

801.1(c)
802.1

From: [REDACTED]
To: FTC.SERIOUS("mverne@ftc.gov")
Date: Tue, Mar 6, 2001 6:04 PM
Subject: Premerger Notification Filing Question

Mike:

Attached is a summary of our premerger analysis regarding a transaction that we are currently considering. We would like to discuss this matter with you after you have had an opportunity to review and consider the relevant facts and issues. If you could let me know a few time slots that would be convenient for you, I will coordinate with the parties.

As always, thank you for your time. We look forward to hearing from you.

[REDACTED]

CC:

[REDACTED]

SEE NOTES ON ATTACHED.
W. OVUKA, T. HANCOCK & R. SMITH AGREE.

B. Michael

SUMMARY OF HART SCOTT RODINO PREMERGER NOTIFICATION ANALYSIS

In conducting our analysis, we have relied upon the following facts:

1. Parent 1 will hold total assets in excess of \$100 million before and after the restructuring.
2. Parent 2 holds assets of more than \$10 million before the restructuring and will hold less than \$10 million after the restructuring.
3. Joint Venture Company will hold assets in excess of \$50 million following the restructuring.

Joint Venture Company is currently a subsidiary of two hospitals (Hospital A and Hospital B) and manages Hospital A, Hospital B, and Hospital C under a joint operating agreement (see attached diagram.) Parent 1 and Parent 2 have decided to restructure Joint Venture Company such that it will be the sole member of Hospitals A, B, and C.

Following the restructuring, Joint Venture Company will have two corporate members, Parent 1 and Parent 2. (See attached diagram.)

Joint Venture Company will be governed by a 12 to 15 member Board. Through the rights granted in the Affiliation Agreement between Parent 1 and Parent 2, Parent 1 and Parent 2 will jointly agree on the initial Board of Joint Venture Company (following the restructuring). Thereafter, Joint Venture Company's Board will nominate directors subject to the approval of Parent 1. Parent 1 will also have the unilateral right to remove directors, although it is expected (but not required) that Parent 1 will consult with and seek Parent 2's concurrence. Finally, Parent 1 will designate the Board Chairperson and the President/CEO who have been nominated by the Joint Venture Company's Board. The President/CEO will serve on the Board as an *ex officio* voting member.

Joint Venture Company and Hospitals A, B, and C will have a common Board.

Analysis

THIS IS TRUE FOR ACQUISITIONS OF NFP COMP
BUT NOT OTHER NON-STOCK ACQUISITIONS (IC-LPS, LLCs)

We have been advised in the context of another transaction that non-stock transactions are purely asset deals and that the only applicable control test is set forth in 16 CFR §801.1(b)(2) - "contractual power to appoint directors."

Under this assumption, the focus of our analysis is whether:

1. Parent 1 and Parent 2's joint appointment of the initial Board of Joint Venture Company (following the restructuring), **and**
2. Parent 1's ability to approve directors nominated by Joint Venture Company and remove Joint Venture Company's directors (after the initial Board is constructed),

gives Parent 1 the right to "presently designate 50 percent or more of the directors," and therefore control over Joint Venture Company.

THIS DESIGNATION SEEM RELEVANT

According to the commentary in Interpretation #62 of the ABA Manual, the contractual power to vote shares constitutes "control" only under certain circumstances. Taking into account provisions of corporate law and governance such as cumulative voting or a staggered Board, the voting rights must actually give the ability to elect half or more of the Board, without the voluntary concurrence of any other shareholder.

Initial Board - Neither Parent 1 nor Parent 2 has the ability to directly designate directors. Each member has a 50 percent vote for the appointment and approval of the initial directors. As a result, each member may only ratify nominated directors with the approval of the other member. Therefore, based on the discussion in Interpretation #62 and verbal confirmation provided by the Premerger Notification Office in another transaction, neither Parent 1 nor Parent 2 will satisfy the control test under 16 CFR §801.1(b)(2). This means that neither Parent 1 nor Parent 2 is an acquiring person.

DIRECTORS CAN UNILATERALLY REMOVE DIRECTORS & MUST A (RAISE NOMINATION, BUT CANNOT CHOOSE WHO IS NAMED). THIS CONSTITUTES CONTROL OF JVC

Perpetuating Board - Parent 2 does not have the ability to elect or approve directors on Joint Venture Company's Board. Parent 1 does not have the ability to directly designate directors without the concurrence of Joint Venture Company's Board (through the nomination process). Parent 1 only has the right to approve the directors nominated by Joint Venture Company's Board. Therefore, based on the discussion in Interpretation #62, we believe that neither Parent 1 nor Parent 2 will satisfy the control test under 16 CFR §801.1(b)(2). Again, if this conclusion is correct, this means that neither Parent 1 nor Parent 2 control Joint Venture Company and the parties do not need to file a Premerger Notification Form.

