801.11(e)
+ 801.(b)

[redacted]

May 6, 1988

FEDERAL EXPRESS

Wayne Kaplan, Esq.
Federal Trade Commission
Premerger Notification Office
Room 303
6th Street and Pennsylvania Avenue, N.W.
Washington, D. C. 20580

Re: Inapplicability of Filing Requirements Under Hart-Scott-Rodino Antitrust Improvements Act of 1976

Dear Mr. Kaplan:

This letter will confirm the facts described in a telephone conversation between [redacted] and myself with you on May 5, 1988 and the advice you provided that, based upon those facts, a Premerger Notification and Report Form need not be filed under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390 (the "Act") to report the transaction described below.

Description of the Transaction

Under the terms of a Merger Agreement among [redacted] "Company"), the shareholders of the Company and [redacted] will be merged

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with and into the Company, with the Company as the surviving corporation (the "Merger"). As a result of the Merger, each outstanding share of common stock of the Company will be converted into the right to receive a payment in cash representing the value of the shares. The aggregate amount of cash payments to Company shareholders will be $6.75 million. Following the Merger, the present shareholders of the Company as such * will have no further interest in the Company and the shareholders of [redacted] will, as a result of the Merger, become the shareholders of the Company.

The business of the Company is limited to serving as general partner of [redacted] (the "Partnership"), a Delaware limited partnership; the Company's sole asset is its partnership interest. Organized in 1986, the Partnership is engaged in the business of importing and distributing eyeglass frames. It has annual sales in excess of $37 million. The Company is the sole general partner of the Partnership and there are two limited partners, both of which are savings banks.

The Merger will not directly affect the Partnership; however, it is expected that certain debts of the Partnership will be prepaid concurrently with the Merger. After the Merger, the Company will continue as the sole general partner of the Partnership and the current limited partners will continue as the limited partners.

Description of Acquiring Person.

The acquiring person will be [redacted] a newly organized Delaware corporation. The voting stock of [redacted] will be owned by six individuals, none of whom will hold in excess of 50% of such shares, although the two largest shareholders will each own 38% of the shares. It is contemplated that concurrent with the consummation of the

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*One of the current shareholders of the Company may be deemed to be an affiliate of two shareholders of [redacted] shareholders will become shareholders of the Company as a result of the Merger solely because they are [redacted] shareholders and irrespective of the pre-merger interests of their affiliates in the Company.

Merger, the shareholders of [redacted] upon becoming the shareholders of the Company, will enter into a shareholders agreement which will impose certain restrictions on the transfer of the stock of the Company. The shareholders agreement will not contain any provisions respecting the election of directors.

All of the shareholders of [redacted] are also members of the senior management and shareholders of [redacted] a company which is engaged in the library services industry. The two largest shareholders of [redacted] also have other common business interests. There is, however, no contractual agreement among them with respect to their investment in [redacted]

Applicability of Act.

A. Acquiring Person

Section 7A(a)(2)(b) of the Act provides that the reporting requirements of the Act will apply to a non-exempt transaction meeting the commerce test of Section 7A(a)(1) and Size-of-the-Transaction test of Section 7A(a)(3) if any voting securities or assets of a person not engaged in manufacturing which has total assets of $10 million or more are being acquired by any person which has total assets or annual net sales of $100 million or more.

Provided [redacted] is deemed to be the acquiring person, the Size-of-the-Parties test would not be satisfied. As a newly formed entity, it has no sales and minimal assets and, accordingly, it would fail to exceed the $100 million threshhold for an acquiring person. If, however, all or the two largest shareholders of [redacted] are deemed to be an entity within the meaning of Section 801.1(a)(2) of the Regulations adopted under the Act (the "Regulations"), the shareholder group would become the ultimate parent entity and other persons would be included within such entity. Among the included persons would be [redacted] which has sales in excess of $100 million.

This letter will confirm your advice that because there is no contractual agreement among the shareholders of [redacted] with respect to their investment in [redacted] or with respect to the election of directors, it is the interpretive position of the staff of the Federal Trade Commission that (1) the shareholders of [redacted] will not be deemed to be an entity, (2) since no one shareholder holds in excess of 50% of the voting securities of [redacted] will be deemed to be the acquiring person, and (3) because [redacted] has no sales or assets, the transaction will not be reportable because the acquiring person will not meet the Size-of-the-Parties test.

