801.40 (LLC formation)

[redacted]

WRITER'S TELEPHONE
[redacted]

February 19, 1998

Via Facsimile Transmission

Mr. Richard B. Smith
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
6th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Smith:

The purpose of this correspondence is to follow up on our recent discussion concerning the question of whether a particular limited liability company ("LLC") structure, involving both voting interests and non-voting interests, should be given partnership treatment for purposes of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR"), with the result that the acquisition of 100 percent of the voting interests but none of the non-voting interests of the LLC would not be a reportable transaction under that statute. Since our discussion, I have obtained some additional information, all of which I believe supports such treatment.

Stated in summary form, the transaction is as follows. Our client, Company A, will form the LLC. Initially Company A will be the sole member and manager of the LLC. Company A will then transfer certain assets to the LLC and will receive back 700 voting interests and 300 non-voting interests in the LLC. Company A will then sell all of the voting interests to Company B for an agreed upon cash amount and retain all of the non-voting interests. In connection with that sale, both the HSR size-of-person test and size-of-transaction test will be met. Also in connection with that sale, the LLC agreement will be amended so as to admit Company B as an additional member of the LLC and to provide that Company B shall be the sole manager of the LLC.

Thereafter, the LLC will be operated on the following basis:

- It will have two members, Company A and Company B.

[redacted]

- The current plans are for the LLC to have no membership board or similar such arrangement (This was a fact which I was unsure about when I talked with you).

- The business and affairs of the LLC will be managed by the sole manager which, as noted above, will be Company B.

- The manager may designate one or more officers of the LLC.

- We understand from counsel for the ultimate parent of Company B, that the persons to be appointed by Company B to be the officer of the LLC will be a person who is also a manager of Company B. Indeed, the individual who is the ultimate parent of Company B and its manager will serve as the President and Chief Executive Officer of the LLC.

- Subject to certain special tax allocations, profits and losses are to be shared pro rata between the voting and non-voting interests.

- The LLC agreement will place restrictions on the ability of the LLC's manager to take certain extraordinary actions (such as sale of material assets of the LLC) without the approval of the "Super Majority in Interest," such quoted term to be defined to mean any combination of members which own at least 80 percent of the total voting interests and 80 percent of the total non-voting interests, voting as separate classes.

- In compliance with certain existing regulatory attribution rules, the LLC agreement will place various limitations on Company A as the holder of non-voting interests in the LLC. For example, Company A may not communicate with the LLC's manager on matters pertaining to the day-to-day operations of the LLC, nor may any of Company A's employees act as an employee of the LLC.

- At sometime in the future, if current regulatory constraints are removed insofar as Company A's ownership of the assets transferred to the LLC, Company A may wish to reacquire control of the LLC. Therefore, Company A has certain rights to acquire Company B's voting interests in the LLC and the right to convert certain loans that it has extended to the LLC into additional voting interests.

My thought after our earlier discussion was that Company B's acquisition of the voting interests in the LLC would be nonreportable for HSR purposes provided that, consistent with your

office's prior interpretations, Company B will place only its own officers and employees on the board of the LLC. While we have now learned that a board structure is not contemplated, the structure is still such that the LLC will be member-managed because the manager and all officers of the LLC will also be officers or managers of Company B.

Accordingly, although the LLC agreement (as is often the case with LLC structures) expressly provides that it is not to be considered a partnership or joint venture other than for tax purposes, we respectfully submit that for HSR purposes because of existence of both voting and non-voting interests and the other factors outlined above, Company B's acquisition of 100 percent of the voting interests in the LLC should be treated as analogous to the acquisition of less than a 100 percent partnership interest, with the result that no HSR filing will be necessary.

It would be greatly appreciated if you could confirm by telephone whether or not your office is in agreement with such conclusion. In that regard, I can be reached a[redacted]

Thank you very much for your assistance.

Sincerely yours,

[redacted]

cc: [redacted]

2/23/98- Advised writer that B's purchase of the "voting" interest in the LLC should best be viewed as the formation of an LLC (since, before the transfer, A held 100% of the LLC interest). Since B's interest does not permit it to elect a [illegible] to the LLC who would serve in a role comparable to that of a director of a corporation, no voting stock is being acquired but, rather, an interest more like a partnership interest. The last "*" paragraph on page 2 must be analyzed to determine if A is acquiring all of the partnership interests in LLC, resulting in a potentially reportable event.

RDBSmith