

Clark-Coleman, Sheila

M. Verna Agree 2/29/12

From: [REDACTED]
Sent: Friday, February 24, 2012 6:51 PM
To: Clark-Coleman, Sheila
Cc: [REDACTED]
Subject: Investment purpose

Dear Sheila,

Thanks again very much for making time this afternoon to speak with us.

To summarize our discussion, we were calling with a question under the investment-only exemption, to confirm our understanding of the Premerger Notification Office's view with respect to prior informal interpretations and from discussions some of our colleagues had with you about a year ago with respect to a similar transaction. The key question is to confirm that the 802.9 exemption is available when the parties are not competitors within the US even if they may compete outside the US. There are several informal interpretations that relate to this question. The most directly on-point is Int. 0705006 (May 9, 2007).

That interpretation notes that the PNO takes the view that being a competitor creates a rebuttable presumption that the securities are not held solely for purposes of investment. However, it also confirmed that the exemption is available where there is no impact on US competition (the companies are not competitors within the US) and the other indicia that are inconsistent with the investment purpose are not present.

We have a case that is very similar to those described in the informal interpretation and in the discussion a year ago. In our most recent discussion on this topic, my colleagues described the acquisition of a 3-5% interest in a US public company by a non-US company. No board seat or observer rights were sought. There was no intent to influence or exert control over the target. The companies did have joint ventures together outside the United States. The companies also were both in the same business, and did compete outside the US. However, the acquiror had no US business and no US sales. In that case, you confirmed that the 802.9 exemption would be available.

The current transaction is similar, although it involves the acquisition of a stake in a non-US company. In this case, the interest to be acquired will be approximately 7%. Both companies are in the same business and compete in Europe for example. However, the target stopped exporting the competitive product to the US in the early 1990s and has no intention to restart sales in the US. Currently, under applicable US regulation, the target's products may not be imported into the US. The target does sell other products, some of which are inputs into the final competitive product. In fact, the target may and probably does sell components to the acquiror in a vendor/vendee relationship. (See Int. 0103013 (Mar. 26, 2001) (vendor-vendee relationship does not preclude use of 802.9)). However, the acquiror is not in the business of selling any competing components to third parties in the US.

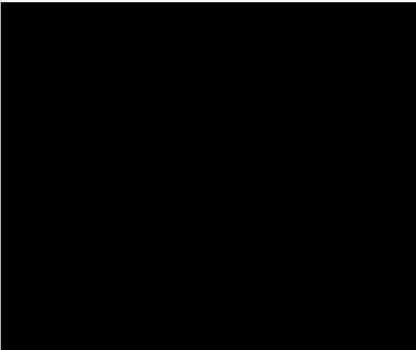
None of the other "disqualifiers" of 802.9 is present. The acquiror will not have a board seat or observer rights, will not propose corporate action or solicit proxies and has no intention to acquire control. There are no common directors or officers. proposing corporate action, no interlocking directors/officers.

As was the case in the other transaction we discussed, the parties do intend at around the same time to enter into a global alliance. The alliance contemplates the joint development of products for sale only outside the US. The parties also contemplate the creation of a corporate purchasing joint venture company, which will be subject to separate HSR analysis and will not implicate US competition issues as there will remain no overlap in the US. (See also Int. 9501007 (Jan 13, 1995) (co-venturers may qualify for 802.9)).

On this basis, we believe that the investment purpose exemption available under 802.9 will apply to the transaction and no HSR notification will be required. Please let us know if you concur, and do let us know if you have any additional questions.

Have a good weekend.

Regards,



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