

802.4
802.5
7A(c)(1)

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, May 23, 2006 11:36 AM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: HSR Compliance Question regarding Section 7A(c)(i) and the REIT Exemption

Mike,

This HSR compliance question concerns the applicability of the exemption for realty acquired in the ordinary course of business under Section 7A(c)(1) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act"). It is my understanding based upon a review of various Informal Staff Opinions of the Premerger Notification Office, including, without limitation, Informal Staff Opinion 9503024, and Section 197 of the ABA Section of Antitrust Law's Premerger Notification Practice Manual (3d. Ed. 2003) that the acquisition by one entity presently qualified as a real estate investment trust under Section 856 of the Internal Revenue Code (a "REIT") of the voting securities of another REIT is exempt from the requirements of the Act.

I have not, however, found any guidance regarding the following question. A REIT contemplates the acquisition of the voting securities and non-corporate interests of various corporations and unincorporated entities that hold nothing but real estate assets. Is the acquisition by a REIT of the voting securities and non-corporate interests of corporations and unincorporated entities that hold nothing but real property assets exempt from the Act pursuant to Section 7A(c)(i)?

In particular, I was wondering if such an acquisition is exempt pursuant to Section 7A(c)(i) and 16 C.F.R. Section 802.4(a). It is my understanding that the acquisition of real property by a REIT is exempt pursuant to Section 7A(c)(1) because REITs acquire and sell real property in the ordinary course of their businesses. Furthermore, 16 C.F.R. Section 802.4(a) provides in relevant part that, "An acquisition of voting securities of an issuer or non-corporate interests in an unincorporated entity whose assets together with those of all entities it controls consist or will consist of assets whose acquisition is exempt from the requirements of the Act pursuant to Section 7A(c)(i) of the Act, this part 802, or pursuant to [Section] 801.21 of this chapter, is exempt from the reporting requirement if the acquired issuer or unincorporated entity and all entities it controls do not hold non-exempt assets with an aggregate fair market value of more than \$50 million (as adjusted)" (bold added for emphasis). It accordingly appears that Section 802.4(a) exempts from the HSR Act any acquisition by a REIT of voting securities in corporations and non-corporate interests in unincorporated entities that hold \$56.7 million or less of non-exempt assets, including any non-realty assets, because a REIT's acquisition of real property by is itself exempt pursuant to Section 7A(c)(1).

Any guidance that you may be able to offer would be appreciated.

Best regards,

[REDACTED]

YES. THE ACQUISITION WOULD
BE EXEMPT UNDER 802.4 (VIA
7A(C)(1)) AND ALSO POSSIBLY
VIA 802.5, DEPENDING ON WHAT
TYPE OF PROPERTY IS INVOLVED.
B. Michael
5/23/06