8 of. 10

From: [redacted]
To: "mverne@ftc.gov" <mverne@ftc.gov>
Date: Tue, May 15, 2001 3:11 PM
Subject: follow-up on conversation yesterday

Dear Mr. Verne:

I am writing to confirm the substance of our telephone conversation yesterday concerning a transaction involving a limited liability company that one of my firm's clients has been negotiating.

During our conversation, I described the following situation: "A" currently holds a less-than-50% member interest in the LLC. All the rest of the member interests are held by an unrelated party, "B." A holds other business assets outside the LLC, the fair market value of which is less than $50 million. A and B have been negotiating a transaction that would result in B acquiring those assets, through the LLC, without any change in the respective holdings of LLC member interests by A and B. For tax reasons, B would prefer to structure the acquisition in two steps, the second occurring immediately after the first. In the first step, A would sell the assets to the LLC in exchange for additional member interests, which would give A over 50% of all the member interests. In the second step, A would sell to B, for cash equal to half the value of the assets just transferred into the LLC, enough of A's member interests in the LLC to return A and B to the respective membership percentages they currently hold.

When I called, I asked whether the FTC would consider these steps separately or as part of one transaction. I asked because, if the steps were considered separately, each of them could require HSR filings under the FTC's Formal Interpretation concerning limited liability companies. (In the first step, assuming the fair market value of the LLC's current assets are over $50 million, A would need to file as the acquiring person and B as the acquired person with respect to those assets, because A's increased membership interest in the LLC would give it control of those assets; in the second, B would need to file as the acquiring person and A as the acquired person with respect to all the assets of the LLC, due to the transfer of control of the LLC back to B.) You explained that, under the circumstances described, the two steps would not be considered separately and, instead, would be considered part of a single transaction.

Therefore, since the respective member interests of A and B would be the exactly the same immediately after the transaction as they are now, the only acquisition that would need to be considered pursuant to the Formal Interpretation is the acquisition by B of the assets now held separately by A. As indicated above, the fair market value of those assets is less than $50 million, and so not enough to satisfy the HSR "size of the parties" test.

B. Michaelson
5/16/01

N. OVUKA CONCURS

I would appreciate it if you would e-mail me or call me [redacted] to confirm that you agree with this conclusion and the underlying reasoning.

Thank you again for your assistance on this matter.

Very truly yours,

[redacted]

THERE IS NO ACQUISITION PRICE UNLESS 100% OF THE INTERESTS ARE BEING ACQUIRED FROM THE SINGLE MEMBER. IN THIS INSTANCE FAIR MARKET VALUE OF THE UNDERLYING ASSETS IS THE SIZE-OF-TRANSACTION.