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March 18, 2005

BY ELECTRONIC DELIVERY

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

Dear Mike:

This letter is to recount and confirm the recent discussions [redacted] and I have had with you relating to issues of control and valuation concerning the formation of a proposed non-corporate joint venture.

As we summarized during our calls, two parties, Party "A" and Party "B," will form a limited liability company ("LLC"). "A" and "B" each will make certain cash and non-cash contributions to LLC upon its formation. The non-cash contributions will include office furniture and equipment, and hardware. In addition, each "A" and "B" will grant LLC an exclusive software license, and each will enter into a services agreement with LLC whereby LLC will perform certain services for entities owned separately by "A" and by "B" in exchange for future revenues to LLC. On the day of formation, "A" and "B" expect the value of "A's" capital contribution to exceed that of "B," such that "A's" capital account balance will exceed that of "B."

Under the proposed formation agreement, the distribution of profits from LLC to "A" and "B" will be governed by a formula that will depend on certain future revenue calculations. Therefore, the agreement will not guarantee that either "A" or "B" will receive 50% or more of the profits of LLC, although both "A" and "B" anticipate that "A" will receive more than 50% of any profits of LLC.

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Also under the proposed formation agreement, the distribution of assets of LLC upon dissolution will be governed by the parties' mutual agreement. If "A" and "B" cannot agree, they will appoint a third-party liquidator to use its reasonable best efforts to reduce to cash all assets it deems advisable to sell. Subsequently, after payment of expenses and debts, the liquidator will distribute the remaining assets pro rata to "A" and "B" based on their respective capital account balances.

Because it is unclear when the proposed transaction will be consummated, we have conducted this analysis under both the existing Hart-Scott-Rodino ("HSR") rules governing the formation of limited liability companies (i.e., "Formal Interpretation No. 15"), as well as the recently announced HSR rules concerning the formation of non-corporate entities, which will become effective on April 7, 2005.

"Control" of LLC

The HSR rules define "control" of a non-corporate entity as "having the right to 50% or more of the profits of the entity, or having the right in the event of dissolution to 50% or more of the assets of the entity." 16 C.F.R. § 801.1(b)(1)(ii). We understand that if the governing agreement of a non-corporate entity does not designate a fixed percentage of profits or assets upon dissolution for each person who acquires and holds interests of the entity, but rather sets out a formula that depends on variables that will be determined in the future, "control" of the entity would be determined by applying the formula to the total assets of the entity at the time of the acquisition, "as if the entity were being dissolved at that time." Premerger Notification; Reporting and Waiting Period Requirements, 70 Fed. Reg. 11,504 (Mar. 8, 2005). Thus, for a non-corporate entity that is to-be-formed, the contributing parties would prepare a pro forma balance sheet listing all of the assets (including cash) which any person contributing to the formation has agreed to transfer and any credit or obligations which any person contributing to the formation has agreed to extend or guarantee. 70 Fed. Reg. 11,511 (to be codified at 16 C.F.R. § 801.50(c)). If no person would have the right to 50% or more of the assets of the entity if the entity was dissolved immediately after its formation, no person would "control" the entity and the formation would not be reportable.

Based on the above facts, it is our understanding that you advised that "A" would be deemed to "control" LLC if "A's" capital contributions to LLC would exceed those of "B" because "A" would receive more than 50% of the assets of LLC if

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LLC was dissolved at the time of its formation. It is also our understanding that your analysis would be the same if LLC was formed under the current HSR rules or the new rules. Please confirm that our understandings are correct.

Valuation of Assets of LLC

If "A" is deemed to control LLC, "A's" acquisition of interests of LLC in exchange for its contributions to LLC at its formation could be reportable if the value of "A's" acquisition would satisfy the $50 million (as adjusted) size-of-transaction threshold test. We assume for purposes of this analysis that both "A" and "B" would be their own ultimate parent entities, that the proposed transaction would satisfy the size-of-person and commerce jurisdictional thresholds tests, and that no exemption would otherwise apply.

Under the current HSR rules, we understand that the formation of LLC would be treated as an acquisition of assets, where "A" would report as an acquiring person in connection with the assets being contributed by "B." The value of the assets contributed by "B" would be the greater of the acquisition price, if determined, and fair market value. If the value of the assets contributed by "B" would not exceed the $50 million (as adjusted) size-of-transaction threshold, the formation of LLC would not be reportable.

