See attached [redacted]

802.50
802.51(b)
802.51(b)(2)

[redacted]

[redacted]

March 20, 1996

By Hand

Mr. Victor Cohen
Bureau of Competition
Room 303
Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Cohen:

This letter follows our conversation of March 8, 1996 concerning certain issues arising under 16 C.F.R. §§ 802.50 and 802.51.

Factual Circumstances

The facts as discussed with you were as follows. Company A is a U.S. issuer and indirectly controls all of the shares of Company B, a foreign issuer. Company B has various subsidiaries which are foreign issuers (referred to as Companies C and D). Company B (including all entities it controls) did not have sales in or into the United States of $25 million or more in its most recent fiscal year. Company B also owns 100 percent of the shares of Company E which is an U.S. issuer. Company E does not have any assets located in the United States having an aggregate book value of $15 million or more. Company E owns 100 percent of the shares of Company F, a foreign issuer. Company F has foreign assets possibly exceeding $15 million in value. For purposes of this inquiry, please assume that Company F has foreign assets exceeding $15 million in value.

Analysis

Based on the facts set forth above, we discussed two possible scenarios with respect to the possible sale by Company A of all of the stock of Company B.

The first scenario was that all of the shares of Company B are sold to a U.S. purchaser. My understanding was that such transaction is exempt from an HSR filing under 16 C.F.R. § 802.50(b)

[redacted]

because Company B (including all entities it controls) does not hold assets located in the United States having an aggregate book value of $15 million or more, nor did Company B (including all entities it controls) have aggregate sales in or into the United States of $25 million or more in its most recent fiscal year.

The second scenario was that all of the shares of Company B are sold to a foreign purchaser. My understanding was that such transaction is exempt from an HSR filing under 16 C.F.R. § 802.51(b) because it would not confer control of an issuer with assets located in the U.S. having an aggregate book value of $15 million or more, or control of a U.S. issuer with annual net sales or total assets of $25 million or more. In making the calculation required by 16 C.F.R. § 802.51(b)(2), I understand that one does not attribute to a U.S. issuer (in the case we discussed, Company E) the sales or assets of any foreign issuer which the U.S. issuer controls (in the case we discussed, the sales or assets of Company F). On the other hand, in making the calculations required by 16 C.F.R. § 802.51(b)(2), I understand that the sales or assets of other U.S. issuers controlled by a U.S. issuer, if there are any (in the case we discussed Company E controlled no other U.S. issuer), would be aggregated with those of the controlling U.S. issuer.

Subsequent to our discussion, I learned that the facts were somewhat different than as set forth above and as I had described in my conversation with you; specifically, during 1995, Company B owned 100 percent of the shares of a U.S. issuer, referred to here as Company G, which indirectly[1] had sales in the U.S. in 1995 exceeding $25 million. However, prior to year end 1995, all of the shares of Company G (and thus its direct and indirect holdings in Companies H through J) were transferred to another subsidiary of A, Company K, which is outside of the ownership chain of relevance for purposes of any sale of Company B stock, such chain being Company A to Company B to Companies C, D, E and F. The current ownership structure is reflected in the enclosed chart. Since any current U.S. or foreign purchaser of Company B's stock would not hold, as a result of the acquisition, voting securities of any company that presently has annual sales in or into the U.S. in excess of $25 million, my understanding is that any such U.S. or foreign purchaser's acquisition of all of the shares of Company B would still be exempt under 16 C.F.R. §§ 802.50(b) and 802.51(b), even though an entity previously indirectly controlled by Company B had U.S. sales in 1995 in excess of $25 million. See paragraph 268 of ABA's Premerger Notification Practice Manual (copy enclosed).

Finally, we discussed a third possible scenario under which all of the shares of Company E, rather than Company B, are sold to either a domestic or foreign purchaser for a price in excess of $15 million. My understanding is that the exemptions set forth in 16 C.F.R. §§ 802.50 and 802.51 are

[1]Company G has two wholly-owned subsidiaries which are U.S. issuers, referred to here as Companies H and I, which together own all of the interests in a U.S.-based partnership, Company J, which generated 1995 sales in the U.S. in excess of $15 million.

not available since they do not apply to the acquisition of shares of U.S. issuers; thus the transaction would necessitate an HSR filing unless another exemption is available.

