[redacted]

801.40(LLC)

FEDERAL TRADE COMMISSION PREMERGER NOTIFICATION OFFICE

Aug 29 4 13 PM '95

August 29, 1995

A/D

VIA FACSIMILE

This material may be subject to the confidentiality provisions of Section

[redacted]

Federal Trade Commission

6th Street and Pennsylvania Avenue, N.W.

Washington, D.C. 20580

Act.

Re: Formation of a Limited Liability Company

Dear Richard:

I am writing to confirm that, as we discussed last Friday, August 25, 1995, the formation of a limited liability company currently being proposed by one of my clients would not be a reportable transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 [redacted]

[redacted] Rules").

The facts are as follows. a limited [redacted]

[redacted] A and B each will [redacted] time the LLC is formed, operating assets to the LLC. Because A's assets may be of somewhat greater value than B's, B also may contribute cash to equalize the value of the two Members' contributions.

LLC will be governed by a Board [redacted] three representatives [redacted]

[redacted] officers and/or directors of A and B. The [redacted] 's duties will include approving acquisitions and dispositions of assets, financings and the LLC's Business Plan. The [redacted] will declare distributions to the [redacted] some cases [redacted]

[redacted]

[redacted] of LLC will consist of two co-managers, each designated by A and B. Each [redacted] significant [redacted]

[redacted] will be

A/D

[redacted]

have responsibility for the day-to-day operations of LLC, subject to the direction of the Board, and will prepare the LLC's Business Plan. Once the plan is approved by the Board, the managers will be free to act in accordance with the plan, but will be required to obtain Board approval for certain actions, including making any [redacted]

acting on behalf of LLC, but the terms of their employment, salary and benefits will be determined by, and be the responsibility of, the employing Member.

The issue presented by these facts is whether the formation of the LLC is reportable under Rule 801.40, which requires that parties to the formation of a joint venture corporation meeting certain dollar thresholds make HSR filings. This rule is based on the assumption that, as part of the formation of the venture, the parties are acquiring "voting securities," as that term is defined for purposes of the Act. In this case, the formation of LLC would meet the dollar thresholds in Rule 801.40. The transaction would not be reportable, however, because the interests in LLC being [redacted]

Rule 801.1(f) defines "voting securities" with respect to an unincorporated entity such as the LLC as securities that "entitle the owner or holder thereof to vote for the election of . . . individuals exercising similar functions" to those of a corporate board of directors. In the course of our conversation last week, you indicated that a key determinant of whether a limited liability company's governing board should be treated like a corporate board [redacted]

directly, as would a partner to a partnership. Thus, the acquisition of the limited liability company interests are not voting securities, and the formation of the limited liability company is not reportable under Act.

[redacted]

officers or employees of A and B, and on significant projects, the Members' own boards will continue to have a right of approval. [redacted]

A ID

managers could be considered the equivalent of electing corporate [illegible]

and in any event, will not exercise the functions of a board of directors.

The facts presented here thus are quite similar to those described in a January 19, 1995 letter to the Premerger Notification Office (a copy of which is attached), in which a natural person and a corporation proposed forming a 50-50 limited liability company. In that case, the approval of both members was required for important decisions, and both members were to represent themselves in governing the LLC--the natural person personally, and the corporation through two officers. The LLC was to have an executive director and other senior management, but none of these would have the authority or approval rights of directors in a corporation. The Premerger Notification Office advised that no filings were required. Similarly, based on the facts in this case, the formation of LLC should not be reportable [illegible]

[redacted]

Attachments

8/29/95 - Writer confirms that phrase in paragraph 2, "or shortly thereafter" means that a shell LLC might be formed and the contributions made [illegible] part of the LLC formation [illegible] managers will be employees of A and B and since [illegible]

[illegible] did not result in [illegible]

I advised that formation of LLC [illegible] back "voting stock" and, thus, was not reportable under 801.40.

RBSmith