

801.1(b)(2); 801.1(c)(2)



July 10, 1996

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BY HAND

Richard B. Smith, Esquire
Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
Sixth St. and Pennsylvania Ave., N.W.
Washington, D.C. 20580

JUL 10 1 10 PM '96
SECRET
PREMERGER NOTIFICATION
OFFICE


Dear Dick:

This letter memorializes the advice you provided yesterday over the telephone concerning the appropriate analysis under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("the Act"), and the implementing regulations, as to who controls a corporation under the following circumstances:

X is a not-for-profit corporation that has no voting securities. X is managed by a board of directors consisting of four natural persons, A, B, C, and D. A and B are husband and wife; C is a lawyer, among whose clients are A and B; and D is a third party who is president of the corporation. None of the directors has any contractual power to control the vote of any other director; each can vote as he or she deems fit, consistent with the fiduciary obligations of a director.

X's by-laws provide that directors are elected at each annual meeting of directors by a plurality of the votes cast by the then-serving directors. Directors can be removed for cause by a majority vote of the directors. If a director resigns or is removed, a new director is selected by majority vote of the remaining directors.

Based on the above facts, you advised that corporation X is not controlled by A or B or any other person, and that X is therefore its own ultimate parent entity. You explained that because X has no voting securities, determining whether X is controlled by any other person depends upon whether any person


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has "the contractual power presently to designate 50% or more of the directors" of X. 16 C.F.R. § 801.1(b)(2).

As we discussed, all decisions regarding the designation of directors are made through votes of the directors themselves. Because directors A, B, C, and D are each natural persons with no contractual power to control the vote of any other director, you indicated that none of their respective voting rights as directors should be aggregated. You advised that § 801.1(c)(2), pertaining to "holdings" of spouses, would not apply in this context, and that C's status as an attorney to A and B should likewise be disregarded in the absence of any agreement binding C to vote as directed by A or B. Thus, because no one person has the contractual right presently to designate 50% or more of the directors of X, you concluded that X is its own ultimate parent entity.

If this letter does not accurately reflect the advice you provided, please call me as soon as possible.

Thank you for your time and assistance.

Very truly yours,


7/12/96 - Advised writer (by phone mail) that, after checking with two staff members of the PTW office, his conclusions were correct and X is its own UPE.

RB Smith