No advise given on this letter
It is superseded by a letter

[redacted]

February 17, 1995

Mr. Patrick Sharpe
Compliance Specialist
Pre-Merger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Sixth Street and Pennsylvania Avenue
Washington, D. C. 20580

VIA FACSIMILE

Dear Patrick:

Pursuant to your conversation with our counsel, [redacted] I am writing to you because the unanticipated decline in the performance of certain real estate has led to a debt workout and I want to confirm that none of the transactions incidental to the workout are reportable pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR").

Specifically, we believe that each "acquisition" involved in this transaction would either: (i) fall below the HSR jurisdictional thresholds; or (ii) be exempt from the filing requirements as a bona fide workout by a creditor in its ordinary course of business under 16 C.F.R. Sec. 802.63.

Background:

In 1989, a group of institutional clients of [redacted] entered into a financing transaction with respect to two shopping centers under common ownership. For your ease of reference, I have attached a diagram showing the initial investment structure. You may find it useful to refer to the diagram when reviewing this letter. [redacted] formed two general partnerships, Loan Partners and Land Partners, each with identical beneficial ownership, to enter into the financing transaction. The beneficial ownership of each of the general partnerships is broken down as follows:

[redacted]

Description of [redacted]	Share of Profits and Assets upon Dissolution
Investor A, a corporation wholly owned by an investment corporation of a foreign government	25.00%
Fund A, a commingled pension fund whose beneficiaries are public and private pension plans	13.42%
Fund B, a public employees retirement system	7.37%
Fund C, a public employees retirement system	4.92%
Fund D, a corporate pension plan	27.07%
Fund E, a corporate pension plan	5.00%
Fund F, a corporate pension plan	17.00%
	100.00%

For ease of reference, I will use the following defined terms in this letter:

"Centers" will mean the two shopping centers which are the subject matter of the financing in question.

[redacted]

"Ownership Interests" will mean (i) the leasehold estate and the improvements comprising Center No. 1, (ii) the leasehold estate and the improvements comprising Center No. 2 and (iii) the land underlying the leasehold improvements comprising Center No. 2.

"Owners" will mean the three entities which own all of the Ownership Interests, all three of which are under common ownership and control. For further ease of reference, these Owners will be specifically referred to as Owner No. 1, Owner No. 2 and Owner No. 3.

"Center No. 1" will mean those portions of one of the Centers which are owned by Owner No. 1 exclusive of any portions owned by the department store anchors at that Center.

"Center No. 2" will mean those portions of the other Center which are owned by Owners Nos. 2 and 3 exclusive of any portions owned by the department store anchors at that Center.

The investment was structured as: (i) two non-recourse loans one in the principal amount of $175 million and the other in the original principal amount of $10 million (two loans were used because the interest rate on each of the loans differed) (collectively the [redacted] and (ii) a sale and leaseback of the land underlying Center No. 1. The [redacted] were secured by two mortgages encumbering the Ownership Interests in Center No. 1 and Center No. 2 which were granted by Owner No. 1, Owner No. 2, Owner No. 3 and Land Partners (the [redacted] Land Partners joined in the execution of the [redacted] so that Loan Partners would have a first priority security interest in all of the real property interests in Center No. 1. The land underlying Center No. 1 was sold to Land Partners and Land Partners entered into a non-recourse long term ground lease of this land to Owner No. 1 (the [redacted] (The portion of the financing transaction involving the [redacted] hereafter called the "Loan Transaction" and the portion of the financing transaction involving the land purchase and leaseback is hereafter called the "Land Lease Transaction"). Loan Partners was formed for the sole purpose of making the [redacted] Land Partners was formed for the sole purpose of entering into the Land Lease Transaction.

After the consummation of the transactions in question, the ownership and debt position of the two Centers was structured as follows:

Center No. 1

1. The land under Center No. 1 is owned by Land Partners and leased to Owner No. 1.

2. The improvements in Center No. 1 are owned by Owner No. 1.

3. Center No. 1 is encumbered only by the [redacted]

Center No. 2

1. The land under Center No. 2 is owned by Owner No. 2 and leased to Owner No. 3.

2. The improvements in Center No. 2 are owned by Owner No. 3.

3. Center No. 2 is encumbered by a first mortgage securing a loan held by an insurance company (the "Center No. 2 First Mortgage"), which entity is unrelated to the Owners and the [redacted] as well as by the [redacted] which are subordinate in priority.

