

802.41; 801.41; 801.1 (c)

July 11, 1995

VIA FACSIMILE

Mr. Richard Smith
FEDERAL TRADE COMMISSION
Premerger Notification Office
Bureau of Competition
Room 303
Washington, D.C. 20580

Subject: Hart-Scott-Rodino Act Notification

Dear Mr. Smith:

I am writing to follow up on a conversation you had with [redacted] an attorney in this office, about the applicability of the reporting requirements of the Hart-Scott-Rodino Act (the "Act") to a transaction being contemplated by a client of this firm. As you know, the Act requires that any person who acquires the assets or voting securities of any other person and meets the threshold requirements of the Act must file a Premerger Notification Report (the "Notification"). See Section 7A of the Clayton Act, 15 U.S.C. § 18a. Accordingly, I am writing to request confirmation that the terms of the transaction specified below (the "Transaction") fall outside of the scope of the Act and, as such, the Notification need not be filed.

Please be advised of the following:

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1. **Parties to the Transaction.** The Transaction refers to the proposed affiliation between two unrelated [REDACTED]. The affiliation will occur because the two [REDACTED] propose to organize a nonprofit, nonstock corporation which will manage the operations of the [REDACTED] of each of the [REDACTED]. A has [REDACTED] which serves as the ultimate parent [REDACTED] [REDACTED] is the corporate member of the [REDACTED] parent ("System Parent A"). System Parent A is the sole member of a [REDACTED] corporation [REDACTED] Corporation A").

The second [REDACTED] comprised of a [REDACTED] parent ("System Parent B") and its wholly-controlled [REDACTED] corporation [REDACTED] Corporation B". One of the [REDACTED] has total net assets in excess of \$100 million and the other has total net assets in excess of \$10 million.

2. **The Transaction.** System Parent A and System Parent B propose to cause the affiliation of their [REDACTED] by organizing a nonprofit corporation ("Newco"). System Parent A and System Parent B will be members of Newco. In turn, Newco will be granted a special membership status in each of [REDACTED] A and [REDACTED] B. Pursuant to the terms of their agreement, each of System Parent A and System Parent B will cause its subsidiary [REDACTED] to create a new class of corporate member pursuant to the laws of its state. The new membership class, to be known as the Managing Member, will consist solely of Newco, which will have certain operational control over each of [REDACTED] A and [REDACTED] B. System Parent A and System Parent B will be the Corporate Members of each of their respective [REDACTED] corporations.

Operational Control Vested in Newco over [REDACTED] A and [REDACTED] B Operations. Subject to the authority reserved to System Parent A and System Parent B, as the Corporate Members of [REDACTED] A and [REDACTED] B, respectively, as the Managing Member of [REDACTED] A and [REDACTED] B, Newco, through its Board of Directors, shall have all authority and responsibility necessary to manage and operate [REDACTED] A and [REDACTED] B as an integrated entity, which authority and responsibility shall include the following:

- a. **Development and implementation of an integrated plan for the delivery of [REDACTED] [REDACTED] programs currently offered by [REDACTED] A and [REDACTED] B with the goals of improving access to services, continuation of [REDACTED] and cost effectiveness.**

A chart which describes the relationship among the parties is attached and referred to herein as Exhibit A.



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- b. Development and implementation of an integrated plan for the offering of new [redacted] programs by [redacted] A and [redacted] B with the goals of improving access to services, continuation of high quality care and cost effectiveness.
- c. Development and implementation of strategies for contracting with [redacted] and other payors, including the development of a [redacted] organization.
- d. Approval of strategic and financial plans of [redacted] A and [redacted] B.
- e. Approval of capital and operating budgets of [redacted] A and [redacted] B.
- f. Approval of the consolidation, material expansion or elimination of any [redacted] [redacted] at [redacted] A or [redacted] B, consistent with the integrated plans referred to above.
 - (1) [redacted] shall mean a [redacted] as defined in the [redacted] section of the General Statutes of the state in which the parties operate, subject to a two million dollar threshold by service; provided however, that the two million dollar threshold shall be based upon gross revenues not the capital investment.
 - (2) [redacted] is defined in the state statute at [redacted] at [redacted]. [redacted] does not include administrative and other activities that are not integral to [redacted].
- g. Approval of the consolidation, material expansion or elimination of any non-[redacted] A or [redacted].
- h. As appropriate, make recommendations to System Parent A and System Parent B, respectively, as the Corporate Members of [redacted] A and [redacted] B regarding amendments to the Articles of Incorporation and Bylaws of [redacted] A and [redacted] B, the sale or disposition of all or substantially all of the assets of [redacted] A and [redacted] B, any plan of dissolution, consolidation or merger of [redacted] A and [redacted] B and appointments to and removal of members of the Boards of Directors of [redacted] A and [redacted] B.



