

FAX COVER LETTER

TO	FAX #	RECIPIENT'S GENERAL PHONE # AND/OR SPECIAL INSTRUCTIONS:
John Patrick Sharpe	202-326-2624	

SENDER: [REDACTED] ATTY #: [REDACTED]

IF A TRANSMITTING PROBLEM OCCURS, CONTACT THE TRANSMITTING ATTORNEY AT (312) 902-5604

DATE: March 25, 1998 TIME: 12:50pm

TOTAL # OF PAGES INCLUDING COVER LETTER: 11

CLIENT/MATTER #: [REDACTED]

CLIENT NAME:

MATTER NAME:

COMMENTS/MESSAGE:

202 MAR 25 11 2 05

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(For Messenger Department Use Only)

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Date \_\_\_\_\_ Time \_\_\_\_\_

Signature \_\_\_\_\_

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801.40  
801.116

Formation of  
LLC / like  
Partnership

WHYER'S DIRECT DIAL NUMBER

March 24, 1998

John Patrick Sharpe  
Premerger Notification Office  
Bureau of Competition  
Sixth & Pennsylvania Avenue, N.W.  
Room 303  
Washington, DC 20580

Re: Premerger Notification Requirements Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act")

Dear Mr. Sharpe:

I am writing to you to confirm our view that a Notification and Report Form is not required to be filed in connection with any of the transactions described below. Where applicable, I have set forth the reason that a particular transaction does not give rise to a reportable event under the Act. In addition, to assist you in considering our analysis, I have attached exhibits depicting the various transactions.

**Formation of New LLC (Exhibit A)**

*No filing was required for its formation*

XYZ LLC is an existing limited liability company that controls a number of operating businesses, each of which is conducted through a separate wholly-owned corporate subsidiary of XYZ LLC. XYZ LLC, which is its own ultimate parent entity, has total assets on a consolidated basis in excess of \$100 million.

Three individuals who are interest holders in XYZ LLC have formed XYZ Inc. in contemplation of the transactions described below involving Target Inc. (the "Target Acquisition"). XYZ Inc. is its own ultimate parent entity and will not have a regularly prepared balance sheet prior to the consummation of the Target Acquisition. *Note: 801.116 is not usable in 801.40 analysis.*

XYZ Inc. will form a wholly-owned limited liability company ("New LLC") in contemplation of the Target Acquisition. New LLC's operating agreement will provide that a corporate management company ("Manager"), with no ownership interest in New LLC, will serve as manager of New LLC, and New LLC will not have an independent board of directors (or functional equivalent) elected by the members. The same persons who are owners of New LLC will be shareholders of Manager and will elect directors of Manager, all of whom will be insiders. New LLC will be capitalized with \$150,000 by XYZ Inc. In addition, XYZ LLC will

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loan \$31 million, and another investor will loan \$15 million, to New LLC, each loan to be made in exchange for a subordinated note that is convertible into interests in New LLC. Finally, New LLC will borrow \$154.5 million from a syndicate of institutional lenders.

**Analysis.** None of the steps taken in connection with the formation and capitalization of New LLC is reportable. Given the nature of the interests in New LLC and the management terms of its operating agreement, New LLC should be regarded as a partnership and not a corporate entity. Therefore, no voting securities have been issued. Furthermore, the formation of a wholly-owned subsidiary would not be reportable in either case. *o/c*

**Acquisition of Target (Exhibit B)**

New LLC will loan \$200.5 million (all of which has been contributed as described above) to XYZ Inc. XYZ Inc., in turn, will purchase all of the outstanding capital stock of Target Inc. from Seller in consideration for \$200.5 million in cash and the issuance of a promissory note in the amount of \$53.4 million to Seller.

**Analysis.** XYZ Inc. has no regularly prepared balance sheet and less than \$10 million in total assets, excluding the proceeds of the loan from New LLC, which proceeds will be used to fund the Target Acquisition. Accordingly, under Rule 801.11(e), XYZ Inc. does not meet the size-of-the-person test, and the stock acquisition is not reportable. *ok*

**Combination of Target and New LLC (Exhibit C)**

*If 100% owned, then it is not like a partnership - all assets are held*

At this point, both Target Inc. and New LLC are wholly-owned by XYZ Inc. XYZ Inc. intends next to merge these two wholly-owned entities by contributing 100% of the capital stock of Target Inc. to New LLC in exchange for (i) the assumption of the \$53.4 promissory note owed by XYZ Inc. to Seller and (ii) the cancellation of the \$200.5 million note due from XYZ Inc. to New LLC. Target Inc. would then be merged into New LLC with New LLC surviving the merger. Following the merger, New LLC will pay the \$53.4 million note to Seller using cash held by Target Inc. prior to such merger.

