802.9 exempt.

[redacted]

April 2, 1992

BY HAND

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FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION OFFICE

Dear Messrs. Sipple and Smith:

Pursuant to a telephone conversation with Mr Schechter of your office, we are writing to confirm our understanding of the notification requirements under the Hart-Scott-Rodino Antitrust Improvements Act for a transaction on which we expect to file premerger notification forms next week.

The transaction is a merger to be accomplished by a stock-for-stock exchange. Company A will acquire the voting securities of Company B, 50% of which are now owned by natural person X and 50% by natural person Y. In return, X and Y will receive voting securities of Company A, valued in excess of $100 million but constituting less than .8% of the outstanding voting securities of A. A has total assets in excess of $100 million, and X and Y each have total assets in excess of $10 million.

A is in the [redacted] business, and B develops and sells [redacted] Following the merger, X will have no position with A. Y will become one of five or six [redacted] in A's [redacted] group. As such, he will be responsible for the technical design of [redacted]. Although this is a senior technical position, Y will have no role in the management of the company. He will not be an officer, will not attend executive staff meetings, and will have no

[redacted]

responsibility for administrative matters. Those responsibilities will continue to be undertaken by the existing management team of A.

A will file as an acquiring person, and X and Y will file as acquired persons. All of the relevant information concerning the transaction will be disclosed in these filings. Our question concerns whether X and Y must also file as acquiring persons, with the concomitant obligation of each to pay a $20,000 filing fee. To our knowledge, neither X nor Y has holdings in any other [redacted] company.

We believe that the acquisition of A's voting securities by X and Y would be exempt from the filing requirements as acquisitions "made solely for the purpose of investment" under 15 U.S.C. § 18a(c)(9) and 16 C.F.R. § 802.9, and that X and Y would hence have to file only as acquired persons, and not acquiring persons. The initial advice we received from your office was that X would qualify for the investment exemption but that the issue was closer with respect to Y. We believe that the exemption applies to Y as well as X because Y does not intend, either through his .39% ownership interest in A or in his technical development work for A, to "participat[e] in the formulation, determination, or direction of the basic business decisions" of A. See 16 C.F.R. § 801(i)(1).

Although there does not appear to be precedent construing the investment exemption under the HSR Act, courts have construed the exemption contained in § 7 of the Clayton Act for acquisitions made "solely for investment". The "ultimate definitive factor" in applying that exemption is "whether the stock was purchased for the purpose of taking over the active management and control of the acquired company."[1]

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[1] United States v. Tracinda Investment Corp., 477 F. Supp. 1093, 1099 (C.D. Cal. 1979). See Crane Co. v. Harsco Corp., 509 F. Supp. 115, 123 (D. Del. 1981)("issue controlling the applicability of the investment exemption, then, is the likelihood that the acquisition would allow the offeror to influence significantly or control management of the target firm.")

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Y's .39% ownership share of A's securities cannot allow him to take over active management and control of A, much less to do so in an anticompetitive fashion.[2] This is especially true given that three members of A's current management team own approximately 50% of A's outstanding shares. Moreover, Y will expressly not be accepting a management position that would involve him in the "basic business decisions" of A. Rather, he will be focussing on the technical aspects of product development in a position involving no management duties. Finally, the transaction will be fully reported in the forms filed by A as acquiring person and X and Y as acquired persons. Requiring Y to file as an acquiring person will merely add unnecessary paperwork and expose the individual to a $20,000 fee payment.

If your office does not agree with the position that Y, as well as X, need file only as an acquired person with respect to the proposed transaction, please contact the undersigned as soon as possible, as the parties currently plan to file the notification forms by April 10. We very much appreciate your assistance in this matter.

Sincerely,

[redacted]

By: [redacted]

cc: [redacted]

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[2] As the FTC's Notice of Proposed Rulemaking concerning de minimis acquisitions of voting securities stated, "even the sparse precedent for finding antitrust violations for acquisitions of less than 10 percent evaporates for acquisitions of less than 5 percent of an issuer's voting securities." 53 Fed. Reg. 36831, 36837 (1988). Y's interest is less than 1/10 of this 5% de minimis figure.

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