

802.2
802.4

June 1, 1999

BY HAND DELIVERY

B. Michael Verne, Esq.
Premerger Notification Office
Room H-301
Federal Trade Commission

Washington, D.C. 20560

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.

~~As a result of our discussions, 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

[REDACTED]

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[REDACTED]

tered into a separate agreement and plan of merger with each of the 18 limited part-

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 each of the three corporations.

[REDACTED]

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.)

[REDACTED]

The Board of the three corporations that the REIT intends to acquire (the "Board") 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

[REDACTED]

is, Advisor Corporation will continue to generate a small portion of its income (less

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 acquisition 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 ad-

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 not related to the ownership of real property. 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

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

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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. Second Mortgage Corporation holds ...

... do not represent an asset ...

whether the issuer that is being acquired by the REIT holds nonexempt assets with an

equipment. We did not discuss whether these assets would be exempt under 16

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 ex-

mply, 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. The ...
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 bal

ceeds \$15 million. We will therefore analyze the assets held by the three target corpo-

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rations at the time of closing to determine whether they hold in the aggregate nonex-

Partnerships

The REIT also intends to acquire 100 percent of the limited partnership inter-

ISR requirements because the FTC has determined that the acquisition of real prop-

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 securities of the REIT. The individual who controls Holding Company 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:

[REDACTED]

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- 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

[REDACTED]

- Bonds collateralized 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).

[REDACTED]

equipment, as well as of fixtures and furniture of real property that is rented

- Cash and cash equivalents, including certificates of deposit. These assets

[REDACTED]

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

[REDACTED]

equivalents would be treated as exempt assets for the purpose of determin-

[REDACTED]
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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

[REDACTED]
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 non-exempt assets exceeds \$15 million.)

\$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,

[REDACTED]

[REDACTED] ASSET MANAGEMENT AND SERVICES
B. Michael Verne
6/10/99