

801.40; 801.1(5)(1) and (2)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

March 16, 1999

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:

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Trustee of a Trust, or the Trust itself. The Trust is a Massachusetts business trust issuing transferable shares, and its only significant asset consists of all voting securities of a corporation (Seller). Seller and the Trust have assets of less than \$10 million. The Trust (Trustee) has assets over \$100 million and is negotiating to purchase substantially all of Seller's assets. If Seller's ultimate parent is the Trust, the size-of-the-person threshold will not be crossed. On the other hand, if Seller's ultimate parent is the individual Trustee, his additional personal business assets will elevate the acquired person over the threshold.

Until January 1, 1999 Seller's voting securities were held by five individuals, four with 15% each and the fifth with 40%. On that date, the five contributed their shares in Seller to a newly created business Trust in exchange for equal numbers of the Trust's transferable shares. This transaction was tax driven.

The former 40% shareholder in Seller and current 40% holder of the Trust's shares is sole Trustee. Under the Declaration of Trust:

*The Trustee shall have without further authorization full and absolute power and control and authority over the Trust Property and over the business of this Trust to the same extent as if the Trustee was the sole owner of such property subject only to the limitations herein expressly stated.*

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Under § 801.1(c) of the ISR regulations, however, as I understand it, that control would not normally result in having the Trustee, rather than the Trust, be deemed to hold Seller's voting power. The Trustee is not a "person" within the meaning of 12 CFR § 9.18(a) . . . [or a] revocable trust or an irrevocable trust in which the settlor retains a reversionary interest in the corpus. . . ." While a section of the trust appears to permit its termination by a vote of three-quarters of the shareholders if they would be adversely affected (without stating what vote is needed if they would not be adversely affected), this

*appoints the Trustees of an employee pension plan organized as a*

Section 801.1(a)(1) of the regulations defines "person" as "an ultimate parent entity and all entities which it controls directly or indirectly." Section 801.1(b)(1) includes within the definition of "control:"

*Having the contractual power presently to designate 50  
unincorporated entities, of individuals exercising similar functions.*

Because virtually every trust provides some method of designating successor trustees, it seems logical that the power to name replacement or successor trustees should only place control

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*specifically identifies the conditions under which the settlor controls. Any third party having the power to designate or replace half or more of the trustees will control. However, it is not clear how this provision relates to the case where a trustee is given the power to designate a replacement trustee. This power adds very little to the actual control that trustee already exercises over the*

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The Manual notes that, "The FTC staff has not stated a position on this issue."

The topic of replacement and successor trustees is treated in §§ 3.6 and 11.2-11.4 of the subject declaration of trust. Generally, the remaining trustees fill vacancies. Although there is

serve as successor trustee. Section 11.2 provides for the removal of trustees by the affirmative vote of not less than three-fourths in interest of the shares then outstanding. Section 11.4 provides that if all trustees shall have died or have become incapacitated and there is no successor trustee serving, new trustees may be elected by the affirmative vote of not less than 60% of the shares outstanding.

Please let me know [redacted] whether we should treat the Trustee or the Trust as Seller's UPE. Thank you very much.

Sincerely yours,

[Redacted signature]

3/19/99 Advised writer that it has been the long-standing policy of the [redacted] office to treat Mass. Business Trusts as corporations. Formerly of this Trust owned by 801.40 but, not a 100% owner at time of formation (and no 100% power, as well, writer advised) Share of Trust held by minority holders only. The five individuals agreed to appoint the 40% holder as sole trustee (director) through the trust instrument, but no single one of the five [redacted] is not held by

any one of the [redacted] and you, the corporation (or trust) is still our UPE. (no agency).  
R.B. Smith