

JS

[REDACTED]

[REDACTED]

[REDACTED]

January 11, 1995

VIA FE #3891931330

Premerger Notification Office
Room 303
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

and

VIA FE #3891931341

Director of Operations
Antitrust Division
Room 3214
Department of Justice
10th Street and Constitution Ave., N.W.
Washington, DC 20530

Re: [REDACTED]

Ladies and Gentlemen:

A [REDACTED] and a [REDACTED] propose to enter into a joint venture which will offer a variety of [REDACTED] products to the public. The joint venture entity will not be a corporation, will provide for sharing of profits and losses between [REDACTED] and will pass the tax effects of these profits and losses to the joint venturers. The joint venturers will be obligated to make additional capital contributions, if needed, not necessarily in equal proportion. The joint venture entity (the "LLC") will be a limited liability company, probably to be formed under [REDACTED]. The

✓

[REDACTED]
Premerger Notification Office -2-
and
Director of Operations

January 11, 1995

LLC will operate in [REDACTED] and, to a limited extent, in nearby counties in certain contiguous states.

It is apparent that the creation of such a new provider of [REDACTED] by two longstanding and respected organizations, in a transaction that does not eliminate any existing competitor or reflect any market power, is wholly pro-competitive. It similarly appears clear that the formation of the LLC, a non-corporate entity, is not subject to the Premerger Notification Filing Requirements of the Hart-Scott Rodino Antitrust Improvements Act (the "Act").

The parties to the proposed joint venture do, however, wish to preclude the possibility of any inquiry at a later date regarding compliance with the Act. We have therefore been asked to write to disclose the basis of the conclusions noted above and, if necessary, attempt to address any questions regarding the subject of this letter. The parties are anxious to proceed with the venture with all due haste and we urgently request the opportunity for early discussions on the subject of the letter.

A. The Inapplicability Of The Act To Formation
Of A Joint Venture Which Is Not In Corporate Form

[REDACTED] (directly or through wholly-owned special purpose entities) will share in the profits and losses of the LLC, which will engage in a variety of related [REDACTED]. The LLC will be structured to assure that the tax effects of these profits and losses flow through to [REDACTED]. The various businesses will, in turn, be conducted through newly-created entities which will similarly not be in corporate form, so that their profits, losses and tax effects will ultimately flow through to [REDACTED]. The LLC may make capital calls on the joint venturers. The LLC will be managed by a group of individuals designated in equal numbers by [REDACTED]. They will act by majority vote. The ultimate structure of the venture will include a re-insurance company, to be organized in corporate form, which will represent a very small part of the operation and be 100% beneficially owned by the joint venturers.

The [REDACTED] Limited Liability Act [REDACTED] permits the creation of an entity which is not a corporation [REDACTED]. The members of the LLC act like partners in a partnership, but are not subject to the risks of individual liability imposed on general partners under partnership law. LLCs may be managed by their

[REDACTED]
Premerger Notification Office -3-
and
Director of Operations

January 11, 1995

members or by managers appointed by the members. LLCs may, by operating agreement, allocate "income, gain, loss, deduction or credit" as is set forth in the operating agreement of the LLC.

[REDACTED]. Like partnerships, they can be structured to pass their tax effects through to the owners.

The initial funding for the LLC of approximately \$16,000,000 will be provided by [REDACTED] (\$11,000,000) and [REDACTED] (\$5,000,000). This amount is anticipated to be sufficient to cover working capital needs as well as to satisfy capital and reserve requirements. In the event of certain contingencies, additional capital will be contributed by [REDACTED] in accordance with an agreed upon formula.

Membership interests in the LLC will be of two types: (1) units with interest payable and principal redeemable by the LLC out of profits, and (2) units which evidence the members' interest in the LLC. If the LLC needs up to \$2 million in capital for excess [REDACTED] losses, each member is obligated to fund 50% of the additional amounts. If additional capital is required, [REDACTED] is required to fund 100% if [REDACTED] declines to contribute. Profits (after paying for interest and redemption of the above noted units), will be distributed in proportion to the members' capital contributions.

We, therefore, rely on 16 CFR §801.40 and 43 FR 33485 et seq. (1978) to support the conclusion that a pre-merger filing is not required under the Act. 16 CFR §801.40 makes clear that the filing requirements apply only to a joint venture in the corporate form. Since the LLC is not a corporation, the Act's premerger notification provisions should not be applicable to the transactions relating to its formation.

We note in particular the statements in the Commission's Statement of Basis and Purpose that:

"[s]ince the rule applies only to the formation of corporations, the formation of entities other than corporations is by virtue of this rule not brought within the coverage of the act and need not be preceded by compliance with the act's requirements" 43 FR at 33485 (1978), and

"[t]his approach obviates the need to decide whether an entity should be termed a joint venture, because the concept of 'corporation' is unambiguous."

[REDACTED]
Premerger Notification Office -4-
and
Director of Operations

January 11, 1995

Id. at 33486. See also Premerger Notification Practice Manual, American Bar Association Section of Antitrust Law, 1991 ed. at Q&A 161.

B. Operation Of The New Entity

The LLC, together with [REDACTED] will form a [REDACTED] again in the form of a limited liability company which will provide for sharing of profits and losses and the flow through of the tax effects (the [REDACTED]). The policies of the [REDACTED] will be determined by managers, appointed in equal number by [REDACTED] who will act by a majority vote. Assistance will be provided to the [REDACTED] by a [REDACTED].

The LLC and the [REDACTED] are expected to enter into separate contracts with [REDACTED] (the "Management Company"). The Management Company will employ all personnel required for marketing and administration of the [REDACTED] to be offered by the LLC and the [REDACTED] and will be responsible for the operational network development, underwriting/actuarial, premium rating and marketing functions of the venture. The products to be offered include [REDACTED] and Point of Service products, [REDACTED] plans and riders and a [REDACTED].

Neither [REDACTED] nor [REDACTED] is currently engaged in the business of operating an [REDACTED] in [REDACTED] or its environs. It is not contemplated that the Venture will begin or grow by acquiring any existing business, although [REDACTED] had previously acquired several [REDACTED] including an entity functioning in [REDACTED]. That entity or certain of its assets will be contributed by [REDACTED] to the LLC as part of the LLC's formation.

The success of the venture will depend entirely on its ability to translate the commitment to the public of the venturers into a functioning operation which can serve the public well enough to attract customers in a competitive environment. There is no indication that the transaction creating the venture could have any implication for market power or power to exclude competition. The venture cannot impose any barriers to entry by competitors. The complementary expertise of [REDACTED] and [REDACTED] will permit the creation of a company which can serve the public and compete more effectively than either could if proceeding without the other. [REDACTED] has not formulated any plan to form an [REDACTED] in [REDACTED] absent the venture and [REDACTED] has

[REDACTED]
Premerger Notification Office -5-
and
Director of Operations

January 11, 1995

not previously provided similar services to people outside the [REDACTED] Community. Both venturers have, however, agreed not to compete with the entity.

C. Conclusion

By this letter, we are not seeking to invoke the provisions of 16 CFR §803.30 for a formal interpretation of the Act's requirements to the transactions surrounding the formation of the joint venture entities, since the existing published materials explicitly limit filing requirements under the Act to joint ventures in corporate form. Based on the analysis provided above it appears to be clear that no filing is required and the transaction is expected to proceed as stated above. Nevertheless, consistent with the desire to move expeditiously and to avoid any misunderstandings, we request the opportunity to confer regarding the subjects of this letter at the earliest possible date.

Very truly yours,

[REDACTED]

[REDACTED]