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801.40(LLC)

FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION OFFICE

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August 29, 1995

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VIA FACSIMILE

This material may be subject to the confidentiality provisions of Section 7A(h) of the Clayton Act which restricts release under the Freedom of Information Act.

Richard B. Smith, Esq.
Premerger Notification Office
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Formation of a Limited Liability Company

Dear Richard:

I am writing to confirm that, as we discussed last Friday, August 25, 1995, the formation of a limited liability company currently being proposed by one of my clients would not be a reportable transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "Act"), and the regulations promulgated thereunder (the "Rules").

The facts are as follows. Corporations A and B intend to form a limited liability company, LLC, in which each of them will be Member with a 50 percent interest. At the time the LLC is formed, or shortly thereafter, A and B each will contribute certain operating assets to the LLC. Because A's assets may be of somewhat greater value than B's, B also may contribute cash to equalize the value of the two Members' contributions.

LLC will be governed by a Board of Directors consisting of three representatives appointed by each Member. These representatives will be employees, officers and/or directors of A and B. The Board's duties will include approving acquisitions and dispositions of assets, financings and the LLC's Business Plan. The Board also will declare distributions to the Members as is appropriate. In some cases, the Board may be asked to approve transactions of such magnitude, that the Members' boards of directors may be required to review and approve the transactions.

The management of LLC will consist of two co-managers, one each designated by A and B. Each of these persons will have significant experience working in the business area that will be

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the subject of the joint venture. These co-managers also may serve as representatives of A and B on the Board. The co-managers will have responsibility for the day-to-day operations of LLC, subject to the direction of the Board, and will prepare the LLC's Business Plan. Once the plan is approved by the Board, the managers will be free to act in accordance with the plan, but will be required to obtain Board approval for certain actions, including making any acquisitions or dispositions of capital assets that are valued at over $100,000, or that are outside the parameters of the Business Plan. The co-managers will identify themselves to third parties as acting on behalf of LLC, but the terms of their employment, salary and benefits will be determined by, and be the responsibility of, the employing Member.

The issue presented by these facts is whether the formation of the LLC is reportable under Rule 801.40, which requires that parties to the formation of a joint venture corporation meeting certain dollar thresholds make HSR filings. This rule is based on the assumption that, as part of the formation of the venture, the parties are acquiring "voting securities," as that term is defined for purposes of the Act. In this case, the formation of LLC would meet the dollar thresholds in Rule 801.40. The transaction would not be reportable, however, because the interests in LLC being acquired by A and B are not "voting securities" for purposes of the Act.

Rule 801.1(f) defines "voting securities" with respect to an unincorporated entity such as the LLC as securities that "entitle the owner or holder thereof to vote for the election of . . . individuals exercising similar functions" to those of a corporate board of directors. In the course of our conversation last week, you indicated that a key determinant of whether a limited liability company's governing board should be treated like a corporate board of directors is whether the individuals appointed to the board are directors, officers or employees of the members, or are outside parties. In the former case, the members are not considered to be voting to elect directors, but rather are representing themselves directly, as would a partner to a partnership. Thus, the acquisition of the limited liability company interests are not voting securities, and the formation of the limited liability company is not reportable under Act.

Here, the appointment of the LLC's Board of Directors cannot be construed as equivalent to voting to elect corporate directors. The representatives on the LLC's Board all will be directors, officers or employees of A and B, and on significant projects, the Members' own boards will continue to have a right of approval. Similarly, while it is possible that the appointment of the co-

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managers could be considered the equivalent of electing corporate directors, the facts do not support such a conclusion. The co-managers will, in substance, continue to be employees of A and B, and in any event, will not exercise the functions of a board of directors.

The facts presented here thus are quite similar to those described in a January 19, 1995 letter to the Premerger Notification Office (a copy of which is attached), in which a natural person and a corporation proposed forming a 50-50 limited liability company. In that case, the approval of both members was required for important decisions, and both members were to represent themselves in governing the LLC--the natural person personally, and the corporation through two officers. The LLC was to have an executive director and other senior management, but none of these would have the authority or approval rights of directors in a corporation. The Premerger Notification Office advised that no filings were required. Similarly, based on the facts in this case, the formation of LLC should not be reportable.

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Attachments

8/29/95 - Writer confirms that phrase in paragraph 2, "or shortly thereafter," means that a shell LLC might be formed and the contributions made a day or week later. However, such contributions are clearly part of the LLC formation and Top of this page, the co-managers will be employees of A and B and, since A+B control LLC, will continue to be employees of an entity controlled by A+B I advised that formation of LLC did not result in A or B taking back "voting stock" and, thus, was not reportable under 801.40.

RBSmith