

801.1 (b)(2)

March 8, 1996

**By Hand Delivery**

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Federal Trade Commission  
Premerger Notification Office  
Bureau of Competition  
Room 303  
Washington, DC 20580

SEARCHED  
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Re: **Hart-Scott-Rodino Act Notification**

Dear Dick:

I am writing to provide a detailed description of the transaction that we discussed over the phone recently and to seek your opinion regarding whether a filing will be necessary for this transaction under the Hart-Scott-Rodino Act. Because the client needs to know as soon as possible whether a filing will be required, I would greatly appreciate hearing from you at your earliest convenience.

As we discussed, the transaction in question involves two [redacted] which, arguably, are already under common control. In order to describe the proposed transaction more precisely, it is necessary to delve into the relevant corporate structures in some detail. As will

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become obvious, the names used in this description are not the actual names of the entities involved.

**I. Description of Entities**

**A. Corporation A**

"A" is a non-profit corporation. Above [REDACTED] in the corporate hierarchy is its sole member, a non-profit corporation that we will call "Corporation A." Corporation A is the sole member not only of [REDACTED] A, but also of "Foundation A" (a non-profit corporation that does the fundraising work of Corporation A), and of "Research and Education A" (a non-profit corporation that does research and education work).

Corporation A has eleven voting Members. Of the eleven voting Members of Corporation A, one is [REDACTED] X, who serves ex-officio. [REDACTED] is appointed by [REDACTED]. Another of the eleven voting Members is [REDACTED], also known as [REDACTED] Y" -- who also serves ex-officio. [REDACTED] Y is [REDACTED] who is elected by [REDACTED]. The slate of nominees for her position must be approved by a Superior (also [REDACTED] in Rome who is above [REDACTED] Y in the [REDACTED]

The remaining nine voting Members of Corporation A are all [REDACTED] of the [REDACTED]. The Membership is self-perpetuating, meaning that any vacancy in the Membership is filled by an election by the current Members. Before a new Member can be elected, the individual must be approved by both [REDACTED] X and [REDACTED] Y. The Chairman of the Board of Directors of Corporation A serves, ex officio, as a non-voting Member of Corporation A. Any Member of Corporation A may be removed by a resolution of the Members of Corporation A with the approval of [REDACTED] X and [REDACTED]

The by-laws of Corporation A provide that the Board of Directors of Corporation A will have at least five and not more than forty Directors, with the exact number fixed by resolution of the Members. There are presently forty individuals on the Board of Directors of Corporation A. These forty include some, but not all, of the eleven voting Members of Corporation A. [REDACTED] X serves as both a Member of Corporation A and one of the Directors of Corporation A.

Nominees to fill vacancies on the Board of Directors of Corporation A are chosen by Nominating Committee A. Nominating Committee A consists of the following six people: the Secretary to [REDACTED] X for Health Affairs (ex officio); the Chairman of the Board of Directors of Corporation A (ex officio); two Members of Corporation A; the President/CEO of [REDACTED] A (ex officio); and the Third Vice Chairman of [REDACTED] A (ex officio).

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When vacancies occur on the Board of Directors, Nominating Committee A submits a list of nominees for those positions to the Members of Corporation A at the annual meeting. However, no nominee can be presented to the Members of Corporation A for consideration unless that nominee has been approved by [REDACTED] X and [REDACTED] Y.

The Members of Corporation A elect the Directors to the Board of Corporation A from among the nominees selected by Nominating Committee A and approved by [REDACTED] X and [REDACTED] Y. In practice, Nominating Committee A sometimes provides [REDACTED] X and [REDACTED] Y with the exactly the same number of nominees as there are vacancies on the Board of Directors. However, Nominating Committee A sometimes provides [REDACTED] and [REDACTED] Y with more nominees than there are vacancies.

In practice [REDACTED] X is actually the one who selects the individuals who will fill the vacancies on the Board of Directors and who has the last say in which nominees are sent to the Members for their "rubber stamp" of approval. Thus, the Nominating Committee never makes nominations without first clearing them unofficially with [REDACTED] [REDACTED] always sends the Members of Corporation A the exact number of approved nominees needed to fill the vacancies on the Board of Directors; and the Members always elect the nominees that have been approved by [REDACTED]. Although the by-laws make it seem that [REDACTED] and [REDACTED] Y play equal roles in selecting the new Directors of Corporation A, and that the current Members could block one of the [REDACTED] elections, in reality, the choice of each new Director is entirely up to the [REDACTED]s neither the [REDACTED]s nor the Members would act against the [REDACTED] wishes.

