

801.1(b)

CONFIDENTIAL

VIA ELECTRONIC MAIL

May 17, 2007

Mr. B. Michael Verne  
Premerger Notification Office  
Bureau of Competition  
Federal Trade Commission  
7th & Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Mike:

I am writing to confirm my understanding of a telephone conversation we had on May 3, 2007 concerning the basis for non-reportability under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act") for a proposed transaction.

Proposed Transaction

I have set forth below the general transaction we discussed, although I have added additional details to help further explain the proposed transaction. There is a proposed affiliation agreement whereby a non-stock, non-profit corporation ("Non-profit A") will become a corporate member of another non-stock, non-profit corporation ("Non-profit B") that operates a hospital. In exchange for Non-profit A becoming a corporate member of Non-profit B, Non-profit A will contribute to Non-profit B an amount equal to 30% of the net book value of Non-profit B. After the transaction closes, the other corporate member of Non-profit B will be a religious congregation ("Congregation") that currently sponsors Non-profit B. Non-profit A will have a 30% membership interest in Non-profit B and the Congregation will have a 70% membership interest in Non-profit B. Non-profit A and Congregation are jointly referred to as the Corporate Members. Each of the two Corporate Members will have equal rights, powers and responsibilities post-close with regard to the operation of Non-profit B except that upon a dissolution of Non-profit B, Non-profit A would have the right to 30% of the assets and Congregation would have the right to 70% of the assets.<sup>1</sup> Further, to ensure compliance with the

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<sup>1</sup> There also are options I did not raise on our call whereby Non-profit A could increase its membership ownership interest in Non-profit B from 30% to 45% by making increased contributions to Non-profit B. This increased ownership would only impact the percentage of assets that Non-profit A would be entitled to upon the dissolution of Non-profit B. It would not change other rights including those related to the designation of members



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Ethical and Religious Directives for Catholic Healthcare Services and to veto any program or service that adversely impacts or violates such Directives, any disagreement between the Corporate Members regarding such veto shall be resolved by the Congregation, with ultimate determination by the Roman Catholic Church as interpreted by the Local Bishop of the Diocese.

As a part of the transaction, amended and restated bylaws will be adopted for Non-profit B. Under the amended and restated bylaws, the Corporate Members will delegate operating responsibility to a joint committee and a board of trustees except for responsibilities reserved solely for the Corporate Members which will be subject to a unanimous vote of the two Corporate Members. There are a substantial number of such reserved responsibilities for the Corporate Members of Non-profit B including, but not limited to, amending the bylaws or articles of incorporation, approving expenditures and commitments above certain dollar thresholds, changing or reducing services offered, appointing the executive director -- the administrator in charge of the hospital (in consultation with or on recommendation by the board of trustees), approving the annual budgets, approving the annual strategic plan and any updates, approving or disapproving a merger or dissolution, revising the reserved powers, and reserving such additional powers as the two Corporate Members jointly determine.

With regard to the joint committee, each of the two Corporate Members will appoint two representatives to the joint committee. Although the Corporate Members can jointly decide to delegate additional powers to the joint committee, the responsibilities of the joint committee outlined in the amended and restated bylaws include conducting an annual evaluation of and setting the compensation of the executive director, and appointing and removing the members of the board of trustees of Non-profit B other than three individuals appointed by Non-profit A, three individuals appointed by the Congregation and the president of the medical staff of the hospital who serves as a member of the board of trustees. The joint committee can only act upon a unanimous vote of the four representatives to the joint committee.

The board of trustees will consist of the three trustees appointed by Non-profit A, the three trustees appointed by Congregation, a number of community trustees appointed by the joint committee, physicians appointed by the joint committee and the president of the medical staff of the hospital. The responsibilities of the board of trustees set forth in the amended and restated bylaws include, but are not limited to, conducting the affairs of Non-profit B and holding powers not otherwise reserved to the joint committee or the Corporate Members, electing officers other than the executive director, appointing and reappointing physicians to the hospital medical staff, developing long range strategic plans for approval by the Corporate Members, assessing the quality of patient care, education, and research being conducted in the

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of the board of trustees. Accordingly, my understanding is that the exercise of these options would not result in any HSR reporting obligation. If you believe this understanding is incorrect, please let me know.



hospital, and reviewing and recommending for approval by the Corporate Members the annual budgets and assuring the hospital is managed within the approved budgets. However, no action of the board of trustees shall be a condition precedent to an action of the Corporate Members.

Conclusions

You agreed that the proposed transaction is not reportable under the HSR Act. Specifically, you confirmed the following:

- The only HSR control test applicable to non-stock, non-profit corporations is having the contractual right presently to designate 50% or more of the directors of the not-for-profit corporation. 16 C.F.R. § 801.1(b)(2).
- The board of trustees discussed above is the same as a board of directors under 16 C.F.R. § 801.1(b)(2).
- Non-profit A will not control Non-profit B for HSR purposes as Non-profit A will not have the right to designate 50% or more of the members of the board of trustees of Non-profit B.
- Non-profit A will not be deemed to have the power to designate the directors selected by the joint committee.
- The conclusion that Non-profit A does not control Non-profit B for HSR purposes is not impacted by the fact that Non-profit A will equally control Non-profit B with regard to any powers reserved by the Corporate Members for themselves or designated to the joint committee.
- The acquisition of a non-controlling interest in a non-profit corporation, such as the acquisition that will be made by Non-profit A in Non-profit B, is HSR exempt regardless of dollar value, and the applicable rule to support this conclusion in the case of a non-stock, non-profit corporation is 16 C.F.R. § 801.2(f)(3). That rule provides that “[a]ny person who acquires control of an existing not-for-profit corporation which has no outstanding voting securities is deemed to be acquiring all of the assets of that corporation.”

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[REDACTED]



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Please let me know as soon as possible if you disagree with any of the conclusions discussed above, or if I have misunderstood any aspect of your advice. Thank you for your assistance in this matter.

Sincerely,



Agree-  
Stanton  
*B*

