801 generally; 801.1(j)(1) [ABA Letter #51]; 801.10(b); 801.10(c)(3); 801.4(b)(2)(ii)

[redacted]

July 1, 1996

BY MESSENGER

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Bureau of Competition
Federal Trade Commission
Room 323
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Washington, D.C. 20580

Dear Dick:

Thank you for taking the time to speak with me last Wednesday. I am writing to confirm the HSR advice we discussed.

My client is entering into what is styled as a "Collaboration Agreement" with an organization that maintains a proprietary database of [redacted] Pursuant to the Agreement, my client will obtain a non-exclusive license (essentially, a right of access) to the database maintained by the database administrator, the other party to this agreement. The database administrator will also perform certain operations [redacted] involving material supplied by my client and material contained in the database, with the results made available to my client on a confidential basis. In return, my client will pay the database administrator a total of $60 million over 5 years ($10 million per year over each of five years for the non-exclusive license, with an additional payment of $2 million per year for 5 years for research and development support to expand the database).

In addition to the non-exclusive license to access the database, my client will also secure a non-exclusive license to use [redacted] already identified by the database administrator and useful in the development of new pharmaceuticals, and a non-exclusive license to use certain proteins which are part of the database as targets for [redacted] My client will also secure options to exercise exclusive licenses in the following areas:

a. They will have an option to secure an exclusive license for new proteins that are identified by my client through its work with the database and which will be used in the preparation of human pharmaceuticals.

b. They will also have an option to secure an exclusive license for new [redacted] that are identified by my client through its work with the database and which will be used in the preparation of human pharmaceuticals.

In both instances and in consideration for granting any such licenses, the Agreement specifies a mix of royalties based on sales of the resulting pharmaceutical products and fixed fee payments ("milestone payments") tied to the completion of certain steps in the FDA drug approval process for each such pharmaceutical product.

In the event that my client secures any patent rights on proteins derived from the database and used in the production of a human pharmaceutical, my client agrees to grant back to the database administrator an exclusive license to certain patented proteins for use by other members of the database. In addition, and again only if my client secures any patent rights deriving from the database, my client agrees to grant the database administrator an exclusive license for the use of certain patents derived from the database that pertain to certain product areas which the database administrator is reserving to itself for further development.

We concluded that acquisition of the non-exclusive licenses by my client from the database administrator would not entail the acquisition of assets within the meaning of the Hart-Scott-Rodino Act or Rules. Furthermore, the acquisition by my client of options for exclusive licenses for proteins o[redacted]iscovered by my client through work with the database similarly would not entail the acquisition of assets. If any of those options ripen into the acquisition of an exclusive license, or if my client grants any exclusive licenses to the database administrator based on patented proteins or[redacted] then the acquisition of such an exclusive license would be regarded as the acquisition of an asset for purposes of the HSR Act and Rules. Assuming that other thresholds were met (e.g., size of person), the principal question to be resolved upon the exercise of the option or the grant of an exclusive license would be whether the acquisition of the exclusive license to the affected[redacted]or protein met the size of transaction test, 15 U.S.C. § 18a(a)(3).

Section 801.10(b) of the HSR Rules states that the value of assets to be acquired shall be the fair market value of the assets or, if determined and greater than the fair market value, the acquisition price. 16 C.F.R. § 801.10(b). We determined that the acquisition price of the exclusive license would be undetermined, because it would be a combination of fixed-fee milestone payments and royalties on the sales of as yet undeveloped and unmarketed pharmaceuticals (in the case of any license by my client to the database administrator, the acquisition price is also undetermined). Therefore, the fair market value of the assets to be

