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October 18, 1995

BY TELECOPIER

Hy David Rubenstein, Esq.
Federal Trade Commission
Premerger Notification Office
Room 303
Sixth Street and Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Application of Hart-Scott-Rodino
Premerger Notification Requirements to
Formation of a Limited Liability Company

Dear Hy:

Per our conversation of earlier today, I am faxing herewith a draft letter to you confirming our understanding of the Commission's position on the application of Hart Scott filing requirements to the formation of limited liability companies. If the letter is an accurate reflection of our past discussions concerning the Commission's position, please let me know and I will send the letter to you in final form. If the letter is incorrect, please let me know at your early convenience so that any necessary corrections can be made.

As always, thanks for your help and guidance.

Very truly yours,

[REDACTED]

[REDACTED]
enclosure

This document may be subject to the confidentiality provisions of section 7A(h) of the Clayton Act which may affect release under the Freedom of Information Act.

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[R&C DRAFT 10/18/95]

October 18, 1995

VIA FACSIMILE AND MAIL

Hy David Rubenstein, Esq.
Federal Trade Commission
Premerger Notification Office
Room 303
Sixth St. and Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Application of Hart-Scott-Rodino
Premerger Notification Requirements to
Formation of a Limited Liability Company

Dear Mr. Rubenstein:

We write to confirm our understanding of the Federal Trade Commission's position concerning the applicability of Hart Scott Rodino premerger notification obligations to the formation of a Limited Liability Company ("LLC") under Delaware law. Our understanding is based on a series of conversations which you and I have had concerning this issue over the last several months.

The basic facts are as follows. Two parties wish to form an LLC under Delaware law in which each party will own a 50% interest. One of the parties is a corporation, which will participate in the LLC through several of its corporate subsidiaries and one of its unincorporated divisions. The other party is an individual. At the time of the LLC's formation, the corporate party, through its unincorporated division and corporate subsidiaries, will contribute cash and intellectual property rights. The individual party will contribute intellectual property rights.

The unincorporated division of the corporate owner will act as the manager of the LLC. In addition, the two owners will create a "Board of Representatives" to make major or strategic

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decisions for the LLC. The Board of Representatives will consist of the individual owner, or officers or directors of a corporate entity which he controls, and officers or directors of the corporate owner, or one or more of its corporate subsidiaries.

Given the above facts, it is likely that a Hart Scott filing would be required if the transaction is viewed as "the formation of a joint venture or other corporation" under §801.40 of the Commission's Hart Scott Rules. However, if the formation of the LLC is treated like the formation of a partnership, no filing would be necessary because the Commission does not view the formation of a partnership as a reportable transaction.

Based on our conversations, we understand that the Commission would not view the above-described LLC formation (and the attendant contribution of assets to the LLC) as a reportable transaction, provided the following conditions were met.

First, if the unincorporated division of the corporate owner, which is to act as manager, is to set policy for the LLC, it must act through an officer or director of the corporate owner or one of that owner's incorporated subsidiaries, affiliates or divisions. If, on the other hand, the manager does not set LLC policy but merely acts like a chief executive or chief operating officer with responsibility for running the LLC's daily operations, it need not act through an officer or director of the corporate owner or one of its subsidiaries or affiliates. Similarly, persons carrying out the manager's instructions and decisions need not be officers or directors.

Second, the Board of Representatives must consist solely of the individual owner and officers or directors of the corporate owner. No outsiders or LLC employees may sit on the Board. However, if the individual owner controls one or more corporate entities so that they are considered to be part of his "person" under §801.1(a)(1) of the Hart Scott rules, officers or directors of those corporations may sit on the Board of Representatives on the individual owner's behalf without compromising the partnership exemption. This would be the case whether or not the corporate entity controlled by the individual owner owns a portion of the LLC.

Third, in the event one member of the Board of Representatives is unable to attend a Board meeting, he/she may be represented at the meeting by persons acting pursuant to validly executed powers of attorney. In the case of the corporate owner, persons acting in the place of the corporate Board representatives, would also have to be officers or directors of the corporate owner, or one of its subsidiaries or

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affiliates.

Please advise if the foregoing is in any way inconsistent with the Commission's position on the applicability of Hart Scott premerger notification requirements to LLC formations, or, if it is your view that a Hart Scott filing would be required for the transaction we have described.

Thank you for your continuing helpful advice and guidance on this matter.

Very truly yours,


10/23 spoke to writer:

Exemptions not limited to officers and directors but can include employees of either side.