Sec. 11

[redacted]

January 22, 1992

BY FEDERAL EXPRESS

Richard Smith, Esq.
Pre-Merger Notification Office, H-303
Federal Trade Commission
Washington, D.C. 20580

Re: [redacted]

Dear Mr. Smith:

The purpose of this letter is to request a further informal determination concerning the proposed filing of a pre-merger notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act"). As we explained in our letter to you and Mr. Thomas Hancock of December 2, 1991, our client, [redacted] is acquiring the assets of [redacted] (the [redacted], a [redacted] organization consisting of five related entities.

The Present Status

In our earlier letter, we indicated that the [redacted] should be viewed as a single "ultimate parent entity" for purposes of the Act, and that the Act should therefore be construed as permitting a single filing, and the payment of a single filing fee. We explained that the [redacted] consisted of several commonly-owned entities engaged in the operation of an integrated [redacted] system, consisting of a [redacted] We reasoned that, because of the virtual identity of ownership, management and business interests among the components of the [redacted], it was in substance a single entity, and that the substance of the organization should take precedence over its legal form.

You were kind enough to give us your informal advice on this matter. As I understood it, your advice was that, because none of the component entities of the [redacted] has a majority interest in the ownership, profits or assets of the others, there is among them no single "ultimate parent entity" under the regulations; and, therefore, there is no provision for departing from the strict terms of the regulations.

[redacted]

The Proposal

The [redacted] is now proposing to create a single ultimate parent entity, for the purpose of enabling it and the acquiring person to make a single filing. As you know, the [redacted] consists of the following entities:

- [redacted], a general [redacted] partnership having seventy partners (the [redacted], which provides professional [redacted] services to the [redacted]

- [redacted], a corporation whose shareholders are the [redacted] and which operates [redacted]

- [redacted], a general partnership of which the [redacted] are the general partners, and which owns the real estate and improvements in which the [redacted] is operated; and

- [redacted] general partnerships that own the real property in which the [redacted] operates the [redacted]. The partners of these partnerships are the [redacted] and an additional outside investor who owns a minority interest in the partnerships.[1]

The proposal in hand is that each of the [redacted] will contribute to the [redacted] his interests in the [redacted] and, if it is not otherwise exempted, [redacted]. As a consequence, the [redacted] will own all of the outstanding stock of [redacted], all of the interests in the profits and assets of [redacted] and over 50% of the interests in the profits and assets of [redacted]. The result will be that the [redacted] will be the

[1] As we mentioned in our earlier letter, we believe that the sale of the assets of [redacted] falls within the exemption for the acquisition of realty in the ordinary course of business under 16 CFR § 802.1, and that the sale of the assets of [redacted] does not meet the size-of-the-transaction threshold under 16 CFR § 802.20. We noted your concern whether the assets of [redacted] constitute office space for purposes of the former exemption, and if the proposal made in this letter is rejected, we will resolve that concern.

ultimate parent entity of the other organizations, and will make a single filing, as the acquired person, on behalf of the consolidated group.

This will bring the legal structure of the organization into closer conformity with its current management, administrative and financial structure. As we mentioned in our earlier letter, the same group of seven persons acts as the Executive Committee of the [redacted] and of [redacted] and as the [redacted] The same person is the Chief Executive Officer of all three organizations, and the other senior executive officers function as executive management for all three organizations. On the administrative level, the [redacted] and the [redacted] share common office and other facilities, and use the same staff to perform common services; and all of the business of [redacted] is performed by employees of the [redacted] or the [redacted]

The [redacted] has an integrated financial structure. Its revenues are derived from services provided to persons who are [redacted] of the [redacted] The [redacted] has a closed [redacted] consisting of the members of the [redacted] and almost all the [redacted] of the [redacted] are referred and treated by the [redacted]. The revenues of the [redacted] and the [redacted] are, in turn, the source of rental payments made by the [redacted] to [redacted], and by the [redacted] to [redacted] All the constituent entities share a Chief Financial Officer, and their financial statements are presented on a consolidated basis.

The Issues

You raised two issues with this proposal: First, whether the transactions just described would themselves require a filing under the Act; and second, whether they should be disregarded as evasive.

(a) Filing requirements concerning the consolidation. We submit that the proposed acquisitions by the [redacted] would not require a filing. The reason for this conclusion is that none of the entities involved has total assets or net annual sales equal to or exceeding $100 million. Although the resulting consolidated [redacted] with the [redacted] its new ultimate parent entity, would have net annual sales in excess of $100 million after the consolidation is consummated, the regulations require a focus on the size of the person as shown on the last regularly prepared

income statement or balance sheet of that person. 16 CFR § 801.11(c). Thus, the acquisitions would not meet the "size-of-the-person" threshold set forth in 15 USC § 18a(a)(2).

(b) Avoidance of compliance. The regulation here in question is 16 CFR § 801.90, which provides that "any transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and *the obligation to comply shall be determined by applying the act and these regulations to the substance of the transaction.*" (Emphasis added).

The purpose of the consolidation of the [redacted] into a single "ultimate parent entity" would be undertaken for the purpose of permitting a single filing, rather than multiple filings. However, we believe that this transaction would not be affected by the regulation, for the following reasons:

(1) The purpose of the Act is to require prior disclosure of impending transactions that might unreasonably restrain trade, so that they can be subjected to scrutiny. The proposal would not avoid compliance with the Act, because the parties would make full disclosure of the proposed transaction.

(2) The emphasized words in the regulation make it clear that regard is to be had to the substance of the transaction, rather than its form. This is not a case where there are five substantially separate transactions, and in which a device is being proposed to cloak them as a single transaction. To the contrary, there is here a single transaction in fact: the components of an integrated enterprise are being sold by their common owners to a single purchaser in one transaction for an aggregate price. The proposal submitted in this letter would merely alter the form of the transaction to fit its substance.

As we said earlier, the [redacted] is operationally and financially integrated, and it would entail considerable duplication of effort to make separate filings under the Act. The transaction is moving forward quickly on other fronts, and we are anxious to avoid delaying it and increasing its costs by adhering to what we believe would be an artificial and technical view of it as several separate transactions.

If you would give this request your usual prompt attention, we would be very grateful.

Thank you again for your cooperation.

Yours truly,

[redacted]

[redacted]

cc: [redacted] 1/24/92 - called [redacted] advised [redacted] that, in the view of the PMN office, if the voting stock and ~~assets~~ partnership interests of the various entities were to be contributed to the Medical Group at the same time (and PTS said they may be), the contributions should be analyzed in all possible sequences to see if the Group (which must include in its sales and assets those of any or all entities acquired before the purchase of the negl entity) ~~transferred~~ became a 100 MM person before the acquisition of any other entity. If such were the case, a filing would be required. (PTS will undertake this analysis to determine the results.) If there is no acquisition of a person of a 100 MM size (none of the acquired entities are such size), then no filing is required. Since the "substance" of the transaction is the Group's acquisition of these entities, it does not appear that 801.90 would be a significant problem.

RBSmith