

802.20(6)

[REDACTED]

[REDACTED]

March 15, 1994

MAIL ROOM
7/4/94
FBI

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 "hard copy" filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "ACT"). During our conversations, you indicated that it would assist you in

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 § 802.206

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



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.

Customer yes

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

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

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 ~~induced by 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

How Payment Direct base



Mr. Patrick Sharpe

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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 as part of the consideration for purposes of~~ indicated above, no portion of the \$4.5 million dollar payment will ~~be paid directly or indirectly to any of the existing owners of~~

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 be no basis whatsoever for~~

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~~

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]
Mr. Patrick Sharpe

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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