Joint Venture Analysis

Based on our discussion above, neither Parent 1 nor Parent 2 are acquiring persons. The restructuring of their relationship through a restructuring of Joint Venture Company, which is tax-exempt and will hold the membership interests of Hospitals A, B, and C, is not subject to a Premerger filing.

Conclusion

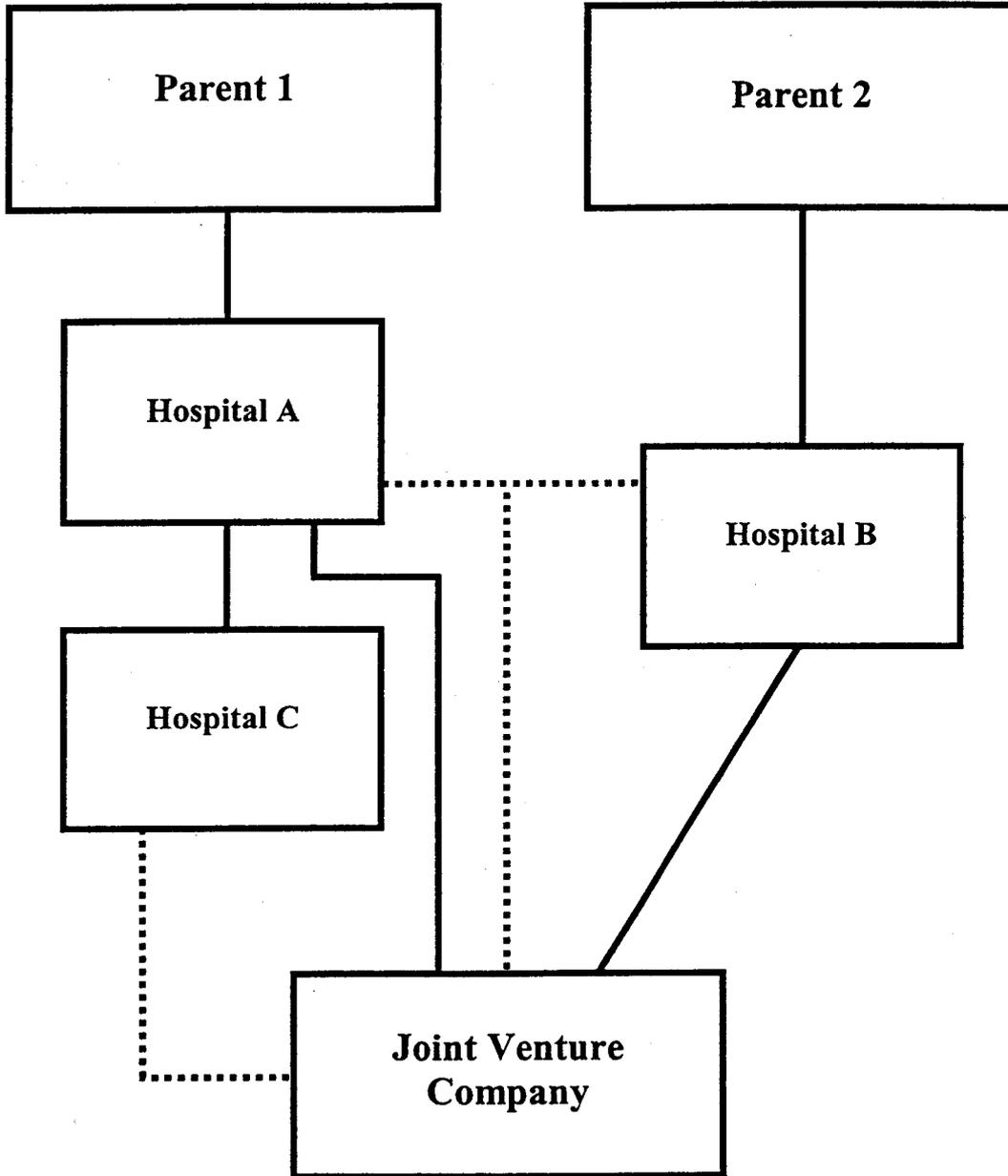
The restructuring does not satisfy Section 7A(a)(3) of the Premerger Notification Act because neither Parent 2 nor Parent 1 will "hold" the threshold amounts of Joint Venture Company's voting securities or assets, [and to the extent the transaction is viewed as the creation of a joint venture, it is exempt from filing under 16 CFR §802.40.] No Premerger Notification is required.

