801.1(b)(1)(ii)

[redacted]

January 24, 1994

not an attorney

Patrick Sharpe, ~~Esquire~~
Federal Trade Commission
Premerger Office
6th Street & Pennsylvania Ave., N.W.
Room 303
Washington, D.C. 20580

BY HAND DELIVERY

Re: Hart-Scott-Rodino Filing

Dear Mr. Sharpe:

We are writing in response to your conversation with [redacted] on January 21, 1994. Based on that conversation, it is our understanding that we may submit a hypothetical transaction to you, regarding which we will receive an oral FTC staff interpretation within approximately two to three days.

Our hypothetical involves a limited partnership (the "Partnership") that will be acquiring assets. For purposes of this letter, please assume that the parties to the transaction meet the size-of-person test and that the transaction meets the size-of-transaction test. The sole issue to be determined is the identification of the "ultimate parent entity" of the Partnership who must file a premerger notification report form as the acquiring person.

Hypothetical

On February 9, 1990, a Second Amended and Restated Limited Partnership Agreement (the "Partnership Agreement") of the Partnership was executed by and among Partner A and Partner B. Pursuant to the Partnership Agreement, Partner A's interest in the Partnership is 49% and Partner B's interest in the Partnership is 51% (the "partnership

[redacted]

interests").

The Partners, pursuant to the Partnership's previous partnership agreement, had executed and delivered to each other two option agreements. The first option agreement, which was exercised in January, 1988, granted to Partner B the right to purchase from Partner A a portion of Partner A's partnership interest equal to 1% of all outstanding partnership interests. The result of the exercise of the first option by Partner B was to increase by 1% its partnership interest from 50% to 51%, and to decrease by 1% the partnership interest of Partner A from 50% to 49%. These are the partnership interests reflected in the Partnership Agreement.

The second option agreement, which has not been formally exercised, granted to Partner A the right to purchase from Partner B all or any part of that portion of Partner B's partnership interest which, when added to Partner A's current interest, will equal 80% of all outstanding partnership interests. As consideration for the grant of the option, Partner A paid the nonrefundable sum of $17,665,200 to Partner B. Upon the formal in full exercise of the option, Partner A will pay Partner B the option exercise price of $1.00. The option may be exercised, in whole at one time or in part from time to time, at any time until the occurrence of the termination of the Partnership.

Although Partner A has not yet paid the option exercise price of $1.00 to formally exercise the second option, Partners A and B deem Partner A to be controlling and, in a number of ways, the Partners are acting, and the Partnership Agreement operates, as though the second option has already been exercised. Specifically:

(a) pursuant to the Partnership Agreement, certain capital contributions are to be made on an 80%/20% basis, and in fact the only capital contributions made since the grant of the second option agreement were on a 80%/20% basis;

(b) pursuant to the Partnership Agreement, loans made by the Partners to the Partnership will be made on an 80%/20% basis;

(c) pursuant to the Partnership Agreement, partnership profits, losses and tax credits are to be distributed according to the partners' "Sharing Percentages", which are defined in the Partnership Agreement as being 80% for Partner A and 20% for Partner B;

[redacted]

[redacted]

(d) the Partnership Agreement states that, upon dissolution of the Partnership, the assets and properties of the Partnership will be distributed to the Partners in proportion to each Partners' Sharing Percentage, which the Partnership Agreement defines as being 80% for Partner A and 20% for Partner B;

(e) Securities and Exchange Commission filings by Partner A indicate an 80%/20% division of partnership interests; and

(f) some recent trade magazines have reported the partnership interests to be on an 80%/20% basis.

Because the second option has not yet been formally exercised, certain aspects of the Partnership's operations continue to be run on a 49%/51% basis:

(a) licenses and permits granted previously by state and local governments indicate a 49%/51% or a 50%/50% partnership interest; and

(b) some trade magazines have reported the partnership interests to be on a 49%/51% basis.

In addition, the management of the Partnership is conducted by a management committee consisting of one representative of Partner A and one representative of Partner B.

We believe that the facts of the foregoing hypothetical demonstrate that only Partner A, and not Partner B, constitute the ultimate parent entity with responsibility for filing, as an acquiring person, a Hart-Scott-Rodino notification regarding the Partnership's acquisition of assets. We request that you provide an informal confirmation of that view.

In light of fast approaching contractual filing deadlines, we appreciate your prompt response to our inquiry.

Very truly yours,

[redacted]

C & D are the determining factors as to who controls which is A in this scenario. The holdings of Partnership [redacted] interests are not a factor in determining control of a partnership. (PS) Talked to [redacted] 1-27-94 I concur with this letter