801.1(b)
801.11(c)
802.2(h)

[redacted]

[redacted]

May 21, 1996

This document may be subject to confidentiality provisions of 7A(h) of the Clayton Act and not for release under the Freedom of Information Act.

VIA HAND-DELIVERY

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

Re: Request for FTC Staff Confirmation Regarding "Non-Reportability" of Proposed Transaction

Dear Mr. Sharpe:

Pursuant to our telephone discussion of May 21, 1996, we write to confirm that no party to the following proposed transaction must comply with the notification and waiting periods of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

The salient facts are as follows. "Owner" is a limited partnership which holds legal title to a [redacted] For the purpose of this letter, it can be assumed that Owner is its own "ultimate parent entity."[1/] The [redacted] encumbered by a non-recourse first trust deed loan in favor of "Lender." Lender is a general partnership which is its own UPE under 16 C.F.R. § 801.1(b). The deed of trust encumbers the [redacted] which is the sole security granted to Lender by the Owner. The outstanding balance of the loan is approximately $ 240 million. Disputes have arisen between Lender and Owner regarding the status of the loan. The present fair market

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1/ Whether Owner is its own UPE or is controlled by one of its partners is not pertinent to the HSR analysis in this particular transaction. As described infra, each "acquisition" in the proposed transaction either fails to meet one of the other jurisdictional tests or is otherwise exempt from the notification and waiting periods of the HSR Act.

[redacted]

value of the [redacted] is estimated to be $173 million. Owner has been unable to make full payments when due under the terms of the loan to Lender for some time.

Lender has agreed to defer its right to foreclose under the mortgage, in consideration for Owner entering into an agreement with Lender as follows. The entire outstanding balance of the loan will become due and payable on May 31, 1996. The partners of Lender will create a new entity -- "Lender's Designee" -- which will be owned by, and in the same percentages as, the existing partners of Lender. Therefore, Lender's Designee will be its own UPE.

Lender's Designee shall be structured as a limited liability company ("LLC"). The LLC will have no board of directors, but shall have an operating manager who will perform functions similar to those of a general partner. The partners of Lender -- who shall be the members of LLC -- will make aggregate total contributions to the formation of the LLC of well less than $10 million -- including the value of (i) all commitments to transfer assets to the LLC at any time; (ii) any credit extended to the LLC by the contributors (members); or (iii) any credit extended to the LLC by third parties which the contributors (members) have guaranteed. It is currently estimated that the value of all such contributions to the LLC by its members will be approximately $1-3 million, and no contributions by third parties to the LLC are expected.

LLC is more compared to a partner

Under the terms of the agreement, Owner shall transfer th[redacted]o Lender's Designee on or before the maturity date, subject to the loan. As consideration for the transfer of property, the LLC as the new owner of the [redacted] will enter into a property management agreement pursuant to which the designated property manager will provid[redacted] roperty management and leasing services with respect to th[redacted] until December 31, 1997 for a management fee of $30,000.00 per month plus reimbursement for customary costs and expenses. Lender's Designee shall assume all liabilities with respect to the property and indemnify the Owner with respect thereto. Lender's Designee shall also be responsible for all transfer of taxes, recording charges, fees and the cost of title insurance. Upon execution of the purchase agreement between Owner and Lender's Designee the parties shall execute and exchange mutual releases with respect to the loan.

ANALYSIS

The transaction involves two potentially reportable acquisitions: (1) the formation of the LLC; and (2) Lender's Designee's acquisition of the [redacted] from the Owner.

