

December 26, 1995

VIA FAX 202 326-2624

Mr. Dick Smith
Senior Attorney
Premerger Notification Office
Federal Trade Commission
Bureau of Competition
Washington, D.C. 20580

Re: Rule 801.40 and Joint Venture
Premerger Notification Requirements

Dear Mr Smith:

[REDACTED] and I recently spoke with one of your staff attorneys, Micheline Hershey, regarding the premerger notification requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") for a joint venture. In discussing whether the joint venture should be formed as a limited partnership or limited liability company, a question has arisen as to whether structuring the joint venture as an LLC would result in loss of the exemption provided in Rule 801.40 and thus require a premerger notification filing under the Act. It is our understanding that the requirement for filing depends on certain factual issues regarding the governance of the joint venture. If the LLC is governed in a manner which functions like a corporation's board of directors (equal vote per director) then a filing may be required. Alternatively, if management is vested in the hands of the members and voting is based on ownership interests, a filing is likely not required because the joint venture more closely resembles a partnership. In visiting with Ms. Hershey, she indicated that we could submit a written summary of the facts involved and request an informal statement of your opinion on whether a premerger

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notification filing is required. We respectfully request such an opinion based on the facts outlined in the balance of this letter.

Our client, an [REDACTED] nonprofit corporation and [REDACTED] §501(c)(3) public charity (the "Foundation"), operates a [REDACTED] in [REDACTED] (the [REDACTED]). The Foundation has begun negotiations and entered into a letter of intent with [REDACTED] a publicly traded [REDACTED] corporation, for the formation of a joint venture for the future operation of the [REDACTED]. The letter of intent describes the formation of the joint venture either as a limited partnership or limited liability company and outlines the terms of the joint venture arrangement. Essentially, the terms of the joint venture are as follows:

1. The Foundation will contribute the operating assets of the [REDACTED] to the joint venture and [REDACTED] will contribute cash. Each party will hold a fifty percent (50%) ownership interest in the joint venture and be entitled to share in the profits and losses of the joint venture in the same percentages.

2. The joint venture will be managed either by a General Partner or Manager depending upon choice of entity, as designated by the partners or members. The General Partner or Manager would oversee the day to day operations of the joint venture within certain prescribed guidelines that would be identical under either governing document.

3. The governance of the joint venture would be in the form of two governing boards and would be identical under either the partnership agreement or the operating agreement. Under the proposed agreement, the Foundation would appoint a board of "Class A governors" and [REDACTED] would appoint a board of "Class B governors." Actions at the joint venture level would require majority approval of both classes of governors and each class has equal voting weight in accordance with their ownership interests in the joint venture. Thus, the Foundation and [REDACTED] each would initially hold 50% of the vote. Voting rights and the voting power of each class of governors could change in the future based on changes in either the Foundation's or [REDACTED] interest in the joint venture.

[REDACTED]

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4. The specific acts requiring approval of a majority of the Boards (both the Class A governors and the Class B governors) include or any act to:

- a. Any act to change the nature of the joint venture's business or activities;
- b. Borrowing or creating any indebtedness or obligation in excess of \$250,000;
- c. Issue an additional ownership units or interests of the nature owned by the Foundation;
- d. Change the name of the joint venture;
- e. Designate the CEO of the joint venture;
- f. Make a capital expenditure or commitment in excess of \$1.0 Million;
- g. Designation of the Chairman of the joint venture;
- h. Declaration and payment of distributions to the parties;
- i. Adoption of annual budget, capital expenditure budget and strategic long-range plan; and
- j. Discontinue and [REDACTED] provided at the joint venture's hospital.

5. The initial draft of the joint venture agreement is in the form of an [REDACTED] limited partnership. Because of liability concerns with the operation of the [REDACTED], the Foundation is concerned about assuming general partner status without limited liability for the joint venture's obligations. The parties have discussed limiting the Foundation's investment to solely limited partnership interests, but there are concerns about the limitations state law imposes on a limited partner's ability to participate in management without being deemed a general partner. The actions requiring the Foundation's approval or action

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outlined in paragraph 4 above are significantly more than those usually requiring a limited partner's approval. The Foundation is extremely concerned that its involvement with the Class A governors and active role in the joint venture's management could cause the Foundation to be viewed as a general partner and render it jointly and severally liable for the joint venture's liabilities and obligations.

6. To avoid the concern raised in paragraph 5 above, the Foundation and [REDACTED] have discussed structuring the joint venture as an LLC, with identical management and operational terms found in the initial draft of the limited partnership agreement. This structure would allow the Foundation to exercise its full management rights and powers based on its ownership interest and percentage, functioning more like a general partnership, without potentially transforming its limited partnership interest to a general partnership interest. The only reason for selecting the LLC structure over the limited partnership is to allow the Foundation to participate in the management of the joint venture in accordance with its ownership interest with limited liability.

We are requesting an informal statement of the FTC's position on this matter in light of Rule 801.40 regarding joint ventures that are corporations and the FTC's long standing position that partnerships are not subject to the premerger notification requirements of the Act. We will be glad to present the draft of the limited partnership agreement and any additional information that you believe would be helpful in framing a response to our inquiry. Also, to the extent that you have any questions, we would be glad to discuss the proposed joint venture with you at your convenience.

Your assistance and cooperation in responding to this request are greatly appreciated. It is my understanding that you will respond by telephone and I would ask that you call either [REDACTED]

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[REDACTED] or me [REDACTED] at your earliest convenience
to discuss your response.

Cordially yours,

[REDACTED]

[REDACTED]