12:04 FR[redacted] TO [redacted] PAGE [redacted]

802.2; 7A(c)(2); 802.5(b)(iv)

April 16, 1996

VIA FACSIMILE

Mr. Richard Smith, Esquire
Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
6th Street and Pennsylvania Avenue
Washington, D.C. 20580

his 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.

Re: **Real Estate Exemption**

Dear Dick:

Pursuant to your request, this letter sets out the facts pertinent to a transaction that we discussed on the telephone last week. We are seeking to determine if the transaction described below is subject to one or more filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a (the "Act").

The proposed transaction involves Person A and Person B. For the purposes of the Act, both Person A and Person B have a size in excess of $100 million. Person A has a corporate ultimate parent entity. To the extent the interior structure of A's person is relevant, it will be discussed below.

Person B has the following structure:

1. Partnership "B" holds approximately 70.9% of the outstanding shares of entity B-1, a corporation;
2. B-1 owns 100% of the outstanding securities of B-2, a corporation;
3. B-2 is the general partner of B-LP, a limited partnership;

4. B-1, B-2 and B-3, a wholly-owned subsidiary of B-2, collectively hold approximately 52% of the partnership interests in B-LP, which 52% interest consists of Class 2 and Class 3 limited partnership units;

5. "B" holds approximately 70.9% of the currently outstanding Class 1 limited partnership units in B-LP; and

6. The management of B-1 collectively holds approximately 5% of B-1's outstanding voting securities.

B is the ultimate parent entity of a Person including B-1, B-2, B-3, B-LP.

Person A and Person B are both large real estate companies. Their holdings consist of: (1) office and warehouse parks that include office buildings, pad sites for future office buildings and land which is leased to restaurants; (2) large parcels of undeveloped land; (3) recreational land such as golf courses (but no skiing facilities); (4) malls; (5) shopping centers; (6) hotels; and (7) assets related to the management of the real estate assets. Person B also holds the right to receive royalties from a silver mine. The market value of this right is far less than $15 million. Person A also manages properties, on a contract basis, that it does not own. At the time of the transaction described below, Person B will also own the right to receive payments on several notes it received in past sales of real property. These notes have a total value of approximately $41 million. Person A will have more than $15 million in cash on hand at the time of the transaction.

In the contemplated transaction, B-1 will merge with a newly-formed, wholly-owned subsidiary of A, with current B-1 shareholders receiving shares of A's common stock in exchange for their shares of B-1 in a proportion determined by a formula. A's newly-formed, wholly-owned subsidiary will be the surviving corporation in this merger. Further, A will form another wholly-owned subsidiary which will merge with B-LP. B-LP will be the surviving entity in that merger. Holders of Class 1 limited partnership units in B-LP will receive cash based upon a formula and have their limited partnership interests extinguished. The Class 2 and Class 3 limited partnership units, as well as the general partnership interest, will survive, and all will be solely within A's person at the conclusion of the transaction.

Based upon the foregoing, there would appear to be four potentially reportable transactions:

1. The merger between B-1 and A's first new wholly-owned subsidiary.

2. Acquisitions of shares of A by current B-1 shareholders.

3. The merger between B-LP and A's second new wholly-owned subsidiary.

4. The buying out of any minority Class 1 limited partnership unit holders of B-LP, where the result is that a single person holds all interests in the partnership.

As I understand the new regulations and the exemptions created thereby, no part of the proposed transaction will be reportable.

The transaction in the fourth category, A becoming the sole person with interests in the partnership B-LP, is necessarily non-reportable because as discussed above, B does not hold more than $15 million of assets which are not exempt real estate pursuant to 16 C.F.R. §802.2 (except for the notes which are cash equivalents and are exempt under 15 U.S.C. § 18a(c)(2)), and thus B-LP could not hold more than $15 million in non-exempt real estate assets pursuant to 16 C.F.R. §802.2.

The remaining three categories listed above are exempt pursuant to 16 C.F.R. §802.4. Each of the three involves an acquisition of voting securities of an issuer whose assets, together with those of all entities it controls, consist of assets the purchase of which would be exempt from the requirements of the Act pursuant to 16 C.F.R. §802.2. The notes are cash equivalents and exempt under 15 U.S.C. § 18a(c)(2). The cash that Person A has on hand is used in the holding and/or management of exempt real property, and/or is proceeds from the holding and/or management of exempt real property and is thus an asset the holding of which is incidental to the holding of that real property. Finally, the right to royalties from the silver mine is not an exempt asset, but it has a market value of less than $15 million (and is valued in the transaction at significantly less than its market value).

If you have any questions, comments or concerns, please feel free to give me a call. If you call between the 15th and 26th of April, please call [Michael Brockmeyer] as I will be out of the office.

under 802.5(b)(iv)

Sincerely,

[redacted]

4/26/96 Advised co-counsel to writer that cash held by A, regardless of its source, is an exempt asset. However assets of A used to manage properties of others are not exempt and must be valued to see if they exceed $15 MM on a fair market value basis. B's $41 MM note from sale of property also is an exempt asset.

RB Smith

cc: [redacted]

Question:

Can one calculate the percentage of voting securities held pursuant to § 801.12(b) by reference to a contract which restricts the right of a shareholder to elect the directors of an issuer? [illegible handwritten note]

Facts:

The issuer has two classes of voting securities: preferred stock and common stock. Under the Articles of Incorporation, (i) preferred shareholders can elect three of the five directors, (ii) common shareholders can elect one director, and (iii) the preferred shareholders and common shareholders, voting together as a single class, can elect the remaining one director.

Preferred Shareholder A holds only preferred stock, which constitutes (i) 75% of the preferred stock and (ii) 39% of all voting securities. Under a calculation pursuant to 801.12, he would hold 52.8% of the voting securities:

75% x 3/5 = 45.0%
39% x 1/5 = 7.8%
52.8%

However, pursuant to a contract with the other shareholders, Preferred Shareholder A is entitled to elect only two of the three directors that the preferred shareholders can elect as a class. Thus, by contract, Preferred Shareholder A holds only 47.8% of the voting securities (40% plus 7.8 (with respect to the fifth director))

4/11/96 - [illegible handwritten note] ... 75% x 3/5 = ... Shareholder A holds ... [illegible]