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August 5, 2004

Nancy M. Ovuka
Compliance Specialist
Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, DC 20580

2004/08/11 11:13:00
FBI/DOJ

**Re: Acquisition of 100% Ownership of LLC by Member that
Held Over 50% Ownership upon LLC's Formation and
Where There Has Been No Prior HSR Notification**


Dear Nancy:

I raised yesterday with you the following hypothetical situation. A two-member US LLC was formed in 1998. Member A contributed cash only and received an over-50% ownership interest in the LLC. Member B contributed the assets of an existing business and received an under-50% interest in the LLC. No HSR filing was made in connection with the formation of the LLC and the acquisition by A and B of their respective interests. In 2004 A and B expect to agree that A will acquire all of B's interest in the LLC, thus giving A an 100% interest ("the Transaction").

I asked you whether A's acquisition of B's entire interest would be an HSR-notifiable transaction (assuming HSR thresholds, etc. are satisfied) in two different scenarios: (1) if the Transaction were consummated under the current law and existing FTC interpretations; or, alternatively, (2) if the Transaction were not consummated until 2005.

You indicated that the Transaction would be notifiable if consummated today under current law and interpretations. The reasoning, as we discussed, is based essentially on the following language of Formal Interpretation Number 15: "The acquisition of a membership interest in an existing LLC will be a potentially reportable event (1) if it results in the acquiring person holding 100 percent of the

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membership interests in that LLC, and (2) that person had not previously filed for and consummated the acquisition of control of that LLC. Such an acquisition is reportable as the acquisition of all the assets of the LLC. This is similar to the PNO's treatment of acquisitions of partnership interests." ABA Section of Antitrust Law, Premerger Notification Practice Manual, Third Ed., at 478-79 (2003)(emphasis added).

You said that if, after consummation, A were to hold only a 99% interest and B or someone else were to hold the remaining 1%, an HSR filing would not be required. You also indicated that your view on the notifiability of the (100%) Transaction was unaffected by the fact, under current law and PNO interpretations, that the formation of the LLC with A receiving a controlling percentage of over 50% would not have been notifiable because only one pre-existing business was contributed to the LLC (namely by B) at the time of formation and A contributed only cash but no second, pre-existing, separately controlled business.

The FTC has proposed to revise its HSR regulations and replace Formal Interpretation 15 with Formal Interpretation 18. One of those revisions would treat the acquisition of all outstanding ownership interests by the member already controlling the LLC as an exempt intraparty transfer. See FTC, 16 CFR Parts 801, 802 and 803, Premerger Notification; Reporting and Waiting Period Requirements, Notice of Proposed Rulemaking (March 31, 2004) <http://www.ftc.gov/opa/2004/03/fyi0423.htm> and printed at 69 Fed. Reg. 18686 et seq. (April 8, 2004). You indicated that if the Transaction is consummated after these new regulations are finalized and go into effect, the Transaction likely would not be HSR notifiable. You also cautioned that the Commission's decision regarding the substance and wording of the revisions and their effective date has not been made.

If I have misunderstood your informal advice in any material respect, please let me know right away. Many thanks for your help.

Very truly yours,



cc (Electronic Mail to): novuka@ftc.gov
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8/12/04
agree
N. Ovuka

