

ownership of subject assets has not been transferred to hospital; thus, hospital does not hold the assets. 0-1.1(c) VC
The Trust holds the assets and the beneficiary
This, [redacted] in [redacted] tabling the [redacted]
transaction it would [redacted] not include
the subject assets.

VIA FACSIMILE

March 15, 1995

Mr. Victor Cohen
Premerger Notification Office
Federal Trade Commission
Washington, D.C.

Re: Application of Hart-Scott-Rodino Antitrust Improvements Act of 1976

Dear Victor:

The purpose of this letter is to outline in greater detail the facts of a particular proposed transaction between not-for-profit corporations that we discussed on February 21 so that the Premerger Notification Office may confirm that no notification filings are required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") before the transaction may be consummated. 4/10

The transaction is the acquisition by one not-for-profit corporation ("Acquirer") of another not-for-profit corporation, which operates a [redacted] by means of having Acquirer become the sole corporate member of [redacted] Acquirer and [redacted] satisfy the "size of person" test under the Act. There is no acquisition price or other consideration being paid or given by Acquirer. Whether or not a notification filing will be required depends upon the fair market value of the assets being acquired. The balance sheet of [redacted] assets with a total value of less than \$15 million and, although Acquirer has not yet made a formal fair market value determination, it is believed that the assets reflected on [redacted] balance sheet have a fair market value of less than \$15 million.

The issue that is presented is whether Acquirer, by virtue of becoming the sole corporate member of [redacted], will be deemed to have acquired assets held by an irrevocable trust ("Trust") of which [redacted] a conditional beneficiary. The Trust was established pursuant to the wills of a married couple who died in the early 1900's, and its assets and income are to be used to support a [redacted]. Under the terms of the applicable trust instrument, [redacted] is granted the right (without charge) to use the facilities owned by the Trust so long as [redacted] continues to function as the [redacted]. The Trust has the express responsibility to maintain and replace, if necessary, the facilities. The trustee of the Trust is an independent commercial trust company which is not controlled by either [redacted] or Acquirer. The parties anticipate that, subject to the conditions of the trust instrument, the facilities will remain available to [redacted] after Acquirer becomes the sole corporate member of [redacted]. ✓

RS agrees

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Under the definition of "hold" (16 C.F.R. §801.1(c)(3)), a trust, not its trustee nor its beneficiaries, is considered to hold the assets constituting the corpus of the trust. It is important to note that neither the audited balance sheet of [REDACTED] nor the accompanying notes contain any reference to the Trust or the Trust's assets used by [REDACTED]. While the Premerger Notification Office does consider the useful life of assets held under long-term leases in determining whether a lease can be deemed an acquisition, there is no actual lease in this situation, but merely a conditional grant of the use of the facilities. Moreover, because the Trust is obligated to maintain the facilities and replace obsolete facilities, there is not really any useful life to the facilities. In fact, the Trust over the years has built, updated and replaced parts of the facilities. The memorandum of understanding between the parties acknowledges the trustee's ongoing ability to discontinue [REDACTED] right to use the facilities if [REDACTED] deviates from the stated [REDACTED] or other applicable provisions of the trust instrument. Additionally, it is clear that [REDACTED] does not have the legal ability to sell the facilities or to use them as collateral for [REDACTED] obligations.

On the basis of our discussion and the facts outlined in this letter, I have concluded that the assets owned by the Trust should not be deemed to be assets held by [REDACTED], therefore, cannot be deemed to be acquired by Acquirer when Acquirer becomes the sole corporate member of [REDACTED]. This conclusion is reached because of (i) the definition of "hold" in the context of assets composing the corpus of irrevocable trusts, (ii) the fact that there is no lease or applicable useful life with respect to the facilities, (iii) the fact that [REDACTED] right to use the facilities is contingent upon continued operation in a certain manner, (iv) the lack of even a reference on [REDACTED] audited balance sheets and notes to the Trust facilities, and (v) the absence of the other typical indicia of beneficial ownership in the [REDACTED] such as the right to sell or encumber.

Please telephone me at [REDACTED] to acknowledge receipt of this letter and confirm that you are in agreement with my conclusion that the Trust assets are not held by [REDACTED] and can therefore not be deemed to be acquired by Acquirer.

Very truly yours,

[REDACTED]