Assuming that no person has control of the subject partnership based upon [redacted] upon dissolution, where a creditor [redacted] for its notes repaid any subsequent distributions [redacted] this former creditor must be considered a distribution of profit which must be considered in determining who (if any person) controls the partnership. [redacted]

801.1(b)
VC

April 22, 1992

Federal Trade Commission
Premerger Notification Office
Bureau of Competition
(Attn: Mr. Victor Cohen)
7th & Pennsylvania Avenue, N.W.
Room 303
Washington, D.C. 20580

APR 24 2 11 PM '92

FEDERAL TRADE COMMISSION PREMERGER NOTIFICATION OFFICE

Re: Request for an Informal Interpretation re the application of 16 C.F.R. § 801.1(b)(1)(ii)

Dear Mr. Cohen:

We have been asked on behalf of a client to request an informal interpretation of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub.L. 94-435, 90 Stat. 1390 (1976) (codified as amended at 15 U.S.C. Sec. 18A) (the "HSR Act"), with respect to the determination of the "ultimate parent entity" of a limited partnership under 16 C.F.R. §801.1(b)(1)(ii).

Facts: The factual situation is described as follows:

1. A newly formed limited partnership called [redacted] is proposing to acquire assets of a company ("Seller") whose ultimate parent entity has $8 million of "annual net sales" and $25 million in "total assets." The purchase price for the assets is $40 million, and the assets being acquired relate to an "activity affecting commerce."

2. In accordance with the terms of the contemplated limited partnership agreement to which all shall be parties, [redacted] shall have three "Investors," as follows:

"A" - The general partner;

"B" - The limited partner; and

"C" - The note investor, holding [redacted] participating notes (the "Notes").

No other person or entity shall have the right to any of the profits of [redacted] or the right in the event of dissolution to any of the assets of [redacted], except for certain financial institutions which shall have a security interest in certain assets of [redacted] and certain rights to foreclose upon such assets upon default.

3. [redacted] limited partnership agreement, to which "C" shall be a party, shall have complicated provisions relating to the distribution of cash and the allocation of profits and losses, taking into consideration payments to "C" under the Notes. Operating together, the partnership agreement and the Notes shall provide for the distribution of amounts to Investors in six stages, as follows:

(1) To return to "C" the amount of its investment, which is the amount of its loans to [redacted] (the principal amount of the Notes);

(2) To pay "C" a rate of return of 10% compounded semiannually on the principal amount of the Notes;

(3) To return to "B" the amount of its investment contributed as capital to [redacted]

(4) To pay "B" a rate of return of 10% compounded semiannually on its contributed capital;

(5) To return to "A" the amount of its investment contributed as capital to [redacted]

(6) Thereafter, 20% to "A"; 45% to "B"; and 35% to "C"; with payments to "C" being called "contingent interest" on the Notes until "C" has achieved a 25% rate of return and thereafter, called "profit participation."

Net profits and net losses will be allocated in order to achieve the distributions set forth above.

Application of HSR. The $10 million "size-of-person" test is met on the acquired side of the transaction, the "size-of-transaction test" is met by the $40 million purchase price for the assets, and the "commerce" test is met. To determine whether the contemplated transaction meets the three criteria for the filing of a pre-merger notification under the HSR Act, the "ultimate parent entity" of the acquiring person, and its annual net sales and total assets, must be determined.

In determining the "ultimate parent entity" of the acquiring person, the "entity which is not controlled by any other entity" must be ascertained. In accordance with Section 801.1(b) of the regulations, partnership interests do not comprise "voting securities," and the "ultimate parent entity" of a limited partnership is that entity "having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50% percent or more of the assets of the entity."

In my phone conversation with you on April 14, 1992, we discussed 16 C.F.R. §801.1(b)(1)(ii) and the requirement thereunder to determine the rights of "A," "B" and "C" to the distributions and profits of [redacted] in order to identify the "ultimate parent entity" of the "acquiring person." I explained to you in general terms the provisions for the distribution of cash under the terms of the limited partnership agreement and the Notes, particularly provision (6) above with respect to distributions to the general partner, the limited partner and the note investor.

You explained that under the circumstances, the payment of "contingent interest" and "profit participation" to the note investor would be considered to be a distribution of profits under 16 C.F.R. §801.1(b)(1)(ii) and thus that the percentage of cash distributions to which the note investor is entitled would be considered in the determination of whether any person or entity has the right to 50% or more of the profits of [redacted] or the right in the event of dissolution to 50% or more of the assets of [redacted]

Accordingly, the "ultimate parent entity" on the acquiring side of the transaction would be [redacted] because neither "A," "B" nor "C" has the right to 50% or more of the profits of [redacted] or the right in the event of dissolution to 50% or more of the assets of [redacted] The size of [redacted] as the "ultimate parent entity" must thus be examined in accordance with 16 C.F.R. §801.11 (c) or (e) to determine whether [redacted] annual net sales or total assets meet the "size-of-person" test under the circumstances, thereby requiring the filing of a pre-merger notification under the HSR Act.

With reference to the above-described factual situation, please confirm whether my description of your explanation set forth above is accurate and whether the conclusions with respect to the "ultimate parent entity" of the acquiring person set forth in the preceding paragraph correctly interprets the application of the FTC's rules under the circumstances.

Please contact the undersigned if you have any questions on the facts or the informal interpretation being requested, and when the FTC has completed its review and you can discuss the FTC's interpretations. Thank you for your attention to this matter.

Very truly yours,

[redacted]