Under the new HSR rules, we understand that the formation of LLC would be treated as an acquisition of non-corporate interests, where "A" would report as an acquiring person in connection with its acquisition of interests of LLC. The value of the interests of LLC to be acquired by "A" would be the acquisition price or the value of the cash and assets contributed by "A" to LLC at its formation (i.e., "A's" consideration for the interests to be acquired). 70 Fed. Reg. 11,511 (to be codified at 16 C.F.R. § 801.10(d)). If "A" cannot determine the acquisition price, the value of the interests to be acquired would be the fair market value. Id.

The board of directors of "A" (or its delegee) would determine the fair market value in good faith and within 60 calendar days prior to the HSR filing or prior to the closing if no HSR filing is required.[1] 16 C.F.R. § 801.10(c)(3). We

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1 We understand that the FTC's Premerger Notification Office would accept as a de facto delegee "A's" chief financial officer or any financial officer of "A" directly responsible for the proposed transaction. ABA SECTION OF ANTITRUST LAW, PREMERGER NOTIFICATION PRACTICE MANUAL (3d ed. 2003), at Int. 92.

understand that the determination should reflect what a third-party in an arm's length negotiation would pay at present in cash for the interests to be acquired. We also understand that the determination need not be made in accordance with generally-accepted accounting principles, and generally will be accepted if its basis is commercially reasonable. ABA SECTION OF ANTITRUST LAW, PREMERGER NOTIFICATION PRACTICE MANUAL (3d ed. 2003), at Int. 92.

Under Section 802.4 of the new rules, "A's" acquisition of interests of LLC would not be reportable if the value of the non-exempt assets contributed (by "A" and "B") to LLC at its formation would not exceed the $50 million (as adjusted) size-of-transaction threshold. 70 Fed. Reg. 11,514 (to be codified at 16 C.F.R. § 802.4). For "A," the exempt assets of LLC would include the assets contributed by "A," and the cash contributed by "A" and "B." The value of the remaining non-exempt assets contributed by "B" would be the greater of the acquisition price, if determined, or fair market value. 16 C.F.R. § 801.10(b).

In the present transaction, "B" will contribute certain assets to LLC at the time of its formation, including office furniture and hardware. We understand that the value of the assets contributed by "B" would be the greater of the acquisition price, if determined, or the fair market value. We also understand that the transfer of the office furniture, if used only to provide management and administrative support services, would be exempt pursuant to 16 C.F.R. § 802.1(d)(4).

Also in the present transaction, "B" will grant LLC a royalty-free exclusive software license, contribute certain existing service contracts between "B" and various third parties, and enter into a service contract with LLC providing for a future income stream to LLC in exchange for future services. We understand that the grant of an exclusive license would be considered the transfer of an asset to LLC, and the value of the exclusive license would be the greater of the acquisition price, if determined, or the fair market value. We also understand that the fair market value of the exclusive license would be determined in good faith by the board of directors of "A" (or its delegee), and that the determination would reflect what a third-party licensee would pay at present in cash for the license in an arm's length negotiation. We further understand that because the exclusive license being contributed by "B" will be royalty-free, the board of directors of "A" (or its delegee) would not need to account for the face value of any future royalties due under the licensing agreement in its fair market value determination. See PREMERGER NOTIFICATION PRACTICE MANUAL, at Int. 91.

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With respect to the service contracts, we understand that "B's" contribution of existing contracts would also be considered the transfer of assets to LLC, and the value of the existing contracts for HSR reporting purposes would include only the premium(s) paid (if any) to acquire the contracts, and would not include any future revenues attributable to those contracts. See PREMERGER NOTIFICATION PRACTICE MANUAL, at Int. 183. We also understand that B's entry into a service contract with LLC requiring future performance by LLC in exchange for future revenues to LLC generally would not be considered an asset of LLC, unless "A" would pay a premium for LLC to assume the obligations under the contract.

Please confirm that the above valuation analysis is correct.

We appreciate the time and thought you have given us to analyze this transaction.

Sincerely,

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cc: [redacted]

AGREE -
B. Verne
2/23/05

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