801.11(c); 7A(a)(2)(A)

[redacted]

[redacted]

March 15, 1994

[redacted]

Richard Smith, Esq.
Federal Trade Commission
Premerger Office
6th and Pennsylvania Avenue, N.W.
Room 301
Washington, D.C. 20580

Re: <u>Telephone Conversation on March 10, 1994</u>

Dear Mr. Smith:

This letter shall confirm our telephone conversation on March 10, 1994, concerning the Federal Trade Commission's interpretation of 16 Code of Federal Regulations § 801.11, with respect to the factual circumstances set forth in this letter.

The question presented is whether, in connection with a statutory merger between two limited partnerships, the acquiring limited partnership ("Partnership A") meets the $100 million size-of-person test with respect to annual net sales. The merger will close on or before March 31, 1994.

Partnership A's fiscal year end is December 31st. Prior to April 30th of each year, Partnership A has its independent auditors prepare audited financial statements for the previous fiscal year. To date, Partnership A's most recent audited financial statements are for the fiscal year ending December 31, 1992 (the "12/31/92 Financial Statements"). The annual net sales of Partnership A set forth in its 12/31/92 Financial Statements are less than $100 million. Partnership A's independent auditors are currently in the process of auditing Partnership A in connection with the preparation of the audited financial statements of Partnership A for the fiscal year ending December 31, 1993. The audited financial statements for the fiscal year ending December 31, 1993 will not be completed by the auditors until April of this year. However, it is expected that, once issued, Partnership A's

Richard Smith, Esq.
March 15, 1994
Page 2

audited financial statements for the fiscal year ending December 31, 1993 will show annual net sales for Partnership A in excess of $100 million. Accordingly, the question that arises is whether Partnership A may rely on the 12/31/92 Financial Statements for purposes of establishing that it does not satisfy the $100 million size-of-person test with respect to its annual net sales, since its audit financial statements for fiscal year ending December 31, 1993 will not be issued until after the closing of the merger transaction.

As we discussed in our telephone conversation, Interpretation 144 of the Premerger Notification Manual (1991 Edition) appears to be directly on point. Interpretation 144 states that, even if the entity knows that the forthcoming audited financials will show it to satisfy the size-of-person test based on its most recent fiscal year, it is entitled to rely on the most recent audited financials, so long as they are not more than fifteen (15) months old. Since Partnership A's 12/31/92 Financial Statements are not of a date more than fifteen (15) months prior to the date of the consummation of the merger (if it is consummated on or before March 31, 1994), Partnership A's 12/31/92 Financial Statements may be relied upon by Partnership A to establish that it does not meet the $100 million size-of-person test with respect to its annual net sales.

In our telephone conversation, you confirmed to me that the foregoing continues to be the view of the Federal Trade Commission.

Very truly yours,

[redacted]

[redacted] 3/21/94 - advised writer that my views reflected only those of the PMN office and were not those of the FTC and did not bind it. Writer said that CA had recently passed a partnership merger law which treated their merger identical to a merger of two corporations. He said that no financials have yet been submitted to the auditors but, when they are, the auditors generally make changes and adjustments in the figures. Partnership A's assets are well below $10MM and the to-be-merged partnership is not a 100MM person. I advised that I agreed that Partnership A (its own UPE) failed to meet the size-of-person test.

RDP [illegible]