

F.I. 15
802.1(a)

[REDACTED]

September 28, 2001

HAND DELIVERY

PRIVILEGED AND CONFIDENTIAL

Mr. Michael Verne
Compliance Specialist
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Washington, DC 20580

Re: Confirmation of Advice Regarding Formation of Limited Liability Company

Dear Mr. Verne:

On Wednesday, September 27, 2001, [REDACTED] and I held a telephone conference with you regarding the formation of a limited liability company ("LLC") pursuant to Formal Opinion number 15 issued by the Premerger Notification Office. 64 FR 34804 (June 29, 1999). Based upon the information that we provided, you advised that the formation of the LLC was not within the scope of Formal Opinion 15 and that an HSR premerger notification and report form would not be required to be filed with the anti-trust agencies. I am writing you to obtain confirmation of your advice.

FACTS:

Companies A and B intend to form a limited liability company pursuant to State of Delaware law. Each forming person will contribute certain assets and lease other assets, as described below. The businesses of Companies A and B compete, and as part of the LLC formation, A and B will agree not to compete with the to-be-formed LLC. In return for its contribution of assets, Company A will receive more than 50 percent of the LLC profits and assets upon dissolution; thus, Company A will be in control of the LLC and should be considered to be the "acquiring" person. Because Company B will receive less than 50 percent of the LLC interests, it is the "acquired" person.

The companies will not be contributing all of their assets in the pertinent line of commerce to the LLC. Both companies will contribute inventory and contracts. Both companies will retain their accounts receivable and working capital. Also, the companies will not contribute their processing facilities and related equipment to the LLC. Instead, they will lease the processing facilities and related equipment for twenty years, which is substantially less than the life of the processing facilities. The leases are at current market rates. At the end of the lease

period, the renewal of the leases will not be automatic. The parties must negotiate a new set of leases, which will depend upon business conditions. There is no right to purchase the leased facilities at the end of the lease period.

Following our conversation, we were able to determine that the processing facilities, equipment, accounts receivable and working capital not being contributed by Company B constitute over 90 percent of Company B's assets in this line of commerce. Thus, it may be fairly stated that the assets being contributed by Company B do not constitute "all or substantially all" of Company B's assets that constitute its operating unit in the line of commerce. (In fact, we were able to determine that the value of the contributed assets is less than 10% of the assets of the business.)

FORMATION OF THE LLC and HSR FILING REQUIRMENTS:

The formation of an LLC is governed by Formal Opinion 15 issued February 5, 1999 and amended on June 29, 1999. This opinion states that an LLC formation is potentially reportable when the formation combines under "common control" two or more pre-existing "businesses." "Common control" exists when a person has a right to either 50 percent or more of the LLC profits or assets upon dissolution. Any person who will "control" the LLC after its formation is considered to be an acquiring person of the other person's "business" as represented by the assets that have been contributed to the LLC by the other person.

A crucial element for an LLC formation to be reportable is the combining of two or more separately controlled "businesses". Formal opinion 15 states that "[i]n determining what is a "business" for purposes of this Interpretation, the PNO will look to the definition of "operating unit" for purposes of section 802.1(a) of the rules...namely,...assets that are operated...as a business undertaking in a particular location or for particular products or services, even though those assets may not be organized as a separate legal entity."

Section 802.1(a) of the HSR rules of practice, 16 CFR Section 802.1(a), notes that an acquisition of "all or substantially all" of the assets of an "operating unit" is not an acquisition in the ordinary course of business and that "operating unit" means assets that are operated as a "business" undertaking in a particular location or for particular products or services, even though those assets may not be organized as a separate legal entity. Thus, if the contribution of assets by the acquired person in the formation of the LLC is not "all or substantially all" of the assets used in the subject line of commerce, then it is not a contribution of a "business" for the purpose of determining whether an LLC formation is within the reporting requirements of Formal Opinion 15.

ANALYSIS:

As noted above, Company A will obtain control of the LLC and therefore is the acquiring person and consequently, Company B, who will obtain less than 50 percent of the LLC interests, is the acquired person. Company B will contribute a very limited set of assets, namely, inventory

and contracts and will grant a covenant not to compete with the LLC. The lease of the processing facilities and related equipment are valid operating leases that do not use up the economic life of the underlying assets. Nor is the lease a disguised sale of any type; Company A cannot purchase the processing facilities or equipment at the end of the lease and it will not receive the processing facilities or equipment as a "gift" or in any other manner. Thus, the lease is not a hidden asset contribution to the LLC and the assets represented by the lease should not be considered in determining whether "all or substantially all" of the assets used in the subject line of commerce are being contributed to the LLC.

In regard to the accounts receivable that are not being transferred to the LLC, a company is free to acquire or contribute what it believes is necessary to operate a business and is under no compulsion to acquire or contribute assets that may have originally constituted part of the business.

The assets being contributed to the LLC at its formation by Company B represent less than 10 percent of the assets that Company B currently uses in this line of commerce; thus, they do not constitute a "business" for purposes of Formal Opinion 15.

CONCLUSION:

The formation of the LLC is not a reportable event since it will not combine under Company A's control two or more businesses.

I wish to thank you in advance for your time and consideration in this matter. If you have any questions, please telephone me at [REDACTED] (home office).

Sincerely,
[REDACTED]

AGREE - THIS IS NOT REPORTABLE.

B. Michael Verne

10/2/01