

801.1(c)(3); 801.1(b); 801.1(c)(1)

[REDACTED]

May 6, 1999

Via Facsimile

Mr. Richard Smith
Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
Sixth Street and Pennsylvania Avenue NW
Washington, D.C. 20580

Re: HSR Issue

Dear Mr. Smith:

Following up on our discussion yesterday, I wanted to set forth the facts and the issue that those facts present. In essence, the question is whether a irrevocable trust in which the settlor has no reversionary interest is nonetheless included within the settlor's "person" by reason of a limited power to appoint trustees.

An individual formerly held more than 50% of the voting securities of Corporation A.

For estate planning purposes, the individual created a trust and transferred to that trust

[REDACTED]

(couple's children are all adults.)

[REDACTED]

legally cannot be a trustee. The Settlor does have, however, the power to appoint successor

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[Settlor] shall have the power at any time and from time to time to appoint a successor to any trustee who fails to qualify and ceases to serve and to remove any trustee then acting, but I shall have the duty to appoint a successor to any trustee that I remove. I shall not appoint, however, a trustee under this Paragraph who is a "related or subordinate party" to me within the meaning of Section 672(c) of the Internal Revenue Code.

Under Section 672(c) of the Internal Revenue Code, a "related or subordinate party" is defined as a "nonadverse party" who is not

- (a) the grantor's spouse if living with the grantor;
- (b) any one of the following: The grantor's father, mother, issue, brother or

26 U.S.C. § 672(c) (1997).¹¹

Thus, although the trust document grants a limited trust-appointment power, the Settlor's ability to control the trust through the trustee-appointment power is severely circumscribed. The Settlor can only appoint someone who falls outside a class of persons whose conduct the Settlor

family members, direct employees, employees of corporations in which either the Settlor or the

¹¹ A "nonadverse party" is defined as anyone who is not an "adverse party," and an "adverse party" is a person who has "a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses with respect to the trust." It is not clear that anyone would qualify as an adverse party for purposes of appointment as trustee, but if there is such a person, by definition that adverse party has a "substantial" interest to protect and therefore presumably will act to protect that interest, regardless of the Settlor's wishes.

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The purpose for the transfer to the trust is to ensure that the transferred securities are not included within the Settlor's estate, and to ensure that the Settlor's estate does not control

Settlor were deemed to control the trust, then, for tax purposes, the trust would be ignored, with significant adverse estate tax consequences for the Settlor's estate and family.

or more of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions."

The Statement of Basis and Purpose notes that a trust is an "entity" and will also be a

controlled by another entity "only if the [other entity] has a contractual power, under the trust indenture, to designate the trustee or, if there is more than one, a majority of the trustees." *Id.* That same definition of "entity" in the ABA Premier Notification Manual is

Indeed, the trust document actually limits the appointment power more than the statute

that kind of appointment.

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But the interpretation itself
even if be...

... a settlor who has a
an anomalous here, where the purpose of the limitation is to ensure that
"control" the trust (or Corporation A) ...

... you further. ... appreciate

Very truly yours,

5/7/99 Called writer and advised that Premier
Office can and will only look at settlor's power to remove and
replace trustees of a trust. Settlor has that power here and thus
controls trust and not not not not. The LYS man can

not) appointed, but such position is not binding on the Premier
Office. (PS, NU, HO and TH agree in conclusion reached)

Richard Smith