§ 801.1 (b)(2)

[redacted]

November 6, 1996

VIA COURIER

Richard Smith
Premerger Notification Office
Federal Trade Commission
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Mr. Smith:

This is to confirm the content of our conversations today and on Monday, November 4, 1996, and to provide you with additional background information. I informed you that the corporation at issue has two shareholders ("shareholder A" and "shareholder B") and that those shareholders and the corporation are parties to a shareholder agreement. Shareholder A currently owns a majority of the corporation's common stock (the only voting securities of the corporation), each share of which entitles the holder to one vote in electing the corporation's Board of Directors.

On November 4, 1992, the corporation's Board of Directors authorized the Board to have five directors. The shareholder agreement, which was entered into on July 6, 1994, and was last amended on March 12, 1996, provides that the shareholders shall take actions to cause the corporation to have five directors and that the shareholders "shall take all actions necessary to ensure the election to the Board of Directors of" (1) one individual nominated by shareholder A, (2) two individuals nominated by shareholder B and (3) two individuals "mutually selected" by shareholders A and B ("independent directors").

Currently, the corporation only has four directors because shareholder A and shareholder B have designated only one of the two independent directors, but the Board's authorization of five directors and the shareholder agreement's provision requiring the shareholders to take actions to have five directors remain in full effect. I represented to you that the Board's authorization of five directors and the shareholder agreement's provision concerning the number of directors are not devices to avoid the Antitrust Improvements Act of 1976's ("the Act") reporting requirements.

[redacted]

You informed me that, under the Act, shareholder A is considered to control the corporation because it holds a majority of the corporation's voting stock. You stated that shareholder B's contractual right to participate in the mutual selection of the two independent directors did not give shareholder B contractual power to appoint the independent directors for purposes of the Act. We agreed that shareholder B, therefore, does not control the corporation, as defined by 16 C.F.R. § 801.1(b), because shareholder B only has contractual power to appoint two of the corporation's five directors. You also stated that because the parties' actions concerning the number of the corporation's directors are not devices to avoid the Act's reporting requirements, the fact that the corporation currently only has four directors (and one vacancy) does not alter the analysis.

This letter supersedes my letter to you of November 5, 1996. Please contact me if any portion of my description of our conversations is inaccurate or the foregoing analysis is incorrect. I appreciate your assistance in this matter.

[redacted]

11/14/96- Agreed with conclusion of letter. In order to have an objective, easily administrable control by conduct criterion, the test is whether the person has the contractual power to appoint half of the persons authorized to be directors. If such were not the case, the person resigned from the board control might shift and if a new person came on it would shift back. Due to the severe penalties for non-compliance (which may be based on who control at the time of consummation), the contractual control test is based on the number of authorized directors and not the number of individuals who may, at any moment, be serving as directors. (This view was confirmed by discussions with persons involved in the drafting of regs. 801.(b)(2).)

RBSmith

[redacted]