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July 6, 2004

Ms. Nancy Ovuka
Compliance Specialist
Premerger Notification Office
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room 301
Washington, D.C. 20580

Re: Re: Integrating Operations of Certain Limited Liability Companies

Dear Ms. Ovuka:

I am writing to follow up on our telephone conversations of June 29, 2004 and to confirm my understanding that, under these circumstances, no further HSR filings will be required as a result of the restructuring moves described below.

In the late fall of 2003, "Fund A", through a newly-formed LLC, "Holding Company B", acquired the assets of "B Industries" out of bankruptcy. In addition to assets, voting securities of certain subsidiaries of B Industries were acquired. To facilitate the acquisition, a principal LLC subsidiary wholly owned by Holding Company B, "Operating Company B", was established. Below Operating Company B, a number of additional LLC subsidiaries were set up. Holding Company B is owned 66.6% by Fund A, which is the ultimate parent entity, with the remaining membership interests in Holding Company B being owned by two other funds. HSR notification and report forms were filed by Fund A and B Industries in connection with the acquisition, and the waiting period expired or was terminated prior to closing.

In the spring of 2004, Fund A, through a different newly-formed LLC, "Holding Company C", acquired the assets of "C Industries" out of bankruptcy. In addition to assets, voting securities of certain subsidiaries of C Industries were acquired. To facilitate the acquisition, a principal LLC subsidiary wholly owned by Holding Company C, "Operating Company C", was established. Below Operating Company C, a number of additional LLC subsidiaries were set up. Holding Company C is owned 100% by Fund A. HSR notification and report forms were filed by Fund A and C Industries in connection with the acquisition by Fund A of the C assets. These filings reflected Fund A's control of Holding Company B and its assets and consequently the combination of the B assets and operations with the C assets and operations. The waiting period on the Fund A/C Industries filings expired or was terminated prior to the closing.

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Fund A is now in the process of integrating the operations of Holding Company B and Holding Company C. Fund A will combine Holding Company B and Holding Company C, and then cause the resulting entity to effect a number of mergers and asset transfers for the purposes of streamlining the organization and aligning operations along product and to an extent geographic lines. To effect the combination of Holding Companies B and C, Fund A is considering three different basic approaches:

- Holding Company C would merge into Holding Company B, with the interests of Fund A and the two other owners with an interest in Holding Company B being adjusted based on the relative values of Holding Company B and Holding Company C. Promptly following the merger, the resulting entity would elect to convert under state law from a limited liability company into a corporation.
- Holding Company B would either have Operating Company B elect to be taxed as a "c corporation" for federal income tax purposes or create a new subsidiary (Newco) taxed as a c corporation and contribute the ownership interests of Operating Company B to Newco. Then Operating Company B (or Newco) would be distributed to the members of Holding Company B pro rata to their membership interests. After the distribution, Holding Company C would merge into Operating Company B (or Newco). If the Newco approach is used, there would be two operating subsidiaries; otherwise the combined holding company would also hold the B assets and Operating Company C would operate as a subsidiary.
- In the third option under consideration, Holding Company B would sell all of the membership interests in Operating Company B to Holding Company C in a taxable transaction in exchange for convertible preferred stock with a value equal to Holding Company B's cost. The preferred stock would then be used to pay down loans from or return equity to the three funds which own Holding Company B, resulting in ownership by the funds in the combined entity. Holding Company C would become the combined holding company, with Operating Company B and Operating Company C being the principal operating subsidiaries.

The ownership interest in the combined holding company of Fund A and the two minority owners of Holding Company B under each of the alternatives under consideration would not vary based on the alternative ultimately chosen. Each will end up with proportional ownership in the combined company based on the relative values of Holding Company B and Holding Company C. Fund A will in any event own more than 50% of the membership interests of the combined entity.

During our conversation, we considered two different lines of analysis in discussing whether the integration process triggers an HSR filing requirement. First, we discussed the application to these facts of Formal Interpretation #15 and related learning on the current treatment of LLC's under the Premerger Notification Rules. Second, putting aside the question of whether those rules on LLC's might lead us to conclude that a particular step, considered by

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itself, would trigger a filing requirement, we discussed whether any further filings are necessary under these circumstances because of the HSR filings made in 2004 which covered the combination of the businesses and operations of Holding Company B and Holding Company C.

