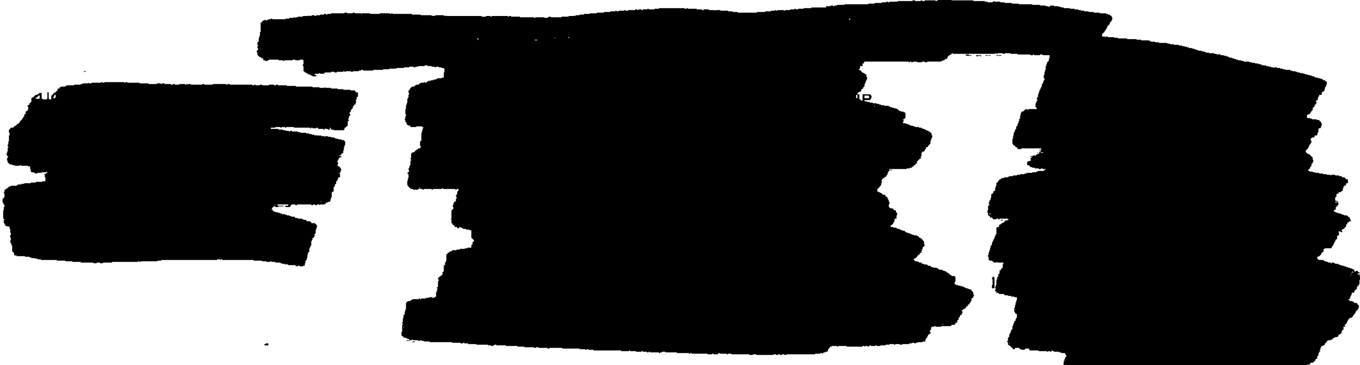
801.40



July 13, 1993

FEDERAL TRADE COMMISSION
MERGER NOTIFICATION OFFICE
13 4 07 PM '93

BY HAND

Richard B. Smith, Esquire
Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
Sixth St. and Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Dick:

I am writing to memorialize the informal interpretations of the FTC Premerger Notification Office which you provided over the telephone yesterday in response to my July 6, 1993 letter.

My letter asked a number of questions concerning the appropriate analysis, under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the implementing regulations, of a limited liability company to be created under Delaware law. A copy of my July 6 letter is appended hereto as Attachment A.

In brief, as described in the letter, X, the new limited liability company, will have the following structural features: (a) a manager or board of managers comparable to a corporation's board of directors; (b) voting interests, comparable to corporate voting securities, entitling the holders, persons A, B, and C, to vote for the manager or managers; and (c) nonvoting interests, comparable to nonvoting, nonconvertible preferred corporate stock, held by person D.

The first question I asked was whether the formation of X would be reportable under 16 C.F.R. § 801.40, assuming applicable size tests were met and no exemptions otherwise applied. You indicated that the Premerger Office viewed X as a corporation for Hart-Scott purposes. Therefore, you advised that the formation of X would be subject to a reporting obligation under § 801.40 to the same extent as if X were a corporation rather than a limited liability company.

The second question I asked was whether the interests to be held by A, B, C, and D would constitute "voting securities" under the Act and the regulations. You agreed with the analysis in my letter, and thus you advised that the interests to be held by A, B, and C would constitute voting securities, but that the interests to be held by D would not constitute voting securities.

Third, I asked how control of X should be determined. You again agreed with the analysis in my letter. You thus advised that the percentage of the voting securities of X held by each of A, B, and C should be determined in accord with § 801.12(b). You advised that, in accord with § 801.1(b)(1)(i), a person holding 50% or more of X's voting securities would control X. You agreed that the alternative control test in § 801.1(b)(1)(ii), for entities without outstanding voting securities, would be inapplicable. You therefore advised that the nonvoting securities held by D could not confer control of X.

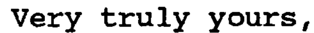
Fourth, I asked how the formation transaction should be analyzed under § 801.40. You agreed that the same § 801.40 rules, and general size tests and exemptions, applicable to corporations, should apply equally here. You therefore indicated that in the formation transaction X would be deemed an acquired person only, and A, B, and C acquiring persons only. You advised that because D will receive only nonvoting securities, D would not qualify as an acquiring person and would not have any potential filing obligation.

You also advised under § 801.40(c) that the assets of X in the formation transaction would include the contributions of A, B, and C, but not the contributions of D. You said that the Premerger Office interprets § 801.40(c) to include only the contributions of persons like A, B, and C, who will acquire "voting securities," which are defined in § 801.1(f)(1) to encompass securities (including options and warrants) that "at present or upon conversion" entitle the holder to vote. You indicated that the contributions of persons like D, who will receive only nonvoting, nonconvertible securities in the new entity, are not counted toward the size of the new entity under § 801.40(c). You confirmed that D's interests would not constitute voting securities, even if, like typical nonvoting preferred stock, they would confer certain voting rights in the event of a default by X, such as failure to pay dividends.

Finally, you also advised that acquisitions of voting securities of X, occurring after the formation transaction, would be subject to the same rules applicable to acquisitions of voting securities of corporations.

I believe the above fully and accurately describes the informal interpretations of the Premerger Notification Office which you related to me, but should anything I have said be in error, please call me immediately.

As always, I appreciate your time and most helpful assistance.


Very truly yours,

Attachment