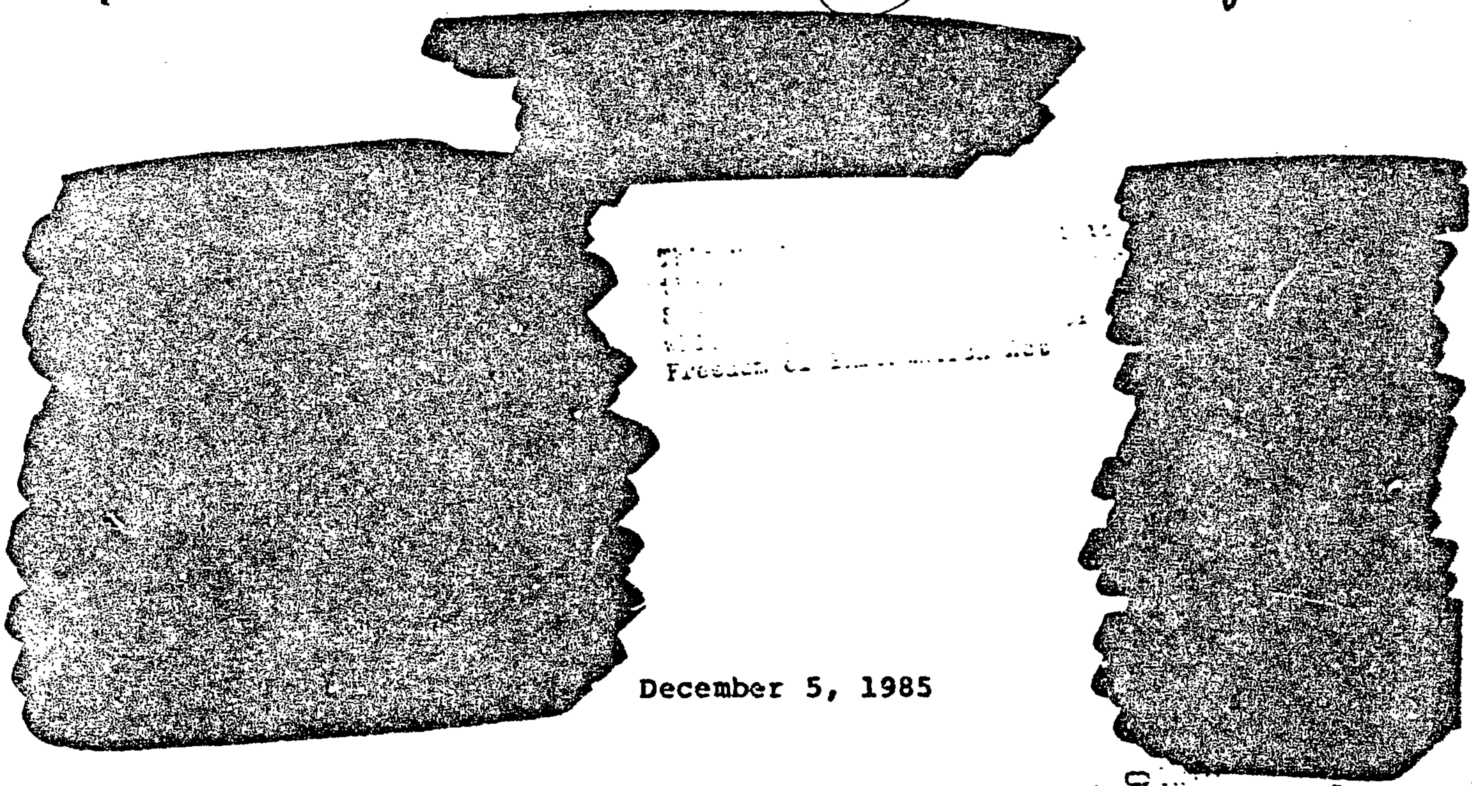

December 5, 1985

Dear Dana:

As we discussed yesterday (and as I have also discussed with Andy Scanlon), our client, Company A, has entered into an agreement with Company B to purchase 100% of the assets of Company X for a total consideration of $28 million. Company A and Company B are Canadian persons; Company A is a $100 million person in the Hart-Scott-Rodino sense and Company B is a $10 million person. Neither Company A nor Company B have any assets or sales in the U.S., except through Company B's ownership of Company X. Company X's gross assets are $52 million; its sales are believed to be considerably less than $50 million.

