

GUN JUMPING

[REDACTED]

[REDACTED]

[REDACTED]

December 5, 2003

VIA EMAIL

Michael Verne
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Premerger Notification Office
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Re: Gun Jumping Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"): [REDACTED] letter to Employees regarding their Employment Status

Dear Mr. Verne:

I very much appreciate your time and assistance during the telephone conversation you and I had yesterday concerning [REDACTED] letter to employees regarding their employment status and Gun Jumping under the HSR Act. Following that call, you reviewed an earlier copy of this letter and asked that I speak with Naomi Licker of Compliance at the FTC. Earlier today, I spoke with and emailed that earlier draft to Ms. Licker. Following her review of that, she concurred with your initial advice. Accordingly, the substance of the view you and she expressed is memorialized below. Thanks again for your insights, time and thoroughness in this matter.

Facts

We discussed the following hypothetical.

[REDACTED] and Buyer have entered into (and announced) a definitive merger agreement, pursuant to which [REDACTED] will become the wholly owned subsidiary of Buyer. Buyer is significantly larger than [REDACTED] in both revenues and number of employees. HSR applies to the deal but the parties have not yet cleared the HSR waiting period.

[REDACTED] financial performance has not been stellar in the last year and, absent the acquisition, will need to lay off some employees. In fact, prior to entry into the acquisition agreement (and unrelated to the deal), [REDACTED] had already completed a reduction in force in the last few months.

[REDACTED]

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Upon announcing the transaction, ██████ advised its employees that ██████ would inform them in the near future if they were likely to be terminated as a result of the transaction. As part of its planning for the post-merger period, ██████ has identified roughly 5% to 15% of the work force who will likely not have jobs if ██████ completes the proposed transaction. Buyer has been involved in this post-merger planning and would agree that these people would likely not be employed post-merger. Note that in announcing the transaction, the parties also announced that the deal would yield synergies. This headcount reduction would generate some of these synergies -- for instance, the parties anticipate that eliminating redundant positions in the accounting/finance department would yield savings.

Moreover, if the transaction does not close, ██████ will be in financially poor condition and will be "damaged goods" in the M&A market. ██████ management currently believes that lay-offs in that eventuality are almost certain, absent an extraordinary event. ██████ management also currently believes that at least some of these same employees likely to be displaced as a result of the transaction would also likely be downsized if the transaction does not close.

Some time has passed since ██████ advised its employees that it would reveal who will be let go as a result of the deal and ██████ has not yet advised those of its employees of their status in light of the merger. As a result, morale has declined while uncertainty has climbed. ██████ has historically had very low turnover. In recent years, ██████ retention has likely been strengthened further by the weak job market in its sector. Since announcing the transaction and in the absence of guidance on which employees may be terminated in the transaction, ██████ has suffered departures from several people who, whether or not the deal is consummated, ██████ would want to retain.

██████ has repeatedly advised its employees that the transaction is subject to a number of approvals and closing conditions and that they are obligated to continue to face the market independently and continue to make their independent sales unless and until the merger is finalized.

██████ wants to send a letter to various employees indicating that these employees may well be let go if and when the deal closes and that if they stay through the closing, they would be entitled to receive enhanced severance benefits. The letter would further state that the deal is contingent upon a variety of closing conditions and would advise them that, if the deal does not close for any reason, ██████ would at that time reach decisions on future employment. ██████ believes that sending such a letter would, among other things:

- protect the value of ██████ current human resource assets by stemming the loss of the people who are key to ██████;
- enable ██████ to make good on its word to let the employees know where they stand; and



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- boost morale by alleviating some uncertainty and by enabling the potentially displaced workers to plan for the future.

Please note that the workers at issue are, in general, not competitively instrumental to the future of [REDACTED] (whether or not this transaction closes) so their departure would not weaken the assets or materially diminish [REDACTED] current value. In fact a primary motivation for [REDACTED] sending the letter is to maintain morale and provide information about incentives to stay because [REDACTED] management feels that failure to do so would adversely impact [REDACTED] as an independent entity if the deal does not close.

How this differs from Input/Output:

Input/Output (see FTC Release dated April 12, 1999 and related documents at <http://www.ftc.gov/os/1999/04/inputoutput.pdf>), the only reported FTC matter involving HSR Gun Jumping from the perspective of communications with employees rather than customer-facing conduct and competitive coordination, differs significantly from the foregoing fact pattern.

In Input/Output, the FTC asserted that following the execution of the acquisition agreement, Input/Output began to exercise operational control over DigiCOURSE by, among other things, "installing a new management team to operate Input/Output Marine, which included both the existing operations of Input/Output and all operations of DigiCOURSE." See Complaint at Paragraph 15.

Input/Output also took the following actions, which the FTC found to have constituted such a transfer:

- announcing and implementing effective immediately, a reorganization of Input/Output into product-based divisions, which included DigiCOURSE and the existing operations of Input/Output;
- as part of the reorganization, senior executives from both companies took new positions and titles at the helm of the joint operations as part of the reorganization, employees moved offices from DigiCOURSE to Input/Output and received email addresses and access to internal reports at Input/Output, and business cards (as approved by Input/Output's President). Those cards were distributed to customers. Also, employees were instructed to answer the DigiCOURSE phones under the Input/Output name ;
- DigiCOURSE's President, Mr. Kelm, who was also the President of Input/Output Marine, went to the UK to settle a dispute between Input/Output and a customer, with the aid of two other DigiCOURSE employees and signed the settlement term sheet on behalf of Input/Output;



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- That same President provided comments (at the request of Input/Output) on a separate potential acquisition which Input/Output was contemplating;
- That same President of Input/Output Marine presided over the management of DigiCOURSE's business at the relevant times;

Complaint at paragraph 15.

The above led the FTC to conclude that Input/Output had taken "operational control over DigiCOURSE's business," which "constituted a transfer of beneficial ownership" prior to HSR clearance.

In the matter we discussed involving [REDACTED] and Buyer, there is no reorganization, no distribution of new titles and positions, no changes in reporting responsibility, no change of business cards or manner of answering the phones, establishing of email accounts, or coordination on other potential M&A activities.

Only a small and select group of senior executives will be told their expected new position or title in the course of the report on status. We further believe that [REDACTED] need to stem the loss of current employees comports with the fiduciary duties of [REDACTED] officers and directors and is also a laudable goal from an antitrust gun-jumping perspective.

Issue

You were kind enough to answer the following question concerning the above statement of facts. I have summarized the question and your answer below.

Q: *Would it be permissible under the HSR Act for [REDACTED] to notify certain [REDACTED]-employees that those employees are likely to be let go if Buyer's acquisition of [REDACTED] is consummated?*

A: Yes. You advised that although Buyer concurs in terms of who will likely not have a job with [REDACTED] post-merger, [REDACTED] is acting independently in notifying its employees and preserving its value. Because there appears to be no impermissible Buyer involvement in [REDACTED] proposed notification, sending this letter does not present a Gun Jumping problem under the HSR Act.

I hope that this letter accurately summarizes the advice we discussed earlier today. If any portion of the above summary is inaccurate, please let me know.

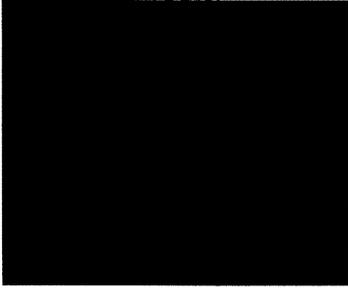


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Thank you again for your time and help.

Very truly yours,



AGREE -
N. OVUKA & N. LICKER (COMPLIANCE)
CONCUR.

B. Michael Verne
12/5/03

