

VIA HAND DELIVERY

Thomas F. Hancock, Esq.
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
6th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Not-For-Prof

Company

Dear Tom:

Two not-for-profit are proposed the joint operation of their related businesses. The proposed transaction would involve the formation of a joint management and operating company which would manage and operate the least the businesses of the two systems as an integrated assets of each of the two systems will remain unchanged, although new projects will generally be titled in the joint operating company. The parties do not believe that the proposed transaction is reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a ("HSR Act"). However, the parties would like to confirm that assessment with your office.

I. Facts

The proposed transaction involves two of is a tax-exemp nonprofit non-membership corporation, qualified under Internal Revenue Code § 501(c)(3), which operates (either directly or through one or more subsidiaries) three two located in and several other elated facilities. An affiliated charitable foundation supports the educational and research activities of the condition of the subsidiaries, supports that non-profit foundation, affiliated with one of its non-profit subsidiaries, supports that non-profit



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charitable mission with the and has a sen-perpetuating Board of Directors.

for-pront membership corporation, qualified under I.R.C. § 501(c)(3). The members of are certain individuals, each of whom is a member in good and regular standing in the

and, in such capacity, elect the Board of Trustees of the state of the

The Board of Directors on the also are the members of the analysis and the capacity, elect its Board of Directors.

Inc. is a tax-exemptor of the corporation, qualified under I.R.C. § 501(c)(3), which operates a skiller

which would manage and operate the parties and their affiliates as an integrate would prefer to effect a merger and have the joint venture acquire title to all of the parties and structurally integrate their operations, but are prevented from doing so by the guidelines of the parties have instead adopted the proposed structure explained below.

Newco will be a tax-exemp nonprofit membership corporation qualified under I.R.C. § 501(c)(3). (A copy of the Affiliation and Management Agreement (the "Agreement") is attached hereto as Appendix 1.) will be the members of the corporation. Newco will be governed by a 20 member Board of Trustees. will vill appoint 7 Trustees; and the Board will appoint 3 appoint 10 Trustees; as Trustees, 2 from a snaw submitted by a and 1 from a slate submitted by In addition, the President of Newco, the senior executive officer of ne senior executive officer of and th vill be ex officie, non-voting members of the Board.

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memors or each of the Board of Directors of the will continue to have sole authority to elect the respective governing boards of the memory of the board of Directors of the will continue to have sole authority to elect the respective governing boards of the memory of the board of the board

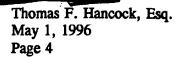
Under Section 4.1 of the Agreement, Newco would be granted the power to manage and direct the operations of the In addition, under Sections 4.2 and 4.4 of the Agreement, Newco would develop a strategic plan and an annual business plan for the Indiana, under Section 4.3, Newco would develop annual capital expenditure and operating budgets of the Under Section 4.5, Newco also would be the exclusive bargaining agent for the Indiana vit and employers. Finally, under Sections 7.2 and 7.9, Newco would have the power to derive its income and capital needs from and indicator transfer funds from one participant to another to meet the financial needs of any participant.

To complete as fully as practicable the financial integration and operation of the parties also have agreed to an income/loss-sharing arrangement. Under the Agreement, the parties would share the risks and rewards of the economic outcome of the All revenue and edited with 75% and will be allocated on a 75/25 basis with facilities had net income credited with 25%. Thus, if in year one the facilities had net income of \$2 million, the tot of \$8 million and th net income of \$10 million would be allocated 75/25, with credited \$7.5 million and redited \$2.5 million. Under Section 7.3 of the Agreement, each of the parties would retain ownership of its existing assets. New assets will ordinarily be titled to the entity which has historically operated the location where the new assets will be used, and it is the parties' preference that assets for new locations will be titled to Newco.

II. Analysis

The parties believe that the formation of Newco would not be reportable under the HSR Act because it would constitute the formation of a not-for-profit joint venture. It is the parties' understanding that the Premerger Notification Office of the Bureau of Competition of the FTC views the formation of not-for-profit joint ventures as non-reportable transactions through the relationship between 16 C.F.R. § 801.40 and 16 C.F.R. § 802.40.

The question arises whether the contractual rights to operate and manage the granted to Newco affect reportability. In the parties' view, they do not. First, the contractual rights do not convey the right to elect any trustee or director of any entity. Second, the contractual rights



do not convey the right to an equity ownership interest in any of the facilities. Finally, even if Newco's assets were deemed to include those of the facilities are transaction would nevertheless be the formation of a not-for-profit joint venture, and thus not reportable.

A final question arises as to whether the income/loss-sharing arrangement affects will be credited with 75% of the net reportability. Pursuant to the arrangement, income of the venture. However, this does not mean that has a right to receive cilities, entities that it does not otherwise 75% of the income of the control. In the example described earlier, in year one, th ities had net facilities was income of \$2 million, but \$500,000 of the net income of the Moreover, even if one were to assume that, under the income loss-sharing credited to were to be deemed to be an additional ultimate parent entity of the arrangement tacilities pursuant to 16 C.F.R. § 801.1(b)(ii), it would not mean that a reportable transaction had taken place. In many instances, non-reportable events occur which result in one entity being deemed the ultimate parent entity of another. For example, the grant by Company A of the right to appoint half its Board of Directors to each of individuals X and Y, may make X and Y Company A's ultimate parent entities, but the grant is not a reportable event because it does not involve the acquisition of voting securities or assets.

For the reasons set forth above, the parties believe that the formation of Newco will not result in a reportable event under the HSR Act. After you have had an opportunity to review this letter and the attachment, I would appreciate your confirming our conclusions.

