802.1

[redacted]

May 3, 1994

FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION OFFICE
MAY 3 3 29 PM '94

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VIA HAND DELIVERY

Mr. Patrick Sharpe
Compliance Specialist
Federal Trade Commission
Pre-Merger Notification Office
6th and Pennsylvania Avenues, N.W.
Room 301
Washington, D.C. 20580

Dear Patrick:

This is to confirm our telephone conversations on Friday April 29, 1994 and earlier today in which you agreed that the following transaction would be exempt from notification under the requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("H-S-R Act"), as amended:

A is a [redacted] business trust which will become, either prior to the transaction or as soon as possible following the transaction, a publicly held company subject to the requirements of the Real Estate Investment Trust Act of 1960, as amended ("REIT")[1]. B,C, and D are Subchapter S

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[1]Prior to the consummation of this transaction and a condition precedent to closing will be the following: (1) an IRS tax opinion will have been obtained indicating that A is operating in a manner which is in compliance with taxation as a REIT; (2) the articles of incorporation for A will be deemed to comply with the requirements for a REIT; and (3) the Form S11 prospectus will have been filed with the SEC indicating that A will comply with all REIT requirements and will elect to be taxed as a REIT. It is not clear whether the timing of the acquisition is such that prior to the acquisition the shareholder dilution requirements of a REIT will have been satisfied or whether this threshold will be met soon

These three factor agree with those presented in a letter to Richard Smith in which the advice given was the deal is exempt under 18a (c)(1) ordinary course.

on 4-8-93 [redacted]

> corporations with common shareholders, but with each being its own ultimate parent entity. B,C, and D each own as its principal asset a [redacted] A proposes acquiring all three [redacted] for a total consideration of $29 million. This acquisition will be accomplished either (1) through a merger of the three Subchapter S corporations into the [redacted] business trust in exchange for restricted shares in the REIT to the shareholders of B,C, and D[2] or cash in the amount of $29 million less the outstanding balances on any mortgages assumed by A or (2) a purchase of the assets from the Subchapter S corporations for cash plus the assumption of mortgage indebtedness.

It is my understanding that this transaction will be exempt from reporting under 15 U.S.C. § 18a(c)(1) since it is an acquisition of [redacted] in the ordinary course of business[3]. This exemption applies to REITs even though the property they are purchasing is income producing. Moreover, given the complexity of obtaining REIT approval, the FTC staff has applied the exemption to entities in the process of becoming a REIT so long as that entity is already conducting its business affairs consistent with those activities typically undertaken by the REIT.[4]

Furthermore, you confirmed that the exemption applies even if the transfer is accomplished through the merger of the corporations owning the [redacted] into the [redacted] business trust prior to the actual conversion of the trust into a REIT. Under 16

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thereafter; we understand, however, that this requirement need not be met prior to the consummation of this acquisition in order for the transaction to be exempted from the reporting requirements of the H-S-R Act.

[2]The receipt of the REIT shares by the four shareholders of B,C, and D will be below the reporting thresholds of the H-S-R Act, and, therefore, will not trigger a separate reporting requirement.

[3]In addition, based upon the allocation of the consideration among B,C, and D and the financial statements of B,C, and D, it is possible that one or more of these transfers would be exempt from reporting under the H-S-R Act under 16 C.F.R. § 802.20 or the size of the parties test prescribed in 15 U.S.C. § 18a. For purposes of this letter alone, however, we will assume that the size of the parties and minimum dollar value exemptions do not apply.

[4]If for some reason the REIT does not receive the requisite approvals, then there may be a reporting requirement for the purchase of the income producing property by the non-REIT entity.

C.F.R. § 802.1, an acquisition of the voting securities of an entity whose assets consist or will consist solely of [redacted] and assets incidental to the ownership of [redacted] is considered an acquisition of realty. It is my understanding that the FTC staff would considered the merger of the corporations owning the [redacted] as being tantamount to the purchase of securities of an entity whose assets consist solely of real property, and, therefore, exempt the transaction from reporting under 16 C.F.R. § 802.1 so long as the purchaser is a REIT.

Please let me know immediately if I have in any way misunderstood the FTC's position on this issue.

Sincerely,

[redacted]

This transaction is exempt.
Informed [redacted] 5-3-94
(RS)

see letter to Dick Smith
April 8, 1993 that
confirms the P.M.N Office
position on REITS.

RS - concurs