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802.5
801.50**Verne, B. Michael**

From: [REDACTED]
Sent: Tuesday, October 23, 2007 7:03 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: HSR confirming letter

VIA ELECTRONIC MAIL (MVERNE@FTC.GOV)

B. Michael Verne
 Compliance Specialist
 Federal Trade Commission

RE: Hart-Scott-Rodino Analysis

Dear Mr. Verne:

This summarizes our conference call on Thursday, October 18, in which we discussed the potential reportability under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR") of a proposed transaction discussed below:

Summary of Relevant Facts

- A. X and Y will be 50/50 owners of a newly formed limited liability company ("New LLC"), formed for the purpose of initially planning for and, subject to the satisfaction of certain contingencies, later implementing a business project ("the Project"). Y is itself an LLC owned 50/50 by A and B. For purposes of HSR, X, A and B will be deemed to control New LLC.
- B. Pursuant to the operating agreement for New LLC (the "Agreement"), approximately \$30,000,000 (the "Initial Cash Contribution") is required to be contributed to New LLC (\$20 million at formation and \$10 million in early 2008). In addition, the Agreement requires X to contribute certain real property (the "Property") and Y to contribute additional cash (the "Additional Cash Contribution" and together with the Property, the "Additional Contributions") to New LLC in the future, subject to the satisfaction of certain conditions, including a contingency that New LLC obtains the necessary financing for the Project (the "Financing Contingency"). The parties currently anticipate that the Additional Contributions will be made (if at all) approximately 12-20 months after formation of New LLC. In the interim, New LLC will perform various development phase activities.
- C. The Property consists of generally unimproved real property, which is currently leased or licensed in part for the following purposes:
1. a lease or license for rental of land for billboards owned and operated by an unaffiliated third party, for which X receives only in-kind advertising space (the use of certain billboard space for its own advertising), instead of lease cash payments (the "Billboard Agreement");
 2. a lease of unpaved land for use as a construction staging area and parking lot by contractors working on a project on nearby property owned and operated by an

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unaffiliated third party (the "Parking Lot Lease"); and

3. a lease of land for a mobile home park owned and operated by an unaffiliated third party (the "Mobile Home Lease", and together with the Billboard Agreement and Parking Lot Lease, the "Leases").
- D. In the event that the Financing Contingency for the Additional Contributions is satisfied and X contributes the Property to New LLC, all of the uses of the Property described in C above will ultimately be terminated as the parties further develop the Project. However, it is not clear when the various arrangements would be terminated – such terminations could occur prior to, simultaneous with, or after the contribution of the Property to New LLC.

Conclusions and Application of the Act

Based on these facts, please confirm your agreement with the following conclusions:

1. The formation of New LLC should be evaluated under Rule 801.50. However, in determining the value of the membership interests acquired at formation for purposes of Rule 801.50, the parties should not include or consider the value of the Additional Contributions, including the Property, because such Additional Contributions are subject to the Financing Contingency. Because the Initial Cash Contribution will be exempt as to all parties under Rule 801.21, the formation of New LLC will not require a filing under HSR.
2. Prior to the time of the Additional Contributions, a second analysis of the possible application of HSR will be required, not as a Rule 801.50 formation. The Additional Cash Contribution to be made by Y would be exempt as to all parties under Rule 801.21. X's contribution of the Property would be exempt as to X under Rule 802.30. However, it is possible that each of A and B may have to file as an acquiring person and X as an acquired person, with respect to the contribution of the Property, unless at such time one or more of the real property exemptions applies. See example 2 of Rule 802.30(a).
3. For purposes of that analysis, the Property subject to the Leases would be exempt under Rule 802.5, as investment rental property, as long as the Leases continue for some time after the Additional Contributions, even though the intent is to subsequently terminate the Leases in undertaking the Project. In evaluating whether the remainder of the Property qualifies for an exemption as unproductive real property for purposes of Rule 802.2(c), revenue from the Leases would not be counted in the \$5 million limitation, as long as those Leases continue for some time after the Additional Contributions and are thus exempt under Rule 802.5.

If you require additional information or context regarding anything written above, please let me know. Thank you in advance for your response and continued assistance with this matter.

Best regards,

[Redacted signature]

AGREE -
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