[redacted]

May 5, 1994

VIA TELECOPY

Mr. Richard Smith
Federal Trade Commission
Sixth and Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Interpretive Advice on Hart-Scott-Rodino

Dear Mr. Smith:

We are writing to confirm our phone call of May 5, 1994 regarding (i) the applicability of the pre-merger notification tests in the context of an acquisition by a limited partnership which has as its ownership [redacted] some of which have been optioned between certain partners and such options are immediately exercisable for nominal consideration, and in the alternative (ii) whether a proposed transaction would qualify as a "bona fide debt work-out" and therefore be exempt from the filing requirement of the Hart-Scott-Rodino Anti-Trust Improvements Act of 1976, as amended.

The particulars of the transaction in question are such that a [redacted] ("Lender"), presently is the lender to a holding company and its [redacted] operating subsidiaries ("Borrowers") pursuant to a loan agreement ("Loan Agreement") which has been in effect for the last [redacted] years. The Borrowers are currently in default under the terms of the Loan Agreement. It has been proposed in workout negotiations that the Borrowers transfer substantially all of the assets of one of the subsidiaries to a newly formed limited partnership ("Newco") of which the Lender will own a 20% partnership interest at closing and the right to acquire up to 75% of the remaining partnership interests in the aggregate. This asset transfer would occur in lieu of foreclosure on the assets of all of the Borrowers, and result in a transfer of the outstanding indebtedness of the Borrowers under the Loan Agreement to Newco, and a release of the liens and other debt obligations of Borrowers to Lender.

Pursuant to Section 7A (a)(1)-(3) of the Clayton Act (the "Act") pre-merger notification is required only if each of three tests

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are satisfied; the Commerce test, the size of person test and the size of transaction test. An application of these jurisdictional tests requires an analysis of definitions set forth in the Act's regulations. Rule 801.1(a)(1) defines "person" as the "ultimate parent entity" and all other "entities" which it controls directly or indirectly. Rule 801.1(a)(3) defines "ultimate parent entity" as an "entity which is not controlled by another entity." Rule 801.1(a)(3)(i) and (ii) states that "control" is found to exist when an entity either owns 50% or more of the voting securities or, in the case of an entity without voting securities, the right to 50% or more of the profits or, in the event of dissolution, to 50% or more of the assets.

Our interpretation of Section 7A(a)(1)-(3) and the rules thereunder which you have agreed with, is that, a partnership is an entity without voting securities and therefore control is found by determining who possesses the right to 50% or more of the profits or upon dissolution 50% or more of the assets. The determination of control is made at the time the transaction takes place. For purposes of applying the control tests to partnerships options or option agreements (even if immediately exercisable for nominal consideration) between the partners are not considered part of the control test until exercised. Therefore, in our transaction, the Lender would be found to be a 20% owner of the partnership and thus not the "ultimate parent entity" despite the Lender's ability to exercise the option at any time to obtain up to 75% ownership interest.

In the alterative, even if the existence of the option was not respected in determining the "ultimate parent entity," our interpretation of Section 7A(c)(11) of the Clayton Act and Rule 802.63 promulgated thereunder, which you have confirmed and agreed with, is that, in the event the Lender (and any other entities controlled by, controlling or under common control with the Lender) does not engage in a line of business as a direct competitor to Newco and the company being purchased, a transaction in which Lender, either directly or indirectly through a newly formed entity, receives assets of its borrower in lieu of foreclosure or pursuant to a bona fide work-out in satisfaction of all outstanding obligations is an exempt transaction and therefore filing under the pre-merger notification rules would not be required.

This is not intended to be, and should not be construed or deemed to be an opinion letter, and no other party shall have the right to rely on anything contained herein. Thank you very much for your time and assistance with this matter.

Very truly yours,

[redacted]

16/94 ~~Advised~~ Writer advises that [le]nder meets "ordinary course of business" [re]quirement of 802.63. Also that partnership [redacted] [ha]s been set up in the described manner for tax reasons and not for avoidance. The phrase "in satisfaction of all outstanding obligations" in the penultimate paragraph modifies both "in lieu of foreclosure" and "pursuant to a bona fide work-out." I agreed with the conclusions of this letter respecting control of the partnership and the use of 802.63. RBSmith