1) Are voting securities coming back to the joint venturers in the formation of the LLC? No

2) Will Lender's Designee acquire any of the business in the [redacted]? No

A. Formation Transaction

Assuming *arguendo* that the contributors to the LLC would meet the "size of person" test, the formation transaction would not be reportable for the following reasons: (1) the LLC will not issue voting securities and its formation is therefore not subject to 16 C.F.R. § 801.40; (2) the joint venture would not meet the special size of person test under 16 C.F.R. § 801.40; and (3) even if the LLC is deemed to issue voting securities, no contributor to the LLC will acquire a sufficient interest in the entity to satisfy the "size of transaction test." agreed

The newly formed LLC will not issue any shares of stock. Rather, its "interests" will be held by each of the contributors to the LLC, each of whom is also a partner in the Lender partnership. LLC will not have a board of directors, and ownership of a membership interest in the LLC will not entitle the holder to vote for any person who exercises functions similar to those of a corporate board of directors. Governance of the LLC will be by a manager, selected in the LLC formation documents, which manager will function much like a general partner of a limited partnership. Accordingly, it is our understanding that the Premerger Notification Office ("PNO") would not deem the interests in LLC to be voting securities within the meaning of 16 C.F.R. § 801.1(f)(1); therefore, the formation transaction would not be deemed to involve either the acquisition of assets or voting securities and would not be subject to 16 C.F.R. § 801.40.

Even if the membership interests in the LLC were deemed to be voting securities, however, the formation transaction would not be reportable because it would meet neither the special size of person test under 16 C.F.R. § 801.40 nor the size of transaction test under 15 U.S.C. § 7A(a)(3), as modified by 16 C.F.R. § 802.20. The value of all contributions to be made by the members -- including the value of all assets to be transferred upon formation, the value of all assets for which agreements to transfer have been secured, and the value of credited extended by the LLC members or extended by third parties and guaranteed by the LLC members, is approximately $1-3 million -- well less than the $10 million size of person threshold under § 801.40.

Since formation of the LLC would not satisfy the size of person test under § 801.40 (assuming that it were subject to § 801.40 in the first instance), it would not be a reportable transaction; therefore, there would be no need for the contributors to make good faith estimates of the value of the membership interests in the LLC that they are acquiring for the purpose of applying the size of transaction test. Given that the size of the LLC for the purpose of § 801.40 will be only approximately $1-3 million, however, any good faith estimate of the value of the membership interests to be acquired by any of the individual members would be considerably less than the $15 million size of transaction threshold. Moreover, since no one member will have a right to 50% or more of the profits of the LLC or its assets upon dissolution, the alternative size of transaction test of § 801.20(b)

would not apply. Even if the alternative size of transaction test were applicable, the jurisdictional threshold would not be satisfied since the LLC would not have assets or voting securities of at least $25 million.

B. [redacted] Acquisition

It is assumed for the purpose of this letter that the fair market value of th[redacted] is approximately $173 million. It is further assumed that Owner has net sales or total assets in excess of $100 million. Nevertheless, the acquisition by Lender's Designee of the[redacted] from Owner is not reportable because (1) Lender's Designee will have less than $10 million in net sales or total assets; (2) the acquisition is exempt pursuant to amended Rule § 802.2(h); and (3) the acquisition should be exempt under 16 C.F.R. § 802.63 as a bona fide debt workout.

agreed 801.11(e)

First, the acquiring person in th[redacted] acquisition, would not meet the size of person test. Since the LLC is not an "issuer," control is determined by 16 C.F.R. § 801.1(b)(1). No person will have a right to 50% or more of the profits of the LLC or of its assets upon liquidation. Even if the membership interests in the LLC were deemed to be voting securities and the LLC itself were deemed to be an issuer, however, no other person would hold 50% or more of the voting securities in the LLC. See 16 C.F.R. § 801.1(b)(1). Finally, no other person will have the power to appoint a majority of any persons exercising functions for the LLC similar to those of directors of a corporation. See 16 C.F.R. § 801.1(b)(1). Therefore, the LLC would be its own UPE.

