[redacted]

June 29, 1999

Mr. Richard B. Smith, Esquire
Premerger Notification Office
Federal Trade Commission, Room 303
6th Street & Pennsylvania Avenue, NW
Washington, DC 20580

Messenger Delivery

Re: *Sale of several separate businesses to individual limited partnerships with identical ownership.*

Dear Mr. Smith:

This letter relates to my telephone call to you on Friday June 11, in which we discussed a set of transactions that a client plans to implement, and the basis for my belief that a premerger notification filing is not required for the transactions. I will summarize our discussion below, and also describe a few changes to the client's plans since our conversation, which I do not believe change the outcome.

Two operators of health care facilities, H1 and H2, have agreed to form a joint venture that will, among other things, complete the construction and development of certain health care facilities begun by H1 or H2, and assume management responsibility for certain newly completed facilities. To carry out their joint venture, H1 and H2 recently have formed a limited liability company, JVLLC, in which each of them has the right to receive 50% of the profits and 50% of the assets upon dissolution. H1 and H2 have only funded JVLLC to the extent of a few hundred thousand dollars to cover administrative expenses. JVLLC has not previously carried on any significant business activities, nor has it prepared an income statement or balance sheet.

H2 plans to arrange for the sale of its interests in the assets of up to 14 health care facilities that are under construction or recently constructed. (Although the discussion below will refer to 14 facilities, a few of the 14 facilities may not be sold initially, for licensing, notice or title-related reasons.) JVLLC has suggested that H2 could sell each of the facilities to a newly organized limited partnership,

[redacted]

[redacted]

and that each limited partnership could be owned 90% by a group of investors and 10% by JVLLC. Accordingly, 14 new limited partnerships (the "LPs") will be organized, and each LP will acquire H2's interests in the assets of one of the health care facilities.

A financial advisor with whom H1 has raised capital in the past has identified a group of around forty-five individuals, trusts and other entities (together, the "Investors"), each of whom may wish to invest in the facilities that will be sold. Each Investor is an accredited investor under the securities laws, or an entity all of whose equity owners are such accredited investors. The financial advisor also will be a limited partner, and its capital contribution will be funded by JVLLC essentially in lieu of a "placement fee."

The characteristics of the 14 LPs are described in a subscription agreement and limited partnership agreements for each LP. The limited partnership agreements will operate so that profit distributions to all partners will be in proportion to their capital accounts, except that a preference provision will cause distributions relating to later-contributed capital to be slightly less than distributions on earlier-contributed capital. The parties anticipate that all capital will be contributed within a six month period. Capital accounts will be maintained so that the limited partners, taken together, will have 90% and the general partner 10% of the total LP capital accounts. Therefore, in the event of dissolution the limited partners taken together will have the rights to receive 90% of the net assets of each LP and the general partner will have the right to receive 10% of net assets.

The Investor limited partners will have differing percentages of the total capital accounts from each other, but the largest capital account held by any limited partner (or group of limited partners whose interests would be aggregated, if any) will be less than 50% of the total of the capital accounts in each LP. The relative shares of the total LP capital accounts among the limited partners are expected to be substantially identical for each of the 14 LPs.

In the event that there may be relationships of the following types among certain of the limited partners so that their ownership interests would be aggregated under the premerger notification law, no such aggregated group of limited partners will have an ownership interest of as much as fifty percent of any LP. These relationships are: (a) an individual limited partner being the spouse or minor child of another limited partner; (b) a limited partner holding as much as

fifty percent of the voting securities of, or having the right to appoint as much as half the members of the board of directors of, another limited partner that is a corporation; (c) a limited partner having the right to receive as much as fifty percent of the profits of, or the right to receive as much as fifty percent of the net assets in dissolution of, another limited partner that is a partnership or limited liability company; (d) a limited partner having the power to revoke a trust that also is a limited partner; and (e) a limited partner retaining a reversionary interest in an irrevocable trust that also is a limited partner. In other words, under the premerger notification law none of the limited partners, nor any group of limited partners, would be the ultimate parent entity of any of the LPs, and each LP would be its own ultimate parent entity.

The LPs will enter into substantially identical development agreements with H2, under which H2 will provide development and construction management services for each facility. The LPs also will enter into substantially identical management agreements with H1, providing that H1 will manage each facility when it begins operations. The subscription agreements and limited partnership agreements will provide that the limited partners will invest in each LP for investment purposes only, that the limited partners will be passive investors investing only for their own account, and that the general partner will have management authority for each LP, except that the general partner may not sell an LP's facility without consent of a majority in interest of the limited partners.

In addition, the limited partnership agreements provide that two years after the first resident occupancy of a facility, the limited partners by a majority in interest vote may require the general partner to attempt to sell the facility. During a specified time period, the limited partners of each LP, as a group, will have a "put option," exercisable by a majority in interest vote of the limited partners in any LP, to require H1 to acquire all the limited partners' interests in that LP at fair market value appraised as provided in the limited partnership agreements. The limited partnership agreements also provide that H1 shall have a "call option" to purchase the limited and general partners' interests in each LP at a price that provides a specified rate of return on the partners' capital contributions.

