

801.40(LLC)

January 10, 1995

Via Facsimile

Richard B. Smith, Esq.  
Premerger Notification Office  
Bureau of Competition  
Federal Trade Commission  
6th and Pennsylvania Avenue, N.W.  
Room 303  
Washington, D.C. 20580

Re: Premerger Notification Analysis  
for Limited Liability Companies

Dear Mr. Smith:

This letter is to confirm the telephone conversation of January 4, 1995, in which you, [REDACTED] and I discussed the possible formation of a limited liability company ("LLC"). It is our understanding, based upon the facts as discussed below, that the formation of LLC would not be a reportable transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 as amended (the "Act") and the rules promulgated thereunder.

For purposes of this inquiry, we are assuming that the size-of-person and the size-of-transaction thresholds would be met if the formation of LLC were deemed to result in the acquisition of "voting securities." It is our understanding, however, that under the current FTC staff interpretation of Rule 801.1(f)(1), if ownership of limited liability company interests does not entitle the members to vote for individuals functioning similarly to corporate directors, those ownership interests will not be characterized as voting securities and thus the formation of such an entity is not a potentially reportable event under the Act.

LLC is proposed to be formed as follows. Several corporations will participate in a joint venture. Corporation A will hold a 50% interest and the remaining corporations will hold various lesser percentages of the remaining 50%.

As we indicated, this proposed venture was initially structured as a partnership, with the rights of and limitations

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upon, the parties specifically negotiated on that basis. Recent changes in state law, however, provide a previously unavailable structure in which the parties may retain the negotiated balance of power and also avail themselves of the protections of limited liability. Thus the current form of the venture is that of a limited liability company. Notwithstanding this change in legal form, the provisions of LLC' operating agreement, as we discussed, contemplate an entity which functions as a partnership in all material respects excepting limited liability.

Members will act through the use of representatives designated on behalf of each (the "Member Representatives"). Each corporation other than Corporation A may designate one Member Representative and Corporation A may designate an amount of Member Representatives equal in number to the aggregate of all other members' Member Representatives.<sup>1/</sup> Each Member representative may cast one vote and a majority interest is defined as 50% plus one. A!

Corporation A will serve as the manager for LLC (the "Manager"). The Manager's role in LLC will not be similar, however, to that of a corporate board of directors, which is typically granted broad powers, including the right to set policy, declare dividends, establish or change the types of goods or services in which the company will operate, elect officers and enter into financing arrangements. In LLC, the Manager will not have such broad powers; rather, the Manager's powers are narrowly circumscribed by the reservation of all of the above rights to a majority vote of the members.

Based upon the foregoing facts, it is our understanding that the staff of the FTC Premerger Office is of the view that the proposed formation of LLC will not be subject to the premerger reporting requirements of the Act. Should you have any questions, or if our understanding respecting the applicability of the exemption is incorrect, I would very much appreciate your contacting me at your earliest possible opportunity.

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<sup>1/</sup> For example, if six corporations other than Corporation A were involved in the joint venture, there would be a total of twelve Member Representatives, six of which would be designated by and on behalf of Corporation A.

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The assistance and guidance you have provided in this matter are very much appreciated.

Sincerely,  
[REDACTED]

1/23/95- Advised writer that, based on the facts presented in the letter, the formation of the subject LLC is a non-reportable event not covered by the requirements of 801.40.

RB Smith