WC 802.1 802.63

[redacted]

August 29, 1988

VIA EXPRESS MAIL

Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dear Sirs:

I am writing to request an informal interpretation of the Hart-Scott-Rodino pre-merger notification rules, in particular of §7A(c)(1) of the Act and §802.1 of the Rules relating to acquisitions of realty transferred in the ordinary course of business.

Our client ("the Company") is [redacted] It proposes to sell a package of voting securities and [redacted] to an investor. The transaction is essentially a means of financing for the Company, inasmuch as it intends (but will not be obligated) to repurchase the [redacted] for use in its [redacted] operations.

In the proposed transaction, the Company will sell to one or more institutional investors approximately [redacted], and will retain an option to repurchase such [redacted] Assets incrementally over

a four year period at a price that will include interest from the date of the sale. The Company intends to repurchase the [redacted] Assets for use in its ongoing [redacted] operations over a period of 18-24 months.

Concurrently with the [redacted] Assets sale, the Company will sell 150,000 Units to the same investor(s) at a price of $100 per Unit, or $15 million in total. Each Unit will consist of one share of $7.00 non-cumulative redeemable convertible Preferred Stock and 20 common stock purchase Warrants. The Preferred Stock, voting as a class, will be entitled to elect 20% of the Company's board members.

We believe that the proposed transaction is exempt from the requirements of the Act, whether engaged in by one or more investors, because (1) the acquisition of the [redacted] Assets is exempt under §7A(c)(1) and §802.1 as in the ordinary course of business, and (2) the sale of the Preferred Stock is exempt under §802.20 because its value (determined pursuant to §801.10(a)(2)(i)) is not in excess of $15 million. Our analysis is as follows:

(1) The [redacted] Assets. While the Company has not previously sold this quantity of [redacted] to an unaffiliated entity in a single transaction, it does sell [redacted] in the regular course of its business. Such [redacted] are considered by the Company and carried on its books as inventory; they are not income-producing assets. Furthermore, since the [redacted] Assets to be sold constitute only about 40% of the Company's inventory of such type of assets (and about 20% of the Company's total [redacted] inventory), §802.1(b) does not apply.

(2) The Preferred Stock. Even if the entire value of the Units is attributed to the Preferred Stock, and none to the Warrants, the value of the Preferred Stock under §801.10(a)(2)(i) is not in excess of $15 million. There would be no basis for attributing any of the consideration for the [redacted] Assets to the Preferred Stock, on the possible theory that the [redacted] Assets' market value might be less than their acquisition price, because the [redacted] ssets will be conveyed at the Company's book cost which is below their market value.

[redacted]

We request an informal interpretation that in these circumstances no filing is required for the proposed transaction, including the Company's planned repurchase of the [redacted] Assets. If you have any questions or wish further information, please contact me. Thank you for your prompt attention to this matter.

Sincerely,

[redacted]

[redacted]

The writer was advised that the transaction involving the [redacted] might qualify as exempt under 802.63 as well as possibly 802.1 if the sale went to a person which does not compete in the same businesses as the [redacted] was being used. In that event the securities transaction above is not reportable.

W. Kaplan
8/30/88