[redacted]

January 17, 1995

PRIVILEGED AND CONFIDENTIAL

VIA HAND DELIVERY

FEDERAL TRADE COMMISSION
Premerger Notification Office
Bureau of Competition
Room 303
Washington, D.C. 20580

Subject: **Hart-Scott-Rodino Act Notification**

Dear Sir or Madam:

The Hart-Scott-Rodino Act (the "Act") requires that any person who acquires the assets of any other person and meets the threshold requirements of the Act must file a premerger Notification and Report Form (the "Notification"). Accordingly, this letter is to request confirmation that, based on the terms of the transactions specified below (collectively, the "Transactions"), the requirements of the Act are not met and, as such, the Notification need not be filed.

Please be advised as follows:

1. **Parties to the Transactions.** The purchaser is a corporation (the "Acquiring Person") unaffiliated with any of the sellers. The sellers are (a) three corporations, two of which (the "Subsidiaries") are controlled by the third corporation (the "Parent Corporation") and (b) a limited partnership (the "Acquired Partnership").

The Parent Corporation has approximately 100 individual shareholders (collectively, the "Investors"), none of whom, individually or collectively, (a) owns greater than

a five percent (5%) interest in the Parent Corporation, (b) has the right to control the board of directors of the Parent Corporation or (c) has the right to control or vote fifty percent (50%) or more of the voting securities of the Parent Corporation.

The general partners of the Acquired Partnership are identical to the Investors. (Any limited partners are family members or entities established for the benefit of family members of the general partners.) As with the Acquired Corporation, none of the Investors (a) has a greater than five percent (5%) interest in the Acquired Partnership or its assets, (b) the right to control the Acquired Partnership or (c) the right to receive fifty percent (50%) or more of any profits or assets upon dissolution of the Acquired Partnership.

2. **Summary of the Transactions.** The Transactions can be summarized as follows:

a. **Asset Acquisition.** The Acquiring Person proposes to purchase substantially all of the assets (collectively, the "Assets") of the Parent Corporation and the Subsidiaries (collectively, the "Acquired Corporation"). For the Assets, the Acquiring Person expects to pay an amount of less than FOURTEEN MILLION AND NO/100 DOLLARS ($14,000,000). Upon the acquisition, most, if not all, of the Investors and employees of the Parent Corporation (of which there are over 500) are expected to be employed by the Acquiring Person. The Investors will sign employment agreements, which are expected to include noncompete provisions, for services to be rendered by each such shareholder to the Acquiring Person following the closing. The length and specific terms of each noncompete provision may vary, depending on each particular shareholder. In addition, certain of the Investors (and certain key employees of the Acquired Corporation) may receive incentive bonuses in connection with the execution of their employment agreements, in an effort, together with the covenants not to compete, to ensure that the Investors (and other employees) become and remain employees of the Acquiring Person following the closing. Further, each of the Investors and all of the employees of the Acquired Corporation will receive credit for a specified number of years of service with the Parent Corporation in the Acquiring Person's defined benefit plan.

b. **Real Estate Acquisition.** Concurrently with the purchase of the Assets, the Acquiring Person proposes to purchase, based on current market appraisals, certain real properties, with improvements (collectively, the "Property") owned by the Acquired Partnership. The purchase price for the Property will be approximately TWELVE MILLION AND NO/100 DOLLARS ($12,000,000).

c. **Closing.** The closing of the Transactions is expected to occur on or before February 28, 1995, contingent upon the preparation of all required documentation and the completion of all appropriate due diligence.

d. **Chart/Outline.** For your ease of reference, the parties and the Transactions are charted on attached Exhibit "A."

3. **Analysis of the Act and the Notification.** Based on our analysis of the Act, as applied to the Transactions, we do not believe that the threshold requirements of the Act are met. As such, we believe that no Notification will be required. Our analysis can be summarized as follows:

a. **The Transactions should not be aggregated.** Each of the Acquired Corporation and the Acquired Partnership are their own "ultimate parent entity" within the meaning of the Act. "Ultimate parent entity" means an entity which is not controlled by any other entity. 16 C.F.R. 801.1(a)(3). In this context, the term "control" generally means, under 16 C.F.R. 801.1(b):

(i) Either

(A) holding fifty percent (50%) or more of the outstanding voting securities of an issuer; or

(B) having the right to fifty percent (50%) or more of the profits of the entity, or having the right in the event of dissolution to fifty percent (50%) or more of the assets of the entity; or

(ii) having the contractual power presently to designate fifty percent (50%) or more of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

Neither is the case here. As a result, the purchase of the Property from the Acquired Partnership should not be aggregated with the purchase of the Assets from the Acquired Corporation.

(b) **The Purchase Price for the Assets excludes the value/amount of any covenant not to compete and incentive bonus.** In connection with the employment of the Investors, the Investors are expected to be subject to a covenant not to compete and the Acquiring Person proposes to pay each individual Investor an incentive bonus. As stated, the noncompete and incentive bonus are intended to ensure that each such Investor become and remain an employee of the Acquiring Person.

