[redacted] (PS)

16 January 1985

EXPRESS MAIL

This material may be subject to the confidentiality provision of Section 7A (h) of the Clayton Act

Mr. Patrick Sharpe
Compliance Specialist
Pre-Merger Notification Office
Bureau of Competition, Room 3010
Federal Trade Commission
Washington, D.C. 20580

Re: Acquisition of all of the stock of [redacted]

Dear Mr. Sharpe:

This letter confirms our telephone conversation of 3 January 1985 concerning the application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18A, and the Rules issued under that act, 16 C.F.R § 800 et seq., to the transaction captioned above.

As you had previously spoken with an attorney with [redacted] counsel for the purchaser, you were familiar with the transaction and I did not recount its details. Rather, we agreed that the Hart-Scott-Rodino Act would apply, requiring filing of notification and a waiting period under 15 U.S.C. § 18A(a), unless the transaction came within one of the exemptions in the Commissioner's Rules issued pursuant to 15 U.S.C. § 18A(d)(2)(B).

In particular, we discussed the tests under the minimum dollar value thresholds of Rule 802.20. Such rule exempts, inter alia, an acquisition of 100% of the securities of a corporation when the value of such securities does not exceed $15,000,000 and the acquired corporation has annual net sales or total assets of less than $25,000,000. I stated that the corporation to be acquired clearly satisfied the $25,000,000 test but that the structure of the purchase price raised possible doubts with respect to the $15,000,000 threshold. I explained that while the initial payment at closing was within the threshold, there were contingent payments which, if counted at face value, would exceed such threshold.

if speculative

I said that I understood that you had assured the attorney at Rosenman with whom you had spoken earlier that contingent payments were not counted in determining the value of securities for the purposes of the $15,000,000 threshold. You confirmed my understanding, stressing that the Federal Trade Commission ignores only those contingent payments that are "speculative" and giving as an example payments based on sales performance where no reasonable estimate of such performance is possible. I responded that it was my understanding that the payments in question were of this speculative nature.

board of directors should make judgement

However, I explained that the question remained whether the mere presence of contingent payments rendered the acquisition price "undetermined" for purposes of Rule 801.10(a)(2). Rule 801.10(a)(2) provides the method for determining the value of acquired securities not traded on a national exchange for purposes of the Rule 802.20 thresholds. This value equals the acquisition price if such price is "determined", otherwise it is the fair market value of the securities as determined by the Board of Directors of the acquiring corporation under Rule 801.10(c)(3). Upon consideration of the issue, you concluded that contingent payments would be ignored also for the purposes of ascertaining whether the acquisition price is "determined". Therefore, we agreed that, where, as here, the purchase price of securities not traded on a national exchange is specified to be a fixed initial payment plus certain contingent future payments which are speculative in nature, the acquisition price is "determined" for purposes of the rule and the value of the shares would be deemed to equal the amount of the initial payment. Because the initial payment is not over $15,000,000 in our case and neither the annual net sales nor the total assets of the acquired corporation equal or exceed $25,000,000, the exemption provided by Rule 802.20 applies.

Our conversation then ended with the understanding that I would write you to confirm that no filing is required with respect to [redacted] acquisition of all the stock of [redacted] because such transaction comes within the exemption provided by Rule 802.20 promulgated pursuant to 15 U.S.C. § 18A(d)(2)(B). This letter confirms that conclusion.

The closing date for the acquisition is tentatively set for 18 January 1985. Please inform me by telephone before then if anything contained in this letter is incorrect.

Once again, thank you for taking the time to discuss these matters with me.

Yours truly,

[redacted]

[redacted]

comments: Wayne Kaplan said contingent payments should be estimated according to 801.10 of the rules and included in transaction price.

Andy Scanlon agrees and added that they indicate a face value for the contingent payments.

Dana agrees contingent payments should be estimated.

called [redacted] 1-22-85 and indicated there was a unanimous disagreement with this letter. Value of the contingent payments should be determined by the board of directors and included in the acquisition price. If the value is so speculative that the price cannot be determined then the contigent payment may be "0". The key here is it is up to the Board of directors to determine the price.