[redacted]

801.1 Control of Partnerships
X-9 NOT
X-10 PARTNERSHIPS SINCE COMPANY A OWNS 100% OF THEM.
X-11

[redacted]

March 6, 1989

BY HAND

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Sixth and Pennsylvania Avenue, N.W.,
Washington, D.C. 20580.

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PREMERGER NOTIFICATION OFFICE

Re: Applicability of Hart-Scott-Rodino Act to Acquisition of Partnership Interests

Dear Mr. Sipple:

On March 2, 1989, we spoke by telephone with Victor Cohen of your office, and discussed with him the applicability of the Hart-Scott-Rodino Act (the "H-S-R Act") to the transaction described below. Mr. Cohen suggested that we submit a letter describing the transaction so that we could obtain your views on whether an H-S-R filing is required.

The transaction involves the acquisition of 50% partnership interests in 11 separate partnerships (Partnerships X-1 through X-11) and a 24.75% interest in another partnership (Partnership X-12). The partnership interests will be transferred from Company A, which is the

ultimate parent entity of all 12 partnerships, to Company B. All of the partnerships will be reconstituted and subsidiaries of Company B will become new partners in such partnerships. With three exceptions (Partnerships X-8 through X-10), each partnership currently has one or more persons unrelated to Company A who have direct or indirect economic interests in them ranging from 1.6% to 51%.

The transaction is as follows:

1. Company A and Company B are both $100 million persons in the H-S-R sense.

2. Primarily for tax reasons, Company A operates a portion of its business through 12 partnerships (Partnerships X-1 through X-12), the combined assets of which constitute less than 10% of the total assets of Company A.

3. Partnerships X-1 through X-8 and X-12 are organized as New York and Connecticut general partnerships and have been in existence since 1984. Partnership R is a partner in all of these partnerships. Company A has a 95% economic interest in Partnership Z, which owns 99% of Partnership R; the other 5% interest in Partnership Z is held by several unrelated third parties. As a result, these unrelated third parties have indirect interests in Partnerships X-1 through X-8 and X-12 ranging from 1.6% to 4.9%. In addition, another unrelated third party is a 50% partner of Partnership X-12, resulting in an interest of 49% or less in that partnership on the part of Company A.

4. Partnerships X-9, X-10 and X-11 are organized as New York general partnerships and were formed in early 1988, early 1989 and early 1989, respectively. These

partnerships each have two partners, both of which are 100%-owned subsidiaries of Company A. These partnerships, however, collectively have total assets of approximately $20 million.

5. Company A has agreed to sell to Company B a 50% partnership interest in Partnerships X-1 through X-11 and 49.5% of Partnership R's 50% interest in Partnership X-12 for a total of approximately $140 million.* The purchase price will be paid to Company A by Company B; it will not be contributed to any of the partnerships.

6. As part of the above-mentioned transaction, the partnership agreements of Partnerships X-1 through X-12 will be amended and restated to show that each partnership has been reconstituted with a subsidiary of Company B as a new partner. In the case of Partnership X-12, Company B will acquire 49.5% of Partnership R's 50% interest through the creation of a new partnership between Partnership R and a subsidiary of Company B to which Partnership R's interest will be transferred. All of the assets presently in Partnerships X-1 through X-12 will remain in those partnerships, and title to those assets will continue to be held by those partnerships.

7. As part of the same transaction, Company A and Company B will form a new partnership, Partnership Y, that will be 50.5% owned by a subsidiary of Company B and

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* Partnership X-12 has a 50% partner that is unrelated to Company A; that partner will continue to hold a 50% interest after Company B acquires a 49.5% interest in Partnership R's 50% interest.

49.5% owned by a subsidiary of Company A. Company B has agreed to contribute to Partnership Y assets which constitute less than one percent of Company B's total assets. Company A has agreed to fund operating expenses of the partnership over a number of years.

8. Following the above-mentioned transactions, Partnerships X-1 through X-9 and X-11 and X-12 will continue to be managed on a day-to-day basis by Company A. Partnership X-10 will be managed jointly by Company A and Company B. Partnership Y will be managed by Company B.

9. Partnerships X-1 through X-12 and Partnership Y will sell services to the same universe of customers. The service to be offered by Partnership Y is not identical to any of the services offered by the other partnerships, but may, depending on how the market is defined, be thought to be a competitive or complementary service.

We believe that none of the transactions described above is required to be reported under the H-S-R Act. The acquisition by Company B of interests in the 12 partnerships fall squarely within "the staff interpretation [that] makes acquisition of less than a 100 percent interest in a partnership not reportable, because a partnership interest is deemed neither a voting security nor an asset." See Amendment of 16 C.F.R. § 801.1(b), 52 Fed. Reg. 20058, 20061 (1987). See also ABA Premerger Notification Practice Manual (1985) (Interpretation #59). We are not aware of any published interpretation indicating that the partnership form will be disregarded where the partners are controlled by the same ultimate parent. The formation of Partnership Y in paragraph 7 above is not reportable, since the formation

of a new partnership is never required to be reported under Section 801.40. See Statement of Basis and Purpose, 43 Fed. Reg. 33450, 33485 (July 31, 1978).

There is no justification for disregarding the partnership form of X-1 through X-12 in analyzing the nature of the "interests" that are being acquired by Company B. In the absence of H-S-R criteria defining what constitutes a "partnership," the validity of a partnership should be determined by reference to state law. There can be no question that each of these partnerships is duly constituted under state law and is treated as a partnership for tax and other purposes by federal and state authorities. The fact that Company A currently owns 49% - 98% of X-1 through X-8 and X-12 and 100% of X-9, X-10 and X-11 does not invalidate their partnership status for H-S-R purposes. State law permits a partnership to be formed by two subsidiaries (or partnerships) of the same corporate entity.

In any event, the partnership form of X-1 through X-8 and X-12 cannot be disregarded, for H-S-R purposes, without nullifying the legally valid indirect interests in each of those partnerships that are currently held by unrelated third parties. (See paragraph 3 above.) There is no conceivable basis for viewing a partnership in which several unrelated parties hold economic interests as not constituting a valid partnership for H-S-R purposes.

The fact that X-9, X-10 and X-11 are comprised entirely of wholly-owned subsidiaries of Company A should not invalidate their partnership form. However, even if deemed to be an acquisition of the assets of these partnerships by Company B from Company A, this acquisition

would not be required to be reported because less than $15 million in assets would be acquired by Company B. (See 16 C.F.R. § 802.20(a)).

Finally, there is no avoidance issue under Section 801.90 because: (a) most of the partnerships were formed more than four years ago, and none of them were formed to avoid H-S-R reporting requirements and (b) all of the assets of Partnerships X-1 through X-12 will remain in the respective partnerships after Company B acquires its interests in those partnerships.

If you have any questions, or require further information, please feel free to call [redacted]

Very truly yours,

[redacted]

cc: Victor Cohen, Esq.