COMPETITELY IRRELEVANT

NOT TAXE

A THROUGH ITS CONTROL OF JVC (WHICH BECAME THE SOLE MEMBER OF THE THREE HOSPITALS) IS DEEMED TO ACQUIRE B. (IT ALREADY CONTAINS A & C). IF THE ASSETS OF B ARE VALUED IN EXCESS OF \$50MM, THIS IS REPORTABLE.

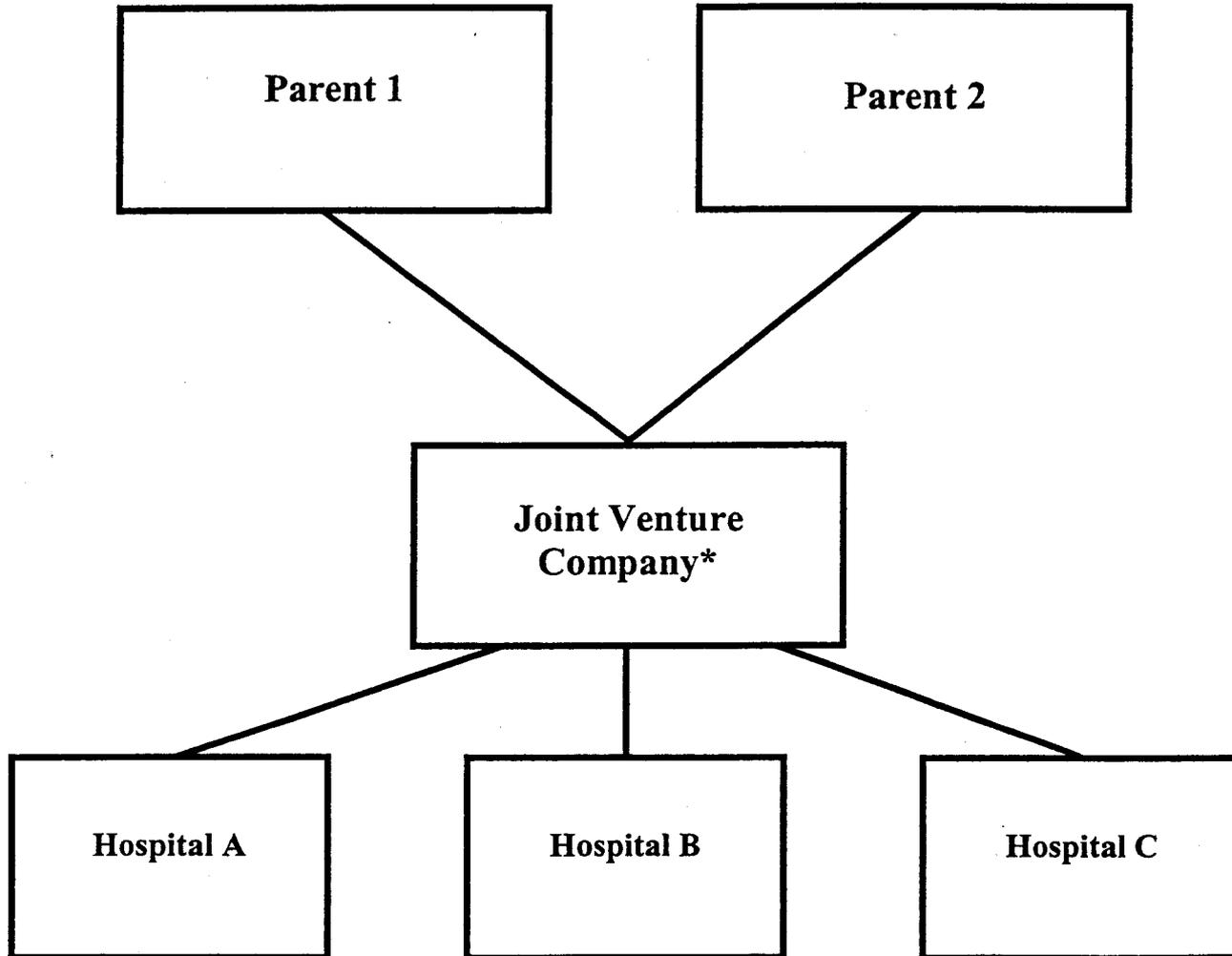
CURRENT CORPORATE STRUCTURE



————— Member

..... Management (Joint Operating Agreement)

CORPORATE STRUCTURE FOLLOWING THE RESTRUCTURING



Member

*** Joint Venture Company's initial Board is agreed upon by Parent 1 and Parent 2. Joint Venture Company's Board of Directors nominates subsequent directors, subject to the approval of Parent 1. Parent 1 may also remove the directors. Hospitals A, B, and C will have a common Board with Joint Venture Company.**