

7A(c)(7); 7A(c)(8); 7A(c)(9); 802.9

[REDACTED]

Writer's Direct Dial: (202) 974-1520

February 4, 1999

1999 FEB -11 A 9:34
FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

VIA FACSIMILE

Confidential Treatment Requested

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

Dear Dick:

We are writing to follow up on our call of yesterday regarding the applicability of the "solely for the purpose of investment" exemption,¹ to the proposed acquisition by our client, [REDACTED] of up to 4.9% of the voting securities of [REDACTED]. We believe that this exemption is available due to restrictions imposed by the Bank Holding Company Act of 1956, as amended (the "BHCA"), that require [REDACTED] to treat this 4.9% interest as a passive investment.

Background

We informed you that [REDACTED] has publicly announced that it has entered into an agreement to acquire 100% of the voting securities of [REDACTED] through a merger (the

¹ 15 U.S.C. § 18a(c)(9); 16 C.F.R. § 802.9. See also 16 C.F.R. § 801(i)(1).

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"Merger"). As we stated, completion of the Merger is conditioned on prior approval by the Board of Governors of the Federal Reserve System (the "FRB") under §3 and §4 of the BHCA.² [REDACTED] has filed applications for FRB approval under §3 and §4 of the BHCA. The statutory HSR exemptions for transactions requiring agency approval under §3 and §4 of the BHCA will thus apply to the Merger.³

The parties currently anticipate that the Merger will not be completed until approximately April or May, however. In the interim, [REDACTED] desires to purchase up to 4.9% of the voting securities of [REDACTED]. The motivation for this investment is purely financial -- [REDACTED] stock is currently trading at a significant discount to the price that [REDACTED] would otherwise ultimately be required to pay at the completion of the Merger. [REDACTED] has no intention to use this 4.9% interest in [REDACTED] to participate in the formulation, determination, or direction of the basic business decisions of [REDACTED] prior to the closing of the Merger or in the event that the Merger is not approved by the FRB, and is in fact barred by the BHCA from doing so.

Bank Holding Company Act Restrictions on Deutsche Bank

Under the BHCA, [REDACTED] may not directly or indirectly own or control more than 5% of the voting shares of a bank, or "control" a bank or bank holding company, regardless of the size of its share ownership,⁴ without the prior approval of the FRB. The FRB presumes that a less than 5% voting interest will not require FRB approval,⁵ provided that the investment is "passive" and the acquirer does not in fact have a "controlling influence" over the management or policies of the bank or bank holding company.⁶ Thus, [REDACTED] is required by the BHCA to treat this 4.9% interest in BT as a passive investment.

² 12 U.S.C. §§ 1842-43.

³ See 15 U.S.C. § 18a(c)(7)-(8).

⁴ See 12 U.S.C. § 1842(a)(3).

⁵ See 12 U.S.C. §§ 1842(a)(1), 1841(a)(1).

⁶ See 12 U.S.C. § 1841(a)(3); see also 12 C.F.R. § 225.31(e)(1).

⁷ See 12 U.S.C. § 1841(a)(2)(C); see also 12 C.F.R. § 225.143 (guidelines for ensuring passivity of less than 5% voting interests when combined with nonvoting equity interests); 12 C.F.R. § 225.137 (limiting BHCA authority to own less than 5% of the voting shares of nonbank companies to passive investments below 5%). Similarly, a bank holding company seeking to make even a noncontrolling investment in a bank holding company's voting shares of between 5 and 25% must first obtain FRB approval. 12 U.S.C. § 1842(a)(3). The presumption of passivity applicable below 5% does not apply between 5 and 25%, and in granting such approvals, the FRB requires applicants to agree to extensive and detailed commitments to ensure that the investment remains

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Analysis

We informed you of our view that [redacted] acquisition of up to a 4.9% interest in [redacted] should be exempt under the "solely for the purpose of investment" exemption.³ [redacted] has no intention of participating in the formulation, determination, or direction of the basic business decisions of [redacted] prior to the Merger through this 4.9% investment. Moreover, [redacted] is required by the BHCA to act as a passive investor with respect to this purchase of 4.9% of the voting securities of [redacted]. Accordingly, we believe that these unique statutory restrictions make clear that [redacted] should be deemed to be acquiring these shares solely for the purpose of investment within the meaning of the HSR Act.

While [redacted] may later complete the Merger with [redacted], it will obviously not rely on the investment exemption at that time. If the FRB approves the Merger, then the agency approval exemptions will become available. Prior to then (and in the event that the FRB ultimately does not approve the Merger), the lack of FRB approval prevents [redacted] from acting as anything other than a passive investor.

We appreciate your attention to this matter and wanted to thank you for returning our call so promptly yesterday. We understand that you would like to speak with the Justice Department before giving us your final view on this issue. We would of course be happy to discuss this issue further with either you or a representative of the Justice Department.

*2/4/99 - Faxed letter to [redacted] He checked with [redacted] and the DOJ
Franklin Division. View was that since intent of [redacted] to acquire BT, the present intent of the 4.9% is irrelevant. The sale intent is by BT, which makes any reportable purchase of 4.9% HSR reportable. Consistent with AOA # 37-33. So advised writer. I agreed with DOJ news. RB Smith*

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passive. See, e.g., Banco Santander S.A., 81 Fed. Res. Bull. 1139, 1143 (1995). The FRB has required similar passivity commitments in the context of less than 5% voting interests combined with the acquisition of nonvoting equity interests (i.e., to ensure consistency with 12 C.F.R. § 225.143).

³ We indicated to you that we were not at this time relying on the agency approval exemptions, 15 U.S.C. § 18a (c)(7)-(8), with respect to the proposed acquisition of up to 4.9% of the voting securities of BT. Indeed, we informed you that the Axinn, Fogg, Stoll & Prager treatise takes the position at page 6-58 that the agency approval exemptions would not be applicable to such partial acquisitions prior to the granting of the appropriate agency approvals.