

801.40 (LLC formation + partnership formation)



November 27, 1996

VIA FACSIMILE (202) 326-2624 and UPS

Richard B. Smith
Federal Trade Commission
Premerger Notification Office
Bureau of Competition
Room 303
6th Street and Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: *Applicability of Hart-Scott-Rodino Antitrust
Improvements Act of 1975 (the "Act") to formation
of Limited Partnership and Limited Liability Company
("LLC")*

Dear Mr. Smith:

This letter is to confirm my telephone conversations of November 5 and November 22, 1996, in which you and I discussed whether the formation of a bona fide limited partnership would be subject to the reporting and waiting period requirements under the Act. Based on my description of the transaction, you advised me that the staff of the Premerger Notification Office (the "Premerger Office staff") of the Federal Trade Commission ("FTC") would treat the following proposed transaction as the formation of a partnership and, therefore, exempt:

Company A and Company B propose to enter into a joint venture in the form of a limited partnership that will conduct a business currently conducted by Company B as well as other related operations. Company A will contribute cash and a note. Company B will contribute assets. Company A and Company B will each be limited partners, each with a right to 49.5% of the profits and losses, and assets of the partnership upon dissolution. An LLC formed by Company A and Company B will be the general partner of the limited partnership with the right to 1% of the profits and losses, and or assets of the partnership upon dissolution. Company A and Company B will each hold a 50% interest in the LLC. The parties have chosen this structure independently of HSR considerations.

The LLC will be governed by a Board of Directors consisting of 8 representatives, all of whom will be officers, directors and/or employees of the members or their affiliates ("Insiders"). There is no specific requirement in the LLC's operating agreement



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requiring the Board members to be "insiders". This LLC does intend, however, to appoint only insiders to the Board upon its formation. Four of the representatives will be selected by Company A and the other four will be selected by Company B.

Based on our conversation, it is my understanding that, under the Premerger Office staff's long-standing interpretation of the Act (e.g., interpretation 196 of the ABA Premerger Notification Manual), the formation of the partnership, regardless of form (i.e., general or limited partnership), would not trigger the HSR premerger notification filing requirements regardless of the size of the parties or of the transaction.

We also discussed the related bona fide LLC formation transaction in which the LLC will act as the general partner of the limited partnership. As the general partner, the LLC will be entitled to only 1% of the profits, losses and assets of the joint venture limited partnership upon dissolution. As described above, the LLC members will act through representatives or directors designated on behalf of each and consisting, at the time of formation, of officers, directors or employees of Companies A and B or their affiliates, respectively (i.e., Insiders).

You advised me of the Premerger Office staff's position that the formation of such an LLC would not be subject to the Act's reporting requirements. You confirmed the policy of the Premerger Office staff to treat an LLC as a partnership if the governing body appointed at formation was comprised of individuals who were officers, directors or employees of the members or their affiliates. You also advised me that a different conclusion may be reached if the initial governing body, or any subsequently appointed one, is comprised of outside representatives (non-Insiders) who act in a manner similar to corporate directors. In such situations, the Premerger Office staff has concluded that the appointment of non-Insiders may be viewed as a conversion wherein the interests held in the LLC would be viewed as voting securities rather than partnership interests and, therefore, reporting is or would be required.

Based upon the foregoing facts, it is my understanding that the FTC Premerger Office staff is of the position that the proposed formation of the limited partnership and the LLC will not be subject to the reporting requirements of the Act. Should you have any questions, or if this letter does not accurately describe the views of the Premerger Office staff concerning the transactions discussed above, please call me as soon as possible.

The assistance and guidance that you have provided in this matter are greatly appreciated.

Very truly yours

12/2/96 - Advised writer that neither the partnership or LLC formation would be reportable under HSR. However, partnership would be controlled by A & B due to their direct holdings of 49.5% and their control of LLC (which is entitled to 50% of its profits or assets on dissolution). 11