**Analysis.** The exemption for intraperson transactions applies only to transactions in which the acquired and acquiring person are deemed to be the same person by reason of holdings of voting securities. However, it is our understanding that the staff has interpreted the intraperson exemption to apply to circumstances in which the acquired and acquiring person are deemed to be the same person as a result of 100% ownership interest in a limited liability company. Thus, since both Target Inc. and New LLC are deemed to be the same person as a result of XYZ Inc.'s 100% ownership interest in both entities, the foregoing transactions are exempt from filing.

[REDACTED]

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#### Conversion of Convertible Notes (Exhibit D)

The convertible notes of New LLC held by XYZ LLC and the other investors then would be converted into interests in New LLC. After giving effect to such conversion, the ownership of New LLC would be as follows:

XYZ Inc.	0.1%
XYZ LLC	80.9
Other Investors	19.0

*Analysis.* As noted above, the New LLC operating agreement assigns management responsibility to the managing member, and New LLC will not have an independent board of directors (or functional equivalent) elected by the members. Accordingly, New LLC should be regarded as a partnership-like entity and not a corporate entity, in which case, the New LLC interests would not constitute voting securities. Therefore, the conversion of the notes into New LLC interests would not be reportable. Furthermore, no person will be deemed to acquire the underlying assets of New LLC since no person will hold 100% of the New LLC interests. OK

#### Exchange of New LLC Interests for XYZ LLC Interests (Exhibits E and F)

XYZ Inc. will contribute its interests in New LLC to XYZ LLC in exchange for an interest in XYZ LLC. This interest will be a new series (Series F) that will convey to XYZ Inc. the right to designate a manager to manage the operations of New LLC on behalf of XYZ LLC. The current expectation is that Manager will designate a person who is an "insider" - i.e., a person who is a shareholder and director of XYZ Inc. Currently, there are outstanding Series A through E interests in XYZ LLC. Each series conveys to its holders the right to designate a manager of XYZ LLC who is delegated authority under the XYZ LLC operating agreement to manage, on behalf of XYZ LLC, a corresponding business owned by XYZ LLC (i.e., direct the long-term planning and decision making of such business). As a result, XYZ LLC will hold approximately 81% of the outstanding interests in New LLC. Exhibit F sets forth the final structure resulting from these transactions. OK

*Analysis.* XYZ Inc. will not own 100% of the LLC interests in XYZ LLC, nor will XYZ LLC own 100% of the New LLC interests. Accordingly, neither the issuance of the Series F interests in XYZ LLC to XYZ Inc. nor the contribution of the interests in New LLC by XYZ Inc. to XYZ LLC is reportable since neither would be deemed to convey the underlying assets of the subject LLC. OK

[Redacted]

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For the foregoing reasons, we do not believe that any of the parties to these transactions are required to file a Notification and Report Form under the Act with respect to any of these transactions. If you have any questions or comments regarding our conclusions, please call me at the above-referenced telephone number. Thank you in advance for your prompt consideration of these matters.

Very truly yours,

[Redacted signature block]

[Redacted]

