[redacted]

801.40
801.10
801.11(e)

April 29, 1999

VIA FACSIMILE (202) 326-2624

B. Michael Verne, Federal Trade Investigator
Federal Trade Commission
Bureau of Competition, Premerger Notification Office
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Review of Filing Requirements Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act")

Dear Mr. Verne:

I am writing to confirm our telephone conversation of April 26, 1999 concerning the applicability of the filing requirements of the Act to a transaction involving a stock purchase and concurrent management agreement.

I. Background

As we discussed, our client (the "Company") is a national health care provider which is engaged in various health care related businesses. Certain executive officers of the Company will form and own all of the outstanding stock of a new corporation ("Newco"). Newco will purchase all of the issued and outstanding capital stock of a wholly owned subsidiary (the "Subsidiary") of the selling company ("Seller") for nominal consideration. In addition, the Company will guaranty certain obligations of Newco under the Purchase Agreement (as defined below) with respect to (i) any severance obligations of Newco to employees of the Seller, and (ii) the indemnification obligations of Newco to Seller under the Purchase Agreement. Concurrently with the consummation of the stock purchase, Newco will enter into a long-term management agreement (the "Management Agreement") with the Company or one of its subsidiaries (the "Manager"), pursuant to which the Manager will manage the business (the "Business") being acquired by Newco for up to fifty years, as more particularly described below. In addition, the Company will have an option to purchase the Business, the stock of the Subsidiary or the stock of Newco for the fair market value thereof. Neither the Company, nor any subsidiary of the Company will have the right or power to elect or direct the election of any directors of Newco. The Company has legitimate business reasons for choosing the above-described structure.

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II. Acquisition of Voting Securities

Pursuant to a stock purchase agreement between Newco and the Seller (the "Purchase Agreement"), Newco will acquire all of the issued and outstanding capital stock of the Subsidiary for nominal consideration. In addition, Seller will guarantee that the amount of net working capital of the Business at the Closing will be at least a specified amount (the parties have not yet agreed upon what such amount will be; however, it is expected to be approximately $30 million). If and to the extent that there is any deficiency in the amount of such net working capital, the Seller will pay to Newco the amount of any such deficiency. It is expected that the amount of the guaranteed net working capital will be approximately $20,000,000.

After giving consideration to the jurisdictional requirements of the Act, we believe that the acquisition described above is not a transaction requiring notification under the Act. Section 7A(a)(2)(B) of the Act provides, in part, that "if... any voting securities...of a person not engaged in manufacturing which has total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more," then the "Size of the Parties" test under the Act would be satisfied. According to Rule 801.11, the annual net sales and total assets of a person shall be as stated on the last regularly prepared balance sheet of that person; provided, however, that if an acquiring person does not have a regularly prepared balance sheet, the total assets of such person shall be (i) all assets held by the acquiring person at the time of the acquisition, less (ii) all cash that will be used by the acquiring person as consideration in the proposed acquisition. In the present transaction, since Newco is a newly-formed entity with no sales and no assets except for the nominal cash that will be used for the acquisition, the "Size of the Parties" test is not satisfied with respect to Newco and no notification is required under the Act.

III. Management Agreement

As we stated above, concurrently with the closing of the acquisition described above, Newco will enter into the Management Agreement with the Company, pursuant to which the Company will manage the affairs and operations of the Business. The term of the Management Agreement will be for ten (10) years, provided that the Manager will have the right, in its sole discretion, to extend the term for up to four (4) consecutive 10-year extension terms. The Manager will be entitled to a management fee equal to the operating cash flow of the Business. At the end of the term (either the initial term or any of the renewal terms), the Company shall have the option to purchase either the Business, the stock of the Subsidiary, or the stock of Newco for the fair market value thereof. The responsibilities of the Manager will include, but will not be limited to, the following: (i) hire, discharge and supervise all employees of the Business; (ii) maintain all licenses in Newco's name; (iii) take all action as may be reasonably necessary to insure compliance with all governmental requirements applicable to the Business; (iv) cause all taxes to be paid by the Business; (v) as agent for Newco, deposit and disburse all monies arising out of the operation of the Business as is necessary from time to time; (vi) maintain the books and records of the Business on behalf of Newco; and (vii) generally manage the business and affairs of the Business.

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Based on our telephone conference, it is my understanding that the notification requirements of the Act would apply to the execution and performance of a management agreement only if the manager can be considered to have "acquired" beneficial ownership of the managed party's assets. I believe we concluded that, based on the foregoing facts, the Manager will not be deemed to have acquired beneficial ownership of Newco's assets, and accordingly, the notification requirements under the Act would not be triggered.

IV. Conclusion.

In summary, based on our telephone conference, we concluded that the acquisition by Newco of the capital stock of the Subsidiary (as described above) and the concurrent execution and performance of the Management Agreement (as described above), including the grant of the fair market value purchase option, does not require that a Notification and Report Form be filed under the Act.

I will call you shortly to confirm that the foregoing accurately reflects our discussions and your conclusions.

Thank you in advance for your time and attention to this matter. If you need clarification or further information regarding any matter discussed in this letter, please do not hesitate to contact me. If I am unavailable at the time of your call, please ask for [redacted] who is the partner in charge of this transaction.

Very truly yours,

[redacted]

cc: [redacted]

POTENTIALLY ACCEPTABLE WITH OPTION IS EXCLUDED.

AGREE THAT THIS TRANSACTION IS NOT ACCEPTABLE.
B Michael Verne 4/30/99

DICK SMITH CONCURS.

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