

[REDACTED]

RS

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

March 23, 1995

Richard B. Smith, Staff Attorney  
Premerger Notification Office  
Bureau of Competition, Room 303  
Federal Trade Commission  
6th St. & Pennsylvania Ave., NW  
Washington, DC 20580

Messenger Delivery

This material may be subject to the confidentiality provisions of (b) (7)(C) of the Clayton Act which require that this information be kept confidential.

Re: *Request for informal staff interpretation*

Dear Mr. Smith:

[REDACTED] intends to affiliate with [REDACTED], a [REDACTED] nonprofit membership corporation. For the reasons set forth below, the [REDACTED] and [REDACTED] believe that because the [REDACTED] is a state agency, no premerger notification obligation applies to the transaction under section 7A of the Hart-Scott-Rodino Antitrust Improvements Act (the "Act"). Pursuant to 16 C.F.R. § 803.30, the University and [REDACTED] request an informal interpretation from the Commission's staff to that effect.

I. Structure of the Proposed Transaction.

The [REDACTED] by and through [REDACTED], [REDACTED] intends to enter into an Affiliation Agreement with [REDACTED] (the "Affiliation Agreement"). The Affiliation Agreement provides that the [REDACTED] will become the sole voting member of [REDACTED] will become an additional obligor on up to \$9 million of [REDACTED] long-term debt, will provide [REDACTED] up to \$4 million in capital to fund the planning,

✓

[REDACTED]

creation and implementation of a region-wide integrated [REDACTED] system and the expansion and upgrade of [REDACTED] current facility, and will build an additional [REDACTED] facility on the [REDACTED] at a cost of up to \$3 million.

After the affiliation, [REDACTED] Board of Directors will consist of four directors appointed by [REDACTED] the President of [REDACTED] the [REDACTED], an independent [REDACTED] who is an active member of the [REDACTED] staff; six community representatives; and one member of the [REDACTED] staff. In addition to the [REDACTED] rights as [REDACTED] sole voting member, the [REDACTED] acting by and through [REDACTED] will have final approval over [REDACTED] annual capital and operating budgets; modifications or amendments to [REDACTED] capital or operating budgets in excess of 2%; adoption of and material modifications to strategic plans; incurrence of non-budgeted indebtedness in excess of \$50,000; sale of all or substantially all of [REDACTED] assets; acquisition, consolidation, change, or expansion of locations other than as contemplated in an approved strategic plan; changes to the [REDACTED] Restated Bylaws or Articles of Incorporation; material transactions other than those contemplated in an approved strategic plan; and any action that might adversely affect [REDACTED] or [REDACTED] exempt status.

## II. Parties to the Proposed Transaction.

[REDACTED] is a nonprofit membership corporation organized under [REDACTED], and is exempt from state and federal income taxes under Section 501(c)(3) of the Internal Revenue Code ("IRC"). It is authorized to operate an [REDACTED] and to carry on [REDACTED] care and various other business activities.

The [REDACTED] is a "constitutional corporation." [REDACTED] Governance of the [REDACTED] is vested in a twelve-member [REDACTED]. Control and management of the [REDACTED] affairs rest with the [REDACTED] subject to the [REDACTED] legislature's right to attach reasonable conditions to appropriations for the [REDACTED] and subject additionally to the requirements of general statutes enacted by the legislature and made applicable to the [REDACTED].

[REDACTED] an operating division of the [REDACTED]. Although it is governed and managed by a separate governing board appointed by the [REDACTED] it has no separate legal existence. The [REDACTED] Board of Governors' authority is limited to that authority granted to them in the Bylaws of the [REDACTED] adopted by the [REDACTED] laws") and delegated to them by [REDACTED] pursuant to a formal written policy last amended in February 1994. The [REDACTED] retain final authority over [REDACTED] mission statement, strategic plan, operating budgets, capital expenditure plans involving [REDACTED].

