

Control - Int'l - 7(A) - Continuum Theory  
801.1(b); 80230;

[REDACTED]

October 11, 1996

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FEDERAL TRADE COMMISSION  
PREMERGER NOTIFICATION

VIA FACSIMILE: (202) 326-2624

John M. Sipple, Jr.  
Chief Premerger Notification Office  
Federal Trade Commission  
Washington, D.C. 20580

Dear Mr. Sipple:

The following letter is a description of the facts and arguments relating to the proposed corporate restructuring transaction which I have discussed with you and Ms. Nancy Ovuka of your office regarding reportability under the Hart-Scott-Rodino Premerger Notification Program.

The questions surrounding this proposed transaction mainly arise from the fact that the corporations involved are non-profit, tax-exempt entities and, as you know, many of the premerger notification rules and guidelines are written for proprietary for-profit entities. As we have discussed, the facts involving the relevant corporate entities are as follows:

CORPORATION A non-profit	CORPORATION B non-profit
<ul style="list-style-type: none"> <li>● Internal Revenue Code Section 501(c)(3) corporation</li> <li>● 509(a)(3) classification; "supporting organization" (as defined by the IRS) to Corporation B</li> <li>● No member interest</li> <li>● 8 member Board of Directors</li> </ul>	<ul style="list-style-type: none"> <li>● Internal Revenue Code Section 501(c)(3) corporation</li> <li>● No member interest</li> <li>● 15 member Board of Directors</li> </ul>



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- 5 directors must also be directors of Board of Corporation B; 8 directors are currently members of Board of Corporation B
- Directors serve 3 year staggered terms; successors
- Power to remove the 5 overlapping directors, with or without cause, serving on the Corporation A Board
- Directors serve 3 year staggered terms; successors

directors, however, the 5 designated seats to Corporation B must be preserved

directors

(Corporation B has a lease arrangement with this governmental entity for substantially all of Corporation B's assets)

● Holds a license to operate,

- Charitable mission to provide for the treatment of the ill and disabled
- Over \$10,000,000 in assets
- Over \$100,000,000 in assets

the corporate restructuring we are proposing is to amend Corporation B's Articles of Incorporation to make Corporation A its Member. Corporation B's Articles and Bylaws will be amended to provide the following reserve powers to Corporation A: approval of directors, approval of CEO and executive officers, approval of Articles of Incorporation and Bylaws, and approval of operating budget and strategic plan.

■ The purpose of the "certification theory" being considered to exempt this restructuring from filing a Premerger Notification Report Form, the purpose for proposing this restructuring transaction is in preparation for an immediate subsequent transaction where a third-party non-profit health care system would



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acquire Corporation A through an Affiliation Agreement. This Affiliation Agreement provides that the third-party health care system will become the Member of Corporation A. As a pre-requisite to this contemplated transaction, the third-party non-profit health

B will not occur unless the affiliation transaction with the third-party health care system will be consummated.

Before I discuss more fully the reasoning supporting the proposed corporate restructuring, I think it would be useful to

with the Internal Revenue Code as it pertains to tax exempt

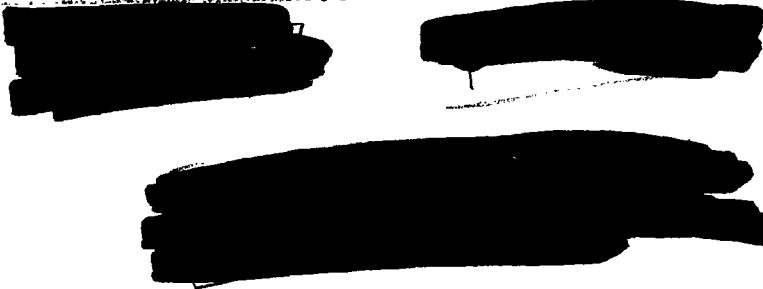
corporate structure and utilization parent holding companies. These

structures.

For example, this type of organization allows a charitable

which parent may then hold other non-profit and for-profit entities. Holding such diverse entities by a hospital itself could not be accomplished without potentially impacting a variety of issues, including its tax exempt status. These other non-profit or for-profit entities can take the form of fund raising foundations, physician organizations, home health agencies, organized delivery

systems which are vital in meeting the demands of customers and payors (e.g., insurers) who require such a structure to contract



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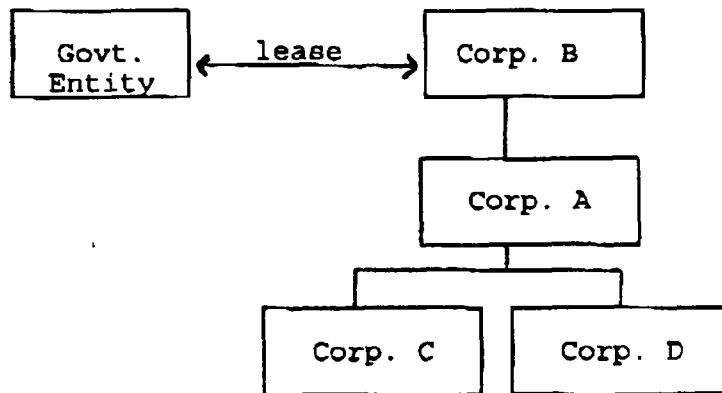
parent holding company must meet the organizational and operational tests of an Internal Revenue Code ("IRC") Section 509(a) support organization.

