

801 generally; 801.1(f)(1) [ABA Section 5]; 801.10(b); 801.10(c)(3);
801.10(b)(2)(ii)

July 1, 1996

BY MESSENGER

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Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Room 323
Sixth Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Dick:

Thank you for taking the time to speak with me last Wednesday. I am writing to you from

My client is entering into what is stated as a "Confidential Agreement" with

inasmuch 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

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 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 My client will also secure options to exercise exclusive licenses in the following areas:

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- 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.

In both instances and in consideration for granting any such licenses, the Agreement specifies a ("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

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

licenses for proteins of discovered 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 then the acquisition of such an exclusive license would be considered as the acquisition of an asset for purposes of the HSR Act and Rules.

the exclusive license to the affected 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

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

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[REDACTED]

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

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

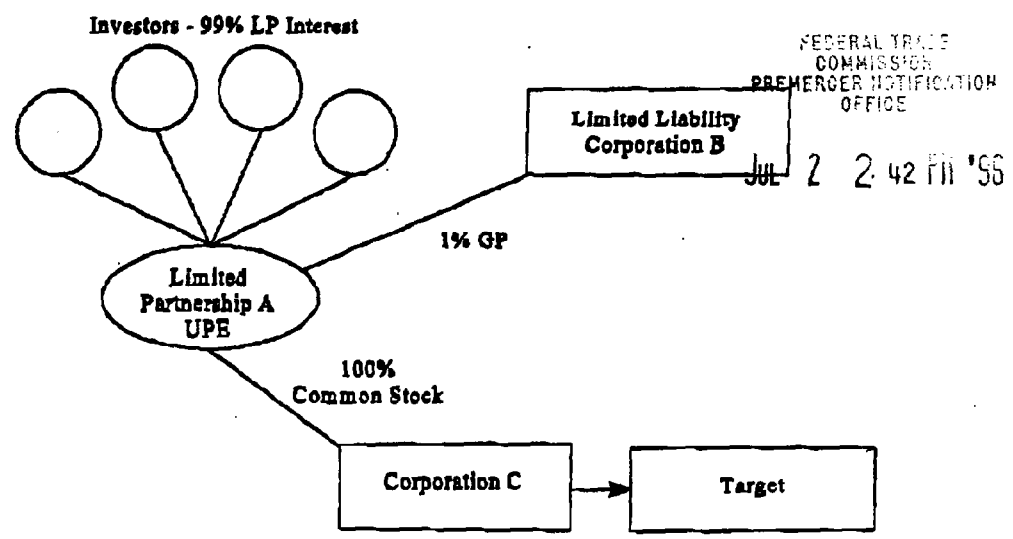
meets the size of transaction test (including, if applicable, any aggregation of previously-acquired

the database. The database administrator should also make a fair market value assessment of the

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.

Sincerely,
[REDACTED]



FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION OFFICE

JUL 2 2 42 PM '96

Limited Partnership A is newly-formed and owns 100% of the voting securities in newly-

Commitments to contribute cash for the purpose of acquiring voting securities of Target are procured by Limited Partnership A from its investors

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 49% of [REDACTED] is acquired by Limited Partnership A, UPE of Corporation C?

No, 802.30 exempts this acquisition.

called [REDACTED] and convey answers to his questions,

(PS)