

~~18(c)(10)~~ 7A(c)(3) and (c)(10); 801.90

[REDACTED]

July 2, 1999

[REDACTED]

[REDACTED]

Richard B. Smith  
Deputy Assistant Director  
Premerger Notification Office  
Bureau of Competition  
Room 301  
Federal Trade Commission  
Sixth and Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

RECEIVED  
FEDERAL TRADE  
COMMISSION  
PREMERGER NOTIFICATION  
OFFICE  
JUL 8 2 19

Re: Application of Proposed Transaction Under the Hart-Scott-Rodino Antitrust  
Improvements Act of 1976, as Amended

Dear Dick:

This letter is to confirm the telephone conversation that [REDACTED] you and I had on July 2, 1999, in which we discussed a proposed transaction and the need to file a Notification and Report Form under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

REC

[REDACTED]

[REDACTED]  
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and 3 Inc. from another seller ("Seller 2")<sup>1/</sup>. Party B and Seller 1 filed under the HSR Act with respect to the acquisition of the voting securities of 1 Inc. by the LLC, and Party B and Seller 2 filed under the HSR Act with respect to the acquisition of the voting securities of 2 Inc. and 3 Inc. by the LLC. The waiting period under the HSR Act expired with respect to these filings in

1999. <sup>2/</sup> The structure of the relevant entities following this acquisition, which is the currently existing structure, is shown on Exhibit A as the "Post-Option Exercise Structure."

Party C intends to exercise an option granted by Party A to acquire all of Party A's interest in the LLC (i.e., a 50% interest in the profits, and in the assets upon liquidation and of that acquisition, is shown on Exhibit A as the "Post-Option Exercise Structure."

After Party A sells its interest in the LLC to Party C, Party C and Party B will Inc. to Party B (the "Distribution"). The structure following the Distribution is shown on Exhibit A as the "Post-Distribution Structure."

As we discussed, notwithstanding that the JV -- which is a general partnership -- of the interests of the LLC.

As we further discussed, the Distribution also should not require a filing under the HSR Act. As you noted, following Party C's acquisition of Party A's interest in the LLC, Parties

single seller 2 for convenience.

<sup>2/</sup> Party A was not required to file under the HSR Act because it did not have total assets or net sales of \$10 million or more.

<sup>3/</sup> See Formal Interpretation No. 15, 64 Fed. Reg. 5808 (1999).

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C and B each will be deemed to hold 100% of the voting securities of each of the Corporations.<sup>4/</sup> Following the Distribution, Party C will continue to hold 100% of the voting securities of 1 Inc. but will hold no voting securities of 2 Inc. or 3 Inc., while Party B will hold all of the voting securities of 2 Inc. and 3 Inc. but will hold no voting securities of 1 Inc. Consequently, I understand that it is the position of the Premerger Notification Office that the Distribution would be exempt from filing based upon Section 7A(c)(10) of the HSR Act because neither Party B nor Party C's per centum share of the outstanding voting securities of any issuer will have increased as a result of the Distribution.<sup>5/</sup>

During our conversation, you indicated that, although these transactions as currently structured would not require filing under the HSR Act, an issue may arise as to whether they will constitute a transaction or device for avoidance under Rule 801.90.<sup>6/</sup> As we discussed, provided that the structure of a transaction was not driven by a desire to avoid filing under the

<sup>4/</sup> See, e.g., FTC Informal Interpretation No. 253, ABA Premerger Notification Practice Manual (1991).

<sup>6/</sup> 16 C.F.R. 801.90.

<sup>7/</sup> See S. Axinn, B. Fogg, *et al.*, Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act, 1.03[1][c].

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[REDACTED]  
benefits, but in order to prevent deterioration of these tax benefits Party B needed to consummate the acquisition of its indirect interest in the JV as early in 1999 as possible. Consequently, Party B desired to proceed with negotiation of the acquisition of the securities of the Corporations

[REDACTED]  
agreement would be signed, and that steps toward closing (including the filings under the HSR Act described above) would be taken, but that the acquisition of the securities of the Corporations would not be consummated until Party B had located a suitable partner and Party B's interest in the LLC had been reduced to 50%.

Because of the need to consummate the acquisition of the securities of the Corporations as soon as possible in order to preserve the tax benefits to Party B, Party A agreed to be a 50% member of the LLC for a limited period of time until a more permanent member was located. Subsequently, Party B did locate another partner (*i.e.*, Party C) which will acquire the interest of Party A in the LLC as described above. Following that acquisition, in order to most effectively utilize the tax benefits associated with the JV's ownership of the IPP, the securities of

8/ Party B's search for a partner to hold a 50% interest prior to Party B having negotiated the terms of the acquisition of the securities of the Corporations was also hindered by the fact that a number of likely candidates were unwilling to discuss the terms of such a partnership until Party B had first reached agreement with Sellers 1 and 2 with respect to such acquisition.

