802.5 /
802.20

[redacted]

March 5, 1999

Via Facsimile

Patrick Sharpe
Federal Trade Commission
Premerger Notification Office
Room 303
6th and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Acquisition of Voting Securities of Foreign and U.S. Subsidiaries

Dear Patrick:

I am writing to confirm advice I received from you during a phone conversation on Friday, February 19, 1999 that the following transaction is not reportable under the Hart-Scott-Rodino Act of 1976, as amended, 15 U.S.C. § 18a ("HSR Act" or the "Act"), and the rules promulgated thereunder, 16 C.F.R. § 801 *et seq.*, (the "Rules"). A, a U.S. person is proposing to acquire 20 percent of the voting securities of two subsidiaries of B, a foreign person. C, the first subsidiary, is a Bermuda insurance company, while D, the second subsidiary, is a U.S. issuer. The total purchase price for the minority interests in both subsidiaries is $30 million, of which approximately $27 million is for the C voting securities and $3 million is for the D voting securities. C's total assets and annual net sales each exceed $25 million. D's total assets are less than $15 million and its annual net sales are less than $1 million. For purposes of this analysis, it is assumed that A and B meet the Size-of-the-Persons test in 15 U.S.C. § 18a(a)(2).

C provides reinsurance for a number of U.S. customers. In C's most recent fiscal year, the total revenues C received under these contracts was in excess of $25 million. But C maintains no offices in the U.S. and writes the policies for these U.S. customers in Bermuda. As a result, C does not report U.S. income from these policies for U.S. tax purposes. C does hold assets in the U.S. valued at more than $100 million, but these are either "investment assets" as defined under Rule 801.1(i)(2), or minority voting and nonvoting security interests in other persons. C derived no taxable dividend income from these investments, though it did derive approximately $13 million in non-taxable coupon income in its most recent fiscal year from these holdings. Under Rule 802.50(b), the acquisition by a U.S. person of the voting securities

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of a foreign issuer is exempt so long as the foreign issuer does not hold assets located in the U.S. with a book value of $15 million or more (other than investment assets or voting or nonvoting securities of another person), and did not make sales in or into the U.S. of $25 million or more in its most recent fiscal year. Because C does not hold assets located in the U.S. to which the $15 million threshold in Rule 802.50(b) applies and has only $13 million in U.S. income from investments, A's acquisition of 20 percent of C's voting securities is exempt under the Rule. In addition, because A is acquiring 20 percent of D's voting securities for less than $15 million, A's acquisition of those voting securities is exempt under Rule 802.20(b) (exempting acquisition of minority voting security interest in U.S. issuer where aggregate value of all assets and voting securities being acquired by purchaser from seller is less than $15 million).

One possible issue raised by this analysis is whether, under Rule 801.15, which requires aggregation of certain acquisitions under the HSR Act, the value of C's voting securities must be aggregated with the value of D's voting securities for purposes of the $15 million threshold in Rule 802.20(b). If such aggregation were required, the total value of the voting securities A is acquiring from B would be $30 million, and the Rule 802.20(b) exemption would not be available for the purchase of D's voting securities. Under Rule 801.15, an acquisition of the voting securities of a foreign issuer that is exempt under Rule 802.50(b) need not be aggregated with any other acquisition(s) being made by the same person from the same seller so long as the other acquisition(s) will not cause the dollar thresholds in Rule 802.50(b) to be exceeded. In this case, the value of C's voting securities need not be aggregated with the value of D's voting securities unless the acquisition of D would cause the $15 million threshold for assets held in the U.S. or the $25 million threshold for U.S. sales to be exceeded.

correct

Under the facts at issue, no such aggregation would be required. First, because C has no U.S. assets for purposes of Rule 802.50(b) and only $13 million in U.S. investment revenue, and D has less than $15 million in U.S. assets and less than $1 million in annual net sales, aggregation would not be required because the acquisition of D does not cause the thresholds in 802.50(b) to be exceeded. Second, even if C's and D's combined assets and annual net sales exceeded the $15 million and $25 million thresholds, aggregation would not be appropriate under Rule 802.50(b). In evaluating whether the thresholds in that rule have been exceeded, only assets and sales made by the foreign issuer *and entities controlled by that issuer* need be considered. Since D is not a subsidiary of C, but rather is a sister company, its U.S. assets and sales need not be aggregated with those of C for purposes of the Rule 802.50 (b) thresholds. See ABA *Premerger Notification Practice Manual*, (1991 ed.), Interpretation No. 266. In the absence of any required aggregation, A's acquisition of 20 percent of D's voting securities for $3 million clearly is exempt under Rule 802.20(b).

a U.S. issuer need does not aggregate with a foreign issuer

Correct

During our phone conversation, you confirmed to me that the Premerger Notification Office has taken the position that an insurance company that insures U.S. customers, but does not report the premiums received from these customers as U.S. income for tax purposes, does not maintain offices in the U.S. and writes the policies for the U.S. customers outside the U.S. is

is not a foreign issuer and is not a subsidiary of C

deemed not to have U.S. sales for purposes of Rule 802.50(b). I also asked you whether, under Rule 801.15, aggregation of the value of C's voting securities with the value of D's was required for purposes of the $15 million threshold in Rule 802.20(b). You confirmed that even if D's U.S. assets and sales were sufficient when combined with C's to cause the thresholds in Rule 802.50(b) to be exceeded, D's assets and sales should not be considered for purposes of Rule 802.50(b) because D is not a subsidiary of C. Based on these conclusions, A's acquisition of 20 percent interests in C and D would not be reportable under the HSR Act.

Please call me after you have had an opportunity to review this letter to confirm whether I have properly understood your advice. I look forward to hearing from you soon.

Sincerely,

[redacted]

required of [redacted]

No aggregation one can carve out 802.50(b) from the size of transaction (which is allowed in 802.20). This allows you to apply 802.20 for the remaining acquisition of 20% of C for $3.0mm.

called [redacted] 3/8/99
I concur with this letter.
BS

RS also concurs.