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Rights of Corporate Members of Newco. Although Newco will have operational control over [redacted] A and [redacted] B, corporate control of [redacted] A and [redacted] B will be retained by System Parent A and System Parent B, respectively. As Corporate Members of [redacted] A and [redacted] B, System Parent A and System Parent B shall each have the following rights with regard to [redacted] A and [redacted] B, respectively:

- a. Approval of the mission, purpose, philosophy and objectives of [redacted] A and [redacted]
- b. Approval of any amendments to the Articles of Incorporation and Bylaws of [redacted] A and [redacted] B.
- c. Appointment and removal of members of the Boards of Directors of [redacted] A and [redacted] B.
- d. Approval of any plan of dissolution, consolidation or merger of [redacted] A and [redacted] B.
- e. Approval of the acquisition, purchase, sale or disposition of assets of [redacted] A of [redacted] B with a value in excess of \$3 million.
- f. Approval of the incurrence of long-term debt.
- g. Appointment and/or removal of the Presidents of [redacted] A and [redacted]

In all instances, before exercising their respective rights as the Corporate Members [redacted] and [redacted] B, System Parent A and System Parent B shall first consider any recommendations made by the Newco Board of Directors.

Board of Directors of Newco. The Board of Directors of Newco will consist of seventeen (17) members. Four (4) of the directors will be elected by System Parent A and five (5) of the directors will be elected by System Parent B. The Newco chief executive officer and executive vice president will serve as *ex officio* directors. The remaining six (6) directors will be elected by the other eleven (11) board members from a slate of nominees prepared by a Nominating Committee of the Board. Most actions of the Board of Directors will require a simple majority vote of the members of the Board. Certain actions will require a simple majority of the Board of Directors, provided that the majority includes at least three (3) System Parent A Directors and at least four (4) System Parent B Directors.



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Capitalization and Distribution of Newco Assets. Newco will create a combined statement of revenue and expenses in order to determine the financial operating results of the combine [redacted] and [redacted] corporations for a particular year. The combined statement of revenues and expenses will be developed for internal use only and will be prepared according to generally accepted accounting principles. Each of the [redacted] corporations will continue to prepare revenue statements independently. The parties have agreed that historically, on a combined basis [redacted] A accounted for approximately thirty percent (30%) of the combined operating revenues and that [redacted] B accounted for approximately seventy percent (70%) of the combined operating revenues. Based upon the annual combined financial statement, the parties will adjust the actual operating results as between [redacted] A and [redacted] B in order to reflect the historical ratio of combined operating revenues. In this regard, the parties have determined that [redacted] A will be entitled to 30% of the revenues and [redacted] B will be entitled to 70% of the revenues in future years. Upon dissolution of Newco, its assets will first be distributed to the parties in repayment of their initial capital contributions. Thereafter, any remaining assets will be distributed thirty percent (30%) to System Parent A and seventy percent (70%) to System Parent B.^{2/}

Each of System Parent A and System Parent B agrees that it will not transfer its interest in or sell the assets of either [redacted] A or [redacted] B without the express written approval of the other party or Newco for a period of three years following the date of the formation of Newco. Thereafter, each of System Parent A and System Parent B may sell its interest to outside parties, provided that it offers the other System Parent a right of first refusal.

