...Including Professional Corporations
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802.4

June 1, 1999

BY HAND DELIVERY

B. Michael Verne, Esq.
Premerger Notification Office
Room H-301
Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Verne:

This letter is to summarize conversations that we have had over the past few weeks concerning the application of the filing and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a, to the proposed acquisition by a real estate investment trust of voting securities and of partnership interests, as well as to the concomitant acquisition by an individual of voting securities of the real estate investment trust valued at more than $15 million. As we discussed, and for the reasons set forth in this letter, you agreed that the proposed acquisitions would not be subject to the Hart-Scott-Rodino ("HSR") requirements.

I. PROPOSED ACQUISITIONS BY THE REIT

A corporation that is qualified under the Internal Revenue Code as a real estate investment trust (the "REIT"), that is its own ultimate parent entity, and that has total assets in excess of $100 million intends to acquire 21 separate entities. The first three entities that the REIT intends to acquire are three separate corporations that are controlled by the same ultimate parent entity, which has assets in excess of $10 million. The REIT will pay in excess of $15 million to acquire 100 percent of the voting securities of these three corporations. As we discussed and as described in detail below, the acquisition of these three corporations would be exempt from the HSR requirements under 16 C.F.R. § 802.4 because the three corporations largely hold assets that are exempt from the HSR requirements under 15 U.S.C. § 18a(c)(2) or under 16 C.F.R. § 802.2, § 802.3, or § 802.5 and the nonexempt assets held by these corpora-

tions do not have an aggregate fair market value more than $15 million. The other 18 entities that the REIT intends to acquire are 18 separate limited partnerships, each of which is its own ultimate parent entity and each of which has total assets in excess of $10 million. With one exception, the REIT will pay in excess of $15 million for each limited partnership. Because each limited partnership holds only real property, you agreed that the acquisitions of the 18 limited partnerships by the REIT would be exempt from the HSR requirements. It must be noted, however, that the REIT has entered into a separate agreement and plan of merger with each of the 18 limited partnerships it intends to acquire. Each agreement and plan of merger is subject to the approval of the limited partners of the limited partnership that is the party to the particular agreement and plan of merger. Each agreement and plan of merger stands on its own. That is, the REIT intends to acquire as many of the limited partnerships that approve the agreement and plan of merger, and the acquisition of any one limited partnership does not depend on the acquisition of any other limited partnership. It is possible, therefore, that the REIT would acquire as many as 18 and as few as none of the 18 limited partnerships.

A. Proposed Acquisition by the REIT of Voting Securities of Corporations That Hold Exempt Assets

Each of the three separate corporations that the REIT intends to acquire is controlled by the same holding company ("Holding Company"). An individual owns more than 50 percent of the voting securities of Holding Company and, therefore, is the ultimate parent entity of each of the three corporations. (Because the minority holders of the first corporation are different from the minority holders of the second and third corporations, the sale of the first corporation is governed by one agreement, and the sale of the second and third corporations is governed by a separate agreement.)

The first of the three corporations that the REIT intends to acquire ("Advisor Corporation") serves as an investment adviser for the REIT, for the 18 limited partnerships that the REIT intends to acquire, and for certain third parties. Advisor Corporation advises the REIT and the limited partnerships with respect to acquisitions of real property. At present, Advisor Corporation derives most of its income from the REIT and derives some (less than 10 percent) of its income from the 18 limited partnerships that the REIT intends to acquire. Advisor Corporation derives less than 15 percent of its income from parties other than the REIT and the 18 limited partnerships that the REIT intends to acquire. It is the REIT's present intention to continue to operate Advisor Corporation as Advisor Corporation has been operated in the past. That

is, Advisor Corporation will continue to generate a small portion of its income (less than 15 percent) from sources other than its prospective parent corporation (the REIT) and its prospective related entities (e.g., the 18 limited partnerships).

