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FEDERAL TRADE COMMISSION PREMERGER NOTIFICATION OFFICE

DEC 22 3 43 PM '9[redacted]

December 22, 1995

BY TELECOPIER

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

HSR Act Reportability of a Proposed LLC

Dear Dick:

Yesterday [redacted] and I discussed with you whether a proposed joint venture between two U.S. corporations would be subject to the reporting and waiting requirements of the Hart-Scott-Rodino Act. As you suggested, we confirm those discussions with this letter.

We informed you that Corporation A and Corporation B intend to form a joint venture which will create a medium capable of distributing a certain type of intellectual property. The venture will be in the form of a "member-managed" limited liability company ("LLC"), with only employees of A and B (and possibly the LLC) serving on the member board or similar governing body of the LLC. As part of the formation of the venture, A will contribute primarily cash and B will contribute certain assets and grant an exclusive license to certain intellectual property. The license will obligate B to provide the LLC with the intellectual property in exchange for a substantial annual royalty calculated under a rather complex formula.

The venture will be created through a number of legal agreements that will be executed at a single closing. Although a master agreement will obligate A and B, among other things, to form the LLC and B to license the intellectual property to the LLC, the license will be executed as a separate agreement at the closing. However, the agreements are interdependent such that the license agreement would not be entered into apart from the parties forming the joint venture. If the venture is dissolved, B's obligation to contribute intellectual property under the exclusive license will terminate.[1] The agreements -- including the license -- are an integral part of forming the joint venture and constituting it so that it may conduct its intended business.

A and B will each receive 50% of the equity interests. If the parties were to change the license to one with no royalties, the percentage of B's equity interests it would receive as consideration for its contribution of the assets and license together would have to increase substantially above 50% (and A's interests correspondingly below 50%), contrary to the business goal of the parties to keep the venture 50% each. Moreover, the success of the venture in distributing the intellectual property is uncertain and a percentage royalty is the most efficient way to recognize the value of the intellectual property contributed to the venture.

After reviewing the facts described above, we all agreed that the entire set of transactions, including the license agreement, should be treated as a single formation event for purposes of analyzing reportability under the HSR Act. Since all of these transactions will be part of a single economic plan, negotiated concurrently, and consummated at one closing, it is proper to treat them in the aggregate as a single joint venture formation. The fact that the license conveyed at closing contains a provision for an annual royalty does not make it a separate transaction. Instead, the license remains an "asset" conveyed at closing and the annual royalty payment instead may be more properly viewed as an "equalization" payment allowing A and B to each receive 50% equity interests where otherwise B's contributions would be significantly greater than A's contributions. *See* ABA Premerger Notification Practice Manual at ¶ 47.

Under previous FTC Premerger Office interpretations, the formation of a member-managed LLC does not require HSR Act reporting because the acquisition of equity interests in such entities is not deemed to be an acquisition of voting securities covered by the HSR Act. We all agreed that the proposed transaction described above is properly considered to be solely the formation of an LLC and is accordingly not subject to HSR Act reporting.

Since we spoke yesterday we learned that A and B may elect to form this venture as either a partnership or a member-managed LLC. Because the FTC Premerger Office also takes the view that the formation of a partnership is not reportable, we assume that if the parties elect to form a partnership here instead of an LLC the analysis described above does not change.

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1 The venture will retain the right to use intellectual property contributed before termination of the license. In addition, the parties expect to provide a transitional period of one year during which B will contribute on a non-exclusive basis newly-created intellectual property.

We very much appreciate your time and attention to this matter. If any of the above does not comport to your understanding of the proposed transaction as we presented it or inaccurately describes any of your conclusions, please advise me of such misstatements at your earliest convenience. In any event, please do not hesitate to contact me with any questions or concerns you or others at the Commission may have on this matter.

[redacted]

cc: [redacted]

1/2/96 Advised writer that this particular fact scenario did not constitute a reportable formation of an LLC. The exclusive license of the intellectual property appears to be part of the LLC formation. The future royalty payments may appear to be a purchase by the LLC rather than a part of the formation, but since it is correlated to the 50/50 ownership of the LLC (which could not be achieved without the future royalty payment), such payments might logically be viewed as a quasi equalization payment. On these facts, the PMN Office would so view such payments (whether the transaction took the form of an LLC or partnership formation).

RB Smith