3. Analysis of the Application of the Act. On the basis of our analysis, we believe that the Transaction falls outside of the jurisdiction of the Act and is therefore exempt from the premerger notification requirements. First, the formation of a nonprofit corporation is not subject to the Act. Second, making Newco the Managing Member of [redacted] A and [redacted] B does not give Newco "control" of either entity under the definition of "control" contained in 16 C.F.R. § 801.1(b). Rather, System Parent A and System Parent B, respectively, each retains control of its subsidiary [redacted] corporation. This "control" is evidenced by two factors: (1) System Parent A and System Parent B each retains the right to appoint or elect the Board of Directors of [redacted] corporation, subject only to the recommendation of Newco; and (2) the assets of each [redacted] corporation are distributable, upon dissolution of th [redacted]

^{2/} Although the amount that the corporate members of Newco will receive upon dissolution is based upon historic figures relating to the contributions of each member, these contribution amounts may be subject to modification.

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corporation, to the [redacted] system parent entity.^{2/} Consequently, there has been no change in control of the assets of either System Parent A or System Parent B as a result of the Transaction.

In order for the formation of a joint venture to be subject to the premerger notification requirements under 16 C.F.R. § 801.40(a), the contributing parties must be "acquiring persons" within the meaning 16 C.F.R. § 801.2. An acquiring person is "[a]ny person which as a result of an acquisition, will hold voting securities or assets, either directly or indirectly, or through fiduciaries, agents, or other entities acting on behalf of such person" As applied to the herein described facts, Newco is a nonstock membership corporation such that no voting securities will issue to the corporate members of Newco. Rather, System Parent A and System Parent B will each retain a membership interest in Newco. Because 16 C.F.R. §§ 801.40 and 801.2 fail to specifically address membership interests, the parties believe that the Transaction falls outside of the scope of the Act's notification requirements. Further, no person will "hold" assets of any other person as a result of the Transaction since neither party will have "beneficial ownership" of the assets of any other party as a result of the transaction. See 16 C.F.R. § 801.1(c).

In addition, the Act does not apply to the proposed transaction because neither System Parent A nor System Parent B will be "acquiring persons" by virtue of the transaction to create Newco or the subsequent management of the [redacted] corporations by Newco. Under 16 C.F.R. § 801.2(a), "[a]ny person which, as a result of an acquisition, will hold (i.e., have beneficial ownership, either directly or indirectly) voting securities or assets, either directly or indirectly, or through fiduciaries, agents, or other entities acting on behalf of such person is an "acquiring person" within the meaning of the Act. The proposed organization and operation of Newco will not result in the acquisition of the assets of either [redacted] by the other [redacted]. Accordingly, the Act would not apply to cause the organization of Newco, or the subsequent operation by Newco of [redacted] and [redacted], to be subject to the reporting and notification requirements of the Act.

4. **Conclusion and Understanding.** The creation and operation of Newco, including the management by Newco of [redacted] A and [redacted] B, will not result in the acquisition of assets of one of the [redacted] by the other [redacted] as a party to the joint venture. Further, neither System Parent A nor System Parent B is an "acquiring person" within the meaning of 16 C.F.R. §§ 801.40 and 801.2 since neither will receive voting securities as a result of the formation of Newco or ownership of the assets of any other party

^{2/} Alternatively, because both [redacted] corporations are exempt from taxation pursuant to 501(c) [redacted] of the Code, the assets may be distributed to other exempt organizations.

[Redacted]

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to the Transaction. Accordingly, the Transaction falls outside of the jurisdiction of the application of the Act and the parties are not subject to the reporting requirements of the Act.

Please confirm our understanding that the jurisdictional requirements of the Act are not met and, accordingly, no filing of Notification is required by System Parent A, System Parent B, or Newco.

In addition to any oral response, I respectfully request a written response as soon as practicable. If no written response will be provided, please let me know. Otherwise, please let me know when I should expect such a response.

Your prompt attention to this request would be greatly appreciated. If you have any questions or need any additional information, please call [Redacted]

Sincerely,

[Redacted Signature]

7/12/95 - called writer's assistant and advised that I agreed with conclusion that the fact situation described did not require any HSR

Attachment

Jelung

RS Smith

EXHIBIT A