[REDACTED]

legislative funding or increases in indebtedness, significant changes in strategic direction, changes in major public policy or business practices, significant changes in the employment status of [REDACTED] employees, and commitment of significant resources beyond the level contemplated in approved strategic plans or operating budgets.<sup>1</sup>

<sup>1</sup>The [REDACTED] coordinates its provision of [REDACTED] services through [REDACTED] which operates the [REDACTED] which are staffed by [REDACTED] who also are [REDACTED] (i.e., those services outside their roles as [REDACTED] are provided through a number of separate [REDACTED] entities which enter into service contracts with the [REDACTED] through the [REDACTED] members of the [REDACTED] have established [REDACTED] as an independent corporation organized under [REDACTED] has no voting members. Its mission is to coordinate delivery of [REDACTED] the faculty of the [REDACTED] It is not a subsidiary or corporate [REDACTED] has no legal relationship to the [REDACTED] part from a contractual obligation to provide services to [REDACTED]

[REDACTED] management and direction is vested in a Board of Directors composed of six at-large directors, an unspecified number of ex-officio voting directors, and five ex-officio non-voting directors. The at-large directors are elected from and by the [REDACTED] The [REDACTED] as ex-officio voting directors. The five ex-officio non-voting members are the [REDACTED] Executive Director, the [REDACTED] General Director, the [REDACTED] President, and the [REDACTED]

[REDACTED] coordinates the activities of [REDACTED] and [REDACTED] a nonprofit corporation and has a pending application for exemption from state and federal income taxes under IRC Section 501(c)(3). It was incorporated to [REDACTED] had annual revenues of approximately \$ .5 million in 1994. [REDACTED] total assets of approximately \$ 1.4 million as of December 31, 1994. In 1995, [REDACTED] required an [REDACTED] with annual revenues of approximately \$ 1.3 million and total assets of approximately \$ .7 million. [REDACTED] the assets of [REDACTED] affiliated with the [REDACTED] 1992. [REDACTED] nonprofit corporation organized under [REDACTED] law and has a pending application for exemption from state and federal income taxes under IRC Section 501(c)(3), which the IRS has informally indicated will be granted. [REDACTED] Board of Directors is split equally between [REDACTED] appointees and [REDACTED] appointees. As of December 31, 1994, [REDACTED] total assets of approximately \$ 7.1 million and annual revenues of approximately \$ 13.3 million.

[REDACTED]  
The [REDACTED] is affiliated with two foundations, each of which has total assets or revenues approaching or in excess of \$100 million.

[REDACTED] operates exclusively for the benefit of the [REDACTED] in support of the [REDACTED] the second foundation, [REDACTED] reports the [REDACTED]

[REDACTED] is an independent, nonprofit charitable corporation exempt from taxes under IRC Section 501(c)(3). It is a publicly-supported organization under IRC Section 170(b)(1)(A). It is not a private foundation under IRC Section 501(c)(3). [REDACTED] raises, invests, and manages contributions and endowments and disburses those funds for [REDACTED] improvements, [REDACTED]

[REDACTED] As of June 30, 1994, [REDACTED] had total assets of \$ 372.2 million and annual revenues of \$ 34.1 million.<sup>3</sup> [REDACTED] did not have any unrelated business income during the fiscal year ended June 30, 1994. [REDACTED] governed by a 45-member Board of Trustees, approximately one quarter of whom are appointed by the [REDACTED] and three-quarters of whom are elected.

[REDACTED] is an independent nonprofit corporation exempt from taxes under IRC Section 501(c)(3) and Minnesota Statute § 290.05. It is not a private foundation under IRC Sections 509(a)(1) and 170(b)(1). As of June 30, 1994, [REDACTED] had total assets of \$ 97.5 million and Total revenues of \$ 22.7 million. [REDACTED] did not have any unrelated business income for the year ended June 30, 1994. [REDACTED] revenues for the year ended June 30, 1994 were primarily derived from gifts, grants, investment income, funds raised by affiliated organizations and [REDACTED] efforts. Other than expenses incurred for management, operations, and fund-raising efforts, all expenses were related to [REDACTED] grant, award and [REDACTED] Board of Trustees now has 36 members, seven of whom are members of the [REDACTED] the [REDACTED].

<sup>2</sup>Two other foundations are affiliated with the [REDACTED] and the [REDACTED]. Neither [REDACTED] the [REDACTED] total assets or annual revenues approaching \$ 100 million.

