1995 were approximately $8.0 million and "adjusted gross revenues" were also approximately $8.0 million. If W Division's revenues are not included in TUSA's revenues for § 802.20 purposes, the gross revenues of TUSA are $23.3 million and the

1/ "Adjusted gross revenues" consist of gross revenues less "Corrections & Collection Adjustments" (i.e., revenues which were booked but not actually collected and other corrections) and "Intrabranch Assistance" (i.e., assistance billed by one TUSA division to another TUSA division).

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adjusted gross revenues are $20.9 million. Thus, if the W Division's revenues are not included in the revenue of TUSA, the § 802.20 exemption will apply and no Hart-Scott-Rodino filing will be necessary.

Interpretation #158 in the *Premerger Notification Practice Manual* (ABA Section of Antitrust Law, 1991) is directly applicable to this situation. Interpretation #158 asks "Whether income from discontinued operations, separately stated on an entity's last regularly prepared annual statement of income and expense, must be included for purposes of the size-of-person test." The "Interpretation and Commentary" states that ". . . the FTC staff determined that . . . income from discontinued operations . . . could be *excluded* by all persons who have separately stated the revenues of the discontinued operations somewhere in their financials. The current FTC staff position is that revenues from 'discontinued' operations may not be excluded if the company still holds the assets of the business which generated those revenues."

In this instance, TUSA has "separately stated the revenues of the discontinued operations [the W Division] somewhere in their financials [the consolidating summary of operations]" and "the assets of the business which generated those revenues" have been sold. You advised that Int. #158 applied to the situation at hand and that W Division's revenues may be excluded from TUSA's revenues when determining the annual net sales of TUSA. Therefore, TUSA's annual net sales and total assets are both below $25 million and the transaction is exempt under § 802.20 from the HSR reporting requirements.

If the foregoing does not comport with your recollection of the advice given, please contact me as soon as possible. If we do not hear from you, we will proceed in reliance upon this advice. Thank you for your efforts in this matter. Best regards.

Sincerely,

[redacted]