

[REDACTED]
Attorneys at Law

Rule 801.1(b)
Control

[REDACTED]
February 10, 2000

VIA FACSIMILE

Ms. Alice Villavicencio
Compliance Specialist
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Re: 15 CFR 801.1(b) - Control by Designation and the Difference
Between Designation and Nomination

Dear Alice:

I very much appreciate your time and assistance during our February 3 and 4, 2000 telephone conversations concerning the distinction between "designating" and "nominating" directors under Rule 801.1(b). Pursuant to your suggestion, I am writing to confirm the substance of those conversations.

Facts

The facts we discussed involved Mr. A, a shareholder, who pursuant to a shareholder agreement has the right to "nominate" three of the five directors of the Company, an acquired entity in a reportable acquisition. At your request, I have attached a sanitized copy of the relevant page of that agreement. The shareholder agreement obligates the shareholders to "vote their shares of Capital Stock of the Company in order to elect a Board of Directors of the Company in accordance with the provisions of this Section 2.2."

Further, the shareholder agreement discusses the composition of the initial board, which has become irrelevant since that board has been succeeded.

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The shareholder agreement also provides that in the event of a vacancy on the board, the party who nominated the departed director "shall nominate a replacement and the Shareholders shall vote their shares of Capital Stock of the Company to elect the individuals so nominated to fill such vacancy."

Mr. A owns less than 50% of the total outstanding voting securities of the Company.

Issue

You were kind enough to answer the following question concerning the above statement of facts. I have summarized the question and your answer below.

Whether Mr. A has the "contractual power presently to designate 50 percent or more of the directors of a corporation..." within the meaning of Rule 801.1 (b) (2), by virtue of the above shareholder agreement?

Yes. Mr. A's rights under the shareholder agreement give him the power to designate directors, because he has the power to nominate directors and the shareholders are contractually bound to vote for his nominations.

In accordance with the interpretation and discussion portions of informal staff interpretation number 62 in the Premerger Notification Practice Manual (American Bar Association, 1991 Edition), you advised that, the shareholder agreement requires the conclusion that Mr. A can actually designate three of the five board members. You and I discussed the Premerger Notification Office's ("PNO") position on designation by comparing the above facts to a hypothetical involving an irrevocable proxy - if Mr. A presently had an irrevocable proxy to vote 60% of the shares then he could, at a shareholder meeting, simply vote all 60% of the shares, plus whatever he held, and elect the board he chose. The PNO would clearly take the position that under those circumstances, Mr. A would possess the right to designate. Likewise, in the present case, the shareholders agree to vote their shares in accordance with the Section of the shareholder agreement that entitles Mr. A to nominate three directors. (See Section 2.2 of the attached). The power Mr. A has under this arrangement, as it relates to his ability to control the Company, is the same as if he held a combination of irrevocable proxies and personal ownership of voting securities enabling him to vote 60% of the shares.

Because Mr. A has the present right to designate three of the five directors of the Company, Mr. A controls the Company, pursuant to the definition of "control" in Rule 801.1 (b).

I hope that this letter accurately summarizes the advice we discussed on February 3rd and 4th. If I am incorrect in my summary of our conversations, please let me know.

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