

801.40 (LLC)

[REDACTED]

[REDACTED]

FEDERAL
COMM
PREMERGER
OF

NOV 20

November 20, 1995

BY FACSIMILE

Richard B. Smith, Esq.
Federal Trade Commission
Premerger Notification Office
600 Pennsylvania Avenue, NW
Washington, DC 20530

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600 Pennsylvania Avenue, NW
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Re: Reportability of LLC Formation

Dear Dick:

This letter is to request confirmation that the FTC Premerger Office would not require an H-S-R filing for the hypothetical transaction described herein. If, after you review this letter, you have any questions or would like additional facts, please call us at your earliest convenience to discuss those issues.

FACTS

Company A ("A") and Company B ("B") intend to form a limited liability company ("LLC") that will be owned 50% by A and 50% by B. Both A and B will contribute assets to the LLC in exchange for their respective ownership interests in the LLC. We can assume that both the H-S-R size-of-person and size-of-transaction tests will be satisfied in the proposed transaction.

The key provisions of the management structure of the LLC include the following:

- All authority to manage the LLC will vest in the CEO of the LLC, who will be appointed by A. B will have the right to object to A's nominee for CEO. B will appoint the COO, who will report to the CEO.
- A limited number of highly material matters, primarily entering into significant contracts, must be approved by A and B. Such approval will come from A and B directly, as there is no "Members Committee" or Board of Directors of the LLC.

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- The LLC will have an "Advisory Board" composed of seven members. Two members each will be appointed by A and B, and these "inside" members will be executives of A and B. Three members of the Advisory Board will be appointed jointly by A and B, and these "outside" members cannot be executives of A or B. The outside members can be removed at any time, with or without cause, by A and B. The chairperson of the Advisory Board will always be one of the "inside" members.
- The principal function of the Advisory Board will be to provide advice to the CEO of the LLC. However, the CEO has no obligation to seek the approval of the Advisory Board or to follow the advice of the Advisory Board.
- The Advisory Board will have the power to remove the CEO if it believes he or she is not performing the duties of the office properly. A may also remove the CEO at any time.
- The Advisory Board will have the power to resolve deadlocks between A and B on those highly material matters for which the CEO is required to obtain approval from A and B.

ANALYSIS

We believe that the proposed transaction is not H-S-R reportable under the Staff's previously announced standards regarding reporting the formation of a limited liability company. The Staff has indicated that if a limited liability company will be governed by an outside Board of Directors, the formation of the limited liability company will be treated as the formation of a joint venture corporation, and hence potentially reportable under the H-S-R Act. However, if the limited liability company appears to be organized more like a partnership, and in particular is not governed by an outside Board of Directors, the Staff will treat the formation of the limited liability company as the formation of a partnership, which is not reportable under the H-S-R Act.

The LLC in this case is similar to a partnership in that the management decisions will be made by a CEO, who will be appointed by A. The only exception to the CEO's authority is that he must present certain highly material matters to the parties, A and B, for approval. The Advisory Board in this case will not function as an "outside Board of Directors." First, four of the seven members of the Advisory Board will be executives of A and B. Second, the Advisory Board will not function as a Board of Directors with governing authority, but instead, as its name suggests, may advise the CEO regarding matters the CEO chooses to present to the Advisory Board.

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Given the above facts, we do not believe the formation of the LLC in this hypothetical case is reportable under the Staff's prior treatment of the formation of limited liability companies. We therefore intend to advise our client that no filing would be required for the transaction described above, and we would appreciate hearing from you as soon as possible if you have any questions regarding the facts, our analysis or our conclusion. [REDACTED] direct dial number is [REDACTED], and [REDACTED]

Sincerely,

[REDACTED]

11/21/95 - Advised writer that formation of LLC is non-reportable. The outside persons appointed to the Advisory Board will not be functioning as ~~board~~ members of a corporate board function. Although Advisory Board can remove CEO, it does not hold this power alone, as usual Board of corporation does.
R. B. Smith