[redacted]

March 29, 1996

BY TELECOPY

Richard Smith, Esq.
Senior Attorney
Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
6th Street and Pennsylvania Avenue N.W.
Washington, DC 20580

Re: Joint request to FTC for Informal HSR Interpretation

Dear Mr. Smith:

The enclosed Joint Request for an Informal Interpretation is submitted by us, as counsel for the acquired person, and by [redacted] as counsel for the acquiring person. The facts and the issue on which we request your opinion are set forth in the enclosure. We had a telephone conversation on this matter several days ago and the enclosed Joint Request supplements and clarifies such prior inquiry.

We would greatly appreciate your early attention to this request because the parties have been proceeding on the understanding that no filing would be required. Should this not be the case, they will have to file rapidly in order to disrupt as little as possible their schedule of events.

Thank you very much for your consideration of this request.

Sincerely yours,

[redacted]

[redacted]

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JOINT REQUEST TO FTC FOR INFORMAL HSR INTERPRETATION

[redacted] LLP's client is a limited partnership that was formed in October 1995 in order to make investments in attractive businesses from time to time (the "LP"). The LP is now ready to make its first investment. It will be acquiring the assets of an operating division of a corporation, represented by [redacted] LLP, that has many other operations (the "Corporation"). The Corporation's assets exceed $100 million.

The LP has no ultimate parent. Its fiscal year is the calendar year, and its audited regularly prepared balance sheet as of December 31, 1995 showed assets of less than $4 million, and its income statement showed income of less than $100. The LP has the right to call upon its partners as money is needed from time to time to make investments. The LP also has unaudited regularly prepared monthly financials, and the balance sheet for February 29, 1996 shows assets of approximately $2 million.

The proposed acquisition of assets will exceed $15 million in value and will be financed both by calling on the LP's partners to contribute funds and by bank financing.

In preparation for the acquisition [redacted] LLP has organized on behalf of the LP an acquisition corporation and a holding corporation, neither of which has any assets or has issued any stock. At the closing of the acquisition of assets, it is contemplated that the LP would contribute funds from the partners to the holding corporation, in exchange for shares of

its stock, and the holding corporation in turn would contribute those funds to the acquisition corporation, in exchange for its stock. The acquisition corporation would then use those funds plus bank borrowings to purchase the assets from the seller Corporation. These events would all occur concurrently.

The issue that has been raised is whether 16 C.F.R. § 801.11(b)(1) is applicable so as to require recomputing the LP's balance sheet to include the funds to be used by the acquisition subsidiary to acquire the assets. That section includes the following:

> If the annual net sales and total assets of any entity included within the person are not consolidated in such statements, the annual net sales and total assets of the person filing notification shall be recomputed to include the non-duplicative annual net sales and non-duplicative total assets of each such entity. . . .

It is our position that § 801.11(b)(1) was not intended to treat the situation in which an acquisition corporation is formed for the purpose of closing a deal. Rather, the regulation is aimed at two other situations: first, where a company has purchased another operating company since its last regularly prepared financial statements and is about to make another acquisition, and, second, where a company has an operating subsidiary that for some reason was not included in its consolidated financial statements.

Our position is entirely consistent with the policy of pre-merger notification. A financial entity, the LP, with no operations is about to draw in cash from its partners and banker to acquire operating assets. There is no combination of any possible antitrust significance. As the SBP stated in discussing

the promulgation of § 801.11(e), that rule "is appropriate because transactions that may pose an antitrust concern are those in which two or more entities of significant size combine. . . ." 53 Fed. Reg. No. 44 at 7070 (March 6, 1987).

That the LP will hold the assets through corporations rather than directly is of absolutely no antitrust significance. In fact, if the holding corporation and the acquisition corporation had been created during February and had issued stock for nominal consideration, the "consolidated" balance sheet of the LP would have stated the same total assets as did the actual balance sheet of February 29, 1996. In short, § 801.11(b)(1) was simply not aimed at situations in which the existing balance sheet fully discloses all assets of the relevant party, in this case the LP. Rather, as stated above, that section was aimed at requiring disclosure of assets of an operating entity that had been acquired since the last financials or assets of an operating entity that had been controlled by the acquirer all along but had not been included in its consolidated financials.

The policy of § 801.11(e) affirms that capital injected for the purpose of an acquisition and to be expended in making the acquisition is of no antitrust concern.

There have probably been numerous transactions in which an acquiring party falling under a size-of-a-party threshold borrowed or otherwise received money to make a transaction where if its balance sheet had to be recast prior to the next regular date of issuance, the threshold would be crossed. So far as we are aware, the use or non-use of a newly created acquisition corporation to hold the assets being acquired has never been

considered a factor in analyzing whether pre-merger notification is required.

Because the parties have been proceeding on the understanding that filing was not required and would have to scramble if they are required to file, we would greatly appreciate hearing your decision as soon as possible. Thank you very much for your cooperation.