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September 24, 2001

BY FACSIMILE

Michael Verne
Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: HSR Analysis of Partnership Transaction

Dear Mike:

I am writing to confirm my understanding of advice that you gave to me during our telephone conversations on September 19, 2001, and September 20, 2001, concerning the appropriate Hart-Scott-Rodino ("HSR") analysis of a particular transaction. Below is a description of the transaction we discussed, along with a few additional facts that we did not discuss, and my understanding of the appropriate HSR analysis of the transaction.

Today A, B, and C own a limited liability company ("LLC"). A is entitled to over 50% of the profits or assets of LLC. LLC holds $2.4 million in cash and pending patent applications. A, B, and C are planning a transaction with D, a foreign person, and others that will result in the conversion of LLC into a partnership ("LP"). No one person (after the aggregation of the holdings of entities under common control for HSR purposes) will be entitled to at least 50% of the profits or assets of LP. Specifically, the transaction involves the following steps.

(1) A, B, C, D, and possibly others will form a corporation ("Newco GP") which will serve as the general partner of LP. The only holding of Newco GP will be minority partnership interests in LP. No one (after the aggregation of the holdings of entities under common control for HSR purposes) will hold at least 50% of Newco GP's outstanding voting securities or have the contractual right to appoint at least 50% of Newco GP's directors. None of Newco GP's stockholders will hold

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Newco GP voting securities valued in excess of $50 million. Therefore, the formation of Newco GP would not be reportable because the size-of-transaction test would not be satisfied with respect to any of Newco GP's stockholders at the time of the formation of Newco GP.

(2) LLC will be converted into LP. LP will form a wholly-owned subsidiary -- Newco Sub -- to hold certain assets that A (or a wholly-owned subsidiary of A) and D (or wholly-owned or majority owned subsidiaries of D) will transfer to LP on the day of LP's formation. The creation of a wholly-owned subsidiary is not reportable under the HSR Act.

(3) LP will issue and sell to E $50 million worth of subordinated convertible promissory notes which will be convertible into LP interests. The acquisition of such notes, and their possible subsequent conversion, would not be reportable under the HSR Act because E would not hold 100% of the interests of LP as a result of the conversion.

(4) A subsidiary of A will purchase from LP a convertible note in the principal amount of $2.5 million. This purchase would not be reportable under the HSR Act because it does not involve the transfer of assets or voting securities.

(5) D will form a wholly-owned partnership to hold D's interests in LP. The formation of a wholly-owned partnership is not reportable under the HSR Act. Similarly, A will form a wholly-owned subsidiary to hold A's interests in LP and to purchase the note described in # 4 supra. The formation of a wholly-owned subsidiary is not reportable under the HSR Act.

(6) D, pursuant to a number of agreements some of which are termed asset sale agreements, will transfer to LP the following: (i) 33% of the stock of a foreign subsidiary ("Holdco"); (ii) 20% of the equity of a foreign subsidiary of Holdco ("Holdco Sub"); (iii) 100% of the interests of a foreign unlimited liability company ("ULC"); and (iv) assets located in the U.S. D will receive interests in LP, a $11.5 million promissory note, and $7.5 million.

(7) Pursuant to a leasing agreement, Holdco Sub will lease substantially all of an asset to LP in exchange for services to be provided by LP. The terms of the lease agreement could possibly be interpreted under HSR regulations and interpretations as the transfer of the underlying asset to LP.

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(8) On the same day that LLC is converted into LP, and A's LLC interests become LP interests, A (or a subsidiary of A) will contribute to LP, through various agreements some of which are termed asset purchase agreements, certain assets. A (or a subsidiary of A) will receive from LP a $15 million promissory note and $45 million.

The formation of a partnership is not a reportable event under the HSR Act. Therefore, if the steps described above are analyzed as part of the formation of LP, no HSR filing would be required in connection with the transaction described above. However, two of the new partners of LP, A and D, will receive not only interests in LP, but also cash and notes. I understand from our conversations that a partnership's acquisition of assets at the time of its formation from its new partners would not be reportable even if the new partners receive partnership interests and cash in exchange for the assets they transfer to the new partnership if the cash amounts to equalization payments. See ABA Section of Antitrust Law, *Premerger Practice Manual* (1991 edition) at Interpretation # 47.

As we discussed, A currently carries its interests in LLC on its books at $1 and will carry its interests in LP in the future on its books at $1. Thus, from a financial accounting perspective, $1 would be the value of A's capital contributions to LP. In addition, A is treating its transfer of assets to LP from an accounting perspective as a sale of assets. I understand from our conversations, that these facts do not preclude the conclusion that LP's acquisition of assets from A at the time of the formation of LP would not be reportable so long as the cash and notes A receives at the time of the formation of LP can be characterized as equalization payments.

On the day that LP is formed, A will cause its wholly-owned subsidiary to transfer assets to LP and A will receive LP interests in exchange for its LLC interests, and cash and a note. I understand that if the value of A's interests in LLC and the assets that it will transfer to LP exceed the value of the cash and notes that A will acquire from LP, the cash and notes that A will acquire from LP on the day of LP's formation would be equalization payments.

It is difficult for A to determine the value of its majority interests in LLC, but LLC does hold cash and patent applications with some value. Therefore because the $60 million (comprised of $45 million in cash and a $15 million note) that A will receive from LP at the time of LP's formation approximates the value of the assets that A (or a wholly-owned subsidiary of A) will transfer to LP at the time

of its formation, and does not compensate A for its interests in the LLC that will be converted into LP, the $60 million may be characterized as an equalization payment and LP would not have to report its acquisition of assets from A on the day of its formation.

The same analysis applies to D. D will receive in exchange for assets and interests in subsidiaries, LP interests, cash, and a note. Because the value of the assets and securities that D is transferring to LP at the time of LP's formation exceeds the value of the cash and the note that D will acquire from LP on that day, such cash and note may be regarded as equalization payments. Therefore, LP does not have to report its acquisition of assets and voting securities from D on the day of LP's formation, including the acquisition described in #7 supra.

Please let me know if you disagree in any way with the analysis described above. As always, thank you for your help.

Best regards,

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ASSUMING THESE ARE BONA FIDE EQUALIZATION PAYMENTS, AGREE THAT ALL OF THIS IS PART OF THE FORMATION OF A PARTNERSHIP AND THEREFORE NOT REPORTABLE. N. OUUKA CONCURS.

B. Mc[illegible]
9/26/01

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