Although Hospital A, Foundation A, and Research and Education A each has its own Board of Directors, the individuals on each of those Boards are automatically the same individuals that are on the Board of Directors of Corporation A.

#### **B. Corporation B**

Like [REDACTED] A [REDACTED] B is a non-profit corporation. Above [REDACTED] in the corporate hierarchy is its sole member, a non-profit corporation that we will call "Corporation B." Corporation B is the sole member not only of [REDACTED] B, but also of [REDACTED] B (a non-profit corporation that operates as [REDACTED]).

Corporation B has five voting Members. Of the five voting Members, one is [REDACTED] X, who serves ex-officio; two are persons designated by the [REDACTED] one is the President of [REDACTED] Q; and one is a member of [REDACTED] Q designated by the President of [REDACTED] Q. The President of [REDACTED] Q is [REDACTED] chosen by [REDACTED] and

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plays a role for Corporation B similar to that played by [REDACTED] Y for Corporation A.

The Board of Trustees of Corporation B is elected by the Members of Corporation B. The by-laws of Corporation B provide that its Board of Trustees will have a minimum of five Trustees, and will include at least two members of [REDACTED] Q appointed by the President of [REDACTED] Q, with vote, and the President and CEO of Corporation B, ex officio, with vote. There are presently 24 Trustees on the Board of Corporation B.

The Trustees of Corporation B are nominated by Nominating Committee B, which, according to the by-laws of Corporation B, shall consist of at least three persons, all of whom shall be Trustees of Corporation B, and at least one of whom shall be a member of [REDACTED] Q.

Although the by-laws of Corporation B do not specify that [REDACTED] X or the President of [REDACTED] Q must approve nominees for the Board of Trustees before the Members can vote on them, in practice, the selection of the Trustees for Corporation B occurs in the same way as the selection of the Directors for Corporation A. In short, it is [REDACTED] X who actually selects new Trustees and the Members of Corporation B simply rubber stamp his choices.

[REDACTED] B and [REDACTED] B each has its own Board. These Boards overlap with, but are not identical to, the Board of Corporation B.

## **II. Description of the Proposed Transaction**

Pursuant to the proposed transaction, Corporation B -- which is already the sole member of [REDACTED] B and [REDACTED] B -- would become the sole member of [REDACTED] A, Foundation A, and Research and Education A. The new Corporation B would then have nine members, made up of some of the Members of the old Corporation A and some of the Members of the old Corporation B. Corporation A and Corporation B would then consolidate their Boards and their operations. [REDACTED] A and [REDACTED] B are not expected to consolidate their Boards or operations immediately, but may do so at some point in the future.

## **III. Discussion**

### **A. Relevant Definitions**

The Hart-Scott-Rodino Act (HSRA) requires entities to file notification of an acquisition or consolidation when the "acquiring person," the "acquired person," and the proposed transaction meet certain financial thresholds. Specifically, the HSRA states, in relevant part:

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. . . no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons . . . file notification . . . and the waiting period . . . has expired, if [certain specified financial thresholds are met].

Section 7A of the Clayton Act, 15 U.S.C. § 18a.

The regulations promulgated under the HSRA provide that "Any person which, as a result of an acquisition, will hold . . . assets . . . is an acquiring person." 16 C.F.R. § 801.2(a)(emphasis added). The regulations also provide that, except in certain situations not relevant here, "the person(s) within which the entity whose assets or voting securities are being acquired is included, is an acquired person." 16 C.F.R. § 801.2(b)(emphasis added).

The regulations also specifically address consolidations, stating:

(2) (i) Any person party to a merger or consolidation is an acquiring person if, as a result of the transaction, such person will hold any assets or voting securities which it did not hold prior to the transaction.

(ii) Any person party to a merger or consolidation is an acquired person if, as a result of the transaction, the assets or voting securities of any entity included within such person will be held by any other person.

