

§ 1A(c)(6)
of the Act

[Redacted]
[Redacted]
[Redacted] material may be subject
[Redacted] confidentiality provisions
[Redacted] (h) of the
[Redacted] restricts release of
[Redacted] Freedom of Information Act
[Redacted]

October 2, 1991

John Sipple
~~Senior Attorney~~ Assistant Director
Pre-Merger Notification Office
Federal Trade Commission
Room 306
6th and Pennsylvania Ave., N.W.
Washington, D.C. 20580

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RECEIVED
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Re: Hart-Scott-Rodino Act Advice

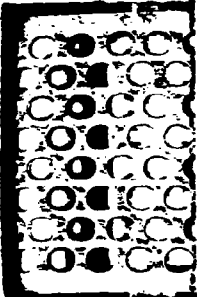
Dear John:

This will confirm the advice received on October 1, 1990 regarding the interpretation of Exemption 6, 15 U.S.C. § 18a(c)(6). The question involved an acquisition of one rail carrier by another, in which the transaction would be implemented through a voting trust during the pendency of proceedings before the Interstate Commerce Commission. The FTC/DOJ staff position is that Exemption 6 applies, and no HSR filing is required where the application to the regulatory agency is filed prior to or contemporaneously with the closing on the sale and transfer to the voting trust.

Sincerely,

[Redacted Signature]

Called on 10/3, Agree the letter reflects the advice given.



In conclusion, the following rule of thumb should be used in determining the availability of the Section 7A(c)(1) exemption: The exemption should always be applicable if the purchase and sale is a *typical transaction* in both the seller's and buyer's businesses. If, however, there are obvious antitrust implications in the transaction, such as where the buyer and seller are competitors, or if the sale is *not* a typical business transaction for either the buyer or seller, the FTC should be consulted in order to reduce the risk involved in relying on the exemption. Thus, counsel must carefully review transactions on a case-by-case basis in order to determine whether the transaction is in the "ordinary course of business" within the somewhat narrow reading being given Section 7A(c)(1).

[iv]—*Office Buildings and Residential Property*. For example, a major corporation acquired a stock interest in an entity whose only asset consisted of an office building. The FTC staff determined that the acquisition was exempt as an acquisition of voting securities of an entity holding only realty under Rule § 802.1(a). In this regard, the FTC deems purchases of office buildings to be exempt in most cases and has concluded that acquisitions of residential property will virtually always be exempt. Many acquisitions of office buildings and residential property involve other types of assets or realty as well. An office building may, for example, include retail space, restaurants or other nonexempt real estate. Residential developments may include assets related to the construction or sale of the properties. In each case the FTC staff has required that the acquisition price be allocated between exempt and nonexempt property to determine if the nonexempt portion is of reportable size. In an unusual twist, however, the FTC staff does not require aggregation of the nonexempt portions of realty parcels located in different cities. Thus, if a transaction includes the sale of two office buildings located in Chicago, each with retail space valued at \$10 million, it will be reportable if the Size-of-Person Test is met. By contrast, if one of the two buildings is in Denver the transaction will be exempt. Although this approach may have substantial merit in terms of substantive antitrust policy, it is not supported by the Act or Rules. The FTC staff justifies the position by explaining that they are merely defining what is an office building for purposes of their informal exemptive treatment. As a result, the FTC staff *declines* to extend this position so far as to override the general asset aggregation rules. Therefore an acquisition of two nonexempt hotels for \$10 million each, one in New York and one in New Orleans would be reportable.

