

Verne, B. Michael

801.1(b)

From: [REDACTED]
Sent: Thursday, November 17, 2005 5:54 PM
To: Verne, B. Michael
Subject: Request for telephone conference re potential transaction

Mike,

I left a vmsg but thought it more efficient to send an email. I hope we can schedule a telephone call at your earliest convenience to discuss the following fact pattern in the context of when the required HSR should be filed.

My hospital client is negotiating the acquisition of a small hospital-system. The target system is bleeding cash profusely, and the acquiring hospital has certain constraints that prevents it from taking title to the assets before 7/1/06. To conserve cash and protect the value of the assets pending the actual acquisition, the parties desire to implement a two-part transaction to become effective on or about January 1, 2006 (subject to government approvals).

The two-part transaction contemplates a management contract, followed by an affiliation agreement through which § 801.1(b) "control" will be transferred. First, the parties intend to enter into a management contract through which my client will exert management control, but not § 801.1(b) "control," over the system as soon as all necessary government approvals are obtained. Second, the parties intend to enter into an affiliation agreement that requires my client to acquire virtually all system assets no earlier than 7/1/06 and no later than 6/30/07. The contracts are to be executed simultaneously with each contract being contingent upon execution of the other contract.

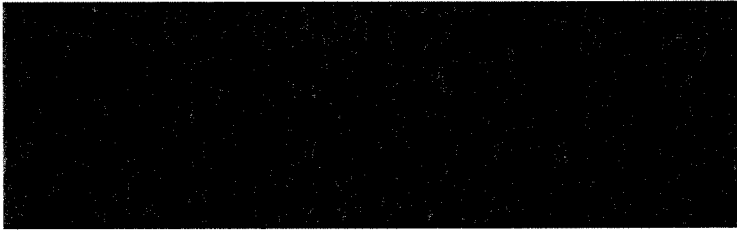
Pursuant to the management contract, my client is to exercise complete day-to-day operational control over the system, subject to oversight and strategic direction by the system's governing board. The management contract, standing alone, might raise Section 1 issues. However, we contend that this contract is ancillary to the delayed acquisition because of the unique circumstances facing the parties. The parties propose to file their respective HSRs on or about December 1 and to implement the two-part transaction as soon as possible after receiving all necessary government approvals.

Issues for discussion:

1. Should the HSRs for this transaction be filed in anticipation of the management contract as proposed, or should they be delayed until § 801.1(b) control is about to be transferred? We believe the HSRs should be filed in anticipation of signing the contracts and not delayed.
2. Assuming that the simultaneous execution of the management contract and affiliation agreement may be treated as a unitary transaction, will the parties be required to file a second HSR if § 801.1(b) control is not transferred within one year from the expiration/termination of the first waiting period? We believe that the transfer of § 801.1(b) control is not relevant if the two-part structure is indeed a unitary transaction for purposes of the Act.
3. If, on the other hand, the transfer of § 801.1(b) control is key to when the HSRs are to be filed for this transaction, we wish to verify that execution of the proposed management contract will not be considered by the PNO to be gun-jumping for purposes of a later HSR filing. (We do not intend to solicit guidance as to whether the management contract in question would raise Section 1 issues.)

Thank you for your attention to this fact pattern. Please let me know if/when you might be available to discuss this situation.

Best regards,



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M. BRUNO & COMPLIANCE
CONCERN

B. [Signature]
~~11/21/05~~ 11/21/05