

802.9

January 27, 2005

Via E-mail

Mr. Michael Verne  
Premerger Notification Office  
Federal Trade Commission  
6th Street and Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: Application of the Investment-Only Exemption

Dear Mike:

I am writing to confirm the advice that you provided to me and [REDACTED] in our telephone conversation of January 24, 2005, and my follow-up call of January 25, relating to Rule 802.9, 16 C.F.R. § 802.9, and Section 7A(c)(9) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act" or "the Act"), 15 U.S.C. § 18a(c)(9), commonly referred to as the "investment-only" exemption.

The factual background that we provided to you is as follows:

1. Company A and Company B are pharmaceutical companies. Company A engages in research and development and actively markets and manufactures products. Company B engages in research and development, but has not yet commercialized any of its products.
2. Company A is acquiring an exclusive license from Company B that will give Company A the rights to develop, manufacture and market compound X which Company B owns. Assume that the consideration to be paid in connection with the acquisition of the exclusive license renders the acquisition reportable under the HSR Act.
3. At the same time that Company A licenses compound X, and pursuant to the same agreement, Company A will also acquire less than 10% of Company B's outstanding voting securities for separate consideration. This separate consideration is a result of a trade-off made during negotiations in which Company A refused to pay more for the rights to the license but was willing instead to make an equity investment in Company B.

We understand that the acquisition of the exclusive license is treated as the transfer of an asset to the licensee under the HSR Act. ABA SECTION OF ANTITRUST LAW, PREMERGER NOTIFICATION PRACTICE MANUAL, Interpretation No. 29 (3d Ed. 2003). We further understand that the consideration paid for the acquisition of the assets and voting securities must be aggregated for purposes of valuing this transaction absent an applicable exemption.

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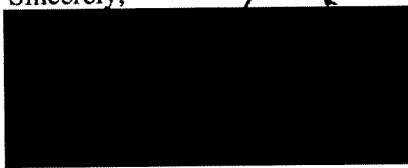
In our telephone conversation, we asked you to assume that Company A does not have a subjective intent that is inconsistent with that of a passive investor. We also asked you to assume that Company A does not currently engage in, and has no present intention to engage in, any of the conduct described in the Statement of Basis and Purpose ("SBP") to the original rules that are identified as inconsistent with an investment-only purpose. See 42 Fed. Reg. 33465 (July 31, 1978).

The language of that SBP also states that being a "competitor" disqualifies an acquiring person from invoking the exemption. However, you confirmed that Company B would not be deemed a competitor of Company A because Company B has not yet commercialized any of its products.

The HSR rules also state that voting securities are held or acquired "solely for the purpose of investment" if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer. You confirmed that Company A's acquisition of an exclusive license of one of Company B's compounds is by itself not inconsistent with harboring an investment-only intention as long as Company B would not be involved in any co-promotional or co-marketing activities relating to the licensed intellectual property. You indicated that such activities might render the exemption unavailable depending on the circumstances, such as if the product involved were the licensor's main or only product.

We appreciate your taking the time to respond to our questions with respect to this matter. Please contact me directly if I have misstated any of your conclusions or if you have any questions after reviewing this letter.

Sincerely,



AGNES -  
B. [unclear]  
1/27/05

