KLO MB MU Conair 2/23/10

2/23/10 – The HSR Act exempts "acquisitions of goods . . . transferred in the ordinary course of business." 15 U.S.C. 18a(c)(1). See 16 CFR 802.1. The Premerger Notification Office (PNO) has long taken the position that in transactions involving a type of good that can be transferred in the ordinary course of business, if the seller is exiting an entire business via the transaction, the ordinary course exemption will not apply. For example, if a seller is exiting the mortgage servicing business via a sale of all of its mortgage servicing rights, that transaction would not be within the ordinary course of business even though the sale of such rights might otherwise qualify for the ordinary course of business exemption.

The question as to whether the ordinary course of business exemption can be relied upon where the seller has announced that it intends to exit an entire business (e.g., the mortgage servicing business), but will do so through two or more transactions involving multiple buyers rather than through a single transaction recently arose as a result of the email below. The PNO's position is that if seller has announced that it intends to exit a business, and it will do so through two or more sales of assets, none of those sales qualify for the ordinary course of business exemption. Such exit may be as a result of bankruptcy, or without seller entering bankruptcy. The fact that seller may not actually exit the business until the last sale occurs is not determinative. Thus, the transaction described below would be reportable.

From: [redacted]
Sent: Wednesday, November 04, 2009 1:07 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: HSR Question re: 802.1(a)

Dear Mike:
We would like for you to confirm that the following transaction is not reportable under Section 7A of the Clayton Act:

Buyer intends to acquire the following assets relating to Seller's mortgage servicing business: (i) servicing contracts for certain commercial mortgage loans, including securitized mortgage loans, mortgage loans serviced for certain governmental-sponsored entities and portfolio loans ("Servicing Contracts"), with a value in excess of $65.2 million (exclusive of advances); (ii) Buyer will also pay Seller approximately $15 million for certain accrued and unpaid servicing fees ("Servicing Fees") (this amount includes the value of any fees the servicer is entitled to receive from collections on account of the serviced loans, but that it has not yet received); and (iii) Buyer will also reimburse Seller for the value of "advances," i.e., payments the servicer has made on behalf of the mortgagees for principal and interest payments to bondholders and protective advances including property taxes and insurance premiums ("Servicing Advances"). The approximate value of the Servicing Advances is anticipated to be greater than $65.2 million. In addition, Buyer proposes to acquire certain mortgage loans from the Seller with an approximate outstanding

principal balance of $303 million that are unrelated to the Servicing Contracts.

Buyer will not be acquiring Seller's servicing rights and servicing agreements relating to a portfolio of Fannie Mae loans currently serviced by Seller. Buyer will also not be agreeing to offer employment to the employees of the Seller, but may in its discretion choose to do so in selected cases. However, Seller has filed for Chapter 11 bankruptcy, and its remaining mortgage servicing assets are likely to be sold to another bidder.

Under § 802.1(a), the sale of mortgage servicing rights constitutes a sale of goods in the ordinary course of business for purposes of the ordinary course of business exemption under Section 7A(c)(1) of the HSR Act. The exemption applies as long as (1) the seller remains in the ordinary course of business of servicing mortgage loans after the transaction has been consummated; and (2) the acquisition does not constitute the sale of an operating unit within the meaning of § 802.1(a).* See Informal Interpretation No. 0609005 (September 19, 2006); Informal Interpretation No. 0607001 (July 3, 2006). Because Seller will continue to service Fannie Mae mortgages after the transaction closes, the first requirement is met. This is the case even though Seller's remaining mortgage servicing business involves a different line of mortgages. See Informal Interpretation No. 0607001 (July 3, 2006); Informal Interpretation No. 9806002 (June 5, 1998). Secondly, there is no acquisition of an operating unit, as evidenced by the fact, among others, that a substantial majority of the employees associated with the business being acquired will not be offered employment with Buyer. Because the acquisition by Buyer of Seller's mortgage servicing business does not result in Seller exiting the mortgage servicing business entirely, it is our understanding that the acquisition by Buyer of the Servicing Contracts is exempt under § 802.1(a) as an acquisition of goods in the ordinary course of business.

The acquisition of the Servicing Fees is akin to the acquisition of accounts receivable. Based on Informal Interpretation 0804012 (April 23, 2008), we assume that we need to include the value of the consideration paid to acquire these assets in the size-of-transaction, since they do not constitute exempt assets under the Act.

Finally, we understand that unreimbursed advances, such as the Servicing Advances described above, are viewed by the FTC PNO as cash equivalents. See Informal Interpretation 0804012 (April 23, 2008). Cash and cash equivalents are assets whose acquisition is exempt under § 801.21. Therefore, the value of the Servicing Advances to be paid by the Buyer to the Seller is not included in the HSR size-of-transaction.

Based on the foregoing, because the acquisition of the Servicing Contracts is exempt under § 802.1(a), and because the acquisition of the Servicing Advances is exempt under § 801.21, assuming that the fair market value of the Servicing Fees is below $65.2 million, the transaction will not be not reportable.

Thank you for your help with this issue. Please feel free to call me to discuss the foregoing. I can be reached at [redacted] today and tomorrow.

Thank you,

[redacted]

* It is unclear whether the PNO still applies the "operating unit" concept in this context. See ABA Section of Antitrust Law, Premerger Notification Practice Manual, Interpretation 7 (4th ed. 2007). We have not addressed the question since the concept does not, in any event, apply to this transaction.

[redacted]