As its own UPE, the LLC would not meet the size of person test for its acquisition of th[redacted] At the time of the closing, the LLC will not have a regularly prepared balance sheet. As a newly-formed entity, it will not have had any previous sales. Pursuant to 16 C.F.R. § 801.11(e), the total assets of the LLC are equal to "all assets held" by the LLC at the time of th[redacted] cquisition, less all cash that will be used by the LLC as consideration for the acquisition of the[redacted] d less all cash used for expenses incidental to the acquisition. At the time of the acquisition, the value of the assets held by the LLC will be no greater than the value of the LLC's assets at the time of formation as described above. Therefore, the total assets of the LLC will be well less than $10 million and the LLC will not meet the size of person test under 15 U.S.C. § 7A(a)(1).

Second, the acquisition of th[redacted] Lender's Designee from Owner should be exempt under newly-amended § 802.2(h) which provides:

> An acquisition of retail rental space (including shopping centers or warehouses and assets incidental to the ownership of retail rental

[redacted]

> space or warehouses shall be exempt from the requirements of the act, except when the retail rental space or warehouse is to be acquired in an acquisition of a business conducted on the real property. In an acquisition that includes retail rental space or warehouses, the transfer of any assets that are neither retail rental space nor warehouses shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

The property to be sold by Owner to Lender's Designee is the [redacted] and is within the exemption. Lender's Designee is not purchasing the "business" of any [redacted] the [redacted] and the "exception" to the exemption should not apply. The Owner of the [redacted] prior to the transfer to Lender's Designee, however, may receive rents based on a percentage of the [redacted] sales in th[redacted] Lender's Designee may continue to receive such rents after its acquisition of th[redacted] Pursuant to the purchase agreement between Lender's Designee and Owner, Lender's designee must enter into a management contract with an entity to be designated by Owner for the purpose of managing the [redacted] roperty. Even if the property management services are performed on the premises of the [redacted] the [redacted] tself is not being acquired "in an acquisition of a business conducted on the property." Therefore, the § 802.2(h) exemption is applicable (and the "exception" to the exemption is not).

Furthermore, we submit that the contractual obligation to enter into the property management agreement is not a "transfer of an asset" that must be separately valued under the rule. Even if the obligation were deemed to subject to the separate valuation provisions of amended § 802.2(h), however, the value of the management agreement -- $30,000 per month plus reimbursement of costs and expenses until December 31, 1997 -- would not meet the $15 million size of transaction threshold and would independently trigger a filing obligation. Similarly, we submit that any transfer of rights to assume rental payments based on a percentage of sales by stores in the [redacted] s either not the transfer of an "asset" under the Act or is only the transfer of an asset "incidental to the ownership" of the exempt retail rental space.

Finally, even if the jurisdictional thresholds were met and the acquisition of the [redacted] were not exempt under new § 802.2(h), it should nevertheless be exempt as a bona fide debt workout under § 802.63. Rule 802.63 provides in pertinent part:

> An acquisition of collateral or receivables, or an acquisition in foreclosure, or upon default, . . . or in connection with a bona fide debt work-out shall be exempt from the requirements of the act if

[redacted]

made by a creditor in a bona fide credit transaction entered into in the ordinary course of the creditor's business.

Th[redacted]acquisition is being made as part of a bona fide debt work-out in lieu of Lender fo[redacted]g on th[redacted]Owner is in default under the terms of the loan extended by Lender. The acquisition is the type of transaction that Lender would enter into in the ordinary course of its business. Although Lender's designee is actually making the acquisition, rather than Lender itself, Lender's Designee is being created, by Lender partners, solely for the purpose of effecting this debt work-out on Lender's behalf. Thus, even though Lender's Designee is not technically a "creditor" in making the acquisition, it is acting on behalf of a Lender, which is the creditor. Applying the bona fide debt work-out exemption under these circumstances is entirely consistent with the rationale of § 802.63, and the exemption should be deemed applicable to Lender's Designee's acquisition of the[redacted]

Once you have had an opportunity to review this letter, please give me a call to share your views. As always, we appreciate your consideration of and assistance in this matter.

Sincerely,

[redacted]

[redacted]

Based on the facts there are no reporting obligations for the parties involved in these transactions.

called [redacted]
5-23-96
PS