7A(c)(1)

Verne, B. Michael

From: [redacted]
Sent: Tuesday, February 05, 2013 4:41 AM
To: Verne, B. Michael; Walsh, Kathryn
Subject: Question Regarding "Ordinary Course" Exemption

Hi, Mike and Kate -

I am writing to inquire whether the "ordinary course" exemption would apply to the sale of mortgage servicing rights in the following situation:

X1 is a subsidiary of X and is in the business of acquiring, originating and funding residential mortgage loans. X1 acquires, originates and funds both "conforming" mortgage loans that are eligible for sale to government-sponsored enterprises such as Fannie Mae and Freddie Mac, and "non-conforming" mortgage loans that are not eligible for such sale. These mortgage loans generate a monthly payment that is composed of three parts: (1) the monthly principal amount; (2) the monthly interest payment; and (3) the monthly servicing fee payment. X1 often pools a group of conforming mortgage loans and sells the pool (a "GSE pool") to Fannie Mae or Freddie Mac. In this case, X1 essentially sells the monthly principal and interest components and retains ownership of the monthly servicing fee payment. Consequently, X1 remains the "servicer of record" per Fannie Mae and Freddie Mac.

When one party (here, X1) owns the right to receive the monthly servicing fee payments for a pool of loans owned by a second party investor (here, Fannie Mae or Freddie Mac), the rights to receive the monthly servicing fee payments are called the "mortgage servicing rights" for the pool.

X1, however, does not service itself, and has never itself serviced, any mortgage loans. X1 historically has contracted out the mortgage servicing for both conforming and non-conforming loans to X2, a separate subsidiary of X, or to third party sub-servicers. X2 currently is a debtor-in-possession in bankruptcy and eventually will be sold or liquidated.

X1 intends to sell to a third party the mortgage servicing rights related to the GSE pools. Subsequent to the sale of the mortgage servicing rights in the proposed transaction, X1 will continue in the business of acquiring and funding non-conforming residential mortgage loans. X1 will continue to own the right to receive cash flows that include amounts equivalent to the monthly servicing fee payments for these non-conforming loans, as well as the right in most cases to receive the remaining principal and interest collections, but will continue to contract out the mortgage servicing to third parties, as it historically has done. X1 also likely will remain in the business of acquiring and funding a limited number of conforming

residential mortgage loans, but it will not retain the rights to receive monthly servicing fee payments for those conforming loans and it will reduce significantly the amount of conforming loans that it originates.

We understand that the "ordinary course of business" exemption under 7A(c)(1) and Section 802.1 will apply to the sale of mortgage servicing rights provided that the seller is not exiting the mortgage servicing business as a result of the sale. See Informal Staff Opinions 1002001 (02/23/10) and 0901004 (01/12/09). We believe that there are two different means of analyzing this fact pattern, each of which supports the view that the "ordinary course" exemption should be available.

First, the level of X1's involvement with the servicing of mortgages is not changing. X1 was never itself in the business of servicing mortgages, although it did own the mortgage servicing rights for the GSE pools. Moreover, X2 is no longer considered part of X, as bankruptcy severs the chain of control for HSR purposes, so X cannot be considered to be exiting the mortgage servicing business by virtue of X2's impending sale or liquidation. See Informal Staff Opinion 0212014 (12/24/02). Since neither X1 nor any subsidiary of X (other than X2, which is in bankruptcy and no longer considered part of X for HSR purposes) is engaged in the mortgage servicing business, X1/X would not be exiting the mortgage servicing business as a result of the transaction.

Our second and alternative argument is that, after the sale of the mortgage servicing rights for the GSE pools, X1 will continue to hold rights to receive cash flows that include amounts equivalent to monthly servicing fee payments. This is the case because X1 will continue to originate non-conforming mortgage loans and to own the rights to receive interest cash flows that include amounts equivalent to monthly servicing fee payments with respect its ongoing mortgage loan production. Accordingly, X1 cannot be said to have exited the mortgage servicing business entirely, taking into account the nature and extent of its previous involvement. Indeed, X1 will continue to contract out the mortgage servicing for non-conforming loans as it has done historically (although the contracts will be with third parties).

Do you agree that the proposed sale of mortgage servicing rights is a sale in the ordinary course of X1's mortgage loan business and thus exempt from HSR reporting since X1 will continue to contract out the mortgage servicing for its non-conforming loan portfolio post-transaction?

Furthermore, we understand that accrued servicing fees are considered akin to accounts receivable and thus, not exempt from HSR. Their value will need to be included in the HSR size-of-transaction. Unreimbursed advances or servicing advances, however, are considered cash/cash equivalents whose acquisition is exempt from HSR reporting.

Please let me know if you have any questions and as always, many thanks for your guidance.

Best regards,

[redacted]

Agree - NL
KW concurs
2/5/13