The [redacted] documents and th[redacted] Land Lease documents collectively provide, in part, that:

1. the return on the investment of th[redacted] would be received partially through interest payments under th[redacted] and partially through ground rents from the [redacted] and

2. during the first four years, a portion of the return on investment would be accrued, added to the principal of th[redacted] and repayable only upon retirement of the [redacted]

Current State of Affairs

As a result of an unanticipated general decline in the economy where the Centers are located and an increase in competition from other retail alternatives, the cash flows generated by both Centers, after payment of all property related expenses (including principal and interest payments on the Center No. 2 First Mortgage), have been insufficient for some time to cover the total payments due to the [redacted] nder the [redacted] and the [redacted] Land Lease. Nevertheless, [redacted] Advisory believes the Owners have subsidized those payments with more than $17,000,000 of their own capital through and including the September 1, 1994 payments.

In the spring of 1994, the Owners advised the [redacted] vestors that at some point in the near future they would no longer continue to subsidize the regular debt service and ground rent payments to them. As announced, the Owners defaulted in their obligations with respect to the required debt service and ground rent payments for the month of October, 1994 and each subsequent monthly payment. The Owners have continued to make some payment each month, but each such payment has been less than the amount required to be paid under the [redacted] Mortgages and the [redacted] and Lease. Those defaults have not been cured. Since the [redacted] Loans were secured by both Centers, without any allocations being made, a default under the [redacted] Loan was a default under the [redacted] Mortgages for both Centers.

[redacted]

[redacted] Advisory and the Owners have been engaged in attempting to negotiate an amicable resolution of the problem as an alternative to foreclosure and consequent litigation. The results of those negotiations have led to the following agreement in principle:

In return for the payment by the [redacted] Investors to the Owners of a negotiated sum of money less than $2,500,000 in total, the Owners will voluntarily convey title to all of the Ownership Interests to the [redacted] Investors or their nominees. After this conveyance, the Owners will have no interest in the Centers. With respect to both Centers the Owners will convey their interest subject to the [redacted] Loans and the Center No. 2 First Mortgage remaining in place. In addition, at Center No. 2 the existing ground leases will remain in place. The [redacted] Loans will also be modified in certain respects.

In order to shelter the [redacted] Investors from potential liability after stepping into an ownership position with respect to the above-described interests in the Centers, the following steps will be taken:

1. Three new [redacted] limited liability companies will be formed to take title to the respective Centers (let us call them "LLC-1", "LLC-2" and "LLC-3" individually and the "LLCs" collectively). The beneficial owners of each LLC will be the [redacted] Investors. The "members" of each limited liability company will be some combination of: (i) the general partners of Loan Partners and Land Partners, i.e., Loan Corporation, Land Corporation, Land Group Trust and Loan Group Trust; and (ii) possibly, instead of Loan Corporation or Land Corporation, a new wholly-owned corporation formed by Investor A. There may be changes in the beneficial interest held by each [redacted] Investor, but in no event shall such change exceed 1% of any [redacted] Investor's interest in the investment. Since no other person will hold 50% or more of the voting securities of each new LLC, each LLC shall be its own ultimate parent entity.

2. A portion of the [redacted] Loans will be assigned to LLC-1. Owner No. 1 will convey to LLC-1 its Ownership Interests in Center No. 1 by a deed-in-lieu of foreclosure subject to the [redacted] Mortgage encumbering Center No. 1 and LLC-1 will assume liability for the payment of the debt secured thereby. Land Partners will also convey to LLC-1 its interest in Center No. 1 by a deed-in-lieu of foreclosure subject to the [redacted] Mortgage encumbering Center No. 1 and LLC-1 will assume liability for the payment of the debt secured thereby.

3. LLC-2 and LLC-3 will "purchase" form Owner No. 2 and Owner No. 3, respectively, their Ownership Interests in Center No. 2 subject to the Center No. 2 First Mortgage and the [redacted] Mortgage encumbering Center No. 2 and LLC-3 will assume liability for the payment of the debts secured thereby.

The two transactions which require analysis as to reportability are:

1. the acquisition from the Owners of the Ownership Interests in the Centers; and

2. the formation of the three limited liability companies to take title to the Ownership Interests.

