

801.2(d); 801.10(b); 801.1(b); 801.1(c)(8)

FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

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March 6, 1996

VIA HAND DELIVERY

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Office of Premerger Notification
Federal Trade Commission
Room 303
6th and Pennsylvania Ave., N.W.
Washington, D.C. 20580

This material may be subject to the
confidentiality provisions of Section
7A(h) of the Clayton Act which restricts
release under the Freedom of Information
Act.

Dear Mr. Smith:

I am writing to confirm our telephone conversations on Tuesday, February 20, 1996, and Tuesday, March 5, 1996, during which I requested your advice as to the filing requirements of the parties to a merger of nonprofit corporations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR").

Corporation A is a nonprofit membership corporation co-sponsored by [redacted] which serve as the members of Corporation A. No single member has the right to appoint 50 percent or more of the board of trustees or otherwise control Corporation A. By contract or in its capacity as sole corporate member, Corporation A controls a [redacted] in 13 states. Corporation A is the sole corporate member of 13 of [redacted]. As to the remaining 31 [redacted] either (i) one of the [redacted] that is a member of Corporation A is the sole corporate member of [redacted]; or (ii) one of the [redacted] that is a member of Corporation A is the sole corporate member of a nonprofit corporation which, in turn, is the sole corporate member of [redacted]. In either case, pursuant to an affiliation agreement, Corporation A has the power to appoint the board of trustees of the hospital. ¹

¹ You asked if the sole corporate member retained any power over [redacted]. I advised that, under the affiliation agreement, the sole corporate member had limited "reserved powers" requiring its approval of:

[cont.]

[redacted]

✓

[REDACTED]

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Corporation B is a nonprofit membership corporation sponsored by a single [REDACTED] which serves as its sole member. Corporation B, is the sole corporate member of 13 nonprofit [REDACTED] in seven states.

Corporation C also is a nonprofit corporation sponsored by a single [REDACTED] which serves as its sole corporate member. Corporation C is the sole corporate member of 19 nonprofit [REDACTED] in five states.

As I explained, in accordance with the agreement between the parties, there are three principal aspects to the proposed merger. First, Corporation B will merge into Corporation A in a statutory merger. Second, Corporation C and each of the [REDACTED] which it is the sole corporate member will amend its respective articles of incorporation to designate Corporation A as its sole corporate member. (The reason for this approach is that it would be difficult for Corporation C to effect a statutory merger into Corporation A in the near future because of issues arising out of Corporation C's present debt structure.)

Third, each of the 3 [REDACTED] which Corporation A controls through the contractual power to appoint the board of trustees will amend its respective articles of incorporation to designate Corporation A as its sole corporate member.

In discussing the proposed transaction with you, I requested you to assume that the size of persons and size of transaction tests will be met with respect to each aspect of the proposed merger. As to the first aspect of the merger (the statutory merger of Corporation B into Corporation A), I advised you that I thought this would be considered to be a merger governed by 16 C.F.R. §801.2(d), although, for valuation purposes, the Staff considers such combinations as asset acquisitions pursuant to §801.10(b) rather than as an acquisition of voting securities.

[ftn cont.]

- (a) a sale of [REDACTED] assets;
- (b) a merger or dissolution;
- (c) the incurrence of a major debt obligation;
- (d) amendment of the articles of incorporation or bylaws; and
- (e) alteration of the Philosophy and Mission.

I further advised you that it is my understanding that a principal reason for the reserved powers was to avoid an "alienation" of the hospital under the [REDACTED] which would require the approval of [REDACTED]

[REDACTED]

[REDACTED]

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Corporation A would be required to file as the acquiring person and the ultimate parent entity of Corporation B would file as the acquired person. You concurred in my analysis.

As to the second aspect of the proposed merger (the substitution of Corporation A as the sole corporate member of Corporation C and its controlled corporations), I stated my belief that it would be treated in the same manner as the first aspect, *i.e.*, it would be considered to be a merger governed by 16 CFR §801.2(d), although valued as an asset acquisition pursuant to §801.10(b) rather than as an acquisition of voting securities. Corporation A would be the acquiring person and the ultimate parent entity of Corporation C would be the acquired person. You also agreed with this analysis.

We also discussed the third aspect of the proposed merger, the substitution of Corporation A as the sole corporate member of each of the 3 [REDACTED] to which Corporation A has the contractual power to appoint the board of trustees, particularly as to whether any filings by "acquired persons" would be necessary. Among the considerations we discussed in this regard were: (i) Corporation A already "controls" each of [REDACTED] pursuant to §801.1(b); and (ii) although §802.30 does not apply, the substitutions of Corporation A as sole corporate member appear to be without competitive significance. You advised that no filings were required by the "acquired persons", but that the substitutions should be noted in the description of the acquisition in item 2(a) of the Premerger Notification and Report Form, and that the hospitals should be included within Corporation A for reporting purposes.

We also discussed whether Corporation A could file a single Premerger Notification and Report Form covering the entire transaction. After consideration, you recommended that Corporation A file two forms in order to avoid any confusion in the responses to item 7. In addition, you advised that Corporation A would be required to pay two filing fees since the merger would be considered to encompass two acquisitions.

If I have misunderstood our conversations, please advise me at your earliest possible convenience. My direct dial number is [REDACTED]. Again, thank you for your advice and assistance.

Sincerely,

[REDACTED]

[REDACTED]

3/8/96 - called writer and advised that I agreed with the filing procedures outlined in his letter.

Richard Smith