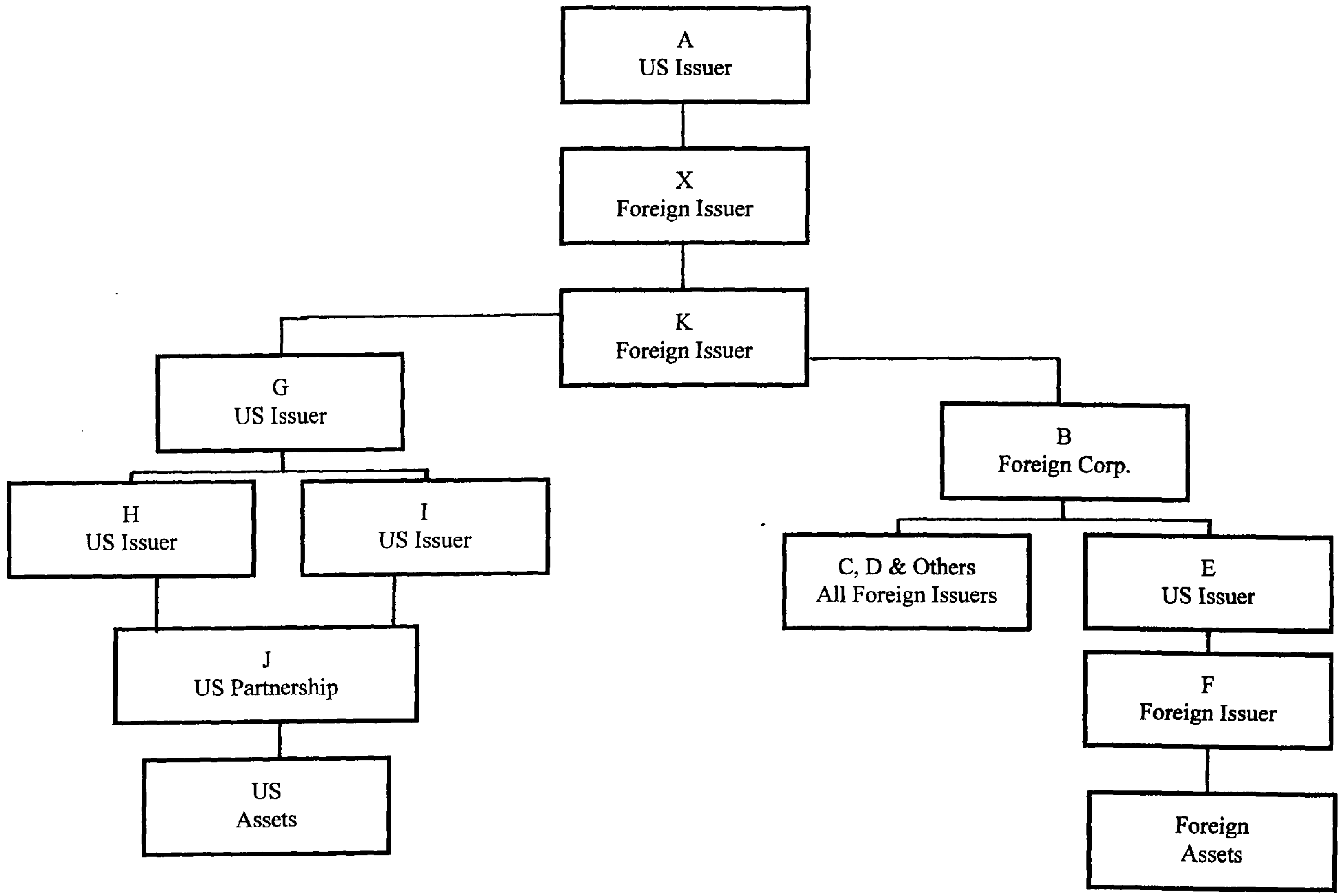
If you disagree with any of the understandings I have outlined above, including most particularly the understanding based on paragraph 268 of the Premerger Notification Practice Manual, please let me know as soon as possible.

