

801.40 (LLC formation)

February 27, 1996

Via Facsimile

Richard B. Smith, Esq.
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
6th and Pennsylvania Avenue, N.W.
Room 303
Washington, D.C. 20580

Re: Premerger Notification Analysis for Limited Liability Companies

Dear Mr. Smith:

I am writing this letter to confirm our telephone conversation of February 23, 1996, regarding the notification and reporting requirements in connection with the possible formation of a Delaware limited liability company ("LLC"). I have summarized below the facts we discussed on the telephone. Based upon this fact scenario, it is our understanding that the formation of the LLC (including the contribution of assets described below as well as the related acquisition of an interest in the LLC by the members) would not be a reportable transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 as amended (the "Act") and the rules promulgated thereunder.

We are assuming, for purposes of this analysis, that the size of the person and size of the transaction threshold would be met if the formation of the LLC were deemed to result in the acquisition of "voting securities." It is our understanding, however, that under the current FTC staff interpretation of the rules, if the LLC is organized and operated in a manner consistent with the formation and operation of a partnership, those ownership interests will not be characterized as voting securities and thus the formation of such entity is not a potentially reportable event under the Act.

The transaction we discussed has three formation steps that will occur simultaneously. Corporation A will acquire a 2% undivided interest in the assets in a division of Corporation B for approximately \$500,000. Corporation A will contribute the assets it acquired from Corporation B to the newly formed LLC in exchange for a 2% equity interest in the newly formed LLC. Corporation B will then contribute the remaining undivided interest in the assets in the division to the newly formed LLC in exchange for a 98% equity interest in the newly formed LLC.

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Corporation A will then acquire from Corporation B an additional 49% interest in the newly formed LLC for approximately \$12.5 million. Thus, at the conclusion of the formation of the LLC, Corporation A will own a 51% interest in the LLC and Corporation B will own the remaining 49% in the LLC.

The limited liability company will operate in a fashion similar to that of a partnership under state law. Members will act through their appointed representatives (the "Member Representatives") who will serve as managers under the Delaware LLC law. Each member would be entitled to appoint Member Representatives generally in accord with its ownership interest in the LLC. Thus, the LLC Operating Agreement provides that Corporation A would have the opportunity to appoint three Member Representatives and Corporation B would have the opportunity to appoint two Member Representatives. Each Member Representative may cast one vote and a majority interest is defined as 50% plus one. Significant business activities such as merger, disposition of LLC assets, the admission of new members, the transfer of a membership interest to a third party, or a material change in business operations would have to be approved by 100% of the members.

Corporation A would provide, directly or through affiliates, sufficient employees and managers to conduct the day to day operations of the business through a contractual service agreement. These employees and managers will be partly from Corporation B, partly from Corporation A, and partly from new hires. Following the consummation of the transaction, the employees of Corporation B will be employed by Corporation A to provide service to the LLC under the service agreement. The duties and obligations of the Corporation A employees, assigned operational responsibility for the LLC, would be limited by the service agreement, that would be enforceable by Corporation B. The service agreement will not give to the employees of Corporation A broad discretionary powers typically attributed to a corporate board of directors.

Based upon the foregoing facts, it is our understanding that the staff of the FTC Premerger Office is of the view that the proposed formation of LLC will not be subject to the premerger reporting requirements of the Act. Based upon this conclusion, we do not anticipate Corporation A, Corporation B, or LLC making a filing in connection with the formation of the LLC. Should you have any questions, or if our understanding respecting the applicability of the Act is incorrect, I would appreciate it if you would let me know as soon as possible.

Thank you again for taking the time to speak with us.

[REDACTED]

[REDACTED]

2/27/96 - Writer advises that in first full paragraph above, the Member Representatives will be employees of Corp. A and Corp. B. Advised that formation is non-reportable and that transfer of ownership interests would be 100%.