

December 14, 1995

BY FAX

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

DEC 14 9 16 AM '95
FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

Dear Mr. Rubenstein:

I am following up on our phone conversation. As you know, that conversation focused on my letter to you of November 10, 1995. The terms used below (such as "New REIT") are used here the same way they are used in my earlier letter.

Of the several acquisitions described in my earlier letter, you indicated that two may be reportable -- Shareholder X's acquisition of New REIT's voting securities and Shareholder Y's acquisitions of New REIT's voting securities. If I understand correctly, your analysis is that, by virtue of the Merger of REITs A, B and C into New REIT, New REIT will have exceeded one or both of the \$10 million size-of-the-person thresholds by the time Shareholders X and Y acquire voting securities of New REIT.

That, however, is not what will happen. By virtue of state corporate law, the conversion of Shareholder X's and Shareholder Y's stock in REITs A, B and C will occur automatically upon, and as an integral part of, the Merger. The issuance of the New REIT shares cannot occur without the Merger and the Merger cannot occur without the issuance of the New REIT shares. They necessarily happen at the same time. Granted the HSR rules analyze the elements of the Merger separately (i.e., the acquisition of the disappearing corporations by the surviving corporation and the acquisition of the surviving corporation's voting securities by shareholders of the disappearing

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But to separate these elements in time and place

the person test is applied on a one-transaction basis

of the transaction itself. But the two size tests (person and transaction) are separate. One does not confuse them by taking

Nor does Rule 801.11(b)(1) dictate a different result. That rule requires the recomputation of assets and net sales for multiple entities that, at the applicable measurement time, are part of the same person but happen not to have consolidated financial statements. But here, REITs A, B and C will not have been part of New REIT's person at any time during the last full fiscal year preceding the Merger or as of the last balance sheet

it does

consolidated AN ISSUER

size of the person. And, or so we understand, neither "expansion events" (events that would drive a person above a size threshold) or "contraction events" (events that would drive a person below a

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the measurement time but before the closing of the transaction being tested. A fortiori, or so it seems to me, the transaction itself does not affect the size of the person. Certainly no rule says otherwise.

WRONG.

unconsolidated issuers must be added in!!!
Please let me know what you think. I again thank you for your patience and assistance, particularly given the time of year.

Very truly yours

[Redacted signature block]

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12/20 spoke to writer; Told him as above;
K & Y have to file.
HDR