Corporation A was formed in 1992 as part of such a reorganization and was recognized as an IRC Section 509(a)(3)

(a)(3) is for Corporation A's Board of Directors to be controlled by a majority of directors from a public charitable organization

the level of control stops short of that which is desirable for the [redacted] affiliation with the third party non-profit health

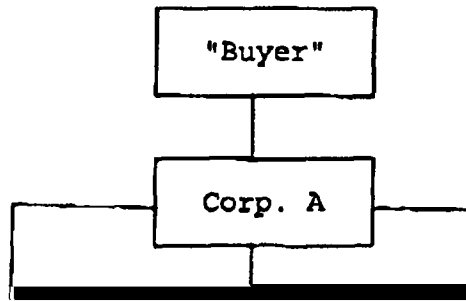
The current organizational structure of Corporation A and its controlled subsidiaries is as follows:



As stated, we desire to "flip-flop" Corporations A and B. The following illustrates the organizational structure following the described transactions:



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ENTITY			
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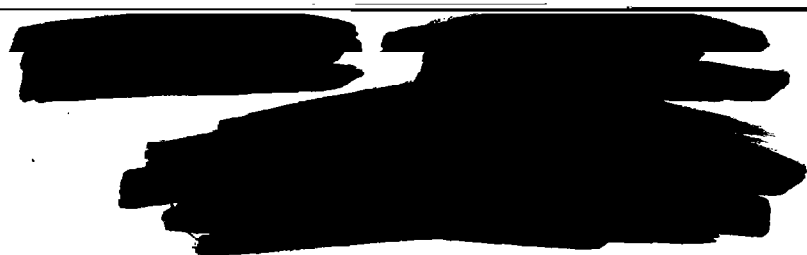
There are numerous reasons why the third party health care system requires this organizational restructuring prior to its affiliation with Corporation A. First, the tax exemption implications behind the 1992 corporate restructuring remain activities be conducted by separate entities under a common corporate parent. As such, the operations of the related health

parent's (b)iporallbirth; should be the entity which is contracted with in an affiliation agreement, not one of the separate entities (e.g., Corporation B).

Second, the corporate structure "acquired" by the third-party "Buyer" must be organized in such a way that it will promote the "Buyer's" business plan and be compatible with its overall system. Specifically, the corporate parent must be able to clearly contractually commit each subsidiary in an integrated fashion to

its power over Corporation A, this power is attenuated and not as direct as is desirable. After the proposed corporate restructuring, the "Buyer's" ability to work with a system or organization with Corporation A as the parent is more direct and efficient. In fact, the third-party Buyer currently has similar Affiliation Agreements in place with other health care systems. In each case, it is a support organization (like Corporation A) with

subsidiary (subsidiary to the Buyer) position as outlined in the proposed restructuring transaction.



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Third, in the future there may be circumstances where other entities will want to affiliate with Corporation A's system. Future affiliations or acquisitions can be more efficiently

entity at the parent level and allow for an efficient manageable transaction.

Finally, the lease which Corporation B has with the governmental entity is a major factor. In view of the strict covenants contained with the lease, it is desirable that the lease not impact the other entities within the corporate system.

In addition to the "continuum theory" which you are considering to exempt the proposed transaction, I would respectfully ask that you considered the following additional arguments:

(1) ~~The proposed transaction is outside the definition of 15~~

"ultimate parent entity. . ." and "ultimate parent entity" means "an entity which is not controlled by any

Before applying the definition of "person" to the proposed transaction, this section would in essence read: Corporation A may not acquire Corporation B without filing. However, applying the definition of person (the "ultimate parent entity"), this section reads: Corporation B may not acquire Corporation B without filing. Clearly this is not how the section is intended to apply. Indeed, as evidence of the illogical position of requiring the proposed transaction reportable, the two required filings would describe identical data since the

transaction is indeed an intra-person transaction,

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however, this exemption refers to "voting securities."

and acquired persons are the same person. [and should] be

corporations. Indeed, the IRS quite often applies terms written for for-profit corporations by analogy to non-profit corporations.

- (3) The proposed transaction is outside the purpose of the premerger notification program. The FTC guide materials illustrate the lack of connection between the proposed transaction and the intent of the premerger notification program. For example, the Introductory Guides to the

agencies encounter when they challenge anti-competitive acquisitions after they occur." Corporation A and Corporation B exhibit the exact same competitive effects today as they would after the proposed transaction. Furthermore, if the FTC is concerned about any anti-competitive effects, this transaction is being performed in preparation for a subsequent transaction, as discussed above.

Therefore, all questions involving competition may be resolved. Finally, the FTC guide materials also state

separate business." (Introductory Guides to the Premerger Notification Program Guide II, pg. 4.) In fact, Corporation A and Corporation B never have been and never will be "separate businesses."

In summary, requiring a premerger notification report to be filed for the proposed corporate restructuring transaction will not serve the purpose of the premerger notification program or the related antitrust laws. The preparation and review of the

that it cannot apply exclusionary or exemption language from the statute or rules as described, I would urge that adherence to sound

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and efficient reporting policy should suggest the proposed transaction would not be reportable.

involving this matter. I will contact your office to confirm your receipt of this letter and answer any questions. In the meantime, should you have any questions, please call.

Sincerely,

[REDACTED]

[REDACTED]

[REDACTED]

Advised caller that the corporate restructuring resulting in a change of control of interest within the same person occurring in connection with an acquisition of that person was not separately reportable where the primary acquisition of that person is reportable under HSR.