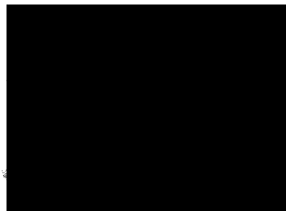
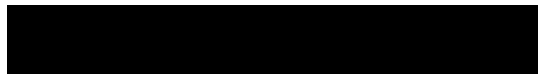
F.I. 15





February 23, 2004

VIA EMAIL AND REGULAR MAIL

Mr. B. Michael Verne
Federal Trade Commission
Premerger Notification Office
Room H-314
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: LLC Formation Interpretation

Dear Mike:

This letter follows up on our discussion on Wednesday, February 18, 2004 relating to a proposed LLC formation, as supplemented by my email to you on Friday, February 20 providing additional details on the nature of the transaction. During our call, you concluded that the situation described below would not be reportable under Formal Interpretation 15 which applies to the formation of new LLCs.

I also understand from our discussion that the proposed changes to the HSR treatment of LLCs may be issued in the near term and could possibly become effective this summer. I understand that the proposed transaction would need to be evaluated in light of those changes if those changes go into effect and the transaction has not been closed prior to the effective date. Based on our discussion and the analysis set forth below, the parties intend to complete the transaction without making an H-S-R filing (subject to the closing occurring prior to the effective date of any new rules governing LLCs, as noted above). Please advise me as soon as possible if you have any questions regarding the analysis set forth below.

Facts[1]

Company A, through various wholly-owned subsidiaries, owns several Businesses. Company A and Company B have reached an agreement in principle to create a new, jointly owned LLC that will control and operate the Businesses. After the transaction, the operations of

[1] These facts summarize those we discussed on February 18, as supplemented by my February 20 email to you.

the new LLC will consist entirely of the Businesses held by Company A prior to the transaction. Mechanically, Company B will contribute cash to the LLC (or various of its subsidiaries). The LLC (or the various subsidiaries) will also arrange to borrow additional funds. Company A will then sell the assets of the Businesses to the LLC in exchange for cash (from Company B's investment and the borrowed funds) and a 10% interest in the LLC. Thus, after the LLC's formation, funding and acquisition of the Businesses from Company A, Company B will hold a 90% interest in the LLC and Company A will hold a 10% interest in the LLC, and will have received a significant cash payment. The LLC will consist of the Businesses previously owned by Company B, which will now be burdened by significant debt. Company B also will obtain an option to purchase Company A's 10% LLC interest. The option will be exercisable at any time. However, the price that Company B would have to pay to exercise the option is approximately three times the valuation that Company B is paying for its 90% LLC interest. Put another way, in order to exercise the option to acquire a 10% interest, Company B would need to pay Company A an amount that is approximately one-third of the amount that Company B is going to invest to obtain its 90% interest. Thus, this is a bona fide option that is subject to contingencies that may or may not occur. Further, there is no agreement between Company B and Company A requiring Company B to exercise its option to purchase the remaining 10% LLC interest.

Analysis

As we discussed on Wednesday, under the facts described above, you concurred that the formation of this LLC would not be reportable as an acquisition by Company B of Company A's Businesses. This analysis is governed by Formal Interpretation 15 relating to the treatment of LLCs under the H-S-R rules. Under Formal Interpretation 15, where two independent entities form an LLC in which they will both hold interests, that LLC formation is reportable only if two or more separately controlled and preexisting businesses are combined in the LLC. In this case, all of the businesses being put into the LLC were controlled by Company A, and Company B is paying only cash in exchange for its LLC interest. Company A will retain an ownership interest in the LLC. Thus, the underlying LLC formation is not reportable under Formal Interpretation 15.

In addition to the foregoing, we discussed Company B's option to acquire Company A's 10% LLC interest and whether that option would change the basic conclusion that the LLC formation was not a reportable event under Formal Interpretation 15. We specifically discussed the option in light of Interpretation 191 of the Premerger Notification Practice Manual (which discusses an LLC formation with an equalization payment and an option to purchase LLC interests). You concluded that if the option in the scenario we described to you was a bona fide option and was subject to contingencies that might or might not occur, then the Interpretation 191 analysis would not apply and the analysis would be governed by Formal Interpretation 15. Here, where there is no agreement or present intention for Company B to exercise the option, and where exercise of the option is subject to legitimate contingencies, you advised that the Premerger Office would not view the option as removing this transaction from the baseline Formal Interpretation 15 analysis. Accordingly, as noted above, since only one party (Company A) controlled the Businesses that are going in to the LLC and since Company A will retain a 10% interest in the

LLC, the LLC may be formed in a manner described above without an H-S-R filing as long as Formal Interpretation 15 governs the H-S-R analysis related to the formation of LLCs.

As always, we greatly appreciate your assistance in this matter. Please call me or [redacted] if you have any questions or concerns regarding this analysis.

Sincerely,

[redacted]

[redacted]

AGREE -
B. Michael Verne
2/24/04

[redacted]