Sheinberg, Samuel I.

From: [redacted]
Sent: Friday, September 28, 2018 1:00 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Carson, Timothy; Sheinberg, Samuel I.; Whitehead, Nora
Subject: FW: Question about § 7A(c)(9) and § 802.9

From: Shaffer, Kristin
Sent: Friday, September 28, 2018 1:00:25 PM (UTC-05:00) Eastern Time (US & Canada)
To: [redacted]
Cc: [redacted]
Subject: RE: Question about § 7A(c)(9) and § 802.9

[redacted]

When asked in the past about acquisitions of shares in a competitor, this has been our response:

Where an acquisition involves a competitor, it raises a strong presumption that the investment is not solely for investment purposes. The agencies will look for specific indications that the acquirer intended not to participate in the formulation, determination, or direction of the basic business decisions of the acquired issuer. In specific factual circumstances, there could be a variety of ways to potentially rebut the presumption, including demonstrating that: (1) although the companies appear to be competitors, they do not actually compete; or (2) although the companies compete, the competitive overlap of the businesses is so insignificant or de minimis that the agencies should not presume that the acquisition is not solely for investment purposes. In all instances involving acquisitions solely for the purpose of investment, the burden is on the acquirer to demonstrate that it has no intention of participating in the formulation, determination, or direction of the basic business decisions of the acquired issuer. This includes, but is not limited to, an intention not to engage in any of the other factors identified in the SBP. For example, the acquiring person could document, contemporaneous with the timing of the acquisition, the deliberation that went into the decision to make the acquisition and determining to do so solely for investment purposes. You should also note, however, that the more directly and substantially the acquirer competes with the issuer the more difficult it will be to demonstrate to the agencies that at the time of the acquisition, the acquirer had no intention to influence the basic business decisions of the issuer.

Best regards,
Kristin

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From: [redacted]
Sent: Thursday, September 27, 2018 12:17:34 PM (UTC-05:00) Eastern Time (US & Canada)
To: [redacted]
Cc: [redacted]
Subject: Question about § 7A(c)(9) and § 802.9

Dear All,

This question relates to § 7A(c)(9) and § 802.9 ("acquisition solely for the purpose of investment"), and, more specifically, to the rebuttable presumption that "being a competitor of an acquired issuer may be viewed as inconsistent with an investment-only intent." See ABA Premerger Notification Practice Manual, 5th Edition, Interpretations 127 and 128.

Several years ago, Company A sold a business to Company B (the "Transaction"). The parties filed the required notifications for the Transaction pursuant to HSR Act, observed the applicable waiting period, and then completed the Transaction.

The consideration for the Transaction included (i) a cash payment from Company B to Company A at closing, and (ii) contingent future issuances of Company B's publicly traded voting securities to Company A, to be delivered to Company A in multiple annual tranches over a period of multiple years following the closing of the Transaction (subject to Company B achieving a designated revenue target in each such year). While the dollar value of each contingent annual issuance may vary from time to time depending on the value of Company B's stock, the number of shares to be issued in each annual issuance is generally well below 1% of the total number of outstanding voting securities of Company B. In addition, under the Transaction agreements, Company A's aggregate holdings cannot exceed 9.9% of the total outstanding voting securities of Company B.

Since the time the parties entered into the Transaction, Company A has never had any intention of participating in the formulation, determination or direction of the basic business decisions of Company B, or any intention of taking any of the other actions listed in Statement of Basis and Purpose as potentially inconsistent with a passive investment intent. Company A has always intended, and continues to intend, to receive voting securities of Company B (and, to the extent it may hold on to the shares received in each issuance, to hold voting securities of Company B) "solely for the purpose of investment."

Over the past several years, Company A has acquired voting securities of Company B in connection with each contingent annual issuance. In each instance, Company A determined that either (i) the acquisition was not reportable under the HSR Act as the voting securities of Company B to be held as a result of the acquisition would not meet the applicable HSR threshold, or (ii) the acquisition was reportable under the HSR Act, but it was exempt pursuant to § 7A(c)(9) of the Act and § 802.9 or the rules promulgated thereunder. Typically, Company A has sold the majority of its newly acquired Company B shares for cash. However, because of positive trends in Company B share price performance, Company A may from time to time hold on to some of the shares to benefit from expected appreciation.

Recently, one of Company A's businesses may have become a competitor to Company B. Company A's business in this regard is very small (indeed, any business currently carried out by Company A in competition with Company B would represent less than 1% of Company A's revenues), and Company A would have only a *de minimis* share of sales in any relevant market common to both companies. However, Company A's intent with respect to the voting securities of Company B has not changed, and Company A continues to have no intention to affect the basic business decisions of Company B. As a result, Company A believes that it continues to be eligible for the exemption under § 802.9 with respect to future annual issuances that may be reportable under the HSR Act.

In sum, Company A (i) periodically acquires newly-issued Company B shares as payment of consideration in connection with the sale of a business several years ago; (ii) has been, and intends to continue to be, a purely

passive investor, with no intention of participating in the formulation, determination or direction of the basic business decisions of Company B; and (iii) does not intend to hold voting securities representing more than a few percentage points of Company B's outstanding voting securities. Under these circumstances, we believe that the presumption that "being a competitor of an acquired issuer may be viewed as inconsistent with an investment-only intent" is rebutted, and the exemption under § 802.9 remains available to Company A.

Please let us know if the above is consistent with the PNO's view.

Thanks and best regards,

[redacted]