

801.40; 801.1 (f)(1)

December 14, 1992

VIA FACSIMILE

Richard B. Smith, Esq.
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Massachusetts Common-Law Trust

Dear Mr. Smith:

This is to confirm our conversation of December 11, 1992, in which we discussed whether the units of a Massachusetts common-law trust constitute "investing securities" and whether the formation of the trust or the acquisition of trust units by the initial investors would require a filing under the

You were presented with the following facts. An investment company has formed a Massachusetts common law trust.^{1/} Several institutional investors intend to acquire the units of the trust

the trust instrument, the operations of the trust are managed by a trustee. The trustee will not be selected by the initial

^{1/} The trust is known colloquially as a "Massachusetts business trust," because it is organized in Massachusetts and has a business purpose (i.e., portfolio investment), as distinguished from a testamentary trust, for example. As a technical matter, the trust is not a "Massachusetts Business Trust" because it does not have transferable shares.

a partnership for tax purposes.

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holders of the units; rather, the trustee has already been determined and is named in the declaration of trust. The trust instrument has no provision for election (periodic or otherwise) of the trustee, and the trustee is vested with sole responsibility for managing the trust. The only power over the trustee held by the holders of the trust units is that holders of fifty-five percent of the units of the trust may, upon delivery of a written instrument to the trust, remove the trustee with or without cause. Holders of sixty-seven percent of the units must approve the successor trustee.

We discussed whether, under these facts, the units of the trust constitute "voting securities."^{2/} You agreed that the units were not "voting securities" and that no filing with the SEC would be required for the acquisition of the trust units by the initial investors (who would not meet the Section 7A(a)(3) size of transaction test since they would not be acquiring any

son offered for this conclusion: the mere removal power held by the holders of the units was not alone enough to constitute

We also discussed an alternative argument why there would be no filing required with respect to the transaction. Because the

best viewed as part of one overall transaction, the transaction

ation. Simply put, the trust is not a corporation. It is a distinct legal entity from a corporation, which is formed under

^{2/} As you are aware, Rule 801.1(f)(1) defines voting securities as "any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer, or of an entity included within the

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trust is not a "joint venture or other corporation," the analysis would end and there would be no filing required (as with the formation of a partnership joint venture).

We further discussed how this trust differs from the unit trust described in Interpretation 91 of the Premerger Notification Practice Manual. There, the unit holders had the sole right to vote for trustees that administered the fund. In the present

matter, no filing is required for the transaction described. If this letter does not accurately reflect our conversation or if your office disagrees with this conclusion, please contact the undersigned immediately. I greatly appreciate your help on this matter, and please call me with any questions.

Very truly yours,
[REDACTED]

in the absence of

*units were not being discussed
restrictions on transferability of such units, which is noted in note
of the 12/14 letter, which copy was supplied in the attached
12/23/92 letter.*

3/ The trust is also not a limited liability company. A limited liability company is organized pursuant to state statute and not as a matter of contract among a trustee and beneficiaries. The statutes usually provide that members and man-

By contrast, in the present case, the trustees' liability is not limited and is governed by its contract with the beneficiaries of the trust.