

Verne, B. Michael

From: [REDACTED]
Sent: Friday, December 13, 2013 3:08 PM
To: Verne, B. Michael; Walsh, Kathryn
Cc: [REDACTED]
Subject: Inquiry Regarding Acquisition by State University Hospital System

Mike and Kate:

I am writing to you with respect to whether the transaction described below involving a state university hospital system is exempt from the filing requirements of the Hart-Scott-Rodino Act.

System A is a network of hospitals, specialty care centers, primary care centers, faculty and providers. It is a division of, and is entirely owned and operated by, a state university, and is known as the state university hospital system. In addition, part of System A acts as a teaching hospital for the university. As a division of the university, and not a separate legal entity, System A's activities are overseen by the university's board of regents. The state's constitution and relevant state case law hold that the university is a constitutional corporation that is a co-equal branch of state government. The university complies with the statutory directive that it have a medical department and faculty, which are part of System A.

System B, the target, is a health care system organized as a system of not-for-profit entities that include an acute care hospital, urgent care center, hospice, home care services, and a network of physicians.

System A plans to acquire control of System B by becoming its sole member and obtaining the right to appoint more than 50% of its board of directors in a transaction that otherwise would be reportable under the HSR Act's size-of-persons and size-of-transaction tests, but that is not valued in excess of \$283.6 million. This transaction could occur in one of three ways. First, System A could become the sole member of System B directly. In essence, this would be an acquisition of System B by the state university itself because System A is a division of the state university, not a separate legal entity. Second, a newly-formed, direct and wholly-owned subsidiary of System A (in essence a wholly-owned subsidiary of the state university because System A is a division of the state university) could become the sole member of System B. Third, a previously-existing not-for-profit corporate subsidiary of System A, which holds System A's interests in joint ventures and minority investments, could become the sole member of System B. System A has not yet decided which of these acquisition vehicles will be used to acquire System B.

As you are aware, "transfers to or from a Federal agency or a State or political subdivision thereof" are exempt from the filing requirements of the HSR Act. 15 U.S.C. § 18a(c)(4) (Clayton Act § 7(a)(c)(4)); *see also* 16 C.F.R. § 801.1(a)(2) ("the United States, any of the States thereof, [and] any political subdivision or agency of either . . . other than a corporation or unincorporated entity engaged in commerce" is exempt from filing an HSR notification). In informal opinions, the FTC has previously found that a state university is not required to file an HSR notification. *See* Informal Opinion No. 9907012 (July 28, 1999) (state university was not required to file HSR notification when receiving assets of a charitable corporation). An FTC informal opinion also indicated that the "Medical Branch" of a state university, including the medical school and health care facilities, was exempt from the HSR Act's filing requirements where the Medical Branch was created by operation of state statute. *See* Informal Opinion No. 9509004 (Sept. 11, 1995) (Medical Branch owned by state university "appeared to be [a] state agenc[y]").

We are aware that one informal opinion suggests that an "affiliated medical center" that is "separately incorporated or otherwise controlled" may not be a State or political subdivision. *See* Informal Opinion No.

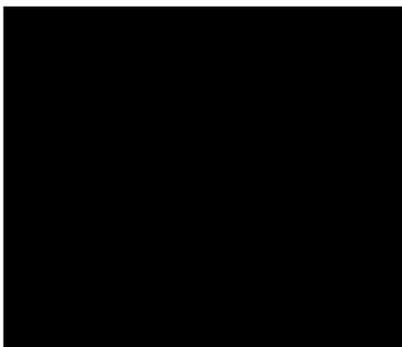
0602026 (Feb. 2, 2006). However, the facts here show that System A is wholly-owned and controlled by the state university and its board of regents; it is an integral component of the state university. For example, System A cannot sue or be sued in its own name. System A does not have its own bank accounts; cannot issue bonds; cannot lease medical equipment in its own name; and cannot enter into employment contracts in its own name. The university board of regents has also created a committee of regents that directly oversees the operations of System A.

In addition, assuming you conclude that a direct acquisition by System A of System B is exempt under Section 7a(c)(4), we believe that an acquisition through a direct, wholly-owned subsidiary of System A (which actually is a direct, wholly-owned subsidiary of the university, as explained above), newly formed specifically to make the acquisition should qualify for the same treatment. However, in the event that you conclude the Section 7a(c)(4) exemption applies to the university, but that it would not apply to an acquisition through such a subsidiary, we understand that the newly-formed subsidiary would be considered its own ultimate parent entity for purposes of analyzing whether the transaction is reportable. Informal Opinion No. 0412011 (where parent is not considered an entity under Rule 801.1(a)(2), subsidiary is treated as the acquiring person). As result, because the newly-formed subsidiary will not hold any assets other than assets to be used to acquire System B, the subsidiary will not meet the size-of-persons test, and the acquisition will not be reportable. *See* 16 C.F.R. § 801.11(e).

Based on these facts, we have the following questions:

- (1) Does the exemption contained in 15 U.S.C. § 18a(c)(4) apply to exempt this transaction from HSR filing requirements?
- (2) Is the answer to question (1) different depending on which of the acquisition vehicles discussed above is employed?
- (3) In the scenario discussed in the last paragraph above, even if the § 18a(c)(4) does not apply to the newly-formed subsidiary, is the transaction not reportable under Rule 801.11(e)?

Thanks as always for your assistance.



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- 1) If B is acquired directly by A, there is no acquiring person, so not reportable.
- 2) If B is acquired by a sub of A that is not itself an agency of the state, the sub would be its own UPE and the acquiring person
- 3) Agree - if the "assets being used to acquire B" are cash, it can be excluded under 801.11(e). If not cash, they cannot be excluded. So the third acquiring entity scenario (previously existing nonprofit) is probably reportable

BW
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