7H(c)(4); 801.1(a)(2); 801.11(e)

[redacted]

July 27, 1993

BY HAND

Richard B. Smith, Esquire
Premerger Notification Office
Bureau of Competition, Room 303
Federal Trade Commission
Sixth St. and Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Dick:

As discussed, this letter will memorialize the advice you provided this morning over the telephone concerning the appropriate analysis under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("the Act"), and the implementing regulations, of a transaction with the following features:

1. The acquiring person, A, is a state taxing district that operates a hospital. Neither A nor the hospital is a corporation. The five members of A's board are appointed by the governor of the state. A has taxing authority within the district where it is located. A has the power of eminent domain. A's board is subject to the state's "government in the sunshine act," which requires state agencies to hold open, public meetings.

2. A intends to acquire 100% of the voting securities of B, a corporation engaged in commerce. A and B meet the Act's size-of-person tests, and the acquisition meets the size-of-transaction test.

3. A will acquire B for cash in either of two ways: (1) A will directly acquire the

> stock of B; or (2) A will form a corporate subsidiary, C, whose only assets will consist of the cash to be used for the acquisition. B will then merge into C in a cash merger transaction.

As we discussed, § 7A(c)(4) of the Act exempts from filing requirements:

> transfers to or from a Federal agency or a state or political subdivision thereof. . .

The regulations, 16 C.F.R. § 801.1(a)(2), exclude from the definition of "entity":

> the United States, any of the States thereof, or any political subdivision or agency of either (other than a corporation engaged in commerce).

Based on the facts detailed above, you advised that A qualifies as a "political subdivision" or "agency" of a state and is therefore not an "entity." You thus advised that if A were to acquire the voting securities of B directly, the acquisition would be exempt from the requirements of the Act.

You further advised that if B were acquired in a cash merger by C, the acquisition would also be exempt, but for a different reason. In such a transaction you advised that C would be its own "ultimate parent entity," as that term is defined in § 801.1(a)(3), even though A would hold 100% of C's voting securities. The reason for this conclusion is that A is not an "entity" under § 801.1(a)(2), and C would therefore constitute "an entity which is not controlled by any other entity." § 801.1(a)(3).

Because C would be its own ultimate parent, you advised that in applying the size of person test to C, A's assets would be disregarded. As noted above, C's only assets would consist of the cash to be used as consideration for the acquisition. Because such assets of a newly formed entity are excluded under § 801.11(e)(1), you advised that C would not meet the size-of-person test and the acquisition would therefore not be reportable.

[redacted]

If this letter does not accurately reflect the view of the FTC Premerger Notification Office as to the nonreportability of the two potential forms of the proposed acquisition described above, please call me immediately.

As always, I thank you for your time and assistance.

Very truly yours,

[redacted]

8/13/93 - I advised writer that it is the view of the PMN Office that no filing is required.

RBSmith