

SECRET (4)

February 4, 1999

SENT VIA FACSIMILE TO NO.: 202-326-2624

Richard B. Smith, Esquire
Preminger Notification Office
Bureau of Competition
Federal Trade Commission
Sixth Street and Pennsylvania Avenue N.W.
Washington DC 20580

Dear Mr. Smith:

This inquiry seeks the staff's determination of who is the ultimate parent entity, an individual stockholder in a corporation, a voting trust, or the corporation itself. The corporation is selling approximately 10% of its assets for cash, so the determination is needed primarily for technical reasons, not because the contents of the acquired person's HSR report would be materially different whoever is UPE.

The corporation, an S corporation for tax purposes, has outstanding 1,000 shares of common stock, 990 of which are designated as non-voting and only 10 as voting. Other than voting rights the shares are identical. The 10 voting shares were issued to father, and the 990 non-voting shares are in six trusts for the children of his six adult sons, 165 shares in each trust. Father did not establish these trusts and has no interest in them.

Father entered a Voting Trust Agreement with his sons with respect to the voting stock. Father and the six sons are all trustees, a majority vote of the trustees (that is, four) governs, and father has no power to appoint replacement trustees. The agreement provides for a ten-year term, which might suggest a reversionary interest in father. The agreement also provides, however, that its terms may be extended by a written notice signed by a majority of the trustees. As stated, the six sons' family trusts among them have 99% of the beneficial interest in the corporation, represented by the 990 non-voting shares. The sons' economic interests are expected to cause them to vote to continue the ten voting shares in the voting trust.

As you know, HSR regulation 801.1(c)(5)-(5) provides, in effect, that with certain exceptions a trust, itself, rather than the settlor, trustee, or beneficiaries, "holds" stock in the trust. Among the exceptions are:

(4) *The assets and voting securities constituting the corpus of a revocable trust or the corpus of an irrevocable trust in which the settlor(s) retain(s) a reversionary interest in the corpus shall be holdings of the settlor(s) of such trust.*

In this situation, with 99% of the beneficial interest in the grandchildren and with the continuation of the voting trust in the sons' discretion it seems to us that the father, having only one vote as trustee out of seven, might not be the UPE of the corporation, though he does retain the beneficial interest (not the voting interest) in the 10 shares.

Please let me know [redacted] whether we should treat the father, the voting trust, or the corporation as UPE. Thank you very much.

Sincerely yours,
[redacted]

[redacted] 2/5/99. Writer advises that father has contributed his 10 shares of voting stock to trust which is to exist for ten years with stock then to revert back to grantor, i.e., father. It is a "reversionary interest" in corpus of trust and, although trust may be extended until after father dies, this reversionary interest means father holds all the voting stock of the trust and must file as the acquired person. RB Smith