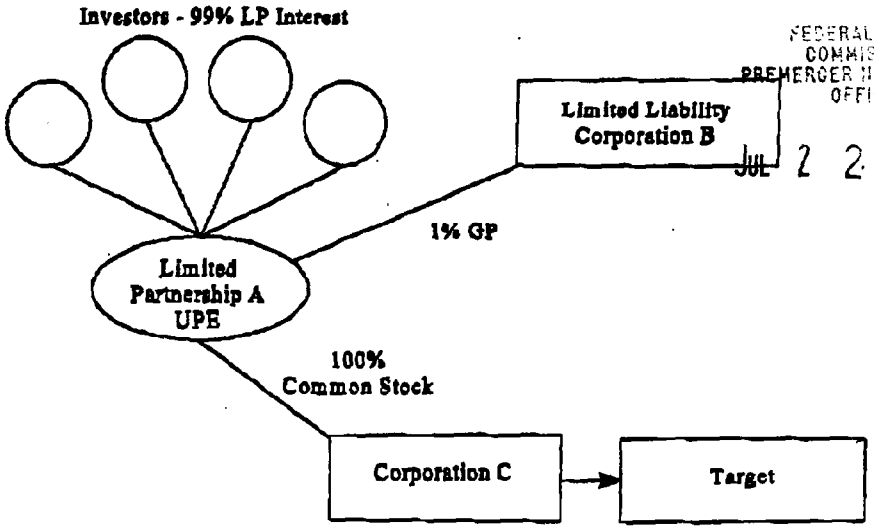
acquired would determine whether the transaction met or exceeded the size-of-transaction threshold. Fair market value is to be determined in good faith by the board of directors of the ultimate parent entity included within the acquiring entity or by an entity included within the acquiring party that is so tasked by the board of directors. 16 C.F.R. § 801.10(c)(3).

We noted that fair market value should essentially equal what a willing buyer would pay a willing seller for the asset at the time of the sale, assuming an arms-length negotiation between the parties. We also noted that an acquiring person might look to such factors as milestone payments and royalty rates (essentially items that might go into determining acquisition price) in an effort to determine fair market value, but that fair market value might encompass more than simply an evaluation of these acquisition-specific factors (e.g., the risk and uncertainty in bringing a laboratory-tested drug to market, inability to estimate future sales for such a product). My client, as the acquiring person, should make such a fair market determination before exercising the option to acquire an exclusive license, in order to determine whether the asset to be acquired meets the size of transaction test (including, if applicable, any aggregation of previously-acquired assets pursuant to 16 C.F.R. § 801.13(b)(2)(ii)). At the time my client grants an exclusive license to the database administrator with respect to certain patente[redacted]or proteins developed from the database, the database administrator should also make a fair market value assessment of the value of such licenses.

I hope that this letter accurately summarizes the advice we discussed during our telephone conversation last Wednesday. If I am incorrect in my summary of our conversation, please let me know as soon as possible, because my client is relying on this advice to proceed with their transaction.

Thank you again for your time.

[redacted]



Limited Partnership A is newly-formed and owns 100% of the voting securities in newly-formed Corporation C. Limited Partnership A is its own ultimate parent entity. Corporation C is formed and its regularly prepared balance sheet shows minimal (less than $10 million) total assets and no sales. Limited Partnership A also has no sales and less than $10 million in total assets. Commitments to contribute cash for the purpose of acquiring voting securities of Target are procured by Limited Partnership A from its investors.

On day 1, a public cash tender offer is made by Corporation C for at least 55% of Target. On day 20, Corporation C acquires 55% of Target voting securities and simultaneously pays cash to Target shareholders with funds called from Limited Partnership A investors.

Subsequent to the transaction in which Corporation C acquires 55% of Target shares, a back-in merger of Corporation C with Target occurs under Delaware law. ? 801.11(e)

Questions: Assuming other size of person and size of transaction tests are met:

1. Is an HSR report required for formation of Limited Partnership A or Corporation C?

2. Is an HSR report required for the acquisition by Corporation C of over 50% of Target's voting securities? assuming tests are met — yes

[redacted]

3. Is an HSR report required for the back-in merger of Corporation C in which the remaining 45% of Target voting securities are acquired by Limited Partnership A, UPE of Corporation C? No, 802.30 exempts this acquisition.

called [redacted] 7/3/96 and convey answers to his questions,

PS

[redacted]