Addressing the latter point first, the acquisition of the C Industries assets by Fund A was covered by the 2004 HSR filings, and Fund A already held the B Industries assets, as reflected in the filings. Since no objection to the acquisition was raised prior the expiration or early termination of the waiting period, Fund A had, and still has, an effective filing for acquisition of all of the C Industries assets. A variety of modifications made to a transaction prior to the closing do not necessitate a re-filing—for instance, shifting from an asset deal to a stock deal (or vice versa) is not material enough to require an amendment. See Int. # 265 of the ABA Premerger Notification Practice Manual. No transaction under consideration post-closing (such as, for instance, substituting a corporate form for an LLC form of holding company) would, if undertaken prior to closing, require a modification to the filing or a new filing.¹ As the integration transactions under consideration can properly be seen as “clean up” refinements to the structures of the basic acquisition, or steps involved in completing the acquisition and integration of the businesses formerly run by C Industries and B Industries, and the basic acquisition has an effective filing in place, there should be no further filing requirement for the steps outlined above. My understanding of our conversation was that you concurred in the view that since the 2004 HSR filings reflected the acquisition by Fund A of the assets now held by Holding Company C, and Fund A controls Holding Company B, the transactions involving Holding Company B and Holding Company C outlined above are fairly covered by those filings and thus do not trigger any further filing requirement.²

While the foregoing would be dispositive of the question of whether a filing is required, we first reviewed the proposed transactions in light of Formal Interpretation #15, in some detail. Assuming for the sake of analysis that we did not have the effective filing to cover the transactions, my understanding of where we came out in the conversation is as follows:

Merger/Conversion. The first alternative involves a merger of Holding Company C into Holding Company B, followed by a conversion of Holding Company B from limited liability status into corporate solution. You agreed with me that under Formal Interpretation #15, the merger should not require a filing because the two businesses being combined are not separately controlled before the merger. However, you did not agree with the further suggestion that the parenthetical exclusion in §801.40 for corporations formed “in connection with” mergers was a basis for concluding that the conversion into a corporation was not potentially reportable under §801.40. Your view was that the conversion would be potentially reportable, at least until the proposed

¹ The one exception might be the issuance of voting securities that will ultimately be owned by the two minority owners of Holding Company B. Based on the valuation of the B Industries business in the HSR filing, the voting securities issuable to each minority owner of Holding Company B will have a value of less than \$50 million per owner.

² All integration steps are expected to be completed during calendar year 2004.

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amendments to §802.10 become effective.

Distribution/Merger. The second alternative involves a pro rata distribution of Operating Company B to the members of Holding Company B, followed by a merger of Operating Company B with Holding Company C. A variation of this under consideration is the creation by Holding Company B of a new wholly-owned subsidiary, Newco, and the contribution of Operating Company B to Newco. The ownership of Newco would then be distributed to Holding Company B owners, to be followed by a merger with Holding Company C. We concurred that the distribution of the LLC interests would not be reportable because no one would be acquiring 100% of the interests, and that the follow on merger should not be reportable under Formal Interpretation #15 for the reasons discussed above. Accordingly, the only area of potential reporting here would be if Newco were created as a corporation rather than an LLC; that was a question you wished to reserve on.

Sale of Assets. The third alternative involves the sale of Operating Company B to Holding Company C. As this would involve all of the membership interests of Operating company B, it would be treated as a sale of assets under Formal Interpretation #15 potentially reportable under the rules.

Downstream Consolidation. Finally, once Holding Company B and Holding Company C are combined, all transactions among the wholly-owned subsidiaries of the new "Holding Company BC" (or between a subsidiary and Holding Company BC) should be exempt because wholly-owned LLC's can be ignored or looked through for purposes of HSR analysis. Thus the transfer, say, of an operating subsidiary from the B side to the C side would be exempt either because it would be considered as an intracompany transfer of assets or, if a corporate subsidiary is involved, it would be exempt under §802.30.

* * * * *

Please let me know if you disagree with any of the foregoing or if my memory of our conversation is faulty in some respect. I appreciate your time and patience in helping work through these questions.

Sincerely yours,

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7/8/04

agree as long
as integration occurs
within 1 year as
required under 803.7.
N. Ovuka M. Verre concurs.

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