

801.1(b)

[REDACTED]

[REDACTED]

[REDACTED]

January 4, 2002

VIA FACSIMILE

Nancy Ovuka
Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
6th Street and Pennsylvania Ave., N.W.
Washington, D.C. 20580

2002 JAN -4 PM 4:54
FEDERAL TRADE COMMISSION
BUREAU OF COMPETITION

Re: Control Test for LLCs and Partnerships

Dear Nancy:

Greetings from [REDACTED] I am writing to confirm the voicemail message you left me, and the subsequent telephone conversation we had yesterday, January 3, 2002, both of which concerned the application of the control test to determine whether limited liability companies ("LLCs") and partnerships are included within a person under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") and the Premerger Notification Rules at 16 C.F.R. Parts 801-803 (the "HSR Rules"). (I understand that, consistently with Formal Interpretation Number 15, LLCs may be treated differently for purposes of determining whether the formation of an LLC is reportable under the HSR Act.)

Section 801.1(b) of the HSR Rules defines "control" as "(1) Either (i) Holding 50 percent or more of the outstanding voting securities of an issuer or (ii) In the case of an entity that has no outstanding voting securities, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity; or (2) having the contractual power presently to designate 50 percent or more of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions."

Section 801.1(f)(1) of the HSR Rules defines "voting securities" as "...any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer, or of an entity included within the same person as the issuer, or, with respect to unincorporated entities, individuals exercising similar functions."

As discussed in passing in Formal Interpretation Number 15, the Premerger Notification Office (the "PNO") of the Federal Trade Commission initially treated LLCs like corporations and, consistently with such treatment, treated LLC ownership interests as voting securities for HSR purposes. On further analysis, the PNO advised that treatment of LLCs for reporting purposes would depend on determination of whether the ownership interests in the relevant LLC were more like a voting security interest or more

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like a partnership interest. This determination involved, among other considerations, determination of whether the relevant LLC had a group that functioned like the board of directors of a corporation.

Based on our telephone conversation yesterday, it is my understanding that the position of the PNO, for purposes of applying the control tests provided in Section 801.1(b) of the HSR Rules in order to determine whether an LLC or partnership is controlled by and therefore included within a person, is that:

- (1) No LLC or partnership has a body of individuals exercising functions similar to those exercised by the directors of a corporation;
- (2) No LLC ownership interests, therefore, are "voting securities" for HSR purposes (since voting securities are defined under the HSR Rules as interests which empower their owner or holder to vote for corporate directors or individuals exercising similar functions);
- (3) In light of 1 and 2, therefore, in determining whether a particular LLC or partnership is controlled by and therefore included within a person for HSR purposes, no consideration should be given to the control test provided in Section 801.1(b)(1)(i), which is based on holding voting securities;
- (4) Further, in determining whether a particular LLC or partnership is controlled by and therefore included within a person for HSR purposes no consideration should be given to the control test provided in Section 801.1(b)(2), which, in the case of such unincorporated entities, pertains to the contractual power to appoint 50 percent or more of individuals within such entities exercising functions similar to those exercised by corporate directors; and
- (5) Therefore, that the sole tests for purposes of determining whether an LLC or a partnership is controlled by and therefore included within a person for HSR purposes is that provided in Section 801.1(1)(ii), that is, having the right to 50 percent or more of the profits of the entity or, in the event of dissolution, to 50 percent or more of the assets of the entity.

Please contact me at the telephone number or email address given above to confirm your agreement with my understanding of our telephone conversation of January 3, 2002, as summarized in this letter. If I do not hear from you within 5 business days of my delivery by facsimile of this letter to you, I will presume your agreement. Thank you for your generous and capable assistance in HSR matters.

Sincerely,



4/7/02
Agree w/
conclusions for
domestic LLC
MV concerns