Verne, B. Michael 7A(c)(1)

From: [redacted]
Sent: Monday, July 03, 2006 11:30 AM
To: Verne, B. Michael
Cc: [redacted]
Subject: HSR Compliance Matter - Application of Section 7A(c)(1) of the Act and Rule § 802.1

Dear Mr. Verne:

My client proposes to enter into the acquisition described below, which appears to be exempt from the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act). After you have had the opportunity to review the description of the acquisition and my analysis, I would appreciate the opportunity to correspond or speak with you to confirm that the Staff of the Premerger Notification Office of the Federal Trade Commission (the "PNO") concurs with my analysis of the proposed acquisition.

Description of Proposed Acquisition

My client is a bank engaged in, among other things, the servicing of mortgage loans. The acquiror is a diversified financial services company that, among other things, services mortgage loans. My client proposes to sell the right to service approximately $175 million of mortgage loans to the acquiror. After the acquisition, my client will still have more than fifty percent (50%) of its current portfolio of mortgage servicing rights.

Approximately two-thirds of the mortgage loans to be sold in the proposed acquisition are of types of mortgage loans that my client will continue to service after consummation of the proposed acquisition. About one-third of the mortgage loans, however, are Federal Housing Administration (FHA)- and U.S Department of Veteran's Affairs (VA)-guaranteed mortgage loans. The rights to service FHA- and VA-guaranteed mortgage loans to be sold by my client pursuant to the proposed acquisition are all of my client's rights to service FHA- and VA-guaranteed mortgage loans.

Furthermore, as part of the proposed acquisition, my client will lease to the acquiror an office from which it has serviced mortgage loans in the past. It also will arrange for the transfer to the acquiror of certain of its employees who have serviced mortgage loans from that office in the past.

The office and employees proposed to be transferred to the acquiror have serviced in the past all types of mortgage loans serviced by my client, including FHA- and VA-guaranteed mortgage loans. The FHA- and VA-guaranteed mortgage loans also have been serviced in the past from other offices of my client along with the other types of mortgage loans serviced by my client. The servicing of the FHA- and VA-guaranteed mortgage loans thus has not been conducted by a discrete business unit distinct from my client's other mortgage servicing operations, and the leasing of the office and the transfer of its employees to the acquiror accordingly is not part of a transfer of such a business unit. Instead, the rationale for the transfer of the office and its employees to the acquiror is that my client will need less space and fewer people to service mortgage loans after the proposed acquisition, whereas the acquiror will need more space and more people to service mortgage loans after the acquisition.

Analysis

Based upon my review of previous informal staff opinions of the PNO, it appears that the sale of mortgage servicing rights between parties that service those rights as part of their business qualifies as a sale of goods in the ordinary course of business for purposes of the sales of goods in the ordinary course of business exemption under Section 7A(c)(1) of the Act and Rule § 802.1. This

exemption applies as long as (1) the seller will remain in the business of servicing mortgage loans after the acquisition and (2) the acquisition does not constitute a sale of an operating unit within the meaning of Rule § 802.1(a).

Regarding the first requirement, my client would remain in the mortgage servicing business after the proposed acquisition because it would retain and continue to provide service for more than fifty percent (50%) of its current portfolio of mortgage servicing rights. Although my client would dispose of all of its rights to service FHA- and VA-guaranteed mortgage loans, previous informal staff opinions of the PNO indicate that ceasing to service certain types of mortgage loans will not, by itself, make an acquisition ineligible for the sale of goods in the ordinary course of business exemption as long as the seller will continue to service other types of mortgage loans after the acquisition. For example, in Informal Staff Opinion 9806012, a sale of first mortgages on residential property, which was the first of two sales of all of the seller's first mortgages on residential property, did not disqualify the parties from the sale of goods in the ordinary course of business exemption where the seller would continue to service commercial first and junior mortgage loans and residential junior mortgage loans after consummation of the contemplated acquisitions.

Regarding the second requirement, the proposed acquisition does not constitute a sale of an operating unit within the meaning of Rule § 802.1(a). As discussed above, my client is not disposing of assets that it operates as a business undertaking in a particular location or for particular products or services. Instead, it is transferring one location from which it has conducted its business for the servicing of all of the different types of mortgage loans that it has serviced in the past.

For these reasons, the proposed acquisition appears to be a sale of goods in the ordinary course of business under Section 7A(c)(1) of the Act and Rule § 802.1. It accordingly should be exempt from the premerger notification requirements of the Act. I would appreciate it if you could e-mail me at [redacted] or call me at [redacted] to either verify my analysis of the facts discussed in this e-mail or to alert me of any additional facts or legal considerations relevant to the analysis.

Thank you for your assistance.

Best regards,

[redacted]

Agree
B
2/3/06