Thank you very much for your assistance in connection with this matter.

Sincerely yours,

[redacted]

Enclosures


A
US Issuer
X
Foreign Issuer
K
Foreign Issuer
G
US Issuer
H
US Issuer
I
US Issuer
J
US Partnership
US
Assets
B
Foreign Corp.
C, D & Others
All Foreign Issuers
E
US Issuer
F
Foreign Issuer
Foreign
Assets

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Applicable subsection of the rules. § 802.50(b)(2).

Brief statement of the question or problem. Whether the acquisition by a U.S. person of voting securities of a foreign issuer is exempt pursuant to § 802.50(b)(2). The foreign issuer had U.S. sales in excess of $25 million during its most recent fiscal year, but it has since sold the division that accounted for nearly all of its U.S. sales.

Interpretation and discussion. The staff advised that the acquisition would be exempt under § 802.50(b)(2) because the U.S. person would not hold, as a result of the acquisition, voting securities of a company that *presently* has annual sales in or into the U.S. in excess of $25 million.

Documents pertaining to this issue. Letter to Andrew Scanlon, dated January 22, 1985.

Commentary. This interpretation seems inconsistent with the language of the regulation, which turns on whether the foreign acquired company made the requisite amount of sales in or into the United States "in its most recent fiscal year." It is also inconsistent with § 801.11(c), which provides that annual net sales shall be as stated on the company's last regularly prepared annual statement of income and expense—regardless of whether the person has bought or sold assets that generate sales since the income statement was prepared. However, this may be a correct result on the basis of comity. Although the rules technically would look to the most recent fiscal year and the last regularly prepared annual income statement for determining sales in or into the United States, in fact, there is no longer a U.S. interest and it would be unnecessary to assert jurisdiction.

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Applicable subsection of the rules. § 802.51(b).

Brief statement of the question or problem. How is the phrase "assets located in the United States" in § 802.51(b) applied to movable assets?

Interpretation and discussion. FTC staff required a full factual analysis of the varying locations and uses of the movable asset, in this case cruise ships, to determine whether the assets should be viewed as "located in the United States." FTC staff looked not only to where the assets were generally located and who owned the assets, but also to the source of the revenues generated by the movable assets. In the case of cruise ships which frequently called on U.S. ports and for which tickets were sold almost exclusively in the United States, the assets were viewed as "located in the United States" despite the fact that the ownership and registry of the ships were foreign, that the captain and most of the crew were foreign, and that a substantial majority of the time the ships were located outside U.S. territory.

Documents pertaining to this issue. Letter to Linda Heban, Esq., dated August 14, 1986.

RESPONSE:

Pursuant to section 802.51(b) an acquisition by a foreign person of the voting stock of a foreign issuer is exempt from HSR reporting requirements if such an acquisition does not confer control of (section 802.51(b)(1)) an issuer which holds assets located in the US having an aggregate book value of $15MM or more, or (section 802.51(b)(2)) a US issuer with annual net sales or total assets of $25MM or more. Where the foreign person is acquiring more than one issuer aggregation is required as follows: in regard to 802.51(b)(1) the total US assets of ALL issuers (and issuers under their control) must be aggregated to see if the $15MM test is met. If the amount is $15MM or more the exemption is lost. In regard to 802.51(b)(2) aggregation of only US issuers's sales and assets is required and if the amount of sales or assets is $25MM or more the exemption is lost. When the US issuer to be acquired controls other issuers only the assets and sales of the US issuers it controls should be included in the aggregation and not the sales and assets of any foreign sub within the US issuer. This exclusion is only for purposes of determining whether 802.51(b)(2) is applicable and not for any other purpose and is based on the fact that 802.51(b)(2) looks at only US issuers whereas 802.51(b)(1) looks at all issuers. Note also that 802.51(b) is listed in the aggregation rule 801.15(b) which results in a loss of the exemption once the threshold of 802.51(b) has been exceeded.

The other issues raised in the letter were resolved correctly.

RS, JS agree with the 802.51 discussion