801.40; 801.1 (g)(1)

[redacted]

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 "voting securities" and whether the formation of the trust or the acquisition of trust units by the initial investors would require a filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act").

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 sale of units will provide the investment capital for the trust. The trust will invest in securities relating directly or indirectly to [redacted] Under the terms of the trust instrument, the operations of the trust are managed by a trustee. The trustee will not be selected by the initial

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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. The beneficial interest in the trust is subject to various restrictions on transfer by virtue of the trust's status as a partnership for tax purposes.

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 accordingly no filing 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 "assets or voting securities"). You agreed with the primary reason offered for this conclusion: the mere removal power held by the holders of the units was not close enough to a power to vote for the trustee. This would be consistent with your office's application of the HSR Act to preferred stock that may vote on certain major corporate matters, such as liquidation or merger, but that does not vote for directors. Such preferred stock is not deemed to consist of "voting securities."

We also discussed an alternative argument why there would be no filing required with respect to the transaction. Because the formation of the trust and the initial issuance of the units are best viewed as part of one overall transaction, the transaction should be tested under Rule 801.40. As we discussed, Rule 801.40 applies only to the formation of a "joint venture or other corporation." Simply put, the trust is not a corporation. It is a distinct legal entity from a corporation, which is formed under

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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 same person as the issuer, or, with respect to unincorporated entities, individuals exercising similar functions."

[redacted]

Massachusetts statute rather than under common law.[3/] If the 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 case, the unit holders have no right to vote for trustee.

Based on the foregoing analysis, the parties believe that no HSR Act 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]

[redacted] 12/16/92 - Advised [redacted] in the absence of that the premerger office was of the view that the trust units were not voting securities. Asked for further info on the restrictions on transferability of such units (which is noted in note 1 of the 12/14 letter, which info was supplied in the attached 12/23/92 letter.

3/ The trust is also not a limited liability company. A limited lability 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 managers of a limited lability company have limited lability. By contrast, in the present case, the trustees' liability is not limited and is governed by its contract with the beneficiaries of the trust.