ABA Premerger Notification Manual ("ABA Manual"), Interpretation No. 52 and Interpretation No. 53 provide, respectively, that "covenants not to compete, which are ancillary to arm's-length consulting agreements for services actually to be rendered, were . . . not

included in the asset purchase price" and that the "entering into an agreement for performance of future services does not by itself involve the acquisition of an asset." See also ABA Manual, Interpretation No. 134. Here, the covenant not to compete and incentive bonus are attributable solely to the contract for services. As such, they should not be included as part of the acquisition price.

(c) **The Purchase Price for the Assets should exclude the value of any Prior Service Credit.** As indicated above, the Investors and any employees of the Acquired Corporation are expected to receive, in connection with their employment with the Acquiring Person, prior service credit in the Acquiring Person's defined benefit plan (the "Prior Service Credit"). The exact value of the Prior Service Credit has not yet been determined.

ABA Manual, Interpretation No. 52, provides, in substantial part, that retirement plans, negotiated in connection with the sale of a business and which reflect the value of services to be rendered, are not considered part of the purchase price for the assets to be transferred. See also ABA Manual, Interpretation No. 53. Consistent therewith, the value of the Prior Service Credit should not affect the specified purchase price for the Assets and cause the purchase price to exceed the "size of the transaction" threshold.

(d) **Conclusion and Understanding.** In conclusion, and with reference to the Act's requirements, we understand that:

i. The Asset Acquisition likely will pass the "commerce test": either the Acquiring Person or the Acquired Corporation may be engaged in an activity affecting interstate commerce. As you know, virtually all asset acquisitions will pass this threshold.

ii. The "size of the parties" test also may be satisfied, because the Acquired Corporation may have total assets in excess of $10,000,000 and the Acquiring Person has total assets of more than $100,000,000.

iii. The "size of the transaction" test likely will not be satisfied in either of the Transactions, because (A) the total consideration for the Assets to be acquired from the Acquired Corporation is less than $15,000,000 and (B) the total consideration for the real estate to be acquired from the Acquired Partnership is less than $15,000,000.

iv. The fact that the Investors of the Acquired Corporation and the partners of the Acquired Partnership are identical does not require that the Transactions with each of the Acquired Corporation and the Acquired Partnership be aggregated for purposes of the Act. As indicated, none of the

Investors owns or has any right to a greater than five percent (5%) interest in, and none of the Investors (individually or as a group) has a right to control, the Acquired Corporation or the Acquired Partnership.

v. Neither the covenants not to compete or the incentive bonus provisions of any employment agreements signed by the Investors nor the Prior Service Credit are considered or affect the "size of the transaction" test set forth in subparagraph (d)(iii), above.

Please confirm our understanding that the requirements of the Act are not met and, accordingly, no filing of the Notification is required. If you have any questions or need any further information, please do not hesitate to call.

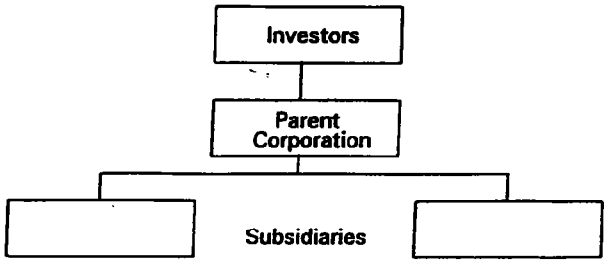
In addition to any verbal response, we respectfully request a written response as soon as practicable. If no written response will be given, please let us know. Otherwise, please let us know when we might expect any such response.

As the parties are anxious to proceed with the Transaction, your prompt attention to this request would be greatly appreciated. Please direct any response or inquires to the undersigned.

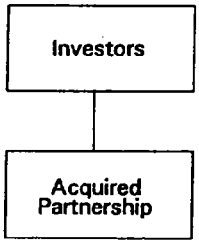
Respectfully submitted,

cc: Mr. Philip M. Eisenstat
Federal Trade Commission

1. Acquired Corporation



2. Acquired Partnership

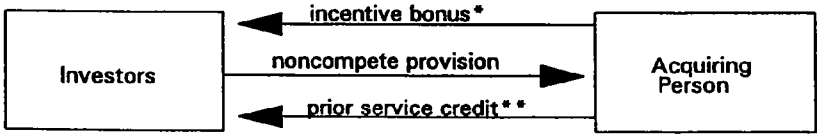


3. Transactions

a. Asset Acquisition

b. Property Acquisition

c. Employment of Investors



* Note that certain key employees of the Acquired Corporation also may receive incentive bonuses.

** Note that all of the employees of the Acquired Corporation, in addition to the Investors, will receive the Prior Service Credit.