[Redacted]

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respect with my understanding. Thank you for taking the time to speak with [Redacted] and [Redacted]

Very truly yours,

[Redacted Signature]

cc: [Redacted] 7/9/99 Left phone mail message  
[Redacted] at [Redacted] [Redacted] [Redacted]

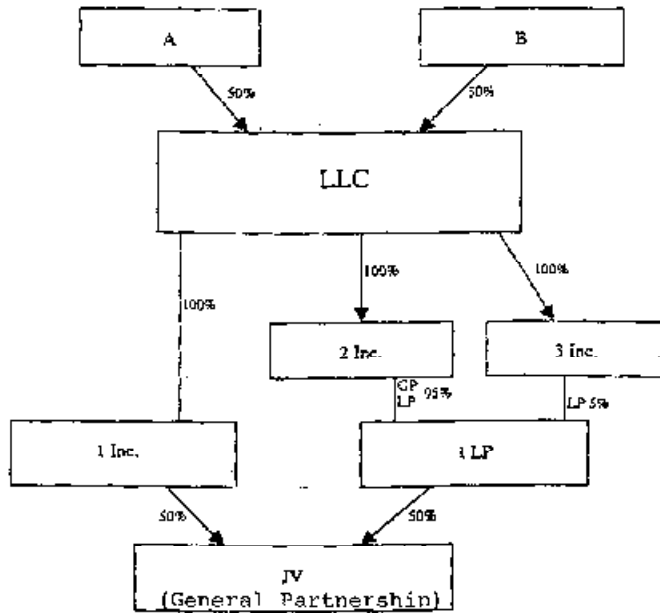
discussed here under the provisions  
of 7A(c)(3) and (c)(10). Also, the explanations  
seemed to resolve any potential 801.90 questions.

[Redacted] 11V and NV agreed with

RBSmith

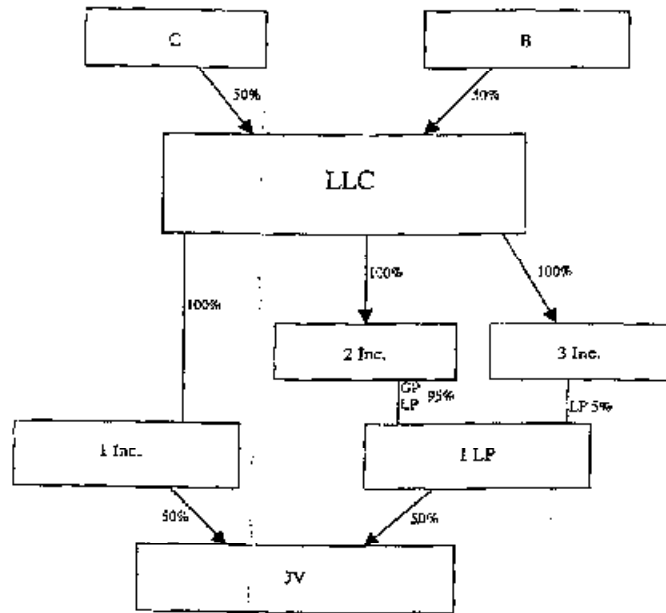
EXHIBIT A

Pre-Option Exercise Structure

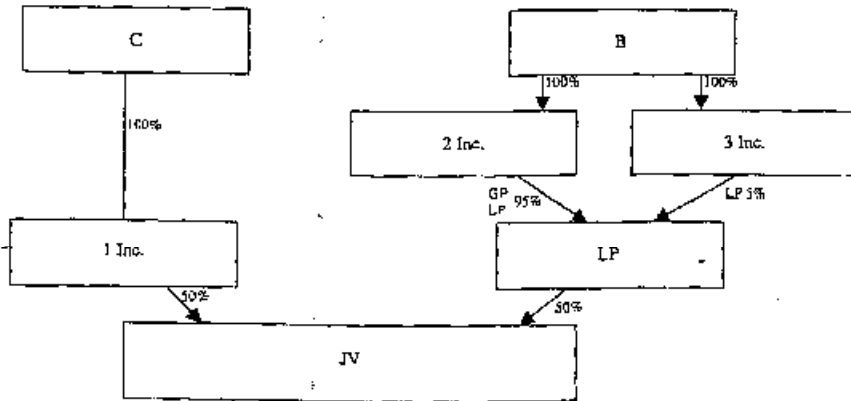


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**Post-Option Exercise Structure**



**Post-Distribution Structure**



SENT BY:

7-8-99 12:15 PM [redacted]

202 996 2884: # 4 / 4

