801.1(b)(1)(ii)

[redacted]

September 4, 1998

SENT VIA FACSIMILE TO NO.: 202-326-2624

Richard B. Smith, Esquire
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Sixth Street and Pennsylvania Avenue N.W.
Washington DC 20580

Dear Mr. Smith:

Earlier this wee[redacted]spoke to you about an acquisition by an LLC, his client, in which our client, a large insurance company, had until recently owned slightly over 50% of the membership interest. On, I believe, last Friday, August 28, the LLC made an HSR filing as the acquiring person with respect to the acquisition. I am writing on behalf of the insurance company to make sure that it does not have to file, that is, that the FTC would not regard it as still controlling the LLC.

Apparently, the LLC wants the acquisition badly and was faced with a seller who was threatening to walk if the HSR filing was not made quickly. Our client, not having known that a filing might be required of it, could not file quickly. As I believe[redacted]xplained to you, the LLC managers exercised pre-existing options to purchase sufficient membership interests in the LLC to reduce the insurance company to below a 50% interest. This is irreversible. The LLC made interest free non-recourse loans to the managers to permit them to exercise the options, and the LLC also agreed to pick up any tax that might be imposed upon the managers if they were deemed to have received income by virtue of receiving interest-free loans.

The insurance company now has less than a 50% beneficial interest in the LLC. By pre-existing contract, another member of the LLC has the right to elect three of the five members of the LLC board of members. Under the terms of the pre-existing options that the managers have now exercised, the insurance company receives proxies from the managers, which enables it to

[redacted]

cast a slighty over 50% vote on major items such as mergers, sale of substantially all of the assets, and the like. In effect, the insurance company has a veto power as to such events. These proxies have no effect, however, on the election of the board of managers because of the contractual right of the other member to elect a majority of that board.

In short, there was no thought here of avoiding an HSR filing and no antitrust motive for reducing the insurance company to a less than 50% beneficial interest in the LLC. That has been done, and the insurance company is no longer entitled to as much as 50% of the profits and losses, or 50% of the assets upon liquidation. Were it relevant, the insurance company has no right to elect 50% or more of the board of managers.

I would appreciate your calling me [redacted] on whether we are right in believing that our client need not file. If it were required to file, the situation would be somewhat bazaar, given that the insurance company no longer has a 50% beneficial interest in the LLC.

Thank you very much for your assistance.

Sincerely yours,

[redacted]

[redacted]

9/14/98 - Advised writer that since LLC was more like a [redacted] than a corporation (per outsiders on board - confirmed by [redacted] in my call to him), the insurance company does not control the LLC under 801.1(b)(1)(ii) at the time of filing (and will not control it at the time of closing). [redacted] the LLC was the proper filing person and only acquiring person required to file.

PBSmith

[redacted]