

801.10

June 14, 2002

BY FACSIMILE AND BY MAIL

Patrick Sharpe  
Premerger Notification Office  
Federal Trade Commission  
Sixth Street & Pennsylvania Avenue, NW  
Washington, D.C. 20580

FEDERAL TRADE  
COMMISSION  
PREMERGER NOTIFICATION  
OFFICE  
2002 JUN 17 A 10:05

Re: Valuation of an Acquisition of Non-public Voting Securities

Dear Mr. Sharpe:

We are writing to confirm the preliminary advice that you provided in our telephone conversation yesterday concerning the proper method of valuing the acquisition of 100% of the voting securities of [redacted] Company, Inc. [redacted] by our client [redacted] purposes of determining the correct filing fee under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act").

As we stated on the telephone [redacted] will be acquiring the [redacted] voting securities in exchange for publicly traded [redacted] voting securities that will be issued only after [redacted] distributes a dividend of \$1.00 per share to its pre-transaction shareholders. The acquisition agreement was executed and announced on June 9, 2002, and we anticipate that the notification under the HSR Act will be filed within fifteen days of that date. We suggested in our conversation that the acquisition price should be the value of the [redacted] shares being offered to purchase the voting securities [redacted] as adjusted to reflect the payment of the dividend. In that regard, we had three areas of inquiry with respect to the proper valuation methodology in determining the acquisition price.

Patrick Sharpe, p. 2

1. Value of [redacted] share. The number [redacted] shares to be paid as consideration for the [redacted] determined by a formula in the acquisition agreement that is driven solely by the price of a share of [redacted] stock. At a particular [redacted] share price, the formula will produce a precise number of shares to be paid in the transaction. Thus, if a particular [redacted] stock price can be relied upon for purposes of valuation under the HSR Act, then the number of [redacted] shares to be valued can be stated with certainty.

You advised us that the market price of [redacted] stock, as a publicly traded security, should be determined in accordance with 16 C.F.R. § 801.10. Accordingly, pursuant to 16 C.F.R. § 801.10(c)(1)(ii), we should use the lowest closing price of [redacted] stock between the date of filing and the day prior to the execution of the transaction agreement as the market price.<sup>1</sup> At present, under this test, the unadjusted market price of a [redacted] share would be \$7.05.

2. Adjusting for the pre-transaction dividend. The acquisition agreement provides that [redacted] will distribute excess cash to its shareholders by declaring a dividend of \$1.00 per share immediately prior to the close of the transaction. Accordingly, the value of the [redacted] shares to be offered in the acquisition will be reduced by \$1.00 per share from their current market price before the transaction. As a result, we understand that the price of an [redacted] share to be used for valuing the transaction should be the market price reduced by \$1.00, which is consistent with the parties' methodology in public statements.

Assuming the market price of a [redacted] share will be \$7.05 at the time of filing, adjusting to reflect the dividend will yield a valuation share price of \$6.05. Pursuant to the acquisition agreement, this price will result in 77,483,581 [redacted] shares (representing 23.8% of the outstanding shares of [redacted] after issuance) being paid to acquire the voting securities of [redacted]. The total value of the transaction would thus be approximately \$468.8 million.

3. Reserves for other obligations. Finally, under the price assumptions described above and the associated share numbers that this price generates pursuant to the acquisition agreement, [redacted] will also reserve approximately 9 million shares in respect of potential future exercise of options, warrants and stock appreciation rights held by current [redacted] shareholders. [redacted] has agreed to convert these [redacted] denominated options, warrants and stock appreciation rights into [redacted] denominated options, warrants and stock appreciation rights after the transaction. These shares will not be transferred at closing or exchanged for the issued and outstanding [redacted] voting securities. They will only be issued upon exercise of the relevant

<sup>1</sup> The transaction was executed on Sunday, June 9, 2002, on which day the prior closing price of [redacted] shares was that of Friday, June 7, 2002. As consummation of the transaction could be delayed for business reasons or to ensure all pre-closing conditions are met, it may be impossible at the time of filing to determine the lowest closing quotation in the 45-day period prior to consummation. The possibility of such a delay exists at the time of every filing, however, and we assume that the amount of the filing fee will not be subject to adjustment nor will a new filing need to be made because of unforeseeable market price fluctuations if the transaction cannot be consummated within the anticipated period. We note that this seems to be an issue more generally with the application of 16 C.F.R. § 801.10(c)(1) under the new multi-tiered filing fee scheme.

rights. We wish to confirm your agreement with our understanding that these shares are in the nature of a reserve to cover a contingent liability and not part of the acquisition price.<sup>2</sup>

1) Yes, if # of shares are known  
2) NO!  
3) Yes

In conclusion, it is our view that (1) the acquisition of [redacted] voting securities should be valued by reference to the lowest closing price for [redacted] shares in the period between the day before the execution of the acquisition agreement and the date of filing; (2) the resulting market price of [redacted] shares should be reduced by \$1.00 to reflect the pre-transaction dividend provided for in the acquisition agreement; and (3) reserving shares of [redacted] stock to secure certain contingent liabilities does not affect valuation of the transaction under the HSR Act.

We note that our conclusions concerning valuation may affect the amount of the filing fee to be paid in connection with [redacted] notification under the HSR Act (in particular, it may affect whether the transaction is valued at above or below the \$500 million threshold). As a result, we would like confirmation from you as to whether we may rely on the guidance you have provided in determining the appropriate filing fee. More specifically, we would like confirmation that if the Federal Trade Commission determines after our notification has been submitted that the above valuation determination is not correct and that a higher filing fee is appropriate, the HSR waiting period will not be restarted provided that the difference in filing fee is paid by [redacted].

Certain information relating to the parties and to the transaction described in this letter is confidential and we request it be treated as such pursuant to the confidentiality provisions of section 7A(h) of The Clayton Act and other applicable laws and regulations.

Please contact me if we have not accurately described your understanding of our telephone conversation or if you have questions or would like any additional information. My direct line [redacted].

Sincerely,

[Redacted signature block]

Advised writer that market 6/18 price is \$7.05, not \$6.05. Further, it appears that the number of shares of purchaser to be given in exchange is unknown. Therefore,

cc: [redacted]

<sup>2</sup> The parties have made certain public statements describing the transaction on a fully-diluted basis, i.e., on the assumption that all such rights would be exercised; however, whether and when the rights would be exercised remains uncertain.

The value based on market price cannot be determined and FMV of shares of target must be calculated. NMO. MV concurs

[REDACTED]

F A C S I M I L E

<b>From</b>	[REDACTED]	<b>Date</b>	June 17, 2002
<b>Sender's direct dial</b>	[REDACTED]	<b>For retransmission</b>	[REDACTED]
<b>Sender's fax</b>	[REDACTED]	<b>Total pages sent</b>	4
<b>To</b>	<b>At</b>	<b>Fax</b>	<b>Phone</b>
Nancy Ovuka	Federal Trade Commission	(202) 326-2624	(202) 326-2609
<b>Cc</b>	<b>At</b>	<b>Fax</b>	<b>Phone</b>
Patrick Sharpe	Federal Trade Commission	(202) 326-2624	(202) 326-2848

Re: Transaction Valuation [REDACTED]

Dear Nancy:

As discussed this morning, I attach a letter sent to Patrick Sharpe last Friday following up on a telephone conversation we had last week. Once you have had the chance to review the letter, I would appreciate it if you could let me know if you have any questions or issues with our method of valuing the [REDACTED] transaction. My direct line is [REDACTED]

Sincerely,

[REDACTED]

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FEDERAL TRADE COMMISSION  
OFFICE

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