

801.1 (b)(2); 801.1 (c)(4); 801.11 (b)(1) and (2)

June 8, 1994

VIA FACSIMILE

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

Re: Application of HSR Act to Trusts

Dear Dick:

I am writing to confirm our discussion of June 3, 1994, in which we reviewed the determination of the "ultimate parent entity" of a corporation making an acquisition. *"Corporation"*

I presented you with the following facts. All of the voting securities of [redacted] are held in two revocable trusts. Approximately 69,000,000 shares, representing roughly 51% of the outstanding voting securities, are held in a trust (the "Controlling Trust") that was established by a mother ("Mrs. A") and her [redacted] (none of whom are minors). Mrs. A is widowed. Mrs. A has a 50.0% interest in the Controlling Trust, and each of her [redacted] children has an approximate [redacted] interest in the Controlling Trust. Although there is a trustee of the Controlling Trust, much of the management of the trust resides in a committee (the "Technical Committee") that has various powers over the operation of the trust, including the power to vote the voting securities held by the trust. The operation of the Technical Committee is reviewed below.

All the remaining voting securities of the Corporation, approximately 65,000,000 shares, are held in another trust (the

Richard B. Smith, Esq.  
June 8, 1994  
Page 2

"CPO Trust") that issued certificates ("CPOs") representing indirect interests in the underlying Corporation shares. CPOs representing roughly 29,000,000 shares are held by the Controlling Trust. The remaining CPOs are held by various third parties. Under the terms of the CPO Trust agreement, the trustee of the CPO Trust must vote the shares of the Corporation held by the CPO Trust in exactly the same way that the shares held by the Controlling Trust are voted. Therefore, the Technical Committee of the Controlling Trust effectively directs the votes of all shares held in the CPO Trust, and thus directs the votes of all shares of the Corporation. Accordingly, the Technical Committee of the Controlling Trust has the power to select all of the directors of the Corporation.

The Technical Committee of the Controlling Trust operates in the following manner. At the formation of the Controlling Trust, Mrs. A and each of her children were appointed to the Technical Committee. Although Mrs. A therefore is only 1 of individuals on the Committee, she is entitled to a 50.0% vote on matters brought before the Technical Committee. Each of her children has a vote on such matters. Under the terms of the Controlling Trust agreement, a majority is required for actions taken by the Technical Committee. The Controlling Trust agreement further permits a veto of the actions of the majority if or more of Mrs. A's children vote opposite the vote of Mrs. A.

Because the actions of the Technical Committee require the vote of a majority of the interests (rather than 50% or more), Mrs. A could not alone select the trustee of the Controlling Trust, nor alone vote the voting securities held by the Controlling Trust (and, indirectly, the shares held by the CPO Trust).

You agreed with the conclusion that because Mrs. A does not alone hold a majority percentage interest in the voting of the Technical Committee of the Controlling Trust, she should not be viewed as (i) having the contractual power presently to designate 50% or more of individuals exercising functions similar to a board of directors of the Controlling Trust (or to select its trustee, if viewed differently), nor (ii) having the contractual power presently to designate 50% or more of the board of directors of the Corporation. Accordingly, Mrs. A would not be viewed as "controlling" the Corporation through a contractual power, and, assuming she does not "hold" 50% or more of the

Richard B. Smith, Esq.  
June 8, 1994  
Page 3

Corporation's voting securities, she would not be the "ultimate parent entity" of the Corporation.<sup>1/</sup>

Assuming that the Corporation did not meet the \$100,000,000 "size of person" jurisdictional test,<sup>2/</sup> then no HSR Act filing would be required with respect to a contemplated acquisition to be made by the Corporation of \$20,000,000 of voting securities (roughly 3%) of an entity that is included within an ultimate parent entity that also does not meet the \$100,000,000 "size of person" jurisdictional test.

The parties intend to proceed on the basis that this transaction does not require a filing under the HSR Act, based on Mrs. A not controlling the Corporation and assuming the facts are as presented in our telephone call and in this letter. Should this letter not accurately summarize our discussion or your agreement with the conclusions stated, please contact me as soon as possible at [REDACTED]

As always, I very much appreciate your assistance, and please call me if you have any questions or need any further information.

Very truly yours,  
[REDACTED]

6/8/94 - advised writer that I agreed with his conclusion that Mrs. A did not have the contractual power to designate (or to vote in) 50% or more of the directors of the Corporation or the trustee of the two trusts. (Of course if she "holds" 50% or more of the stock of the Corporation as the settlor of the two revocable trusts, she "controls" the Corporation by such method.) In p.m. 2/ below, the writer confirmed that the Corporation's financials included all entities it controlled and are of a date not more than 15 months prior to the acquisition. RB Smith

<sup>1/</sup> I understand that if one traces the shares of the Corporation through to the settlors of the Controlling Trust and the CPO Trust as provided in 16 CFR § 801.1(c)(4), Mrs. A would not be deemed to "hold" 50% or more of the Corporation's voting securities, having been the settlor of less than 50% of the shares outstanding.

<sup>2/</sup> On its most recently regularly prepared balance sheet, the Corporation had total assets of less than \$100,000,000, and its annual net sales were well under \$100,000,000, as stated on its most recent regularly prepared annual financial statements.