<sup>3</sup>In 1983, [REDACTED] acquired 90 percent of the common shares of [REDACTED] doing business as [REDACTED] corporation. The remaining shares were held by the [REDACTED] inc. engages in the operation of [REDACTED] resources. On September 6, 1994, the [REDACTED] and [REDACTED] a letter of intent to sell their shares to [REDACTED]. That sale was consummated prior to January 1, 1995.

[REDACTED]

The [REDACTED] has a wholly-owned subsidiary [REDACTED] as incorporated in [REDACTED] is the [REDACTED] provides [REDACTED] for the [REDACTED] and does not [REDACTED] anyone else. [REDACTED] Board of Directors consists of officers of the [REDACTED] and [REDACTED] as of June 30, 1994, [REDACTED] total assets of approximately \$ 19.7 million and annual revenues of approximately \$ 2.4 million.

The [REDACTED] may control other corporations which, because of the [REDACTED] size, age, and decentralization, have not been identified. It is the [REDACTED] belief after reasonable investigation that no such corporation has assets or annual revenues even approaching \$ 100 million.

### III. Potential Applicability of the Act.

But for the [REDACTED] status as an agency of the State of [REDACTED] appears that a premerger notification filing might be required. As a result of the Affiliation Agreement, the [REDACTED] hold the assets of [REDACTED], which appears to be an "entity" engaged in commerce. The total assets of the [REDACTED] exceed \$100 million and the total assets of [REDACTED] exceed \$15 million. [REDACTED]'s assets and revenues are well below \$100 million. Although [REDACTED] does not have voting securities for the [REDACTED] acquire, after the transaction the [REDACTED] control [REDACTED] as though it were [REDACTED] sole shareholder. The issue, then, is whether the [REDACTED] "person" subject to section 7A's filing requirements.

### IV. Issue Upon Which Interpretation Is Sought.

Section 7A requires premerger notification when any "person" acquires the assets or voting securities of another "person." The regulations define a "person" as an ultimate parent entity and all entities which it controls directly or indirectly. 16 C.F.R. § 801.1(a)(1). "Entity" includes corporations and many other forms of organizations, but does not include "the United States, any of the States thereof, or any political subdivision or agency of either (other than a corporation engaged in commerce)." 16 C.F.R. § 801.1(a)(2). States and their political subdivisions and agencies thus are excluded from the definition of an "entity" unless they are corporations engaged in commerce. Because a state agency is not an "entity," it is not a "person" within the meaning of the statute. Because premerger notification obligations only apply to transactions between two or more "persons," the parties to a transaction with a state agency are not obliged to make any premerger notification filing.

[REDACTED]

When the premerger notification regulations were promulgated, the FTC's "Statement of Basis and Purpose" of the regulations said that

...States, as well as their agencies and political subdivisions .... are not subject to the act. However, corporations controlled by such units and engaged in commerce are entities, and may be subject to the requirements of the act.

43 Fed. Reg. 33450, 33456 (July 31, 1978). We understand the Premerger Notification Office's analysis of the regulations is that the assets and revenues of each corporation engaged in commerce and controlled by a state agency should be compared to the filing threshold levels as though each such corporation were an acquiring entity, but that if a state agency controls more than one corporation engaged in commerce, the assets and revenues of those corporations need not be added together because the state agency is not an "entity" subject to the Act.

In addition to the exclusion from the Act just discussed, section 7A(c)(4) of the Act exempts "transfers to or from a Federal agency or a State or political subdivision thereof."

The [REDACTED] is an agency or arm of the State of [REDACTED] law. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] an agency or department of the state government and is not liable in damages for injury to person or property . . . [and hence] the [REDACTED] without power to pay premiums for [liability] insurance . . . .").

The [REDACTED] status as a state agency is not dependent on the character of the [REDACTED] actions. The business transacted by the [REDACTED] "public business." [REDACTED]  
[REDACTED] applicability of  
[REDACTED] open meeting law, [REDACTED] meetings of a committee  
advising the [REDACTED] in executive recruitment matter). Actions taken by the [REDACTED]  
appear to be outside the scope of the original vision of the [REDACTED] nonetheless actions of a  
state agency (at least as long as they are within the scope of the [REDACTED] ver). [REDACTED]

[REDACTED] According to the [REDACTED]  
Supreme Court, [any possible doubt as to the permissible range of the [REDACTED] proper  
authority has long since been laid to rest. . . . This court indicated the broad scope of the  
[REDACTED] powers when it stated that the territorial act and constitution intended [REDACTED] which

would grow and develop and undertake activities in the way of research and in other respects not visualized in the dreams of the founders. . . ."