Under 16 C.F.R. § 802.4, the acquisition of an issuer that holds assets that are exempt under 15 U.S.C. § 18a(c)(2) or under 16 C.F.R. § 802.2, § 802.3, or § 802.5 is exempt "if the acquired issuer and all entities it controls do not hold other nonexempt assets with aggregate fair market value more than $15 million." 16 C.F.R. § 802.4. You stated that because Advisor Corporation advises the REIT and the 18 limited partnerships that the REIT intends to acquire with respect to acquisitions of real property, the REIT's acquisition of that portion of Advisor Corporation dedicated to advising the REIT and its related entities (including those limited partnerships that the REIT ultimately acquires) would be exempt from the HSR requirements under 16 C.F.R. § 802.2 as an acquisition of assets incidental to the ownership of real property. However, you stated that the acquisition of that part of Advisor Corporation that advises third parties other than the REIT and the limited partnerships acquired by the REIT would not be exempt from the HSR requirements. You stated that in order to calculate the value of the nonexempt assets held by Advisor Corporation, one would seek to determine the fair market value of the assets of Advisor Corporation that are devoted to advising entities other than the REIT and entities the REIT will control. You stated, however, that if such a determination could not be made (because, for example, the company does not segregate its assets in that manner), as a proxy one could apply the percentage of Advisor Corporation's business that is derived from advising entities other than the REIT and entities that the REIT will control (which is less than 25 percent of Advisor Corporation's business, even if one assumes that the REIT will acquire none of the limited partnerships) to all of the assets of Advisor Corporation. If the value of those nonexempt assets, together with the value of other nonexempt assets that the REIT may acquire from the same acquired person, does not exceed $15 million, then the acquisition of Advisor Corporation would be exempt from the HSR requirements. In this case, the value of the nonexempt assets of Advisor Corporation is less than $2 million.

The second and third corporations that the REIT intends to acquire are closely related mortgage finance corporations ("First Mortgage Corporation" and "Second Mortgage Corporation"). As set forth above, each of these mortgage finance companies -- like Advisor Corporation -- is controlled by the same ultimate parent entity.

First Mortgage Corporation holds chiefly mortgages. These loans also may be secured by other assets, including leasehold interests and the business enterprise value

of the borrower's business operations. You agreed that these assets, because they are mortgages, would be exempt under 15 U.S.C. § 18a(c)(2) and that the additional security would not affect the exemption. First Mortgage Corporation also holds non-voting securities. You agreed that these assets probably would be exempt under 15 U.S.C. § 18a(c)(2) and, in any case, are not covered by the HSR reporting requirements for a secondary acquisition. 16 C.F.R. § 801.4.

First Mortgage Finance Corporation also holds other assets, largely cash and cash equivalents. We did not discuss whether these assets would be exempt under 16 C.F.R. § 802.4. The aggregate fair market value of these other assets is less than $8.5 million.

Second Mortgage Corporation holds assets that chiefly consist of receivables that are due from First Mortgage Corporation. You agreed that because these receivables do not represent an actual economic asset that will ultimately be held by the REIT, because both Second Mortgage Corporation and First Mortgage Corporation will be owned by the REIT, they need not be considered in the determination of whether the issuer that is being acquired by the REIT holds nonexempt assets with an aggregate fair market value of more than $15 million under 16 C.F.R. § 802.4. Second Mortgage Corporation holds other assets, largely cash and office furnishings and equipment. We did not discuss whether these assets would be exempt under 16 C.F.R. § 802.4. The aggregate fair market value of these other assets is less than $1.5 million.

In sum, even if all of the assets held by the First Mortgage Corporation and Second Mortgage Corporation that we did not agree are exempt are in fact not exempt, the value of those nonexempt assets would not exceed $10 million. Accordingly, the value of those possibly nonexempt assets – together with the value of the nonexempt portion of the assets of Advisor Corporation (less than $2 million) – would not exceed $15 million. Therefore, you agreed that the REIT may acquire Advisor Corporation, First Mortgage Corporation, and Second Mortgage Corporation from Holding Company without making an HSR filing.

(We understand that, under 16 C.F.R. § 802.4, the acquiring person should value the nonexempt assets of the issuers it is acquiring at the time of acquisition and not by reference to each issuer's most recent regularly prepared balance sheet – in order to determine whether the value of the nonexempt assets held by the issuers exceeds $15 million. We will therefore analyze the assets held by the three target corpo-

rations at the time of closing to determine whether they hold in the aggregate nonexempt assets with a fair market value of more than $15 million.)

B. Proposed Acquisition by the REIT of 18 Limited Partnerships

The REIT also intends to acquire 100 percent of the limited partnership interests of each of 18 separate limited partnerships. Each of the 18 limited partnerships is its own ultimate parent entity. Because the Federal Trade Commission ("FTC") views the acquisition of 100 percent of the interests of a partnership as the acquisition of the assets held by the partnership, the acquisition of each of the 18 limited partnerships would be viewed as the acquisition of the underlying assets of each limited partnership. Each limited partnership holds only real property. You agreed that the acquisition of these limited partnership interests by the REIT would be exempt from the HSR requirements because the FTC has determined that the acquisition of real property by a REIT is exempt from the HSR requirements. 61 Fed. Reg. 13682 (March 28, 1996).

