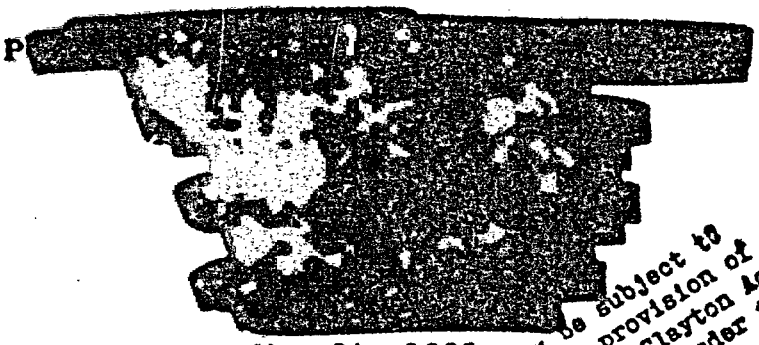

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May 24, 1985

This material may be subject to the confidentiality provision of Section 7A (h) of the Clayton Act which restricts release under the Freedom of Information Act

VIA HAND DELIVERY

Mr. Wayne Kaplan
Federal Trade Commission
Room 301
FTC Building
7th and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Interpretation of "Control" and Calculation of "Total Assets" under the Premerger Notification Regulations

Dear Mr. Kaplan:

This will confirm our telephone conversation of May 13, 1985 concerning the applicability of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Section 7A of the Clayton Act, 15 U.S.C. §18a (the "Act"), and the regulations promulgated under the Act, 16 C.F.R. Parts 801, 802 and 803 (the "Regulations"), to leveraged buy-outs.

As I explained to you, the subject transaction involves the acquisition of all of the assets, and the assumption of certain liabilities, of a corporate division engaged in the distribution of hardware products (the "Acquired Entity"). Since the Acquired Entity is a division of a multi-billion dollar corporation, the "acquired person" in the subject transaction will have assets and sales in excess of $100,000,000.

The assets of the Acquired Entity will be purchased by a corporation (the "Acquiring Entity") recently formed for the purpose of effecting the subject transaction. Fifty percent of the stock of the Acquiring Entity will be owned by a recently-formed limited partnership (the "Limited Partnership"); the remaining fifty percent of the stock of the Acquiring Entity will be owned by three individuals and/or their families.

The general partner of the Limited Partnership will be a second limited partnership (the "General Partner"); the Limited Partnership will also have four individuals as "special" limited partners, and other individuals as ordinary limited partners ("special" limited partners being entitled to a preferential allocation of profits and losses). As to the General Partner, its general partners will be two individuals; it will also have three individual limited partners. (At present, it appears that one individual will own a nominal amount of shares in the Acquiring Entity, will be a special limited partner of the Limited Partnership, and will be a limited partner in the General Partner; two other individuals will be both special limited partners in the Limited Partnership and limited partners in the General Partner.)

None of the individuals involved in the ownership of the Acquiring Entity, the Limited Partnership or the General Partner presently is involved, either directly or through the exercise of control, in the business of distributing hardware products. Moreover, we are unaware of any contractual arrangement which would provide any of the individual shareholders of the Acquiring Entity with "control" of that Entity, as defined in the Regulations.

The financing for the subject transaction will be provided by two institutional lenders, who have committed to loan the acquisition funds to or for the benefit of the Acquiring Entity. In addition, a portion of the purchase price will be funded through the capital contributions of the shareholders of the Acquiring Entity. entities

We have determined that the "acquiring person" in the subject transaction, as described above, will be the Limited Partnership (having as persons within the "acquiring person" the Limited Partnership and the Acquiring Entity), and that the subject transaction is exempt from the filing requirements of the Act and the Regulations. In part, our determination is based upon FTC staff's interpretations of certain provisions of the Regulations of which we have been advised by you, as follows:

1. We understand that, for purposes of determining the identity of the "acquiring person" and the "acquired person" in a merger or acquisition transaction, both the FTC and the

Department of Justice interpret Section 801.1(b) of the Regulations such that a limited partnership cannot be "controlled by" another entity and therefore will always be considered the "ultimate parent entity" in a merger or acquisition transaction in which the limited partnership, or an entity it controls, is involved; and

2. We understand that, for purposes of determining the "total assets" of the "acquiring person" in a merger or acquisition transaction, both the FTC and the Department of Justice will exclude from the calculation of the "total assets" of a "newly-formed" entity (e.g., a recently-formed entity not having any regularly prepared balance sheet or income statement) cash or its equivalent contributed to or borrowed by or on behalf of the "newly-formed" entity and used by that entity in making one acquisition.

I would appreciate your reviewing this letter at your earliest convenience and contacting me if we are incorrect in our understanding of FTC staff's interpretations, as described above.

Thank you for your attention to this matter.

Very truly yours,

[redacted]

OK. WEK 5/24/85-