

802.5d

RECEIVED BY MAIL

June 17, 1999

BY TELEPHONE

Richard B. Smith, Esq.
Premerger Notification Office
Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20004

RECEIVED
FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION
JUN 17 11:43

Dear Dick:

This letter confirms the advice you communicated to me in our conversation yesterday and in your voice-message of earlier today.

The Primary Acquisition

Company "A" intends to acquire 100% of the outstanding voting securities of Company "B" (the "Primary Transaction"). B is an issuer organized under the laws of France, and is a "foreign issuer" within the meaning of Section 801.1(c)(2)(ii) of the HSR Rules. A is also a "foreign issuer," approximately 57% of the outstanding voting securities of which are (and at closing will be) held by the French State. Accordingly, A is its own ultimate parent entity and A is a "foreign person" within the meaning of Section 801.1(s)(2)(i). Assume for analytical purposes that A's acquisition of 100% of B's outstanding voting securities satisfies all jurisdictional thresholds of the HSR Act (i.e., the size-of-person, size-of-transaction and commerce tests) and, accordingly, unless an exemption is available, HSR notification of the Primary Transaction would be required.

It is our understanding that neither Section 802.51(b) nor Section 802.51(d) of the HSR Rules would serve to exempt the Primary Transaction because the U.S. sales/asset thresholds contained in those Sections would be exceeded. However, because A is controlled by the French State and B is an issuer organized under the laws of France, you confirmed that the Primary Acquisition would be exempt from HSR notification pursuant to Section 802.52 of the HSR Rules.

June 17, 1999

You further confirmed that the availability of the 802.51 exemption is unaffected by the fact that as consideration for the acquisition, B's current shareholders will receive, in aggregate, shares of A stock representing approximately 43% of A's outstanding voting securities *post-closing*, which will dilute the French State's holdings in A to less than 50% *post-closing*.

The Secondary Acquisition

Having confirmed that the Primary Acquisition is exempt from HSR notification pursuant to Section 802.52, we discussed the potential reportability of a secondary acquisition resulting from the Primary Acquisition.

B (the entity whose voting securities are being acquired in the Primary Acquisition) holds approximately 38% of the outstanding voting securities of X, a United States issuer which is its own ultimate parent entity. If A were to *directly* acquire 38% of X's voting securities, it is our understanding that all relevant HSR jurisdictional thresholds would be satisfied and we are aware of no exemption from notification that would be available. Accordingly, I inquired whether A's *indirect* acquisition of X's voting securities as a result of the (exempt) Primary Acquisition would be a "secondary acquisition," separately subject to HSR notification pursuant to Section 801.4 of the HSR Rules.¹

You confirmed that A's indirect acquisition of the 38% interest in X as a result of the Primary Acquisition would be a secondary acquisition within the meaning of Section 801.4, however, you advised me that no HSR filing would be required in connection with this secondary acquisition, because of a long standing interpretation of the Section 802.51(b) exemption by the Staff of the Premerger Notification Office. Specifically, you indicated that the Staff's position, which originated with John Sipple, is that if a foreign person is acquiring control of another foreign person, and the acquired foreign person has a *minority* interest in a US issuer, then under Section 802.51(b), the secondary acquisition of the interest in the US issuer is nonreportable. Essentially, Staff has made a judgment call that on the basis of comity, it did not want to compromise the foreign acquiring person's ability to acquire another foreign person in order to reach the secondary acquisition. Accordingly, "right or wrong," the call was made that secondary acquisitions in the "foreign/foreign" context are exempt from HSR notification by virtue of Section 802.51(b) because the acquiring person is not gaining control of a US issuer.

¹ If this indirect acquisition was subject to HSR notification and no exemption from reporting was available, A and X would be required to file HSR notification as acquiring and acquired person, respectively.

Richard B. Smith

June 17, 1999

If the foregoing in any way fails to accurately reflect your advice, please call me
() or () as soon as possible.

Very truly yours,

6/17/99 TS (co-counsel with writer) advises that none of B's shareholders are U.S. persons and, thus, their respective minority takings of A's stock would be exempt under 802.5N(b). As to potential reportability of "secondary acquisition," Commission's statement in first paragraph of pp 33500 of 7/31/78 SBP indicates that it considered including such, but comments from the State Dept. caused the Commission to exempt all such indirect acquisitions of ~~U.S.~~ voting securities of U.S. issuers.

RBSmith