16 C.F.R. § 801.2(d)(2)(i) and (ii) (emphasis added).

"Person" is defined, in relevant part, to mean "an ultimate parent entity and all entities which it controls directly or indirectly." 16 C.F.R. § 801.1(a)(1). "Entity" is defined, in relevant part, as "any natural person, corporation, company, partnership, joint venture . . . or club, whether incorporated or not . . ." 16 C.F.R. § 801.1(a)(2). "Ultimate parent entity" is defined to mean "an entity which is not controlled by any other entity." 16 C.F.R. § 801.1(a)(3).

The word "control" is defined, in relevant part, as follows:

The term "control" (as used in the terms "control(s)," "controlling," "controlled by" and "under common control with") means . . . Having the contractual power presently to designate 50 percent or more of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

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16 C.F.R. § 801.1(b).

The term "hold" is defined, in relevant part, as follows:

(c) (1) . . . the term "hold" (as used in the terms "hold(s)," "holding," "holder," and "held") means beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means. . . .

(8) A person holds all assets and voting securities held by the entities included within it; in addition to its own holding, an entity holds all assets and voting securities held by the entities which it controls directly or indirectly.

16 C.F.R. § 801.1(c)(1) and (8).

**B. Analysis of the Present Situation**

In reality, no person can be elected to the Board of Directors of Corporation A or to the Board of Trustees of Corporation B unless first approved by [REDACTED] X. In fact [REDACTED] X selects all new Directors for Corporation A and all new Trustees for Corporation B, and the Members of each corporation have always elected every person selected by [REDACTED] X. Thus, [REDACTED] X appears to have the power to designate over 50 percent of the Directors of Corporation A and over 50 percent of the Trustees of Corporation B.

Based on the definition of "control" in the regulations, this would mean that [REDACTED] X has control over both Corporation A and Corporation B. Although [REDACTED] X is appointed by [REDACTED] and thus, arguably, "controlled" by [REDACTED], you have explained that the Federal Trade Commission has rejected the argument that [REDACTED] is the Ultimate Parent Entity of a [REDACTED] and thus has taken the position that for HSRA purposes, the Ultimate Parent Entity of [REDACTED] must be some entity below [REDACTED]. Thus, it appears that, given this limitation [REDACTED] X is the Ultimate Parent Entity of both Corporation A and Corporation B.

Thus, the relevant "Person" for HSRA purposes is [REDACTED] X, plus Corporation A and Corporation B, as well as the corporations below each of those entities in the corporate hierarchy. This "Person" then "holds" "all assets and voting securities held by the entities included within it."

Because this "Person" already "holds" Corporation A and Corporation B, the "Person" will not "hold any assets or voting securities which it did not hold prior to the transaction" as

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a result of the transaction, and thus cannot be an "acquiring person." Similarly, no "assets or voting securities of any entity included within such person will be held by any other person" as a result of the proposed transaction, and thus, the "Person" cannot be an "acquired person."

In short, Corporation A and Corporation B are already controlled by a common Ultimate Parent Entity, namely [REDACTED] X. Thus, the proposed transaction effectively constitutes an "intraperson" transaction. Although the rules provide no explicit exemption for intraperson transactions in non-stock acquisitions, and although neither the Act nor the rules defines the word "acquire," on which the obligation to file hinges, the fact that there will be no acquiring or acquired persons in this transaction within the meaning of the rules suggests that nothing will be "acquired" within the meaning of the Act and that, therefore, no filing is required.

#### IV. Conclusion

Because [REDACTED] X has the power to designate over half of the Directors of Corporation A and over half of the Trustees of Corporation B, these two corporations are already a single "Person" within the meaning of the HSRA, and the proposed transaction will not result in any person holding assets not previously held and therefore does not constitute a reportable acquisition under the HSRA.

I appreciate your taking the time to review this description, and look forward to hearing your conclusions regarding whether a filing is necessary for the transaction described above. You can reach me at [REDACTED]

Sincerely,

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3/20/96 - Advised writer that a filing will be required. While [REDACTED] X may, in effect, control the two non-profits due to deference to his position by others at a lower level in the [REDACTED] he does not possess a contractual power to appoint half or more of the boards + trustees as required by 801.1.(b)(2). The PHD officer cannot defer control to [REDACTED] because of his high position in the [REDACTED]. Under HSRA rules, no one person controls both of the non-profits.

RTS Smith