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MEMORANDUM

TO: Alice Villavicencio

FROM: [redacted]

RE: HSR Filing Obligations

DATE: June 4, 1998

Attached, as we discussed, is our revised proposed memo regarding the possible HSR filing requirements applicable to a proposed limited liability company which you have agreed to review.

Thank you for your assistance.

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MEMORANDUM

TO:

FROM:

RE: Hart-Scott-Rodino Filing Requirements

DATE: June 3, 1998

DRAFT

This memorandum responds to your request for our input regarding the filing requirements under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"), 15 U.S.C. § 18a, and the rules promulgated thereunder ("HSR Rules"). 16 C.F.R. § 801, et seq., relating to the proposed formation of a Delaware limited liability company to be called LLC3.

As we understand it, Individual 2 ("I2") and Individual 3 ("I3") are forming an Ohio Limited Liability Company to be called "LLC2", in which each will own a 50% membership interest. LLC2 will then enter into an agreement with a Delaware limited liability company ("LLC1") of which Individual 1 ("I1") is the ultimate parent entity, relating to the formation of LLC3. LLC1 will contribute to LLC3 approximately $8 million. LLC1 will also make a commitment to contribute $2 million of additional cash to LLC3, bringing its total commitment to $10 million.

In return for its contributions, LLC1 will receive a "preferred" membership interest from LLC3, entitling LLC1 to receive the first $10 million of LLC3's liquidating distributions, i.e., assets upon dissolution of LLC 3, and a 50% "common" membership interest in LLC3.

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LLC2, which will make a nominal cash contribution to LLC3, will also receive 50% "common" membership interest in LLC3.

You have inquired: (1) whether the formation of LLC3 is a transaction requiring the filing of a Notification and Report Form ("Form") under the HSR Act; (2) who will be the "acquiring person" or persons for purposes of the HSR Act should LLC3 make any future acquisitions subject to the Act, and (3) whether the FTC requires more than one $45,000 filing fee when more than one acquiring person files a Form relating to the same transaction?

1. **The Formation of BIS Holdings May Not Be A Reportable Transaction**

Neither the HSR Act nor the HSR Rules address your inquiry whether the formation of an LLC triggers the HSR Act's filing requirements. We discussed this matter hypothetically with a compliance officer in the FTC's Premerger Notification Office. She informed us that under the FTC's current informal interpretation of the HSR Act if, at the time of formation of a new LLC, the management committee of the LLC is comprised solely of individuals who are employees, officers or directors of entities controlled by the individuals or entities that control the LLC, or partners of the new LLC themselves, *i.e.*, "insiders", then the LLC is treated as a partnership LLC and, thus, no voting securities are being acquired by the partners. If, however, the management committee is comprised of one or more "outside" individuals, then the LLC is treated like corporate LLC, voting securities are being acquired, and a filing may be required, assuming other requirements of the HSR Act are met and no exemption applies.

Thus, the answer to your inquiry whether the formation of LLC3 triggers a filing obligation under the Act will turn, part, on whether its' management committee is comprised

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entirely of "insiders". The Premerger Office has informed us, however, that this informal interpretation of the HSR Act is subject to change. Thus, at the time of the actual formation of LLC3, you should confirm that the policy is still in effect.

2. Acquisitions By LLC3 May Require I1, I2 and I3 to File an HSR Form

The HSR Act requires any person acquiring the voting securities or assets of another person to file a Form and await expiration of the waiting period before consummating a proposed transaction if certain "commerce", "size-of-person" and "size-of-transaction" tests are met and the proposed acquisition is not otherwise exempt. 15 U.S.C. § 18a. The HSR Rules define the term "person" as an ultimate parent entity and all the entities it directly or indirectly controls. 16 C.F.R. § 801.1(a)(1). An "ultimate parent entity" is "an entity which is not controlled by any other entity." 16 C.F.R. § 801.1(a)(3). The term "control" means:

> (1) Either: (i) Holding 50 percent or more of the outstanding voting securities of an issuer or
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> (ii) In the case of an entity that has no outstanding voting securities, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity; or
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> (2) Having the contractual power presently to designate 50 percent or more of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

Thus, in the instant case, if LLC1 and LLC2 have (1) the right to 50% or more of the profits of LLC3; (2) the right in the event of dissolution to 50% or more of the assets of LLC3, or (3) the contractual power to designate 50% or more of the individuals exercising management

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functions, then the ultimate parent entities of both LLC1 and LLC2 may be required to file, assuming, as explained below, such entity meets the "size-of-person" test. Assuming I2 and I3 each "control" LL2, they may each also "control" LL3, and therefore be deemed the ultimate parent entities of LLC2 and LLC3.

For purposes of the size-of-person, test, however, the Act's filing requirements would not be triggered as to I1, I2 or I3 if they have total assets or net sales of less than $10 million, or if LLC3 is acquiring an entity with total assets or annual net sales of less than $100,000.

3. If I1, I2 and I3 Are Each Required To File, Then Each Must Pay The $45,000 Filing Fee

Assuming I1, I2 and I3 are each required to file, then, according to the FTC staffer we consulted, each would have to pay a $45,000 filing fee as to the same transaction. This is consistent with the *Federal Register* Notice announcing the $45,000 fee, which states in relevant part:

> ....In most transactions the Act and Rules specify only one acquiring person who is required to file a premerger notification, and who therefore will be obligated by the proposed statute to pay a filing fee. However, in some transactions more than one person is required under the Act and Rules to file a premerger notification. In these circumstances, each acquiring person required to file a premerger notification will be obligated by the statute to pay a filing fee.

[redacted] Called Weiss on June 8, 1998 for [illegible] is required based on information in this letter. MW