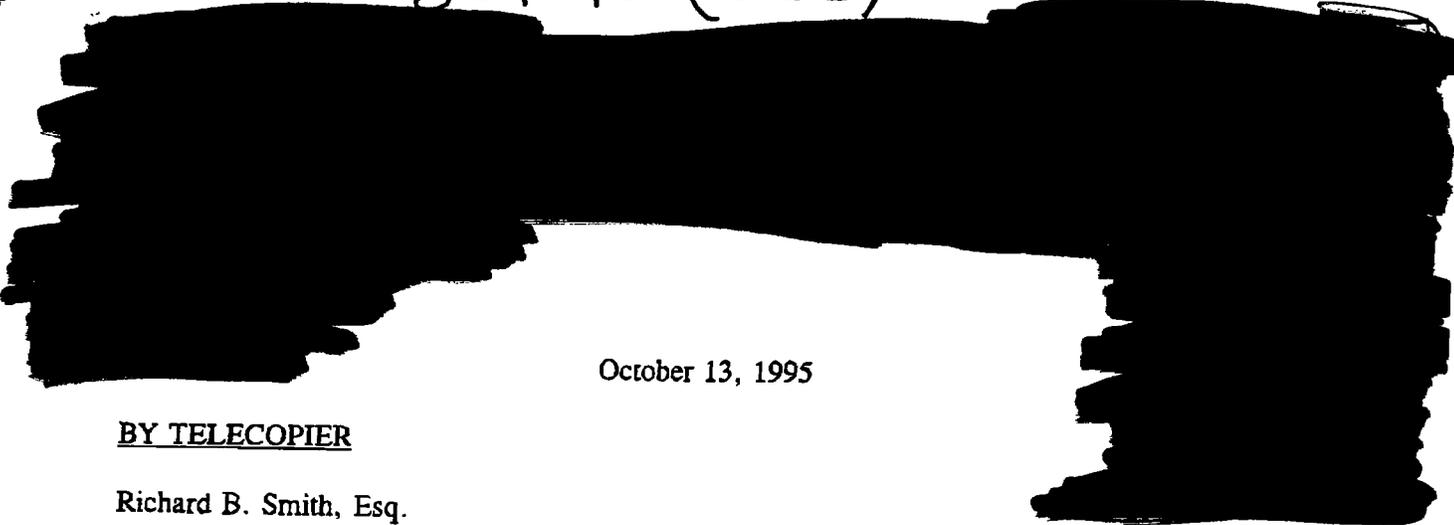


801.40 (LLC)



October 13, 1995

BY TELECOPIER

Richard B. Smith, Esq.  
Staff Attorney  
Premerger Notification Office, Room 301  
Federal Trade Commission  
6th & Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

HSR Reportability of the  
Formation of Limited Liability Companies

Dear Dick:

I am writing to confirm the advice that you gave to me in our telephone conversations of yesterday and today regarding under what circumstances the formation of a Limited Liability Company ("LLC") and the acquisition of membership interests therein by the contributing parties would be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act").

You informed me that the reportability of the formation of an LLC involves a fact-specific inquiry that is based on the definition of "voting securities" set forth in Section 801.1(f)(1) of the Rules implementing the HSR Act.<sup>1</sup> You also stated that, in determining whether LLC formation is reportable, the Staff would examine whether the contributors to a newly formed LLC are in fact getting back instruments which entitle them to vote or appoint members of a body which is functionally akin to a board of directors. In other words, the determination of reportability involves a two-part inquiry: (1) does the LLC have some supervisory body that is the functional equivalent to a board of directors? and (2) do the LLC interests actually give the holder/owner the right to elect, nominate,

<sup>1</sup> Section 801.1(f)(1) 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 . . . or, with respect to unincorporated entities, individuals exercising similar functions." 16 C.F.R. § 801.1(f)(1).

[Redacted]

Richard B. Smith, Esq.

October 13, 1995

designate or appoint third parties as members of that supervisory body? If both prongs of this test are satisfied, the LLC interests will be deemed voting securities and their acquisition will be subject to HSR reporting, assuming that all relevant thresholds are met and no exemption is available.

With respect to the second prong, you stated that if at the time of formation the LLC interest holder *itself* served on the board equivalent (rather than electing or appointing a third party), the LLC interest would not be a "voting security." After formation, subsequent appointment of a third party to represent the LLC interest holder would *not* convert that interest into a voting security for purposes of determining whether the formation of the LLC is reportable.<sup>2</sup> Where the holder of the LLC interest is a corporation, having one or more director, officer or employee of that corporation serve on the board equivalent of the LLC would be viewed by the Staff as the corporation serving thereon, and the corporation's LLC interest *would not* be viewed as a voting security. On the other hand, where the corporation elected or appointed a third party at the time of formation to represent its LLC interest, the interest *might* be viewed as a voting security. In such a case, you stated that the Staff's view would depend upon what role the third party played in the administration and governance of the LLC. If the third party functioned in an "officer" or "employee" role (responsible for the day-to-day operation of the LLC), the corporation's LLC interest *would not* be viewed as a voting security. If, however, the third party functioned as a "director" (*i.e.*, attending "board" meetings—not being involved in the LLC's day-to-day operations), the corporation's LLC interest *would* be viewed as a voting security. Finally, you said that if the holder of the LLC interest elected or appointed two persons to the board equivalent, one an officer of the LLC interest holder and the second an unrelated third party who had no officer or employee role in the LLC's operations, the LLC interest *would* be viewed by the Staff as a voting security.

If this letter fails to accurately reflect the views of the Premerger Notification Office as to the issues set forth, please notify me immediately.

Thank you for your helpful advice regarding this matter.

Very truly yours,

[Redacted signature]

[Redacted]

10/13/95 - Advised writer's phone mail that letter was correct in its statement of how the PHN office presently views formation of LLCs. RB Smith

<sup>2</sup> However, the LLC interest then may be viewed as a voting security for purposes of determining whether a subsequent transfer of the interest would be reportable.