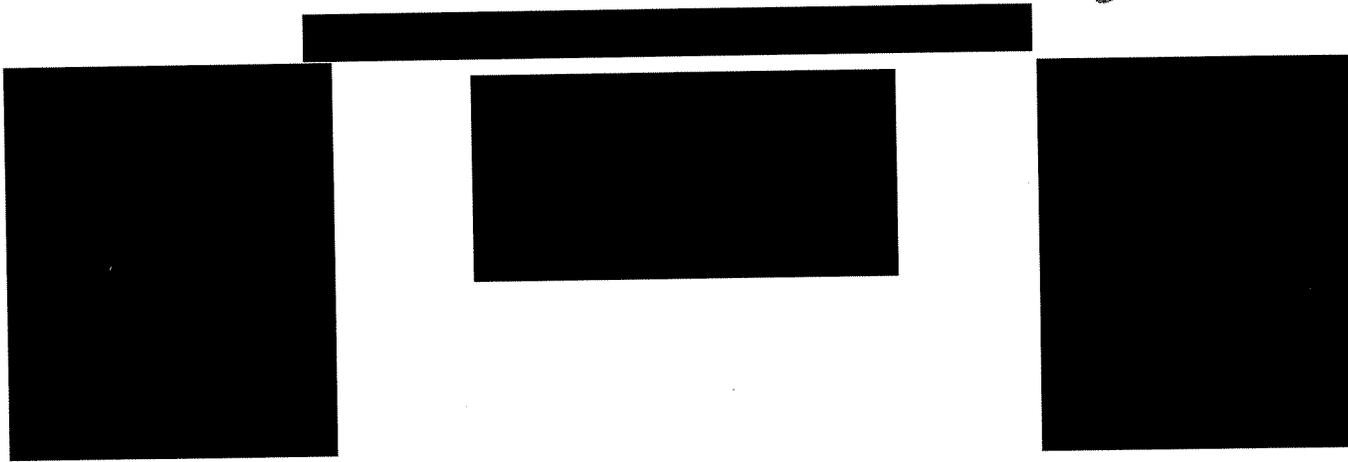


802.50



November 8, 2004

VIA EMAIL

Mr. Michael Verne
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Request for Informal Interpretation Under Rule 802.50

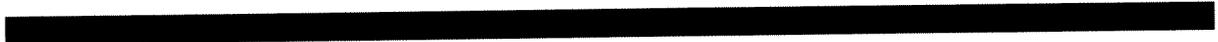
Dear Mr. Verne:

I write seeking clarification of how to determine when certain intangible property is deemed to be "located outside the United States" within the meaning of Rule 802.50.

We represent Purchaser, the US subsidiary of a foreign person. The ultimate parent entity of the Seller is also a foreign person. Purchaser and Seller (together, the "Parties") are contemplating a transaction in which Purchaser would purchase from Seller certain assets related to a brand name product ("Product") manufactured and sold worldwide by Seller. The purchase price will be approximately \$76 million for intellectual property rights and good will associated with the Product and an additional approximately \$2.3 million worth of inventory. The intellectual property is registered in multiple jurisdictions, including the United States. The Parties meet the size-of-person test for transactions valued at not more than \$200 million. Because the purchase price will exceed the HSR \$50 million filing threshold, the proposed transaction will be reportable unless one of the exemptions provided by Part 802 of the Rules applies.

Rule 802.50(a) provides:

The acquisition of assets located outside the United States shall be exempt from the requirements of the act unless the foreign assets the acquiring person would hold as a result of the acquisition generated



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sales in or into the U.S. exceeding \$50 million during the acquired person's most recent fiscal year.

The Premerger Notification Office has provided informal guidance on several occasions regarding how to interpret the word "located" in Rule 802.50 with respect to assets that have no fixed location. In determining where movable ships were located, the PNO has advised that it looks "not only to where the assets were generally located and who owned the assets, but also to the source of the revenues generated by the movable assets." *ABA Premerger Notification Practice Manual*, Interpretation 269 (1991). In a later interpretation involving the location of patent rights and other intellectual property, the PNO agreed that "the portion of the license attributable to the foreign patents is 'located outside the United States' because the source of the revenues generated is foreign intellectual property. The remaining portion of the license attribute to the U.S. patents is located in the United States." Informal Staff Opinion (File No. 9912003).

In Seller's most recent fiscal year, approximately 56 percent of total Product sales were of sales in or into the U.S. and approximately 45 percent of sales were outside the U.S. Based on the above interpretations, it appears that the proper method of determining where the intangible assets to be purchased are "located" is to multiply the percentages reflecting sales inside and outside the U.S. by the purchase price of the assets. Accordingly, approximately \$33 million of the asset value was of assets located outside the United States (\$76 million x .44) with no sales attributable to these assets as "in or into the U.S.," and the remaining approximately \$43 million worth of the assets (\$76 million x .56) was of assets deemed to be "located" in the United States. Because the value of the assets located in the United States is below the HSR threshold (even if the value of all the inventory is attributed to the United States) and the foreign assets did not generate sales in or into the US exceeding \$50 million, the transaction will be exempt from HSR filing requirements.

The Parties further contemplate that the purchase agreement may contain a purchase price allocation based on tax and/or other business purposes. This allocation may be same as or different from the above analysis based on most recent fiscal year revenue. It is my understanding that the PNO does not consider an allocation of the purchase price for tax or other business purposes as relevant to the determination of where assets are located for purposes of interpreting Rule 802.50.

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Please confirm that this transaction will be exempt from reporting requirements under Rule 802.50.

Sincerely yours,

AGREE THAT THIS IS A
REASONABLE METHOD OF
ALLOCATING THE VALUE OF
THE TRANSACTION BETWEEN
THE U.S. & FOREIGN ASSETS.

B. Michael

11/9/07

Verne, B. Michael

From: [REDACTED]
Sent: Monday, November 08, 2004 2:19 PM
To: Verne, B. Michael
Subject: FW: HSR Letter



Untitled_9.pdf (109 KB)

Mike,

Thank you for responding to my letter (copy attached) so quickly. This is to confirm your advice that: (1) my letter correctly states how the PNO interprets the word "located" within the meaning of Rule 802.50 for "movable assets"; (2) with respect to patents, the PNO considers patents that are registered outside the United States to be "located" outside the United States with no sales "in or into the United States" attributable to those patents; and that (3) in the situation where, as here, the patents are registered both in the US and abroad and where other intangible property, such as goodwill and know-how, are not registered anywhere, it is reasonable to use the Seller's prior fiscal year sales information as a basis to allocate the purchase price between US and non-US "located" assets.

If the foregoing does not accurately reflect your advice, please contact me at your earliest convenience.

Best regards,
[REDACTED]

-----Original Message-----

From: [REDACTED]
Sent: Monday, November 08, 2004 2:02 PM
To: Michael Verne (E-mail)
Subject: FW: HSR Letter

Mike,

I'm attaching a letter requesting advice on the interpretation of Rule 802.50. The facts are set out for your convenience in the letter. Please call me at your earliest convenience after you have read the letter.

Thanks and best regards,
[REDACTED]

[REDACTED]