7A(c)(1); 802.1(a)

By Fax

October 4, 1991

Mr. Richard Smith
Pre-Merger Notification Office
Room H-303
Federal Trade Commission
Washington, DC 20580

Dear Mr. Smith:

I am writing in further reference to the request for advice contained in my letter of September 19, 1991, and to follow up on our conversations of September 23 and 24, 1991.

In this letter, I will provide our client's responses to the factual inquiries that you made, and discuss certain legal points that you suggested might govern your Office's disposition of my request for advice.

You asked whether any of the office buildings in question contains retail space valued at $15 million or more. The answer is no.

You asked for more information on the nature of the post office buildings in question. All of the post office buildings except one contain facilities for both serving the public (e.g., selling stamps, accepting parcels) and sorting mail; one is solely a distribution center and office building, without any facility for serving the public. The value of that building is far below $15 million.

You asked for more information on what I characterized as "miscellaneous buildings" in my September 19, 1991 letter. All of them except one have, at minimum, some office component; some have parking lots and/or storage facilities attached to them. The one that lacks some office component is a parking lot. The aggregate value of these "miscellaneous buildings" is less than $15 million.

The aggregate value of all of the retail space in the office buildings, plus the post office building that is solely a distribution center post office, plus all of the "miscellaneous buildings" (including the parking lot) is less than $15 million.

Turning to the legal points, you suggested that the inclusion in the assets in question of real estate that is not of the type the acquisition of which would be exempt from a Hart-Scott-Rodino filing might preclude reliance on Reg. § 802.1(a). I respectfully suggest that this conclusion does not follow from either the language or the policy of the regulations.

Section 802.1(a) merely provides that "an acquisition of the voting securities of an issuer whose assets consist . . . solely of real property and assets incidental to the ownership of real property . . . shall be deemed an acquisition of realty." The language does not distinguish between "exempt-type" realty and "non-exempt-type" realty. In this case, "C"'s assets do consist solely of real property and assets incidental to the ownership of real property (subject to the qualification discussed in the next paragraph of this letter). Section 802.1(a) thus explicitly provides that an acquisition of "C"'s voting securities is to be deemed an acquisition of realty. But this does not answer -- and § 802.1(a) does not purport to address -- the ultimate question: whether the acquisition is exempt. For the answer to that question, it is necessary to turn to the statute's exemption of "acquisitions of . . . realty transferred in the ordinary course of business," and to the Office's consistent recognition that acquisitions of (among other things) office buildings fall within this exemption. Plainly, if the proposed transaction had involved the acquisition of the assets owned by "C," it would have been exempt, for the realty consists primarily of office buildings (and to the extent it is any other kind of realty, the value of such realty is less than $15 million). Under these circumstances, § 802.1(a) dictates that the fact that the acquisition is of securities rather than of assets does not alter that result. I suggest that the Office's policy of considering substance, rather than form, also compels this conclusion.

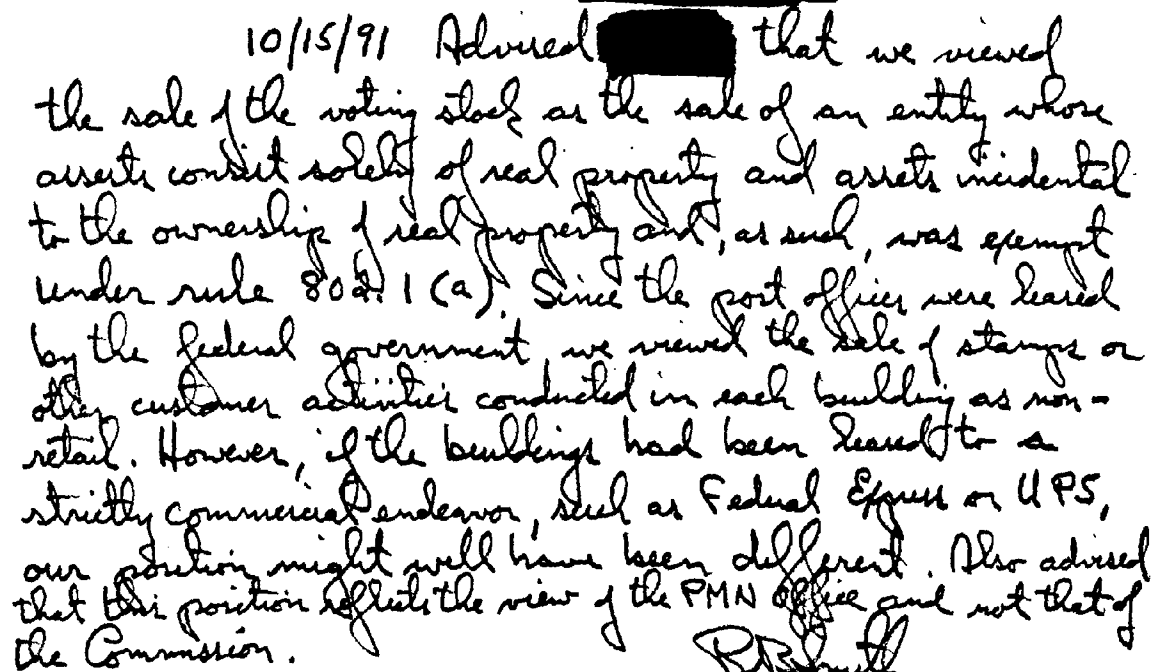
The other legal point that you raised is based on the fact that the proposed transaction involves the sale of the securities of "C," which in turn owns 100% of the voting securities of other entities; i.e., "C" indirectly owns the realty at issue here. You suggested that this therefore may not be the acquisition of the voting securities of an entity whose assets consist of real property and incidental assets, as required by § 802.1(a). I respectfully suggest that such a narrow reading of § 802.1(a) would create a meaningless distinction that could not have been intended by the drafters of the regulations, and that would serve no enforcement objective. It is of no possible antitrust significance that an entity's assets are held by a 100%-owned subsidiary, rather than by the entity itself. Whatever the tax or cor-

porate reasons for a structure consisting of levels of subsidiaries, the competitive consequences are precisely the same as if the structure had no such levels.

I appreciate the opportunity to present these views to you. If I can be of further assistance, please do not hesitate to call.

Thank you.

Very truly yours,



10/15/91 Advised [redacted] that we viewed the sale of the voting stock as the sale of an entity whose assets consist solely of real property and assets incidental to the ownership of real property and, as such, was exempt under rule 802.1(a). Since the post offices were leased by the federal government, we viewed the sale of stamps or other customer activities conducted in each building as non-retail. However, if the buildings had been leased to a strictly commercial endeavor, such as Federal Express or UPS, our position might well have been different. Also advised that this position reflects the view of the PMN Office and not that of the Commission.

R B Smith