801.10 (c)

[redacted]

April 21, 2000

VIA FACSIMILE and HAND DELIVERY

Mr. Michael Verne
Federal Trade Commission
Premerger Notification Office
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: **Confirmation of Fair Market Valuation Analysis**

Dear Mike:

As you will recall, we e-mailed to you a hypothetical fact situation to facilitate our discussion of an issue regarding a fair market valuation question. We have attached a copy of that hypothetical to this letter.

You advised that, under the facts presented in the attached hypothetical, each of A and B can rely on a good faith, fair market valuation determination of the business being "acquired" through the LLC formation if the valuation is prepared by an accounting firm on behalf of the respective party's board of directors and the respective boards adopt that valuation. A party is entitled to rely on a good faith, fair market valuation, even though the details of the business transaction between the parties could reflect a larger difference in the relative asset contributions to the venture than would result from comparing accountant-generated fair market valuations. In short, under the hypothetical presented, you advised that as long as there has been a good faith, fair market valuation of the assets actually being acquired, the different factors as presented by the transaction agreement, as described in the hypothetical would not come into play in the fair market valuation determination for H-S-R analysis.

[redacted]

[redacted]

We believe that this letter accurately describes the guidance that you provided on the telephone. The conclusion was that no filing would be required if the accountant-derived fair market valuation did not exceed the $15 million size-of-transaction threshold. If you disagree with our summary of our discussion or the result, please let us know as soon as possible as our client will be proceeding based on this analysis.

As always, thank you for your prompt assistance in addressing this issue.

[redacted]

Enclosure

AGREE WITH THE WRITER'S CONCLUSION.
N. OVUKA AGREES.

B Michael Verne
4/26/00

[redacted]

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HYPOTHETICAL FOR DISCUSSION WITH FTC PREMERGER OFFICE

Company A and Company B intend to form a new LLC to combine their respective businesses. A and B will each acquire a 50% interest in the LLC. Each of A and B will be contributing a business (hard assets, contracts, accounts, employees, but not receivables). No liabilities will be transferred to or assumed by the LLC, with the exception of a $5 million debt related to the assets being contributed by B. Because both A and B will be deemed to control the LLC and two separately controlled businesses are being contributed to the LLC, this is a potentially reportable event under Formal Interpretation 15.

The parties have not established the "purchase price" as they are contributing assets. Thus, A needs to do a fair market valuation of B's assets being contributed. To do so, A will value the assets of the business on a going concern basis, and B needs to do a similar fair market valuation of A's assets that are being contributed to determine whether either side is acquiring $15 million in assets, so that the size of transaction test is met.

A and B have retained accountants to perform preliminary valuations of their respective businesses. The accountants have determined the EBIT for the businesses to be contributed, and have applied a multiple of that EBIT to determine their valuations. Assume that the multiple of EBIT is based on multiples paid to acquire businesses similar to those being contributed to the LLC. The contributions are shown in the table below.

Company A contributions	Company B contributions
A's business (EBIT based FMV = $8M)	B's business (EBIT based FMV = $10M, not including the $5M debt noted below)
$10M cash, designated as working capital	Note payable (debt) of $5 million

The issue presented is the following. There is a reasonable method of deriving a fair market value for A's business that would value it at $8M, and would value B's business at $10M. If those values can be used, then neither A nor B would be making a reportable acquisition.

However, another way of viewing the transaction would say that the parties need to account for the fact that, in addition to the businesses, A is contributing cash and B is contributing a liability to the venture. In essence, the issue is whether, or how, the parties need to account for the fixed amounts being contributed (whether as cash assets or a note payable liability) in deriving fair market value of the respective businesses. Under that scenario:

A's contribution is = A's business + $10M cash.
B's contribution is = B's business - $5M note payable.
Otherwise put, would the Premerger Office take the position that the parties' agreement, which results in a 50/50 ownership split, implicitly says:

A's business + $10 M = B's business - $5M

A's business + $15M = B's business.

If you assume that A's business has some positive value, then under this scenario B's business being "acquired" by A would be worth some amount (undetermined) over $15 M. If that's the

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case, would A would need to file and observe the waiting period prior to "acquiring" B's assets through the formation of the LLC even if there is another method of determining fair market value that would say that B's assets/ business is worth only $10 million?