

Ovuka Nancy

**From:** [REDACTED]  
**Sent:** Friday, January 09, 2004 4:13 PM  
**To:** Ovuka Nancy  
**Subject:** LLC Transaction

Hi Nancy,

I am writing to you on behalf of a client that is currently suffering from sticker shock.

The client is forming a wholly-owned LLC ("New LLC"). New LLC plans to acquire 100% of the membership interests of a LLC ("Purchased LLC") from seller the principal assets of which are utility assets that will in turn be leased back to the seller. The value of the transaction is greater than \$200m but less than \$500m. Prior to closing the client is planning to bring in one additional investor that will own 50% of the membership interests in New LLC and will have the right to 50% of the profits of New LLC. The client intends to bring in this investor prior to closing the acquisition of Purchased LLC.

Our reading of applicable statutes, regulations and interpretations indicates that New LLC will have two ultimate parents at closing, each of which are required to file an HSR Notification and pay a \$125,000 filing fee in connection with the acquisition of Purchased LLC. However, there appear to be certain similar situations that would require only one HSR Notification and filing fee.

First, for business reasons, were our client were to bring in the 50% investor after closing the acquisition of Purchased LLC (i.e. with New LLC remaining wholly-owned by our client at closing), then the investor would not have to file an HSR Notification as it would be acquiring less than 100% of New LLC and only one HSR Notification would have to be filed in connection with the acquisition of Purchased LLC.

Second, for business reasons, were our client to bring in the investor prior to closing and structure the LLC with one member being entitled to 49.9% of the profits and the other to 50.1%, then only one HSR Notification would need to be filed by the 50.1% member in connection with the acquisition of Purchased LLC.

I am writing to confirm that your understanding is (apart from the two scenarios described above) that both 50% members of New LLC as described above are required to file an HSR Notification in connection with the acquisition of Purchased LLC and that you are not aware of any other interpretations that would suggest that only one HSR Notification and one \$125,000 filing fee would be required for such transaction.

Please let me know if you have any questions or concerns or if you need additional facts or information.

Thanks for your assistance. Try to stay warm this weekend.

**STAFF COMMENTS:**

After further conversations, counsel indicated that the fact pattern was not as stated. The acquiring person will take beneficial ownership of the assets and will enter into a long-term agreement to supply manufactured components to the seller that support the utilities operated by the seller. This arrangement is not a sale-leaseback arrangement that would be exempt under 802.63. It is also not exempt under 802.1(d)(4) since that exemption applies only to assets which have provided management or administrative services to the seller; not manufacturing services.

*Richard J. [Signature]*  
1/15/04