

802.30
801.1(e)(8)
801.1(b)(2)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

TELETYPE DIRECT DIAL NUMBER

[REDACTED]

January 22, 1993

By UPS

Nancy Ovuka, Esquire
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Washington, DC 20580

This material may be subject to
a confidentiality provision of
section 74 (h) of the Clayton Act
which restricts release under the
Freedom of Information Act.

Re: Application of the Hart-Scott-Rodino
Act to the Merger of Commonly
Held Nonprofit Entities

Dear Ms. Ovuka:

We recently spoke about the potential applicability of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, ("the Act") to a proposed merger of jointly-owned nonprofit entities. In accordance with your suggestion, I am submitting this description of the transaction so that the Federal Trade Commission may better consider whether the transaction, a proposed merger between related nonprofit institutions I will refer to as Sub B and Sub C, is exempt from the filing requirements of the Act.

The current structure of the entities is as follows. Under the terms of a management agreement between the ultimate parent entity ("Parent") and Sub B, Parent currently has the power to appoint 50 percent of the board of directors of Sub B. Parent also has the contractual authority to appoint 50 percent of the board of directors of Sub A, the corporate member of Sub B. Parent accordingly controls both Sub A and Sub B within the meaning of the regulations. 16 C.F.R. § 801.1(b)(2).

Parent similarly controls Sub C within the meaning of the regulations because Sub A has the contractual power to appoint two-thirds of the directors of Sub C's board. Accordingly, the same ultimate parent entity, Parent, currently controls both parties to the merger. The proposed transaction will be accomplished through resolutions by the boards of Sub B and Sub C approving the merger, but will include no exchange of consideration between the parties.

then, use fair market value

*in
by [unclear]*

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Nancy Ovuka, Esquire

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used for filing of - person test
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The proposed merger will have no impact on existing competition and will permit substantial cost-savings and greatly enhance the efficiency of both nonprofit entities by combining and streamlining administrative functions now performed separately by each.

As an initial matter, this transaction may not constitute an "acquisition" within the meaning of the Act. Parent currently holds all of the assets of Sub A, Sub B and Sub C pursuant to 16 C.F.R. § 801.1(c)(8), because each of those entities is included within Parent, as explained above. Accordingly, no new entity will "hold" assets or voting securities "as a result of" the transaction within the meaning of the Act. 15 U.S.C. § 18a(a)(3). After the transaction, as now, Parent will control all of the entities and hold all of their assets within the meaning of the regulations.

In addition, although these nonprofit entities have no voting securities, it is instructive to consider the treatment under the regulations of mergers between entities that are controlled by the same parent through the ownership of voting securities. Such transactions are exempt from the Act as intraperson transactions. 16 C.F.R. § 802.30. The exemption of a merger between related entities controlled through voting securities suggests that an exemption should also be available in the current circumstances.

Although the Federal Trade Commission apparently has taken the position in the past that the acquisition of the corporate membership of a nonprofit corporation is an acquisition of assets and not eligible for this exemption, the proposed transaction does not involve the acquisition of a corporate membership. Accordingly, the requirement that mergers be analyzed as acquisitions of voting securities, 16 C.F.R. § 801.2(d)(1)(i), coupled with the exemption for the acquisition of voting securities between entities controlled by the same ultimate parent would support the conclusion that the proposed transaction is exempt from the Act. A determination that the proposed transaction is reportable would be especially anomalous here because if the entities were for-profit, stock corporations, Parent's current control undoubtedly would be sufficient to exempt the transaction from the filing requirements under § 802.30.

Furthermore, under the current interpretation of the regulations, acquisitions of partnership interests are not subject to the reporting requirements of the Act. If the merging entities were organized as partnerships under the common control of a

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single general partner who held a majority interest in both, the merger of the two partnerships into one would not trigger the reporting requirement.

The regulations and interpretations provide that this same proposed transaction, if between entities organized in any other business form, would not require a filing. Nothing in the statute or the regulations, or their histories, suggests that transactions between related nonprofits were to be treated differently and less favorably than those between other business forms. We believe that under either of the approaches outlined above, this proposed merger would not be reportable under the Act.

I appreciate your willingness to consider these circumstances. If you have further questions about the transaction, please do not hesitate to call me. Timing is of critical importance to my client, and therefore, we look forward to hearing from you at your earliest possible convenience.

Sincerely,

[REDACTED]

Partnership
mergers
are not
covered
by 802.30
As
acquisition
of all
partnership
interest
may be
reportable

[REDACTED]

1/22/93

PMN can't expand 802.30 to exclude
the merger of two subs held contractually,
must be by Holdings of 1/5.