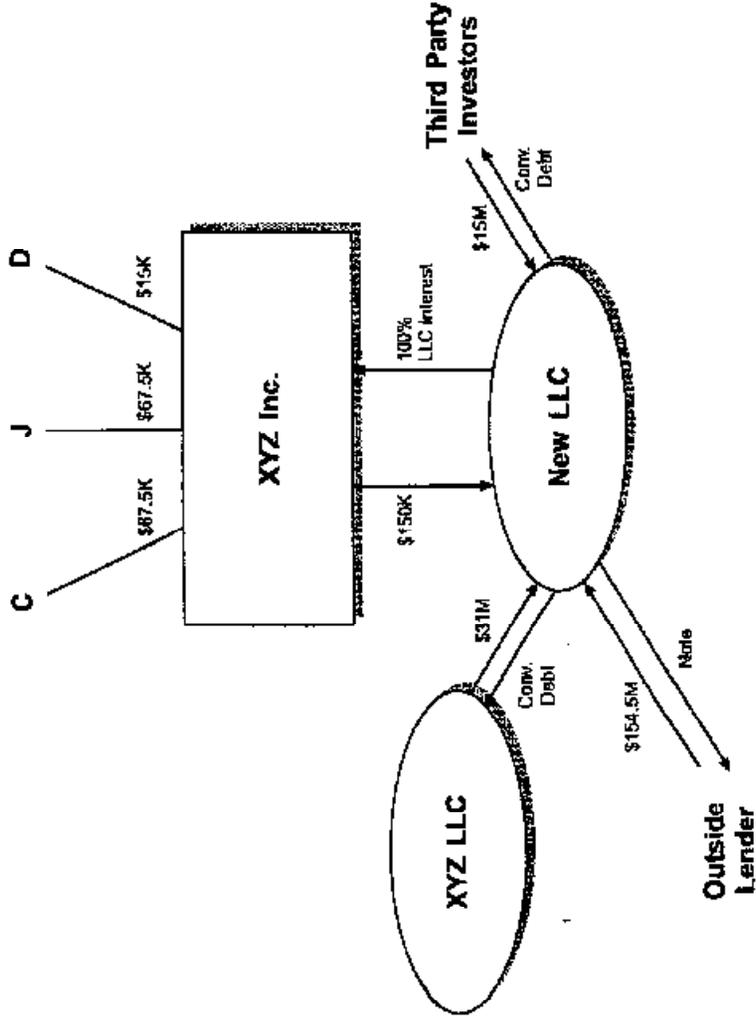
*I concur with this letter.  
RS reviewed a prior draft. This letter is a final  
that addresses most of RS's concerns - exceptions  
and clarifications are noted.*

[Redacted signature block]

