801.40 (LLC); 802.30; 1A(c)(3); 801.1 (b)(1)(ii) and (2

[redacted]

October 31, 1995

VIA FEDERAL EXPRESS

Attorney Richard Smith
Staff Attorney
Premerger Notification Office
H-303
Federal Trade Commission
Washington, D.C. 20580

Dear Attorney Smith:

I am writing to confirm my understanding of our telephone discussions concerning the applicability of the Rules, Regulations, Statements and Interpretations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act"), to the possible transactions described below.

Description of Transactions

A corporation ("A"), a venture capital fund organized as a limited partnership ("B") and an irrevocable trust ("C") intend to form a limited liability company (the "LLC"). The initial members of the LLC will be two newly formed corporations which are wholly owned by A and B, respectively, and C. A has annual net sales and total assets in excess of $100 million. B has assets in excess of $100

million. C has assets of less than $10 million and revenues of less than $100 million. A and B will each commit to contribute $22,500,000 to the LLC. C will commit to contribute to the LLC shares of common stock of a corporation ("D") representing 55% of the voting stock of D. The cash contributions of A and B will be made in installments in accordance with the LLC's funding needs and subject to fulfillment of certain conditions. A and B will each initially receive voting units representing 45% (90% in the aggregate) of the total membership interests and 50% (100% in the aggregate) of the total voting power in the LLC. The voting units will entitle the owner to vote for the election of the Board of Managers. In exchange for its contribution, C will receive non-voting units representing 10% of the total membership interests in the LLC, and which are convertible into voting units, representing up to 10% of the voting power in the LLC.

The LLC will acquire the remaining 45% of the stock of D pursuant to a merger occurring immediately following the contribution by C of the D shares. A trustee of C will enter into a non-competition agreement at the closing of the acquisition of D in consideration of a payment of $1,000,000. D is engaged in a service business and has assets of less than $10 million and revenues of less than $100 million.

The obligations of A, B and C to make the initial capital contributions to the LLC are contingent upon the consummation of the acquisition of D.

The LLC's organizational documents will provide that a Board of Managers will be responsible for the management of the LLC. The Board of Managers will consist of five Managers, namely, two Managers chosen by A ("A Managers"), two chosen by B ("B Managers") and an individual who serves as trustee of C. The LLC documents provide that, initially, the A Managers will be either employees, officers or directors of A and the B Managers will be either employees, officers or partners of the ultimate corporate general partner of B, although A and B are not required to continue to designate their own employees, officers or directors as Managers.

In the situation described above, you advised us that the LLC would be treated as a partnership because, among other things, the A Managers and the B Managers will initially be either employees, officers or directors of A and of the corporate general partner of B, respectively. The remaining Manager is the trustee of C, the other member. Each member will therefore participate in the management of

the LLC through its own representative(s) on the Board of Managers and will not rely on unrelated, appointed managers.

Rule 801.40 applies only to the formation of a joint venture that will result in the venturers holding voting securities, i.e., securities that entitle them to vote for the members of a board of directors or its equivalent. See Rule 801.f(1). The FTC Premerger Notification Office has taken the position that where an LLC is governed by a board of managers made up of employees, officers, or directors of the LLC members (as opposed to unrelated or third parties) the governing board will not be treated as a board of directors or its equivalent for purposes of the HSR Act. The interests in the LLC therefore will not be treated as voting securities, and Rule 801.40 therefore will not apply. Rather, the formation of the LLC will be treated like the formation of a partnership, which is exempt from the filing requirements of the Act. See ABA Premerger Notification Practice Manual (1991 ed.), Interpretation No. 195.

We request that you confirm our understanding that the parties to a transaction of the kind described above are not required to file a Notification and Report Form For Certain Mergers and Acquisitions (the "Form") pursuant to the Act.

We respectfully request that the Premerger Office expedite its review of this letter because if the Premerger Office does not concur with our interpretation, parties to a transaction similar to the above-described transaction would have to file the Form, which would delay such possible transaction.

If you have any questions about this request or you desire any additional information, please call the undersigned collect at [redacted]

Sincerely,

[redacted]

11/2/95 Writer explains that last full sentence on p. 1 means that A will form a wholly owned sub + B will form a wholly owned sub, which will be members (with C) of LLC. Advised that since an officer, director or employee of A; an officer, director or employee of corporate GP of B; and trustee of C (the Commission has stated that trustees of trusts serve a role comparable to directors of a corporation) will serve on the LLC, the PNO office is of the view that no voting stock is coming back and no 801.40 filing is needed. Neither A, B or C will have right to 50% or more of LLC's profits or assets on dissolution, thereby it is not controlled. Appears that D also [illegible] since for acquired person not engaged in manufacturing; also, since LLC