

801.1 (b) (1) (ii)

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February 13, 1995

BY HAND DELIVERY

Richard B. Smith, Esq.
Premerger Notification Office
Federal Trade Commission
Sixth Street and Pennsylvania Ave., N.W.
Washington, D.C. 20580

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PART

Re: Determination of the Controlling Partner Pursuant to
16 C.F.R. § 801.1(b)(1)(ii)

A. 2

Dear Mr. Smith:

Thank you very much for taking time on January 17, 1995, to discuss with me the interpretation of the Premerger Notification Office concerning the determination of the controlling entity of a partnership for Hart-Scott-Rodino purposes. This letter will confirm the substance of our telephone conversation.

As we discussed, Section 801.1(b)(1)(ii) sets forth the test for determining control of a partnership. Under this section, a partnership is controlled by any entity that has the right to fifty percent or more of the profits of the partnership or that has the right, in the event of dissolution, to fifty percent or more of the assets of the partnership. The regulations, however, do not address how to determine control of a partnership when the rights to profits and assets upon dissolution are set forth not in terms of percentages, but are allocated between the partners in terms of specific assets.

During our conversation, I described a proposed transaction in which a general partnership ("the Partnership") is to acquire a hotel/office complex for \$50 million. The Partnership has two partners, A and B. The closing documents will recite that the Partnership holds legal title to the hotel/office complex as nominee for the benefit of A, as to the equitable ownership of the hotel, and for the benefit of B, as to the equitable ownership of the



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Page 2

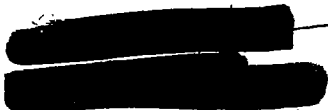
office building.¹⁷ The partnership agreement will provide that A is entitled to all profits generated by the hotel and that B is entitled to all profits generated by the office building. In the past, the hotel has consistently generated more income than the office building and, in the future, the hotel is expected to generate more profit than the office building. The agreement will also provide that upon the subsequent sale of the hotel/office complex, or any component thereof, A will receive all proceeds of the sale attributed to the hotel and B will receive all proceeds of the sale attributed to the office building. At the time of the acquisition, more than half of the \$50 million purchase price will be allocated to the hotel.

AIE

Based on our discussion of the facts set forth above, you concluded that B does not have to report as an acquiring person under Hart-Scott-Rodino because B does not "control" the Partnership as defined in Section 801.1(b)(1)(ii). You explained that B does not meet either of the tests for control because (1) B will not have a right to fifty percent or more of the profits of the Partnership (i.e., the income from the hotel/office complex to which the Partnership will hold legal title); and (2) B will not have a right to fifty percent or more of the Partnership assets upon dissolution (i.e., sale of the Partnership's sole asset, the hotel/office complex to which the Partnership will hold legal title). Thus, at the time of the purchase, B does not control the Partnership, and consequently, does not have a reporting obligation under Hart-Scott-Rodino. A controls the Partnership, however, and may have a reporting obligation if it meets the size-of-person test.

If this letter does not accurately summarize the advice which you gave me, I ask that you contact me promptly. Thank you again for your guidance and assistance in this matter.

Very truly yours,



3/8/95 - Called writer and advised that the P.M.V. office agreed with the conclusion on control of the partnership set forth in this letter. R.B. Smith

¹⁷ As we discussed, the hotel and office are contiguous buildings on a single legal lot. If the property could be timely subdivided before closing, the seller would convey the hotel directly to A and the office building directly to B. Since the subdivision cannot be accomplished before the scheduled closing date, the seller will transfer legal title to the Partnership, which will then pursue subdivision of the property.