Likewise, the [REDACTED] is no less a part of the state as a result of the [REDACTED] independence. The [REDACTED] legislature "has the undoubted right within reason to condition appropriations [for the [REDACTED] . . . ]"

The legislature's ability to supervise the [REDACTED] of [REDACTED] is not insubstantial: the [REDACTED] receives "hundreds of millions of dollars in legislative appropriations each biennium for operations and building needs." *Id.* at 802.

The [REDACTED] status as a part of the state is likewise reflected in numerous [REDACTED] statutes. For example, the [REDACTED] is subject to the [REDACTED] as a "public employer." [REDACTED] "public employer" means: (a) the state of [REDACTED]; (b) the board of [REDACTED] the [REDACTED] . . . ; c) . . . the governing body of a political subdivision or its agency or instrumentality"). The [REDACTED] is included in the definition of "state" for purposes of [REDACTED] claims statute. [REDACTED] "state" includes . . . the [REDACTED]"). The same is true with respect to a variety of other statutes. *See, e.g.,* [REDACTED] an "agency" subject to the requirements of the [REDACTED] (including [REDACTED] definition of "state" for purposes of creating Reinsurance Association).

The [REDACTED] as an arm of the State of [REDACTED] reflected in other contexts as well. Prior to the abrogation of state tort immunity by the [REDACTED] Supreme Court in [REDACTED] the [REDACTED] employed immunity from tort suits under the doctrine of sovereign immunity. [REDACTED] The [REDACTED] Supreme Court specifically held in [REDACTED] that the [REDACTED] status as a constitutional corporation with autonomy to govern the affairs of the [REDACTED] not affect the availability or propriety of sovereign immunity. *Id.*<sup>4</sup> The

<sup>4</sup>Before adoption of the present statutory scheme for limiting the [REDACTED] tort liability, some court cases distinguished between the [REDACTED] proprietary activities and its governmental activities for purposes of determining whether it was immune from tort liability. [REDACTED]

[REDACTED] those cases were decided during the time period after the [REDACTED] Supreme Court and the [REDACTED] legislature adopted a new policy limiting state immunity from liability for tort claims and before the current system of limited liability.

[REDACTED] likewise considered a part of the state when it comes to funds: all funds held by the [REDACTED] and the [REDACTED] are considered funds of the state. [REDACTED] Finally, the [REDACTED] the power of eminent domain, a power which "inheres in the state as an attribute of its sovereignty . . . ." [REDACTED]

The [REDACTED] is considered an arm of the state for purposes of federal law as well. The [REDACTED] is considered a "political subdivision of the state" for purposes of 42 U.S.C. Section 1983, and hence is not a "person" subject to suit under that statute. [REDACTED]

[REDACTED] immunity under the Eleventh Amendment. See, e.g., [REDACTED]

[REDACTED] holding that the [REDACTED] instrumentality of the state and that the [REDACTED] therefore is immune from suit in federal court unless the state has expressly waived its constitutional immunity); [REDACTED]

[REDACTED] holding that plaintiff's state law claims against the [REDACTED] were properly dismissed because the Eleventh Amendment deprived the federal court of jurisdiction over state law claims against the [REDACTED] as a state instrumentality); [REDACTED]

For the above reasons, the [REDACTED] clearly is an agency or arm of the State of [REDACTED] and therefore neither an "entity" nor a "person" whose acquisition of [REDACTED] assets triggers the filing requirement.

