

802.1; 7A(c)(1)

June 4, 1998

VIA FACSIMILE (202) 326-2624
Richard B. Smith
Premerger Notification Office
U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Ordinary Course of Business Exemption

Dear Mr. Smith:

A client proposes to enter into the transaction described below, which I believe would be exempt from premerger notification requirements. After you have had an opportunity to review the description of the transaction and my comments, I would like to speak with you to confirm that the Staff concurs with my conclusion.

The transaction involves the sale of rights to service residential first mortgages. The servicing rights are being sold separately from the underlying mortgage notes. Seller is a commercial bank that, in the regular course of its business, makes loans secured by first and junior mortgages on commercial and residential property. Seller also, in the regular course of its business, buys and sells the rights to service residential mortgage loans. Buyer is a mortgage banking subsidiary of a bank and regularly acquires mortgage servicing rights.

Seller has made the decision that it no longer wants to hold the servicing rights for first mortgages on residential properties. In the past, Seller has not always immediately sold the right to service residential first mortgage notes that it has originated, whether or not the underlying note was sold to investors. Prospectively, Seller intends to monetize, in the current

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period, the future value of those servicing rights by selling them.

In this transaction, Seller will transfer to Buyer all residential first mortgage servicing rights that Seller holds on the effective date of the agreement, but Seller is not ceasing to originate and service of the mortgages. Seller will continue to originate residential loans secured by first and junior mortgages, and although Seller will not retain the servicing rights to the first mortgages, Seller will continue to service residential loans secured by junior mortgages. Seller will also continue to originate and service loans secured by both first and junior mortgages on commercial properties.

As a result of this sale, Seller anticipates that its overall mortgage servicing needs will decline. Seller anticipates that some staff who now provide services for residential first mortgages will be redeployed to positions appropriate to their skills in Seller's consumer finance division or in other areas of Seller. But Seller's staff who service residential first mortgages are not managed as an organizational unit distinct from staff who perform other loan servicing functions. Staff generally service both first and junior mortgages and some staff service both consumer and mortgage loans. In the course of the staff consolidation Seller's space requirements will also decline and it anticipates vacating a portion of the space in the building that houses its loan servicing operations, but loan servicing operations will continue at that location.

As an initial matter, it is my understanding that the sale of mortgage servicing rights would be treated by the Staff as the sale of "goods" for purposes of the ordinary course of business exemption under Section 7a(c)(1). See ABA Premerger Notification Manual, Interpretation 20. Also by analogy to Interpretation 20, it appears clear that such asset transfers are eligible for exemption under the ordinary course of business exemption. The question seems

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to be whether Seller's intention that it will no longer hold servicing rights for residential first mortgage loans makes the ordinary course of business exemption inapplicable to this transaction. That question, however, appears to be resolved by reference to Interpretation 23 in the Premerger Notification Manual. That interpretation confirms the relevance of a seller's organizational structure in determining whether a transaction involves the sale of all or substantially all the assets of an operating unit.

As noted above, Seller does not have a "residential first mortgage servicing unit." The functions and skills of staff who service residential first mortgages are very similar to the functions and skills necessary to service other loans for Seller. This staff, in its reduced form, will continue to perform all the functions that it performed prior to the transaction, i.e., generating mortgages, servicing mortgages (including junior residential mortgages), and selling both mortgage notes and mortgage servicing rights. The only difference will be that when, in the future, Seller originates a residential first mortgage, the rights to service that mortgage will be sold whether or not the underlying mortgage note is sold.

Based on this, I believe that the transaction would be exempt under Section 7a(c)(1). I would, however, like to confirm that the Staff concurs with that conclusion. I will plan to call later today in order to discuss the matter with you. If you would like to call with any questions or comments, please feel free to do so.

Thank you very much for your attention.

Sincerely,

[Redacted signature]

[Redacted text]

6/5/98 - Writer explained that junior mortgages are mortgage loans given on equity built up by owner in commercial or residential property. Also agreed that full sentences on top of page 2 should be corrected as indicated. Admitted that sale does not appear to be that of an operating unit and, thus, no HSR report is required. NO agree with conclusion. RB Smith