

7A(c)(1)

[REDACTED]

[REDACTED]

April 8, 1993

Richard Smith  
Premerger Notification Office  
Bureau of Competition  
Federal Trade Commission  
Washington, D.C. 20580

APR 9 1 50 PM '93  
FEDERAL TRADE COMMISSION  
RECEIVED

Re: Section 18a(c)(1) Exemption for Acquisitions of  
Income-Producing Real Estate by REITs

Dear Mr. Smith:

I am writing to confirm the advice you provided in our telephone conversations of April 5, 1993 and April 7, 1993 and to provide you with the supplemental information you requested. In our conversations, you advised me that it is the position of the Premerger Notification Office of the Bureau of Competition of the Federal Trade Commission that a real estate investment trust ("REIT") that operates in compliance with the requirements to qualify as a REIT under the Internal Revenue Code need not file a premerger notification under 15 U.S. Code Section 18a with respect to an acquisition of income-producing real estate, because such an acquisition is regarded as an "acquisition of goods or realty in the ordinary course of business" of the REIT that is exempt under Subsection 18a(c)(1) (the "REIT Exemption").

My specific question related to whether a newly-formed company intending to qualify as a REIT would qualify for the REIT Exemption. As we discussed, under the federal tax regulations, a REIT may not make its formal election to be taxed as a REIT until the end of its first tax year./1/ However, to qualify as a REIT for such year the company would

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/1/ Treasury Regulation Section 1.856-2(b) provides, in reference to the election to be taxed as a REIT, that the "election shall be made by the trust by computing taxable income as a real estate investment trust in its return for the first taxable year for which it desires the election to apply, even though it may have otherwise qualified as a real estate investment trust for a prior year. No other method of making such election is permitted."

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be required to comply with the same source of income, composition of assets and distribution of income tests that would be applicable to a REIT that had already made its REIT election./2/ In addition, the company will obtain a tax opinion of counsel to the effect that the manner in which the company intends to operate is in compliance with the requirements to, <sup>be</sup> taxed as a REIT.

As we discussed, the company to which my inquiry relates has filed a registration statement with the Securities and Exchange Commission containing a prospectus in which the company represents that it will operate in compliance with the REIT requirements and will elect to be taxed as a REIT./3/ The company will undertake a public offering of securities using this prospectus and, under the Securities Act of 1933, as amended, the company will be subject to civil and criminal liability if the prospectus contains a material misstatement.

You advised me that under these circumstances it is the position of the Premerger Notification Office that as long as the company had a bona fide intention to qualify as a REIT and was operating in a manner consistent with the REIT qualification requirements, the REIT Exemption would apply to acquisitions of income-producing real estate by the company prior to the time the company made its formal election to be taxed as a REIT. You also advised me that it is the position of the Premerger Notification Office that if the company subsequently failed to qualify as a REIT, the company would then have a filing obligation under the premerger notification regulations.

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/2/ Although the company would be required to comply with most of the organizational requirements applicable to REITs that have been operating as such for a number of years, under the Internal Revenue Code the requirements that beneficial ownership of the REIT's shares be held by 100 or more persons and that not more than 50% in value of its shares be held by five or fewer persons are phased in over the initial years of the REIT's existence as such. In the case of the company in question, such requirements will be met at the time the company makes its first acquisition of income-producing real estate.

/3/ The Company's Articles of Incorporation, as filed with the Maryland Department of Assessments and Taxation contain provisions specifically designed to insure that the company will qualify as a REIT.

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Please advise me promptly if I have not accurately summarized the position of the Premerger Notification Office. Because our firm represents newly-formed REITs in addition to the company on whose behalf I called you, we expect to rely upon this position not only in our advice to this company, but also in advising other newly-formed REITs as to the applicability of the REIT Exemption unless we become aware that the position of your office has changed or of a change in the law or published regulations.

Sincerely,

[REDACTED]

[REDACTED] 4/12/93 advised writer that the 7A(c)(1) exemption was available to the proposed REIT due to its 1) having obtained a tax opinion that manner in which company intends to operate is in compliance with the requirements to be taxed as a REIT 2) articles of incorporation contain provisions designed to ensure that company will qualify as a REIT and 3) prospectus filed with SEC states that it will operate in compliance with the REIT requirements and will elect to be taxed as a REIT. Should, for any reason(s), company not become a REIT, it must file for any acquisitions already made which would have been reportable except for the 7A(c)(1) exemption for REIT purchases.

RBSmith