The [REDACTED] also is not a "corporation engaged in commerce" under the regulation. Notwithstanding the fact that it is chartered as a corporation and the Regents are defined as a "body corporate," the [REDACTED] a "constitutional arm" of the [REDACTED] [REDACTED] according to the [REDACTED]

[The] constitutional provision [perpetuating the [REDACTED] corporate franchise] did not change the character of the [REDACTED] make it a private or

The current statutory scheme with regard to state tort liability expressly recognizes the [REDACTED] a part of the state for that purpose. [REDACTED] therefore is entitled to avail itself of the waivable cap on tort liability established in the statute. [REDACTED]



[REDACTED]

independent corporation; but perpetuated it as a public institution, and took from the Legislature the power to discontinue, or abolish it, or convert it into a private corporation. The [REDACTED] has been reorganized from time to time, and its scope and activities much extended; but it has always been recognized as a public institution, forming a part of the [REDACTED] the state, and no attempt has ever been made to give it any other or different character. In [REDACTED] [REDACTED] held that the board of [REDACTED] were a public corporation; but it was also held that such corporation was merely an agency of the state to exercise certain limited and specified powers in the manner and for the purposes prescribed by law. The status of the University as indicated in this decision has stood unquestioned for more than 50 years.

[REDACTED] no sense a private corporation. It is a state institution, established, controlled, and carried on by the state itself." Id.

The [REDACTED] not chartered as a corporation for any reasons having to do with commerce. The [REDACTED] Supreme Court described the rationale for incorporating the [REDACTED] vesting control in the [REDACTED] rather than the legislature as a constitutional plan to "put management of the greatest [REDACTED] beyond the dangers of vacillating policy, ill-informed or careless meddling and partisan ambition . . .". [REDACTED] [REDACTED] valuating the character of the [REDACTED] purposes of determining the applicability of the [REDACTED] Veterans Preference Act).

The [REDACTED] and [REDACTED] believe that the [REDACTED] status as a state agency is not altered by its affiliation with [REDACTED] nor by the affiliation it plans to have with [REDACTED]. Although [REDACTED] are corporations, and they may be "engaged in commerce," the state of [REDACTED] made clear that any commercial activities of the affiliates are incidental to the main purpose of the [REDACTED] which is to carry out the state's [REDACTED] purposes as an agency of the state of [REDACTED] under state and federal law, the [REDACTED] status as a state agency is not affected by its affiliates' activities.

<sup>5</sup>The [REDACTED] is not the only state [REDACTED] structured as a constitutional corporation for this reason.

[REDACTED] be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its [REDACTED] in the administration of its affairs. . . "); [REDACTED]

[REDACTED]

[REDACTED]

In addition, the activities of [REDACTED] and [REDACTED] would be attributed to the [REDACTED] only if the [REDACTED]s considered the "ultimate parent entity" of [REDACTED] and [REDACTED]. As we have explained above, the [REDACTED] neither a "person" nor an "entity" within the meaning of section 7A, and so cannot be considered an "ultimate parent entity" of either for purposes of section 7A. The affiliates do not transform the [REDACTED] into a "person" subject to premerger notification under the Act. Even if [REDACTED] or [REDACTED] were deemed to be a "corporation engaged in commerce" and therefore treated as though it were the acquiring party, neither corporation has assets or revenues approaching the \$100 million filing level.

The [REDACTED] and [REDACTED] likewise believe that the [REDACTED] relationship with various foundations does not affect the [REDACTED]'s status as a state agency. According to a Board of [REDACTED] Statement adopted March 11, 1994, "the Board of [REDACTED] recognizes that it cannot, and should not, have direct control over foundations that enhance and support the [REDACTED] mission. These foundations exist to serve the [REDACTED] but are governed separately. In fact, the [REDACTED] does not have the right to nominate as many as half the members of the board of directors of either [REDACTED] or [REDACTED]. Finally, neither [REDACTED] or [REDACTED] is "engaged in commerce." Instead, the activities of both foundations are solely charitable and neither has significant business income unrelated to those charitable purposes. Any other corporation that might be controlled by the [REDACTED] that might be engaged in commerce has assets and revenues well below the \$100 million filing level.

### CONCLUSION

No premerger notification is required for the proposed transaction because the [REDACTED] is a state agency and not a "person" within the meaning of section 7A(a), and because the transaction is exempt under section 7A(c)(4).

Very truly yours,

[REDACTED]

3/24/95 Advised writer that, based on facts in this letter, no HSR report is required. The [REDACTED] is a state agency and none of the individual corporations it controls meets the 100MM size-of-person test. Since the required person, [REDACTED] is not a 100MM person, the requisite size-of-person test requiring a 100MM person is not met. P. Schmidt