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802-8

September 15, 1986

BY HAND DELIVERY

Dana Abrahamsen, Attorney  
Federal Trade Commission  
Washington, D.C. 20580

RE: AVAILABILITY OF EXEMPTION FROM THE  
HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF  
1976 CONTAINED IN 16 C.F.R. SECTION 802.8(b)(1)

Dear Mr. Abrahamsen:

This letter is intended to follow up on our recent conversations concerning the availability, in the circumstances we discussed, of the exemption from the requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, (the "Act") set forth in 16 C.F.R. Section 802.8(b)(1).

16 C.F.R. Section 802.8(b)(1) provides an exemption from the requirements of the Act as follows:

A merger, consolidation, purchase of assets, or acquisition which requires agency approval under 12 U.S.C. Section 1730(q) shall be exempt from the requirements of the Act if copies of all information and documentary materials filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to the consummation of the proposed acquisition.

Our client desires to increase its approximately 8.6% holdings in a savings and loan association (the "Association") subject to regulation by the Federal Home Loan Bank Board from its current holdings to an amount between 10% and 24.9% of the outstanding shares of the Association. Since the Association is state chartered, it was also necessary to obtain approval of the relevant state savings and loan department and that approval has been obtained.

Acquisition of more than 10% of the outstanding shares of the Association requires what the Act and 16 C.F.R. Section 802.8(b)(1) refer to as "agency approval" under 12 U.S.C. Section 1730(q) (the "Control Act").

The Control Act is most frequently complied with by the filing of a notice of proposed change of control. The Control Act provides that once the notice is substantially complete, the FHLBB has 60 days to "disapprove" the transaction. Failing action by the FHLBB within the 60 day period, the person filing the notice may proceed to acquire shares in excess of 10%.

It is important to note that the Control Act does not therefore actually provide for any "agency approval" as that term is used in the Act and applicable regulations.

Nonetheless, it is clear from 16 C.F.R. Section 802.8(b)(1), acquisitions pursuant to a notice cleared under the Control Act are sufficient to constitute "agency approval" to permit the exemption under 12 C.F.R. Section 802.8(b)(1). It is therefore clear that the words "agency approval" are to be read broadly and is not to be limited to an affirmative act or formal action by the relevant agency.

There is an alternative method of obtaining FHLBB clearance under the Control Act to acquire more than 10%, but less than 25%, of the stock of a savings and loan association. Rather than filing a notice of proposed acquisition, this procedure, referred to herein as the "rebuttal procedure," requires the filing of a statement to the effect that the person proposing to acquire additional shares does not intend to exercise control over the subject association. This rebuttal statement (the

"Rebuttal Statement") must be accompanied by a detailed rebuttal agreement ("Rebuttal Agreement"), which must be executed by the prospective acquiror. Attached is a copy of a form of Rebuttal Agreement prepared by the FHLBB.

The approval of the FHLBB to the rebuttal procedure is necessary in order to permit the acquiror to proceed with the proposed acquisition in excess of 10%. This approval is evidenced by the FHLBB's execution of the Rebuttal Agreement.

The rebuttal procedure is an integral part of the Control Act and the regulations promulgated by the FHLBB thereunder. The Rebuttal Agreement was developed in early 1986 by the FHLBB staff and is authorized by 12 C.F.R. Section 574.4(e). 12 C.F.R. Section 574.4(e) was adopted on November 26, 1985 as part of a comprehensive overhaul of certain regulations of the Federal Savings and Loan Insurance Corporation by Resolution No. 85-1005 of the FHLBB. These regulations became effective on December 26, 1985. The purpose of such regulations is to implement the provisions of the Control Act and the Savings and Loan Holding Company Act, 12 U.S.C. Section 1730a (the "Holding Company Act"). See 12 C.F.R. Section 574.1. The Rebuttal Agreement is authorized by and incorporates specific provisions of the federal regulations found at 12 C.F.R. Section 574.4(e).

The purpose of this letter is to seek an informal interpretation which would confirm our view that the exemption set forth in 16 C.F.R. Section 802.8(b)(1) would apply to acquisitions made pursuant to the rebuttal procedure.

If the exemption is available, the Rebuttal Statement and Rebuttal Agreement and any other related documents would be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General's Office 30 days prior to any acquisition of the Association shares in excess of 10% in order to perfect the exemption.

In approving the Rebuttal Agreement and its related procedures, the FHLBB may possibly not give substantial consideration to the question of the monopolistic or anticompetitive effects of the proposed

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acquisition, because the very nature of the Rebuttal Agreement is to ensure that the acquiror obtains none of the indicia of control of the Association and is therefore incapable of causing any such effects. The acquiror is limited to playing the role of a passive investor.

We therefore believe that approval by the FHLBB of the rebuttal procedure has the effect of "agency approval" of acquisitions made pursuant to such a procedure by the relevant agency within the meaning of the Act and 16 C.F.R. Section 802.8(b)(1).

The approval of the state department of savings and loan referred to earlier in this letter provides that our client's acquisition of more than 10% but less than 24.9% of the Association must be completed by the last week of November, 1986. While our client may seek an extension, it is by no means certain that such an extension would be granted. Thus, it is a matter of urgency for our client to determine whether, in the event it were to proceed under the rebuttal procedure, its acquisitions would be eligible for the Section 802.8(b)(1) exemption. For this reason, we would appreciate any and all expedition you can muster in getting back to us. To that end, I have included two additional copies of this letter and its attachments for distribution to the appropriate persons in your office and in the Assistant Attorney General's Office for their input, as you suggested.

Please call me at your earliest opportunity if you have any questions or comments on the foregoing, or if you are of the view that additional submissions or materials would be required. Thank you for your past courtesy and your continued consideration of this matter.

Very truly yours,

