

[REDACTED]

802-63

[REDACTED]

November 17, 2005

Mr. James Ferkingstad
Federal Trade Commission
600 Pennsylvania Avenue, N.W.,
Washington, D.C. 20580

VIA EMAIL: JFERKINGSTAD@FTC.GOV

Re: Proposed Transaction to Acquire 25 Properties

Dear Mr. Ferkingstad:

My firm represents a company and its affiliates (collectively, "Management Company") engaged in the business of operating a number of health care facilities, including skilled nursing homes and assisted living facilities. The Management Company is a closely held entity owned by a single individual. Twenty-five of the facilities operated by Management Company, consisting of 23 skilled nursing facilities, one assisted living facility, and one Alzheimer's care facility, are owned by a real estate holding company or its affiliates ("RET"). There is a proposal that RET sell these facilities to Management Company.

As we've discussed on the telephone, the purpose of this letter is to describe the facts regarding the current ownership structure and the proposed sale transaction in order to obtain your advice regarding possible implications under the Hart-Scott-Rodino Act ("HSR"). Based upon our preliminary analysis, we believe Management Company and RET meet the "size of person" tests, and the aggregate value of the proposed transaction is approximately \$200 million. However, we also believe the transaction may be exempt under various HSR regulations discussed below.

Ownership of Facilities Prior to 1993 and Sale to RET

Each of the 25 facilities was either built or acquired by Management Company prior to 1993. Over a period of several years prior to 1995, the Management Company entered into a series of transactions in which the 25 properties were sold to RET, and in all but 4 instances, the Management

[REDACTED]

[REDACTED]

Company immediately leased the properties back from the RET. In each of the 21 sale/lease-back agreements, Management Company had an option to purchase the facilities back at a price equivalent to the fair market value of the facility. Four of the 25 facilities were not leased-back due to business reasons, but the parties entered into a management agreement in which Management Company managed the property, and each of these management agreements contained an option to purchase the facilities.

RET Ownership

Our understanding is that RET was formed in 1993 for the purpose of investing in these facilities with the intent to lease them back to Management Company. To our knowledge, RET does not hold any facilities other than the 25 facilities operated by Management Company. RET is privately held by four individuals, two of whom were employees of Management Company prior to 1993. We also understand that the individuals who own the RET have each been actively engaged in other business pursuits, including airplane leasing activities, owning other commercial real estate such as shopping centers, and owning and operating a few health care and retirement facilities unrelated to the facilities operated by Management Company.

Operation of the Facilities

Management Company has maintained the regulatory licenses for the 21 facilities which it leases. RET holds the regulatory license for the 4 facilities that are subject to the management agreements with Management Company. Management Company has operated the 25 facilities continuously since 1993. RET's involvement in each of the 25 facilities since 1993 has been limited to owning the real estate and holding the regulatory license for the 4 facilities subject to the management agreements. The lease agreements are "triple-net" leases, so that the Management Company incurs all risks, generating a fixed rate of return for the RET with respect to the leased facilities, based upon the RET's investment in the facilities, similar to a traditional financing arrangement. All employees at the 25 facilities are employees of Management Company. With respect to the 21 facilities leased, Management Company is entitled to all profits and at risk for all losses incurred from operation of the facilities. With respect to the 4 other properties, Management Company is obligated to share a percentage of the profits with RET, but is still at risk for all losses incurred from operation of the facilities.

Structure of Proposed Sale Transaction

One of the leases has reached maturity, and the RET and the Management Company have entered into an agreement in which the Management Company will purchase all 25 properties. The transaction will occur in 3 phases and is expected to be completed with closings occurring in 2005 and 2006. The aggregate purchase price is estimated at approximately \$200 million. Approximately \$161.5 million of the purchase price will be paid for the 21 properties being leased and approximately \$38.5 million will be paid for the four properties which are not currently being leased by Management Company.



Mr. James Ferkingstad
November 17, 2005
Page 3

Management Company will finance approximately \$72 million of the purchase by entering into an agreement with a publicly held health care real estate investment trust or an affiliate of such trust ("New RET"). Title to eight properties will be held in the name of New RET, and the agreement will provide for New RET to lease the properties to Management Company, with an initial annual rental payment equal to 8.5% of the purchase price and an option for Management Company to purchase the properties at the end of the term for a price equal to \$72 million plus a percentage of any appreciation in the value of the facilities.

With respect to the purchase of the remaining facilities, these properties will be acquired by single purpose entities which will be owned by the same individual who owns Management Company, or an entity controlled by the individual who owns Management Company. The owners of the facilities will lease the facilities to Management Company.

Analysis of Transaction

Based upon the facts set forth above, it appears to us that the original sale of the facilities to RET in 1993 by Management Company was effectively a financing transaction exempt from the reporting requirements, as described in 16 CFR 802.63(a), although since 4 of the facilities were not subject to a lease-back provision, these facilities arguably would not be included in the financing. We believe the proposed sale to the Management Company of the 21 facilities presently under lease represents a winding-down of the financing transaction, as contemplated by the exemption provided in 16 CFR 802.2(b). However, some of the facilities were originally acquired by Management Company as existing facilities prior to 1993 instead of being built as new facilities by Management Company.

Management Company has continually operated the facilities since they were originally owned by Management Company prior to 1993, and has continually held the regulatory licenses for the 21 facilities leased since they were previously owned by Management Company. Management Company will continue to operate and hold the licenses for the facilities after completion of the proposed transactions described above. We do not believe the transfer in actual ownership of the underlying real estate would raise any competitive issues intended to be addressed under the HSR.

We would like to arrange a call with you to discuss whether you concur with our belief that the proposed transaction would be exempt from filing notification under the HSR. We appreciate your assistance in this matter. Please contact me at the number above so that we may discuss these issues further.

Sincerely,



AGREE -
B. McElroy
11/17/05

