

See attached.

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[REDACTED]

[REDACTED]

May 3, 1995

This material may be subject to the confidentiality provisions of Section 7A(h) of the Clayton Act which restricts release under the Freedom of Information Act.

HAND DELIVERED

Malea R. C. Epps, Esq.
Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Ms. Epps:

We recently spoke on the telephone about the reportability of a transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 involving rental real estate property. I am writing this letter to confirm our conversation.

Description of Transaction

The proposed transaction involves the sale by a private investment trust of a small [REDACTED] in Florida to a private pension fund qualified under § 401(c) of the Internal Revenue Code. Buyer intends to create a special purpose limited partnership to acquire the [REDACTED]. The Buyer pension fund will control the limited partnership, but the property will be managed by a real estate development company as a limited partner. The [REDACTED] is currently subject to a \$17 million mortgage note. The [REDACTED] has less than \$25 million in total assets or annual net sales. In all other respects, the parties meet the size of person test under the Act.

Discussion

If the transaction were structured as an acquisition of voting securities, Buyer would pay approximately \$1.5 million for the stock of a special purpose corporation

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whose only assets are the [REDACTED] and assume the \$17 million mortgage liability. As an acquisition of voting securities for less than \$15 million, the transaction would be exempt under § 802.20 because the voting securities would confer control of an entity whose total assets and annual net sales are less than \$25 million. As a stock transaction, Buyer would dissolve the corporation and bring the assets up into the limited partnership. This may be a taxable event for the Buyer. Moreover, as an acquisition of stock, any other liabilities of the selling corporation would pass to the Buyer requiring a cumbersome indemnity arrangement. For the above reasons, it may be preferable to complete the transaction as an asset acquisition.

As we have discussed, as an asset acquisition this transaction would fall squarely within the exemption of proposed Rule 802.5. It is an acquisition of investment rental property assets by an institutional investor, as defined in § 802.64, and the rental property assets will not be rented to any entity included within the acquiring person. The entire [REDACTED] is retail rental property.

You explained that, to an extent, the proposed rules serve as codification of the Premerger Office's current interpretations of filing requirements. With respect to proposed Rule 802.5, I understand that the Premerger Office has regularly exempted acquisitions of rental real estate made by REITS. This position was adopted in part based on the conclusion that restrictions placed on REITS by the Internal Revenue Code limit the activity of REITS with respect to the realty purchased, making them passive investors.

Pension funds, like REITS, operate under certain restrictions to qualify under § 401 of the Internal Revenue Code. In addition, a qualified pension fund is subject to a host of restrictions under ERISA. Unlike the tax code, ERISA imposes fiduciary obligations on pension funds which further restrict their investment options and the activities in which they may engage as an investor. For example, ERISA would not permit a pension fund owner of rental real estate to advance the business interests of one tenant over another in the terms and conditions of the real estate rental. As I understand your reasons for exempting acquisitions by REITS of rental real estate, all of these reasons apply equally to the acquisition of rental real estate by a qualified pension fund. I believe the only difference between REITS and pension funds in

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terms of the degree of restriction and the passive nature of the investment is that pension funds operate under even greater restrictions than REITS.

For the above reasons, I am requesting that the transaction described in this letter be deemed exempt from H-S-R filing requirements prior to final adoption of any proposed rule changes. For the convenience of our communications, I would ask that you notify me if you disagree with my analysis.

Very truly yours,

[REDACTED]

[REDACTED]

[REDACTED]