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PRIVILEGED AND CONFIDENTIAL

February 27, 2007

HAND DELIVERY

Michael Verne
Senior Compliance Specialist
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Washington, DC

Re: FORMATION OF A NEWCO LIMITED LIABILITY COMPANY

Dear Mr. Verne :

On Monday, February 26, 2007 we had a discussion regarding the formation of a new, limited liability company ("LLC") pursuant to section 801.50 of the HSR rules of practice, 16 C.F.R. section 801.50. I am hereby writing to memorialize our discussion and the opinion you provided at that time.

FACTS:

Companies X and Y intend to form an LLC. X will contribute cash and assets that constitute an on-going business unit in the service industry. Very limited hard assets will be contributed by X. Y will contribute its on-going business unit that also provides services. In return for their respective contributions, X will receive a 45 percent interest in the LLC profits and assets upon dissolution and Y will receive a 55 percent interest in the LLC profits and assets upon dissolution. The size requirements found in section 801.50 of the HSR rules of practice will be met.

HSR RULES of PRACTICE:

Section 801.50 of the HSR rules of practice, entitled "Formation of unincorporated entities", governs the formation of both LLCs and partnerships. Pursuant to that section the formation of an LLC is reportable if a forming person obtains "control" of the LLC and the size tests found therein are met, unless an exemption is applicable to the formation. "Control" is defined in section 801.1(b) of the rules relating to an LLC as a right to either 50 percent, or more, of the profits of the entity or having the right to 50 percent, or more, of the assets upon dissolution.

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In regard to possible exemptions, section 802.4(a) provides for an exemption from the filing requirements based upon any exemption found within the HSR Act or any of the HSR rules of practice as long as the entity does not have non-exempt assets meeting or exceeding the HSR threshold then in effect. I noted that cash is not considered to be an asset pursuant to section 801.21 of the rules, and, pursuant to section 802.30(c) any assets contributed by an acquiring person to the new entity are assets whose acquisition by that acquiring person are exempt from the requirements of the HSR Act. Thus, an acquiring person would not be required to include assets it contributes as non-exempt assets at the time of formation of the LLC.

ANALYSIS and CONCLUSION:

Because X is only acquiring a 45 percent interest in the LLC, it is not obtaining "control" of the LLC and therefore, need not file under HSR for its initial acquisition of LLC interests. If X acquires additional interests in the future which afford "control" of the LLC it will need to determine at that time whether it must file a premerger notification and report form.

Because Y is obtaining a 55 percent interest in the LLC it is obtaining "control" of the LLC and will need to file unless an exemption applies. In regard to exemptions, Y need not count its contribution to the LLC in determining the amount of reportable assets that the LLC will hold based on the exemption found in section 802.30(c). In regard to the contribution by X, the cash X contributes to the LLC is not considered an asset pursuant to section 801.21, and thus, Y need only determine the fair market value of the non-exempt assets of the on-going business that X is contributing in order to determine if it is acquiring a reportable amount of non-exempt assets via obtaining "control" of the LLC. The fair market valuation pursuant to the rules must be made by the acquiring person's board of directors, or its delegates, within 60 days of either a premerger filing or consummation of the proposed transaction. In making the valuation, only the non-exempt assets should be considered and if they in effect constitute a business unit, the valuation should consider their value as a going concern. If the transaction is not consummated or filing made within 60 days of determining the fair market value, a new valuation of the non-exempt assets must be made.

Based on the information presented, you agreed that the analysis and conclusion correctly states the application of the HSR rules of practice to the formation of the LLC and that Y would only need to file if the fair market value of the non-exempt assets being contributed by X and determined by Y, meet or exceed the minimum HSR threshold.

If you have any questions or if the letter does not accurately present our discussion, please telephone me at [redacted] Thank you for your time and consideration in this matter

Sincerely

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AGREE –
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2/27/07