B. <u>Acquired Person</u>

During our telephone conversation, we also inquired whether the Company would be deemed to control the Partnership, thereby requiring the sales and assets of the Partnership to be included within the acquired person. Section 801.1(b) of the Rules provides that in the case of a partnership, control means the right to 50% or more of the profits of the Partnership or having the right, in the event of dissolution, to 50% or more of the assets of the entity.

At the inception of the Partnership, the Company, as general partner, contributed $375,000 in cash to the Partnership and the two limited partners contributed an aggregate of $375,000 in cash as well. Under Article 3 of the Limited Partnership Agreement for the Partnership dated July 22, 1986 (the "Partnership Agreement"), net income and net loss for any fiscal year during the Initial Period (as defined) is allocated 10% to the capital account of the general partner and 90% to the capital accounts of the limited partners. As of December 31, 1987, the Company had a capital account of approximately $750,000 and the limited partners had capital accounts aggregating approximately $3.7 million. Accordingly, as of December 31, 1987, the capital account of the Company represented less than 20% of the total capital of the Partnership. Section 7.2 of the Partnership Agreement provides that in the event the Partnership shall be liquidated or dissolved, distributions of property shall be pro rata among the partners in proportion to the respective positive balances of their capital accounts.

The Initial Period of the Partnership is the period which commenced at the inception of the Partnership and which ends on December 31, 1991. Beginning in January, 1991, the allocation of profits and losses between the general and limited partners will be reversed under the current Partnership Agreement. At that time, 90% of the profits and losses will be allocated to the general partner and 10% will be allocated to the limited partners. The principals of [redacted] have reached an understanding with the limited partners of the Partnership to change the allocation provisions in the Partnership Agreement if the principals acquire control of the general partner by virtue of the Merger. Pursuant to this understanding, the Initial Period will end at the time the Merger is consummated. In consideration for accelerating the termination of the Initial Period, the general partner will thereafter be allocated 75% of profits and losses (instead of 90% if the general partner waited until 1991 when the shift occurs under the Partnership Agreement) and the limited partners will receive an allocation of the remaining 25%. Existing capital account balances will initially remain the same and will be adjusted in the future in accordance with the foregoing allocation of profit and loss.

Section 5.3 of the Partnership Agreement imposes certain restrictions on the actions which may be taken by the general partner without the consent of the limited partners. Among other things, the general partner, may not, without the consent of the limited partners (1) amend or modify the Partnership Agreement; (2) admit any additional partner; (3) engage in transactions with affiliates of the general partner; (4) engage in any business other than the sale and distributi[redacted] (5) make any acquisition of a business; or (6) sell, transfer or assign or otherwise dispose of all or substantially all of the assets of the Partnership.

This will confirm that, under the foregoing facts, it is the interpretive position of the staff of the Federal Trade Commission that the Company does not control the Partnership, and accordingly, the sales and assets of the Partnership may be excluded in determining the size of the acquired person. Because the Company's only asset consists of its Partnership interest, it does not exceed the $10 million threshold and therefore does not satisfy the Size-of-the-Parties test for an acquired person. This conclusion is consistent with example 2 included in Section 801.1(b) which defines "control". As noted above, at the present time, the Company has the right to 10% of the profits of the Partnership and upon dissolution, assets will be distributed in accordance with capital accounts. Its present capital account is approximately 20% of the total capital of the Partnership. Accordingly, the

Company would not be deemed to control the Partnership. The proposed change for allocating profits between the general and limited partners will be effective only if the Merger is consummated, has a valid business purpose and is not a device for avoidance within the meaning of Section 801.90 of the Rules.

It is anticipated that the transaction described in this letter will be consummated during the first week of June. Accordingly, if you disagree with any of the conclusions reached herein, I would appreciate it if you would advise either the undersigned or [redacted] of this office as promptly as possible. I will contact your office on May 20, 1988 to confirm that you concur with the analysis contained herein. Your anticipated cooperation is very much appreciated.

Very truly yours,

[redacted]

[redacted]

OK
Wayne Kaplan
5-9-88