801.1(b)(i)(ii); 801.1(b)(i) [LLC]

[redacted]

VIA FACSIMILE

May 1, 1995

Mr. Richard Smith
Premerger Notification Office
Federal Trade Commission
Washington, D.C.

Re: Application of Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act")

Dear Dick:

Earlier this year, we spoke regarding the application of the Act to the formation of a limited liability company and concluded that the formation of the limited liability company would not be reportable under the Act because the size of transaction test was not satisfied. I wrote confirming letters to you regarding this situation, which are attached hereto. Now that the limited liability company has been formed, it proposes to acquire the voting securities of a third party (the "Acquisition"). We have concluded that, consistent with the advice provided by the Premerger Notification Office in response to my earlier letters, the Acquisition would not be reportable under the Act because the limited liability company is its own ultimate parent, and is not a $10 million person.

The issue of whether a filing would be required for the Acquisition turns on how the concept of "control" under 16 C.F.R. §801.1(b)(1) is applied to a limited liability company for purposes of determining the size of person. In particular, if the limited liability company at issue here is considered to have outstanding voting securities, then, based on the facts contained in my earlier letters, it will be its own ultimate parent because no person will hold 50 percent or more of its voting securities or have a contractual right to appoint 50 percent or more of its board of directors. 16 C.F.R. §801.1(b). Further, because the limited liability company has less than $10 million in total assets and less than $10 million in annual net sales based on its most recent financial statements, it will not meet the size of the person threshold. On the other hand, if the ownership interests in the limited liability company are not considered voting securities, then, because each of the [redacted] corporation investors will have a 50 percent interest in the company's profits, each will be deemed to control the limited liability company under 16 C.F.R. §801.1(b)(1)(ii), and each will be an ultimate parent of the company. After aggregating the

assets of each [redacted] corporation with those of the limited liability company for purposes of the size of the person test, both ultimate parents would exceed the $10 million threshold.

It is my understanding that, although the ownership interest in a limited liability company is called a membership, the Premerger Notification Office has taken the position that the formation of a limited liability company may fall under 16 C.F.R. §801.40 if the membership carries the right to appoint or elect individuals that function in a role similar to that of a director. Because the memberships in this limited liability company carry with them the right to elect Managers to the Board of Managers, which functions much like a board of directors, the Premerger Notification Office's prior interpretations indicate that the limited liability company should be treated as if it has outstanding voting securities. Thus, clause (1)(i) of 16 C.F.R. §801.1(b) would apply in this case in determining the ultimate parent entity of the limited liability company, not clause (1)(ii), and the Acquisition would not be reportable.

Please contact me at [redacted] to discuss whether the Premerger Notification Office agrees with the conclusion described in this letter and to discuss any questions you have.

Very truly yours,

[redacted]

[redacted]

5/3/95 - Called writer and advised that, if the LLC purely operated as it was originally formed, then the PNO Office would view the control issue as one based upon holdings of voting stock (or right to appoint half or more of the directors) since we had taken this position based upon the facts, at the time of the formation of the LLC.

RRSmith

[redacted]