

7A(c)(4); 801.1(a)(2)

[REDACTED]

April 8, 1999

*Via Hand Delivery*

Mr. Richard Smith  
Deputy Assistant Director  
Premerger Notification Office  
Federal Trade Commission  
Bureau of Competition  
Room 303  
Washington, DC 20580

1999 APR -9 A 9 20  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Re: Exemption from Filing Under Hart-Scott-Rodino Act

Dear Dick:

This will confirm our conversation of a few weeks ago and my understanding regarding application of the Hart-Scott-Rodino Act's exemption for a transaction involving an acquisition of a hospital by a health care system that is an agency of the state. Section 7A(c) of title 15, U.S. Code, exempts from the requirements of the Act "transfers to or from a . . . State or political subdivision thereof . . ." Our client, a state health care system (System) that operates, among other things, hospitals, proposes to acquire a nonprofit hospital in the state. This acquisition will not require notification under the Act if the health care system is an agency of the state and hence a State for purposes of the statute. We discussed very generally the following indicia that may be used to determine whether our client is an agency of the state.

1. The language of the statute establishing the System.
2. The expressed intention of the legislature in creating the System.
3. The position of the State Attorney General on the issue.
4. Application to the System of laws generally applied to State agencies.

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We also discussed that a state constitutional provision can support the conclusion on this issue, though none is applicable to our client. Additionally, it would seem to me that the method of Board appointment would also be relevant. Let me briefly set out my reasoning that supports my conclusion that the System is a State for purposes of the Act.

1. *Authorizing statute.* The System was explicitly established by public law enacted by the State legislature. ✓
2. *Legislative history.* While there is no "official" legislative history in the state in which the System is located, there are documentary materials contemporaneous with consideration of the legislation that evidence clearly the legislature's intent to establish the System as an agency of the State. ✓
3. *State AG's position.* We do not have a specific Attorney General's opinion directly on this issue, but the Attorney General has historically taken the position that the components of the System are agencies of the State and has opined on applicability of laws to the System and its components in that context. ✓
4. *Applicability of laws.* Laws applying to State agencies have been applied to the System as a matter of practice or as specified by the authorizing legislation. Specifically:
  - employees of the System are deemed to be employees of the State;
  - the System is subject to the State's executive budget act;
  - the State Public Records act applies to the System; and
  - except insofar as the authorizing legislation provides relief, State procurement laws and regulations are applicable to the System.
5. *Board appointments.* In addition to the above, the governing Board of the System is established by the legislation establishing the System, and Board appointments are to be made by designated State officials. ✓

In light of these facts, I believe it is appropriate to conclude, consistent with our discussion, that the System is a state agency exempt from the filing requirement of the Act under the express terms of the statute itself. Moreover, since the System is a State "agency," it is not an "entity" under section 801.1(a)(2) of the applicable regulations.

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If this does not comport with your understanding of the applicable law and regulations and their interpretation as would potentially be applied to the facts provided above, please let me know without delay. Many thanks, as always.

[REDACTED]  
Sincerely,  
[REDACTED]

[REDACTED] 4/9/99 Advised writer that System appears to be a state agency and, as such, is not an entity under 801.1(a)(2). As such, there was no acquiring person in the transaction and, thus, the acquisition of the nonprofit hospital was a non-reportable HS/P event. (TH agrees.)  
R. R. Smith