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April 17, 1986

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Federal Trade Commission
Premerger Notification Office
Bureau of Competition
Room 301
Washington, D.C. 20580

This material may be subject to the confidentiality provision of Section 7A (h) of the Clayton Act which [illegible] under the Freedom of [illegible] Act

Dear Wayne:

This will confirm our recent discussions concerning the non-reportability of the following described transaction.

A is a nonprofit corporation, at present having a self-perpetuating board and no members. A has total annual sales of about $7 million and total assets of about $14 million. B is a nonprofit corporation. For purposes of this transaction, we will assume that B is a $100 million person.

Under the transaction, B will become the sole member of A. However, pursuant to express contractual provisions in the transaction agreement, B will forego the right presently to designate A's board of directors for so long as A is operated in conformity with standards established by or referenced in the transaction agreement; the contract will provide for a phased accession by B to make two board appointments in each of three succeeding years, at the end of which period B will have selected about 1/3 of A's directors.

As presently constituted, B agrees to contribute up to $2 million to A for capital improvements to A's facilities and to judge A's future capital improvement needs by the same standards as B judges the needs of other health care facilities in which it has a legal, beneficial, or eleemosynary interest. As sole member of A, B will be under no legal obligation to satisfy any of A's liabilities. However, under consideration is a request from A that the transaction contract include B's agreement to guarantee such liabilities. These liabilities are about $14 million. A principal component of these liabilities consists of deferred entrance fees. In essence, this is a reserve established for refunds of amounts that A's patients pay for 'life-care' at the facility, if the patients leave the facility or die within a certain time after they arrive. This is only a contingent liability, but one reflected on the balance sheet. We proceeded under the assumption that the transaction would be structured to include a guarantee of A's liabilities.

We contend that the transaction is not an assets acquisition, not an acquisition of voting securities, and not a merger (essentially for the reasons stated in our pending requests for informal interpretation on another nonprofit corporation question). However, for purposes of this transaction, we will assume that the above transaction is a 'merger or consolidation.'

You confirmed that the transaction is not reportable because it is exempt by §802.20(b). As the rules make quite clear, mergers are treated as acquisitions of voting securities. As such, A is an issuer that does not have over $25 million in sales or assets. B's guarantee of A's liabilities is not an assumption thereof, so the purchase price is less than $15 million. Therefore, since the purchase price is less than $15 million and the 'acquired issuer' does not have sales or assets in excess of $25 million, the minimum value exemption excuses reporting under the Act.

If, contrary to present treatment of mergers and consolidations under the rules, the transaction is to be treated as an acquisition of assets, then non-reportability is equally clear. Only where the purchase price (including liabilities assumed) is more than $15 million are assets transactions reportable, regardless of the size of the parties and regardless of whether the acquired party's sales or assets exceed $25 million. Thus, for example, B could become the sole member of A in exchange for guaranteeing $100 million of A's liabilities, so long as B did not pay a price (and/or assume liabilities) in excess of $15 million--even if A's assets or sales were in excess of $25 million.[1]

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[1] For these reasons, it is important for practitioners to understand whether the substitution of members or accession to membership in nonprofit corporations is to be treated as an acquisition of voting securities or assets, or, as we have previously contended, as simply

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We are relying upon your interpretation and do not intend to file on the above transaction unless your opinion is countermanded and we are so advised by Wednesday, April 23.

Sincerely,

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I did not advise the writer that the acquisition of A by B was non reportable if there was an assumption of A's liabilities by B. The transaction would be non reportable only if the sole consideration of $2.0MM was the purchase price and the value of the voting security equivalent was less than $15.0MM. In that event §802.20 would apply. If B assumes the $14.0MM of liabilities of A by guaranteeing their payment then the purchase price is in excess of $15.0MM ($2.0MM plus $14.0MM) and the transaction is reportable. The discussion regarding the asset acquisition hypothesis is equally incorrect.

I informed the writer of the above conclusion on 4/22/86.

Wayne Kaplan.
4/22/86.