FYI

January 27, 1986

Dana Abrahamsen, Esq.
Federal Trade Commission
Pre-Merger Notification Office
Room 301
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Abrahamsen:

This is to confirm our telephone conversation of January 24 in which you advised me that, in measuring the size of a newly formed entity (which does not have a regularly prepared balance sheet) for purposes of the size-of-person test, cash held for payment of expenses ancillary to a proposed acquisition can be disregarded. Thus, cash held for payment of acquisition-related expenses will now be treated like cash earmarked as consideration. Acquisition-related expenses include such items as bank commitment fees, investment banking fees, counsel fees, and so forth.

You indicated that this advice will be codified in the pending proposed rule changes but that it is immediately effective, and can be relied upon, as an informal staff opinion.

Thank you very much for your assistance in clarifying this issue.

Sincerely,

[redacted]

[redacted]

is an office personal to the member. It terminates upon withdrawal, expulsion or death and is not transferable.

Pursuant to the applicable law, which provides for membership to be specified in the Charter or By-Laws, the By-Laws of Corporation B list who the member or members are (the member or members have the power to elect the directors of Corporation B in the manner specified in the By-Laws). Pursuant to vote of the existing members and directors of Corporation B, the By-Laws of Corporation B will be amended to provide that the sole member of Corporation B will be Holding Company X, itself a non-profit, non-stock charitable corporation.

Neither Any Assets Nor Voting Securities Are Being Acquired. Voting securities are defined under the Rules as "any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer, or of an entity included within the same person as the issuer, or, with respect to unincorporated entities, individuals exercising similar functions." (Emphasis added.) In its "Statement of Basis and Purpose" published with the final 1978 regulations under the Act, the FTC stated, "[t]he term 'security' has a commonly understood meaning which poses no difficulty in the vast majority of transactions." 43 F.R. 33462 (July 31, 1978). For that reason the definition of "security" was deleted from the original Proposed Rules and the revised Proposed Rules. "Inherent in the deleted definition was a recognition of this commonly understood meaning." Thus, the FTC concluded, "the deletion should effect no substantive change." It follows from the Rules that only a "security" could ever constitute a "voting security."

Moreover, under the definitions of "security" that had been contained in the proposed Rules, it is clear that Holding Company X would not have acquired a "security." The original Proposed Rules provided:

> [§ 801.05] (e) Security. The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, collateral trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any

> certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or to purchase, any of the foregoing.

41 F.R. 55490 (Dec. 20, 1976). The revised Proposed Rules published on August 1, 1977 retained this definition in §801.1(e), adding only "certificate of interest or participation in any profit-sharing agreement" and deleting "fractional undivided interest in oil, gas, or other mineral rights". 42 F.R. 39048. Except for the deleted language, this definition was verbatim the definition of a "security" in §2(1) of the 1933 Securities Act, 15 U.S.C. §776(1), as it read in 1977.

The Supreme Court has deemed the most common feature of a "security" under §2(1) of the '33 Act to be "the right to receive 'dividends contingent upon an apportionment of profits.'" United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 851, 95 S.Ct. 2051, 2060, 44 L.Ed.2d. 621 (1975), quoting Tcherepnin v. Knight, 389 U.S. 332, 339, 88 S.Ct. 548, 555, 19 L.Ed. 2d. 564 (1967). The substance of a "security" is "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." SEC v. W. J. Howey Co., 328 U.S. 293, 298-299, 66 S.Ct. 1100, 1103, 90 L.Ed.2d 1244 (1946).

The membership by Holding Company X in Corporation B would lack this quintessential feature. Nor does such membership possess other characteristics associated by the Court in Forman with securities: it is not negotiable, it cannot be pledged or hypothecated, and it does not appreciate in value. Voting rights is the sole feature in common between "securities" as defined by the FTC under the Act and by the Court and the personal office of membership which is all that is involved here. But voting rights without more do not make a personal membership status into a "security" as commonly understood. Thus, while the transaction could be viewed, pursuant to the substantive provisions of other antitrust laws, as an agreement resulting in the acquisition by Holding Company X of Corporation B, the procedural provisions of the HSR Act and the Rules only cover (subject to various exemptions for certain joint ventures and other transactions) certain acquisitions--namely those of voting securities, as defined, and assets.

Neither assets nor voting securities are acquired here. It is clear that no assets of any kind are being acquired, and it is also the fact that no securities, whether or not voting securities and including no membership units or other instruments which are securities, will be issued by Corporation B to Holding Company X or otherwise acquired by Holding Company X.

We understand that various persons have expressed to the Staff uncertainty as to when various types of reorganizations of charitable corporations are required to file reports under the Act and the Rules. From our conversations with others, we believe that the practice has been somewhat inconsistent, and, of course, the applicability of the Act and the Rules must depend on a precise analysis of the particular facts of each transaction involved. We are asking the question set forth in this letter to obtain general guidance with respect to a particular type of transaction. Our clients intend to comply with the Act and the Rules, but do not wish to make a filing under the Act or any other statutes that is not required. As set forth in some detail above, it does not appear that any acquisition of a voting security or asset is involved, and, accordingly, we would appreciate the concurrence of the Staff that the transaction outlined above would not require filing under the Act and the Rules.

If there is any additional information you need, please call me. I very much appreciate your indication, when we spoke on January 21, that you would be able to get back to me promptly.

Sincerely,

[redacted]

HKF/cmd

... transaction ... of any type being exchange? No! he does not require ... being acquired. X will control B. Mr. [redacted] said this is an amendment to B's bylaws that make X the sole member. He said it is advantageous to do this. There is no exchange of assets in his opinion.

I called Mr. [redacted] 1-30-86. The staff met on this & reviewed this letter. While this type of transaction has attributes of both v/s and assets, this transaction is infact akin to a cosolidation of two busine which is normally treated as a v/s acquisition.

Patrick Shar