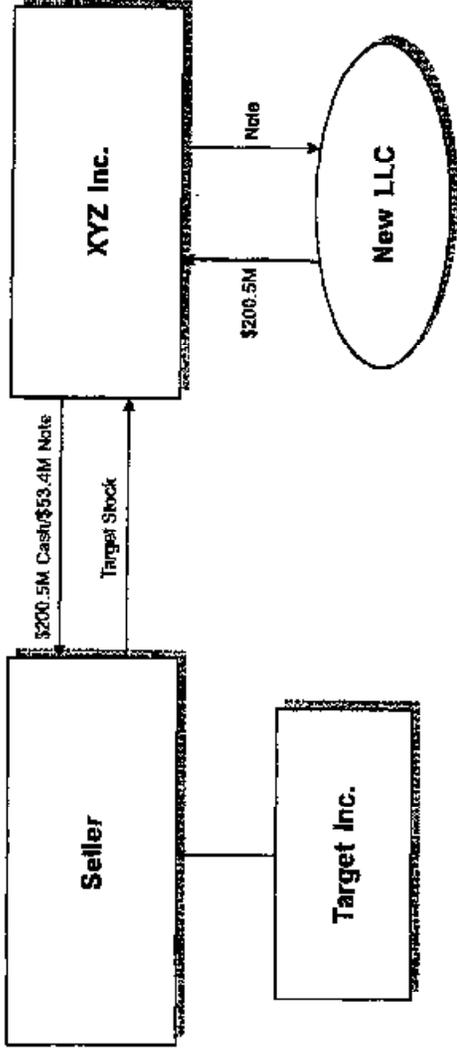
*3/31/98*

*(RS)*

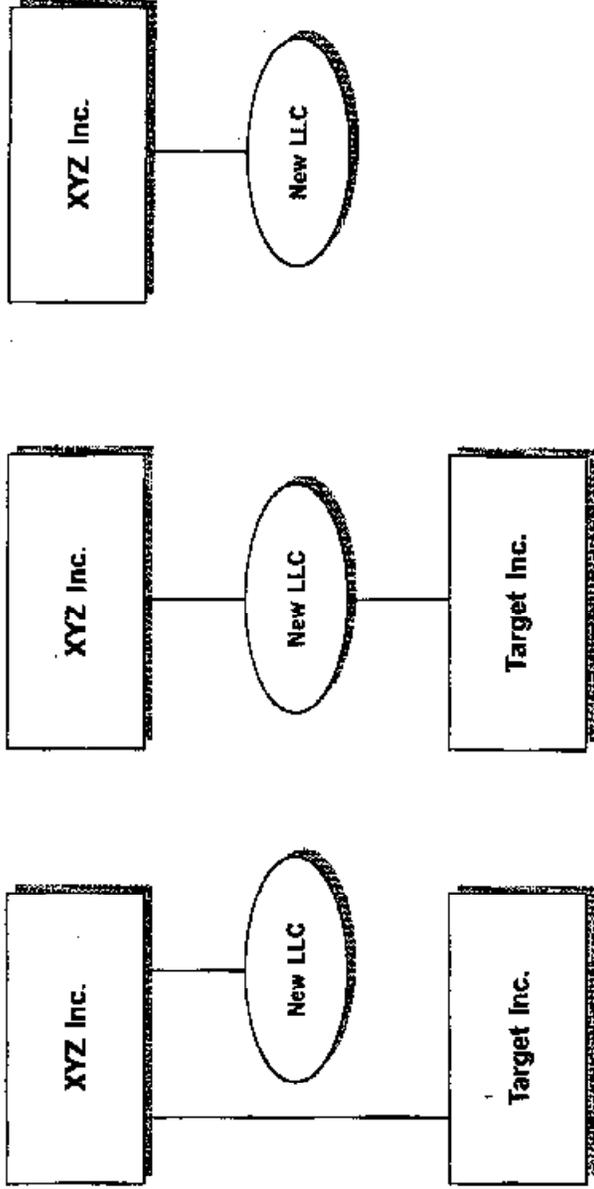
# EXHIBIT A FORMATION OF NEW LLC



# EXHIBIT B ACQUISITION OF TARGET



**EXHIBIT C**  
**COMBINATION OF TARGET AND NEW LLC**



**EXHIBIT D**  
**CONVERSION OF CONVERTIBLE NOTES**

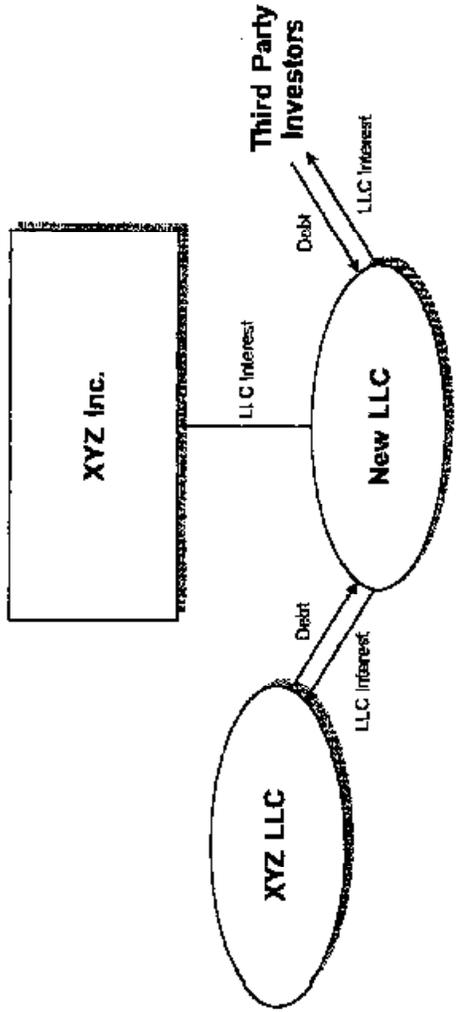
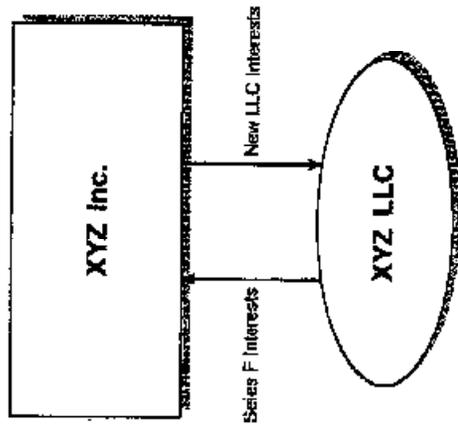


EXHIBIT E

**EXCHANGE OF NEW LLC INTERESTS  
FOR XYZ LLC INTERESTS**



**EXHIBIT F**  
**FINAL STRUCTURE**

