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BY HAND

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[redacted]

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This material may be [illegible] the confidentiality [illegible] Section 7A (h) of the [illegible] which restricts [illegible] Freedom of Information Act.

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FEDERAL TRADE COMMISSION PREMERGER NOTIFICATION OFFICE

[redacted]

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 [redacted] 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.

[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

[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

[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

[redacted] 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).

[redacted] 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 [redacted]

[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.")

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

expressly not be accepting a management position that would involve him in the "basic business decisions" of A. Rather, he

If your office does not agree with the position that Y, as

Sincerely,

By:

cc:

[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

this 5% de minimis figure.