Company X is a California partnership. It is 100% owned by Company B; the general partnership interest of Company X is held by Company M, a wholly-owned subsidiary of Company B; and the five limited partnership interests of Company X are held by five separate corporations, all of which are controlled by Company B.

The purchase agreement for the sale of Company X was entered into in Canada; the only signatories to the agreement are Company A and Company B, both Canadian persons. Company X

is not formally a party to the agreement. Under the terms of the purchase agreement, Company A will acquire all of the partnership interests in Company X that are presently held by Company B.

Section 802.51(d) of the Hart-Scott-Rodino rules exempts transactions between two or more foreign persons if the aggregate sales of the parties in or into the United States are less than $110 million and their aggregate total assets located in the United States are less than $110 million. We agreed that Company A and Company B are "foreign persons", since both are ultimate parent entities and both are Canadian. We also agreed that Company A and Company B did not have aggregate total assets or sales of $110 million in the United States. We also agreed that the transaction would be exempt if Company B were purchasing the assets or voting securities of Company X, since the Statement of Basis and Purpose makes clear that Section 802.51(d) "applies to both voting securities and assets acquisitions". (SBP, p. 33498)

We discussed whether the exemption provided by Section 802.51(d) would be applicable where, as here, Company X is a partnership, Company A presently owns 100% of the partnership interests of Company X, and 100% of those interests are being transferred to Company B. I pointed out that Section 802.51(d) was intended to exempt all forms of acquisitions between foreign persons that did not have a sufficient nexus to U.S. commerce. It does not distinguish between acquisitions of partnerships and other forms of acquisitions. The SBP states that the exemption reflects considerations of comity and an intention to exempt "certain acquistions by foreign persons because of their minimal relationship to United States commerce". (SBP, p. 33498) The same considerations of comity and foreign commerce apply when the assets being transferred are held in partnership form. As I mentioned on the telephone, the assets of Company X are held in partnership form for tax reasons. In every other conceivable respect, the transaction is essentially a transfer of assets from one Canadian person to another. It seems fair to think that if either Congress or the drafters of the 1978 premerger rules had focused on the question, they would not have distinguished between transfers of assets, voting securities, or partnership interests between foreign persons. So long as the transaction has a minimal relationship to U.S. commerce, the form of the transaction should be irrelevant. In these circumstances, it would seem that an acquisition of partnership interests involving only foreign persons should be exempt under Section 802.51(d), despite the staff's view that a partnership is ordinarily its own ultimate parent entity. The policies underlying

Section 802.51(d) favor extending the exemption to acquisitions of partnership interests by foreign persons; and it is hard to conceive of any policy underlying the Hart-Scott-Rodino Act that would be offended by such an interpretation. Indeed, the fact that acquisition of 100% of the partnership interests of a partnership is viewed by staff as an acquistion of <u>assets</u> would seem to support an interpretation of Section 802.51(d) that would exempt acquisitions of partnership interests that are not otherwise reportable.

I would appreciate it if you would let me know if you and your colleagues believe that the Section 802.51(d) exemption applies in these circumstances.

Thank you for your kind cooperation.

Sincerely,

[redacted]

Dana Abrahamsen, Esq.
Premerger Notification Office
Bureau of Competition - Room 301
Federal Trade Commission
Washington, D.C. 20580

<u>BY TELECOPIER</u>

upon later review:
Since 100% of the partnership interests are held by entities within B then the partnership is disregarded and the assets of the partnership are deemed held by B. Thus A's acq of the assets of X is an acquisition by A from B and 802.51(d) is appropriately applied. WEK 3/9/87