

802.4
801.50

[REDACTED]

January 25, 2005

BY FEDERAL EXPRESS

Mr. B. Michael Verne
Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: HSR Treatment of LLC Formation Transaction

Dear Mike:

I am writing to confirm my understanding of the Hart-Scott-Rodino ("HSR") analysis we discussed during our telephone conversations of January 6, 2005 and January 12, 2005.

On January 6, 2005, [REDACTED] of my firm left you a message with a question about the upcoming amendments to the HSR rules as they relate to a party's acquisition of an interest in a limited liability company ("LLC"). Among other things, [REDACTED] asked whether, under the proposed new rule concerning the formation of an LLC, 16 C.F.R. § 801.50, the parties contributing to the formation of the new LLC will be "acquiring parties" only for HSR purposes and not "acquired parties" – as 16 C.F.R. § 801.40 currently provides with respect to the contributors to a newly-formed joint venture corporation. Based on our subsequent telephone call on January 6, we understand that 801.50 would indeed have this effect as currently proposed by the FTC staff, and that edits were made to the expected language of 801.50 in order to make this clear.

On January 12, 2005, [REDACTED], and I called you again to discuss this issue in more depth. In that call, I explained that we had additional questions concerning the proposed new rules as they would affect a transaction involving an LLC, and I

[REDACTED]

indicated that this call was related to the prior call held January 6, 2005. I then provided you with a description of the following transaction.

“Owner” and “Investor” have entered into a Contribution Agreement pursuant to which:

(1) Upon closing, Owner will transfer the principal assets of a business (the “Business”), including real property, intellectual property, contracts, voting securities, and liabilities, to a newly-formed LLC (“Newco”). Newco was created for the purposes of this transaction, but until closing will remain a wholly-owned subsidiary of Owner. The Business is valued at approximately \$350 million.

(2) Upon closing, a financing transaction (arranged by Owner and Investor prior to closing) shall take place pursuant to which Newco will receive debt financing from a third party in the amount of approximately \$350 million.

(3) Upon closing, Investor shall obtain from Owner a 50% membership interest in Newco in return for Investor’s payment directly to Owner of (a) \$50 million in cash; and (b) voting securities of Investor in an amount less than \$20 million.

(4) Upon closing, Newco shall pay approximately \$200 million in cash (obtained from the financing transaction) to Owner, which the contract provides is consideration for the Business contributed by Owner to Newco.

The Contribution Agreement provides that at the closing, the above steps shall be deemed to take place in the order set forth above. Additionally, for the purposes of this analysis, we assume that both Investor and Owner will “control” Newco for HSR purposes after closing.

Based on our January 12, 2005 conversation, I understand that this transaction should be analyzed in the following manner under the proposed new rules. First, the transaction is properly considered a formation transaction subject to proposed new rule 801.50. The fact that cash and securities are being transferred directly from Investor to Owner, and directly from Newco to Owner does not require a different analysis, or result in any reportable transactions separate from the 801.50 formation transaction. (In effect, these payments can be considered equalization payments.)

Second, under the new rule 801.50, as discussed above, Owner and Investor will both be deemed “acquiring persons” only for HSR purposes, and neither Owner nor Investor has any obligation to file an HSR form as an “acquired person” in connection with the transaction described above.



Third, Owner's "acquisition" of a 50% membership interest in Newco is exempt from the HSR reporting requirements pursuant to new 16 C.F.R. § 802.4, which, as modified, will provide that the acquisition of control of an LLC that holds only exempt assets (or less than \$50 million of non-exempt assets) is exempt from HSR reporting requirements. Here, the assets of the Business contributed by Owner will be exempt assets with respect to Owner pursuant to proposed new rule 16 C.F.R. § 802.30(c). Additionally, any cash held by Newco or obtained by Owner as part of this transaction is not an asset for HSR purposes, pursuant to 16 C.F.R. § 801.21(a). Finally, because Owner will not hold voting securities of Investor (including any corporation under common control with Investor) valued in excess of \$50 million, Owner's acquisition of less than \$20 million worth of Investor voting securities is not reportable.

Based on our conversations, I also understand that a provision in the Contribution Agreement that allocates the purchase price for tax and other purposes does not change this analysis. The relevant provision of the Contribution Agreement provides that for the purposes of allocating the purchase price for tax and other purposes: (i) Owner will be considered to have contributed to Newco assets of the Business valued at \$50 million plus the value of the Investor securities obtained by Owner; (ii) Investor will be considered to have purchased from Owner and contributed to Newco assets of the Business with the same total value; and (iii) Newco will be considered to have purchased the remaining assets from Owner for \$200 million. I therefore understand that, under the facts as described above, Owner is not required to file an HSR form and, because Newco will be exempt from filing pursuant to 16 C.F.R. § 802.41, only Investor could be required to file an HSR form in connection with this transaction.

We also discussed whether Investor is required to search for Item 4(c) documents in the custody of Newco and/or Owner as part of this transaction. You confirmed our understanding that neither Investor, Owner, nor Newco are under any obligation under the existing or proposed HSR rules to search the files of Newco and/or Owner for Item 4(c) documents. Additionally, you indicated that Investor would be permitted to file its HSR form as soon as the FTC officially approves and releases the new rules in the form that they will appear in the Federal Register, and not be required to wait for the effective date of the proposed rules prior to filing (as long as Investor in good faith intends to close the transaction after the effective date of the new rules).

Please call me [REDACTED] at your earliest convenience to confirm that my understanding of the proper HSR analysis of the transaction described above, under the new rules, is accurate. Again, thank you very much for your help.

Very truly yours,

[REDACTED]

cc:

[REDACTED]

[REDACTED]

AGREE -
B. [Signature]
11/25/05

[REDACTED]