

801.40 (LLC formation)

[REDACTED]

February 27, 1996

Via Facsimile

Richard B. Smith, Esq.  
Premerger Notification Office  
Bureau of Competition  
Federal Trade Commission  
6th and Pennsylvania Avenue, N.W.  
Washington, D.C. 20560

Re: Premerger Notification Analysis for Limited Liability Companies

Dear Mr. Smith:

Re: [REDACTED] - Summary of [REDACTED] of February 23, 1996

regarding the notification and reporting requirements in connection with the possible formation of a Delaware limited liability company ("LLC"). I have summarized below the facts we discussed on the telephone. Based upon this fact scenario, it is our understanding that the formation of the LLC (including the contribution of assets described below as well as the related acquisition of an interest in the LLC by the members) would not be a reportable transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 as amended (the "Act") and the rules promulgated thereunder.

We are assuming, for purposes of this analysis, that the size of the person and size of the transaction threshold would be met if the formation of the LLC were deemed to result in the acquisition of "voting securities." It is our understanding, however, that under the current FTC staff interpretation of the rules, if the LLC is organized and operated in a manner consistent with the formation and operation of a partnership, those ownership interests will not be characterized under the Act.

The transaction we discussed has three formation steps that will occur simultaneously. Corporation A will acquire a 2% undivided interest in the assets in a division of Corporation B for approximately \$500,000. Corporation A will contribute the assets it acquired from Corporation B to the newly formed LLC in exchange for [REDACTED]

the newly formed LLC in exchange for [REDACTED]

[REDACTED]

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February 27, 1996  
Page 2

limited LLC for approximately \$12.5 million. Thus, at the conclusion of the formation of the LLC, Corporation A would have the opportunity to appoint three Member Representatives and Corporation B would have the

The limited liability company will operate in a fashion similar to that of a partnership under state law. Members will act through their appointed representatives (the "Member Representatives") who will serve as managers under the Delaware LLC law. Each member would be entitled to appoint Member Representatives generally in accord with its ownership interest in the LLC. Thus, the LLC Operating Agreement provides that Corporation A would have the opportunity to appoint three Member Representatives and Corporation B would have the

vote and a majority interest is defined as 50% plus one. Significant business activities such as



Corporation A would provide, directly or through affiliates, sufficient employees and managers to conduct the day to day operations of the business through a contractual service agreement. These employees and managers will be partly from Corporation B, partly from Corporation A, and partly from new hires. Following the consummation of the transaction, the

assigned operational responsibility for the LLC, would be limited by the service agreement, that would be enforceable by Corporation B. The service agreement will not give to the employees of Corporation A broad discretionary powers typically attributed to a corporate board of directors.

Based upon the foregoing facts it is our understanding that the staff of the ETC

Corporation A, Corporation B, or LLC making a filing in connection with the formation of the LLC should be made.

Thank you again for taking the time to speak with us.

  
 2/27/96 - Writer advises that in first full paragraph above, the Member Representatives will be employees of Corp. A and Corp. B. Advised that formation is non-reportable and that transfer of ownership interests would be 100%.