The Acquisition Transaction

It is our belief that the acquisition of the Ownership Interests in the two Centers as described in this letter should be exempt from reporting under Section 802.63(a). The [redacted] investors acted in the ordinary course of business in both entering into the 1989 financing arrangement and in participating in the debt workout described herein. A default in payment has occurred under the [redacted] Loans which remains uncured. The [redacted] Investors had two options as a result of the default either: (i) to exercise their legal remedies to gain control of the Centers; or (ii) to negotiate an arrangement with the Owners whereby they would convey the Ownership Interests to the [redacted] Investors in exchange for a minimal payment. In order to save the costs of a protracted legal proceeding and gain control of the Centers at the earliest possible time to minimize a further decline in value, the [redacted] Investors have agreed to "purchase" the Ownership Interests pursuant to the terms and conditions outlined in this letter. In addition, since Land Partners encumbered its interest in Center No. 1 with th[redacted] Mortgages and the debt secured thereby is in default, it is conveying its interest in Center No. 1 to LLC-1 by a deed-in-lieu of foreclosure. [redacted] Advisory believes that any other lender, given the same facts and circumstances set forth in this letter, would make a similar determination. Therefore, we believe that the acquisition qualifies as a debt workout in the ordinary course of business.

The Formation Transactions

It is also our belief that the formation of each of the three limited liability companies should be exempt from reporting because in each case it fails to meet the size of transaction test and also because it fails to meet the special size of person test set forth in 16 C.F.R. Sec. 801.40. Our analysis is as follows:

1. **The Size of Transaction Test**

Under 16 C.F.R. Sec. 802.20, no filing is required unless a contributor acquires voting securities which:

(a) are valued at not less than $15 million; or

(b) confer control of an issuer which, together with all entities it controls, has at least $25 million in annual net sales or total assets.

Because the membership interests (i.e. "voting securities") in the three new LLCs are not and will not be publicly traded, and the acquisition price has not been determined those interests should be valued at their fair market value ("FMV") as determined, in good faith, by appropriate officials for each acquiring person (16 C.F.R. Sec. 801.10 (a)(2)(ii), (3)).

Under the HSR rules, it is assumed that the amount of any indebtedness with respect to the underlying assets of a corporation is taken into account in arriving at the FMV of its voting securities. One means by which the [redacted] Investors may in good faith determine the FMV of the voting securities they are acquiring in the new LLCs is by valuing the interests that are being acquired by the new LLCs and will be their sole assets.

The three new LLCs will be formed to acquire the aggregate interests of the Owners in the two Centers. Those interests have no economic value whatsoever inasmuch as the outstanding principal balance of the existing [redacted] Loans exceeds by more than $60,000,000 the fair market value of all of those interests combined. However, the [redacted] Investors have determined to pay approximately $2,500,000 for all of the interests in question as an alternative to engaging in costly and time consuming foreclosure litigation with the Owners. It could therefore be argued that the total value of the interests in question is at most $2,500,000. Not surprisingly, it is anticipated that each [redacted] Investor will make a good faith determination that the fair market value of the membership interests that each investor will acquire is substantially less than $15 million, and these fair market determinations will not collectively exceed $2,500,000.

Because none of the [redacted] Investors will, individually, or in the aggregate, acquire $15 million or more in the voting securities from any of the new LLCs, the size of transaction test under 15 U.S.C. § 7A(a)(3), as modified by the minimum dollar value exemption of 16 C.F.R § 802.20, will not be met for any of the [redacted] Investors' acquisition of interests in the LLCs.

In addition, the alternative size of transaction test under 16 C.F.R. 802.20 (b) is not met because the issuers, the new LLCs, will not control any other entity and because the new LLCs will not have annual net sales or total assets of $25 million or more.

2. **The Size of Person Test**

Under the special size of person rules applicable to the formation of corporate joint ventures (as set forth in 16 C.F.R. Sec. 801.40), a formation transaction is not reportable, regardless of the size of the contributors to that venture, unless the venture itself will have at least $10 million in assets.

As stated above, the value of all assets which will be owned by all three new LLCs as a result of the Formation Transaction will be less than $10 million. As a consequence, none of the three joint ventures will meet the special size of person test under 16 C.F.R. Sec. 801.40.

I would appreciate your telephoning me after your receipt of this letter to confirm verbally that my conclusions as stated in this letter are correct and that this letter will be placed in your business files.

Very truly yours,