

Johnson, Janice C.

From: [REDACTED]
Sent: Monday, July 31, 2006 3:14 PM
To: Johnson, Janice C.
Subject: Second transaction of the day

Janice,

The following facts are relevant to the second transaction that I would like to discuss with you at your earliest convenience. I believe that transaction constitutes an acquisition, but it does not fit cleanly into any of the models I've addressed in the past.

1. Hospital A is a nonprofit hospital within "A". Hospital A has assets of ~\$80 million (the fair market value of which has yet to be determined). "A" has assets and annual sales in excess of \$100 million. Prior to closing the proposed transaction, A will transfer cash and marketable securities to A's UPE (or another entity existing or to be created within "A") in such amount as will reduce A's assets to a level approximately equivalent of B's asset base.
2. Hospital B is a nonprofit hospital within "B". Hospital B has assets of ~\$50 million (the fair market value of which has yet to be determined). "B" has assets and annual sales in excess of \$10 million but less than \$100 million.
3. A and B wish to consolidate their operations under the common control of a new, 501(c)(3) nonprofit holding company ("HC") that will have a community Board but no corporate members. Please confirm that the formation of HC is exempt from the reporting requirements pursuant to Rule 802.40.
4. A and B will cause their respective governing documents to be amended to make HC the sole corporate member of each of A and B. "A" will exit the market, and A and B will be controlled by HC. HC will have the power to appoint the members of the Board of each A and B, and rights to any profits generated by A or B and to their respective assets upon dissolution. (Another version has A and B merging into HC, but that alternative does not appear to raise a material difference in the HSR analysis.) Please confirm that Rule 801.40 does not apply to this transaction insofar as the formation of HC is in connection with the consolidation of A and B.
5. Historically, mergers and consolidations of nonprofit entities have been treated as asset transactions rather than acquisitions of voting securities as described in Rule 801.2(d), with the final analysis addressing who ultimately controls whom. In this situation, it appears that HC controls A and B, and that neither A nor B control HC. Neither A nor B will have a right to any profits generated by HC, nor will A or B have any right to HC's assets upon dissolution. Pursuant to state law, the distribution of HC's assets, if any, will be handled by the county court responsible for distribution of charitable assets. HC will have no corporate member but will be governed by a Board comprised of 15 directors. With respect to the initial Board appointments only, A and B will each appoint 7 directors and the 14 appointed directors will appoint the 15th director. After the initial Board selection, the Board will be self-sustaining and neither A nor B will have any right to appoint future members of the Board. We contend that the power to appoint the initial Board should not confer control of HC on A and B for HSR purposes, but acknowledge that one might also argue that both A and

Called Mr. [REDACTED] on 8/2/06.
The consolidation of nonprofit hospitals A + B into nonprofit HC is not reportable.
For HSR purposes, this is analyzed as one transaction -- the formation of a nonprofit, which is exempt under 802.40 of the HSR Rules.

J Johnson
W. Vane Co. Inc.

B indirectly control the election of the 15th director (via the exercise of a no vote), in which case A and B would be ultimate parent entities of HC. On the other hand, if neither A nor B have the power to appoint Board members in the future, the practical conclusion appears to be that the HC is its own UPE, and the UPE of both A and B. Please confirm that neither A nor B controls HC under these circumstances.

6. The transfer of corporate membership in A and B to HC appears to constitute a merger or consolidation under the Act. As such HC appears to be the acquiring person of both A and B. HC is projected to have assets of ~\$100 million upon closing and sales of \$0. Please confirm (a) that HC is the acquiring person and (b) whether the prior year's sales of A and B are attributable to HC for purposes of the size of person threshold.

7. Assuming that HC is an acquiring person, there appear to be two acquisitions. We understand that the acquisition of B involves assets worth less than \$56.7 million. We also understand that neither HC nor "B" would satisfy today's size-of-person threshold. If so, the acquisition of B by HC would not be a reportable transaction. Please advise whether HC's acquisition of B as described is reportable.

8. The parallel acquisition involves the change of membership of A, the assets to be acquired of which would be worth less than \$56.7 million. While "A" satisfies the higher size of person reporting threshold and HC would satisfy the lower size of person threshold, the assets to be acquired would not satisfy the size of transaction threshold. Please advise whether HC's acquisition of B as described is reportable.

9. Finally, we wish to confirm that the transfer of cash and marketable securities as described in Paragraph 1 would not constitute an avoidance scheme for purposes of Rule 801.90. Please note that the transfer of assets from A to A's UPE prior to closing will be limited to categories of assets that would not be considered assets if acquired by another person, and that there is no intent on the part of A or A's UPE to avoid the Act's reporting requirements.

We appreciate your assistance in this analysis. The formation of a new, nonprofit holding company with no members and no continuing control by the proposed subsidiaries adds an interesting wrinkle to this transaction. I look forward to speaking with you about these points.

Best regards,



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