

802.51

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B. Michael Verne
Federal Trade Commission
Premerger Notification Office
601 Pennsylvania Avenue, NW
Room 303
Washington, D.C. 20580

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Sales in or into the United States

Dear Nancy and Mike:

I am writing to confirm the conclusions reached during our recent telephone conversations regarding the application of the 802.51 exemption, focusing on what constitutes sales in or into the United States. During our conversations, we discussed three hypotheticals, including a variation on one hypothetical that I discussed only with Mike. Each of the hypotheticals and your conclusions are set forth below.

Hypothetical One

A United States-located consumer orders a pair of shoes via the Internet from an Italian shoe manufacturer that has no US presence except via the Internet. The Italian shoe manufacturer accepts the US-located consumer's order using the customer's US-bank credit card for payment, and ships the shoes to the consumer's US address.

Conclusion: Revenues derived from the sale of the shoes in this hypothetical are sales in or into the United States for the purposes of the application of the HSR Act exemptions.

Hypothetical Two

A non-US company having no presence in the United States operates an online auction site. Although the company's servers are not located in the US, it advertises its service in the United States. The company earns revenues by collecting from sellers a commission for each auction that occurs at its website. The company also provides buyers and sellers access to payment processing services that are provided by third parties. A number of the auction site's buyers are located in the United States.

Conclusion: The commissions earned by the online auction site are not sales in or into the United States for the purposes of applying the HSR Act exemptions. You stated that in the non-

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online world, the site where a service is provided determines whether or not there is a sale in or into the United States. Extending this rationale to Hypothetical Two, you stated that the PNO would not view the commissions earned as sales in or into the United States, because the service provided, *i.e.*, the online market, is being provided on the company's servers located outside the United States.

Hypothetical Two (variation discussed only with Mike Verne)

The same facts as Hypothetical Two above, but now focusing on US-located sellers using the site.

Conclusion: Again, the commissions paid by those US-located sellers are not sales in or into the United States for the purposes of applying the HSR Act exemptions. The same analysis as applied to the Hypothetical Two applies to this variation, *i.e.*, if the service is rendered outside the United States, there are no sales in or into the United States regardless of the location of the company's customers.

Hypothetical Three

A UK company operates an online psychiatric counseling service with patients accessing the service from the United States. The UK company has no US assets. This service is interactive and operates in real-time via the Internet. To use this service, a patient/customer must download software to his/her computer allowing for real-time interaction (similar to instant messaging) between the psychiatrist, who is in the UK and licensed to practice medicine in the UK, and the patient/customer.

Conclusion: The counseling service revenues are not sales in or into the United States for the purposes of applying the HSR Act exemptions, because the location where the service is being rendered is, for HSR Act purposes, outside the US.

As my client intends to rely on the foregoing, please let me know if I have misstated or otherwise misinterpreted any of our discussions or your conclusions.

Thanks as always for being so responsive.

Sincerely,



AGREE. N. OVAKA CONCUR.
 Bruchel
 9/29/05