H1 and H2 each have in excess of $100 million in assets and annual net sales. The total of the purchase prices for all 14 facilities being sold will be in excess of $15 million.

[redacted]

At the time that each of the LPs will acquire one of the facilities from H2, each LP will be a newly created limited partnership which has no significant assets other than funding to acquire one of the facilities. Each LP will have the right to call upon its limited partners and general partner for capital contributions totaling less than $10 million, and to borrow additional funds to acquire one facility, complete construction of that facility and fund that facility's startup operating losses. None of the LPs has prepared an income statement or balance sheet, and none of the LPs has engaged in business operations.

The LPs initially will borrow funds from H2 pursuant to a "bridge" loan, but hope to borrow replacement and additional funds from commercial lenders. The LPs also may borrow from JVLLC or H1. H1 and H2 jointly will guarantee the bank debt of each LP. The parties anticipate that each LP will be jointly and severally liable for the debt of the other LPs, and that debt incurred by each of the LPs will be cross defaulted and cross collateralized with the debt of the other LPs. That is, if any one of the LP's goes into default on a loan, the lender would be entitled to declare each of the other 13 LPs also in default. The parties anticipate that the joint and several liability, cross default and cross collateralization provisions will enable the LPs to borrow at lower interest rates than they could obtain without these terms.

We believe the formation of JVLLC as a limited liability company by H1 and H2 does not now require the filing of a premerger notification because JVLLC does not have sufficient assets or annual net sales to satisfy the $10 million "size of person" standard of the premerger notification laws. The assets transferred to JVLLC so far also do not satisfy the $15 million "size of transaction" standard of the premerger notification law.

H1 and H2 are both ultimate parent entities of JVLLC, but we believe they are not required to make premerger notification filings as acquiring parties when H2 sells its interests in the 14 facilities to the LPs. This is because JVLLC's right to receive net assets in liquidation and its right to receive profits in each LP are both well below the 50% level at which a filing by H1 and H2 might be required. The various loan arrangements, the development agreements between the LPs and H2, the management agreements between the LPs and H1, and JVLLC's role as general partner with management authority for each LP do not change this result.

We believe that premerger notification filings are not required on the 14 acquisitions of H2's interests in the assets of the 14 facilities because each facility is being acquired by an LP that is its own ultimate parent entity, and each of the LPs will fall short of having $10 million in assets (excluding funding to be used for the acquisition) or annual net sales. Therefore each transaction fails to meet the "size of person" standard of the premerger notification law.

In addition, the parties have determined that the value of each of the 14 asset sales is below $15 million, whether valued with reference to the fair market value of H2's interest in the assets of each facility or with reference to the total consideration paid for the assets of each facility. Because of the developmental state of the facilities, the parties have determined that the present fair market value of H1's call option is quite small compared to the value of the assets being sold, and would not, if added to the other consideration provided by the LPs, raise the purchase price for any of the facilities as high as $15 million. For the same reasons, the total value of the limited partners' put options for any LP, standing alone, would not approach the $15 million level. Therefore, each of the 14 sale transactions also falls short of the $15 million "size of transaction" standard of the premerger notification law.

The transactions described above might be subject to a premerger notification filing obligation if one were to aggregate together the total "size of person" represented by some or all of the LPs, and the total "size of transaction" represented by the acquisition of the assets of some or all of the facilities. It would not be correct to aggregate either of these quantities, however, because although each of the LPs will have substantially identical ownership, each will be a separate and distinct legal entity. The parties benefit from the limited partners' willingness and ability to provide passive equity capital that will spread risk and allow the LPs to borrow the additional funds necessary to acquire the 14 facilities. Therefore, the parties have valid business reasons for structuring the transactions as they did entirely apart from the premerger notification consequences.

Since our conversation, the parties have added provisions that the limited partners may vote to require sale of the facility owned by each LP under certain circumstances. In addition, the parties have discovered that the number of Investors is likely to be somewhat higher than twenty, and a few of the Investors may have relationships that could place them under a common ultimate parent entity. Because no group of limited partners under a common ultimate parent

[redacted]

entity would have as much as 50% of the total capital accounts in any LP, I do not believe these new developments change the outcome.

I understand that based on my description of the above transactions in our telephone conversation, you did not disagree with my conclusion that they do not trigger a premerger notification filing obligation. If this letter is in any way less than a reasonably complete and accurate description of the relevant facts and analysis, I would be grateful if you could bring that to my attention. If you would like to discuss anything related to this letter, please do not hesitate to call. Once again, I am very grateful for your extremely helpful assistance in this matter.

Very truly yours,

[redacted]

7/1/99 Called writer and advised that, based on facts in letter, no HSR reportable event or events intervening place. (MV agreed with conclusion.)

RBSmith