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HAND DELIVERY

Mr. Michael Verne
Compliance Specialist
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Washington, DC 20580

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FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

Re: Balance Sheet based upon Payment of Extra-Ordinary Dividend

Dear Mr. Verne:

Pursuant to our telephone conversation of January 8, 2004 I have prepared this letter to memorialize the facts presented to you and to confirm your opinion on how the Premerger Office would analyze the parties' actions to reduce the assets found in the acquired person's balance sheet and thereby fail the HSR "size-of-the person" test.

FACTS:

Company A intends to acquire 100 percent of either the voting stock or the assets of Company B, which is not engaged in manufacturing. Company B has a large amount of cash, a corporate aircraft and other assets not deemed by management of Company B to be required for the operations of its core business. Company B may declare and pay an extra-ordinary dividend (cash and non-cash) to its shareholders resulting in Company B having less than \$10 million in assets as reflected on its next regularly prepared balance sheet, which will be prepared by the time of the closing. There is nothing precluding the shareholders of Company B from leasing to Company A based on arm's length basis some of the non-cash assets distributed in the extra-ordinary dividend.

Company B's balance sheet for many years has normally been prepared on a fiscal year basis ending the last day of February each year. In 2003, Company B elected to be taxed as an S corporation under §1361 of the Internal Revenue Code and therefore consistent with applicable tax regulations adopted a December 31 tax year end. However, Company B will continue to prepare on a regular basis, a last day of February fiscal year end balance sheet. Continuing the preparation of such a consistent fiscal year balance sheet will enable management to compare financial results with prior years.

ANALYSIS:

For a proposed transaction valued in excess of \$50 million and up to and including \$200 million to be reportable under the HSR Act, the parties to the proposed transaction must meet the "size-of-person" test. In this regard, if an acquiring person has over \$100 million in assets or sales and it intends to acquire the voting stock or assets of a person not engaged in manufacturing, the acquired person must have at least \$10 million in assets as shown on its last regularly prepared balance sheet. Opinion number 195 of the Premerger Notification and Practice Manual (2003 edition) provides a question submitted to the Premerger Notification Office ("PNO") inquiring whether a problem arises where shortly before it is to be acquired the acquired person "declares an extraordinary (and accelerated) dividend that reduces its size below \$10 million on its next regularly prepared balance sheet, which is prepared by the time of closing".

The PNO analysis in Opinion 195 states that it does not view this as a device for avoidance and that the HSR rules of practice instructs that the size of a person is to be determined by referring to its financial statements prepared in accordance with the accounting principles normally used; and, if the statements have been prepared on a regularly prepared basis in accordance with the person's normal accounting practices and show that the person does not satisfy the relevant size-of-person test the proposed transaction would not be reportable.

DISCUSSION:

In our conversation, I noted that the PNO's analysis in opinion 195 reverses the viewpoint presented previously in opinion number 215 published in the 1991 edition of the Premerger Notification and Practice Manual. In that opinion, based on a memorandum dated January 23, 1979, the PNO felt that an extra-ordinary dividend declared shortly before the transaction to reduce the person's size and thereby fail the size-of-person test would raise avoidance issues under section 801.90 of the rules. You stated that many of the older opinions in the 1991 edition have been reversed in the new edition of the Premerger Notification and Practice Manual (2003 edition) and that you had "no problem with opinion 195". Additionally, you noted that the size of a person is its size even though the extra-ordinary dividend was created to fail the size-of-person test and was created at the request of the acquiring person.

In regard to the issuance of a balance sheet on a calendar year basis for tax purposes, it is your view that this does not preclude Company B from issuing its regularly prepared balance sheet reflecting a fiscal year as it has done for numerous years in the past. We note that Company B's management needs such a financial statement for management and financial comparison purposes. Thus, the fiscal year statements continue to be regularly prepared financial statements because they will be prepared at the same time and in the same manner in the future as they have been prepared in the past.

CONCLUSION:

The issuance of the extra-ordinary dividend (cash and non-cash) does not raise avoidance issues under section 801.90 of the rules even though the issuance of the dividend occurs shortly before a proposed transaction results in the failure of the acquired person to meet the HSR "size-of-person" test. The continuation of the issuance of balance sheets on a fiscal year basis, to be used for management and financial comparison purposes, is considered to be the creation of regularly prepared balance sheets even though Company B has changed to a calendar year basis for tax purposes.

If the above analysis is incorrect, please telephone me at [REDACTED] to discuss the matter. Thank you for your time and consideration in this matter.

Sincerely,

[REDACTED]

AGREE.

B. [REDACTED]

1/27/09