II. ACQUISITION BY AN INDIVIDUAL OF VOTING SECURITIES OF THE REIT

As consideration for acquiring 100 percent of the voting securities of Advisor Corporation, First Mortgage Corporation, and Second Mortgage Corporation and for acquiring 100 percent of the limited partnership interests of each of the 18 limited partnerships, the REIT will issue voting securities of the REIT to the selling parties. As a result of the transaction, only one person or entity will hold more than $15 million worth of voting securities of the REIT – the individual who controls Holding Company.

The voting securities of the REIT held by that individual will be less than 10 percent of the outstanding voting securities of the REIT. Because that individual intends to participate in the formulation, determination, or direction of the basic business decisions of the issuer, 16 C.F.R. § 801.1(i), the acquisition of voting securities by that individual would not be exempt under 15 U.S.C. § 18a(c)(9). However, you agreed that the acquisition of voting securities of the REIT by that individual would be exempt under 16 C.F.R. § 802.4 if the nonexempt assets held by the REIT do not have an aggregate fair market value of more than $15 million.

The REIT holds the following assets:

- Real property that is currently rented (or held for rent) to entities not within the REIT. You agreed that these assets are exempt under 16 C.F.R. § 802.5.

- An 85 percent investment in a partnership that holds real property and a 68 percent investment in another partnership that holds real property. The real property held by these partnerships is currently rented (or held for rent) to entities not within the REIT. You agreed that these assets are exempt under 16 C.F.R. § 802.5.

- Bonds collaterized by real estate mortgages. You agreed that these assets are exempt under 15 U.S.C. § 18a(c)(2).

- Mortgage notes receivable. You agreed that these assets are exempt under 15 U.S.C. § 18a(c)(2).

- Equipment notes receivable, representing the financing of restaurant equipment, as well as of fixtures and furniture of real property that is rented to restaurants. You agreed that these assets would be exempt under 16 C.F.R. § 802.2(h) as assets incidental to the ownership of retail rental space.

- Cash and cash equivalents, including certificates of deposit. These assets represent (1) funds that have been generated by rental payments on the real property owned by the REIT; and (2) funds provided to the REIT by investors in the REIT and held by the REIT for the purpose of purchasing real property in the future. You agreed that these cash instruments would be exempt under 16 C.F.R. § 802.2 as assets incidental to the ownership of real property. With respect to that portion of these funds that has been provided to the REIT for the purpose of purchasing real property in the future, you stated that in the past the FTC had determined that such cash would not be exempt if held by a person that is not a REIT, even if the good faith intention of the person holding the cash was to use it to purchase exempt real property. However, because in this case the REIT not only has indicated its good faith intention to use these funds to purchase real property, but also is obligated under the tax laws to use these funds to purchase real property (or risk losing its tax-preferred status), you agreed that the cash and cash equivalents would be treated as exempt assets for the purpose of determin-

ing whether the REIT holds nonexempt assets with an aggregate fair market value of more than $15 million under 16 C.F.R. § 802.4.

- Rent receivables and accrued rental income. You agreed that these assets would be exempt under 16 C.F.R. § 802.2 as assets incidental to the ownership of real property.
- Unallocated prepaid fees representing the costs of raising funds for the REIT to be used to purchase real property by the REIT. You agreed that these assets would be exempt under 16 C.F.R. § 802.2 as assets incidental to the ownership of real property.

At present, the REIT holds no other assets. Accordingly, because all of the REIT's assets are exempt, the individual's acquisition of voting securities of the REIT that have a fair market value of more than $15 million would be exempt under 16 C.F.R. § 802.4.

(As set forth above, we understand that, under 16 C.F.R. § 802.4, the acquiring person should value the nonexempt assets of the issuer it is acquiring at the time of acquisition – and not by reference to the issuer's most recent regularly prepared balance sheet – in order to determine whether the value of the nonexempt assets held by the issuer exceeds $15 million. We will therefore analyze the assets held by the REIT at the time that the individual acquires shares of the REIT to determine whether the REIT holds in the aggregate nonexempt assets with a fair market value of more than $15 million.)

Thank you for your assistance in this matter. I look forward to speaking with you soon to confirm that the matters set forth in this letter accurately reflect the conversations that we have had over the past few weeks.

Sincerely,

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B. Michael Verne
6/10/99