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November 17, 1988

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COMMUNICATIONS SECTION

Mr. Patrick Sharpe  
Compliance Specialist  
Federal Trade Commission  
7th Street and Pennsylvania Avenue, N.W.  
Room 303  
Washington, D.C. 20580

Dear Mr. Sharpe:

We represent a state licensed mutual savings bank, a subsidiary of which ("Seller") is considering selling substantially all of its assets to a subsidiary of a publicly traded real estate investment trust ("Buyer"). We are writing pursuant to our telephone conversations of November 11 and 14, 1988, in the hope that you will confirm our conclusion that the proposed transaction is not subject to the premerger reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Hart-Scott-Rodino Act") by virtue of the exemption provided in Section 18a(c)(2) thereof.

Seller was incorporated in 1985 as a limited purpose finance company organized for the purpose of issuing collateralized mortgage obligations ("CMOs")<sup>1</sup>. Under its charter, Seller is prohibited from engaging in any activity other than issuing CMOs and holding the collateral securing such obligations. In October 1985, Seller filed a registration statement with the Securities and Exchange Commission providing for the public offering of up to \$400,000,000 principal amount of CMOs. In November 1985, Seller issued \$200,000,000 principal amount of its CMOs and in January

1. A CMO is a debt obligation issued in one or more classes which is collateralized and funded as to the payment of interest and the repayment of principal by a specific group of mortgage loans or mortgage-backed securities. As of November 1988, over \$200 billion aggregate principal amount of CMOs had been issued.

1986, Seller issued the remaining \$200,000,000 principal amount of its CMOs. Each series of CMOs is separately collateralized, principally by Guaranteed Mortgage Pass-Through Certificates ("FNMA Certificates") issued and guaranteed by the Federal National Mortgage Association ("FNMA"). The first series of CMOs was rated AAA by Standard & Poor's Corporation and the second series of CMOs was rated AAA by Standard & Poor's Corporation and Aaa by Moody's Investors Service. Seller has no present intention of issuing any additional CMOs.

As the issuer of the CMOs, Seller is entitled to receive the difference, if any, between (a) distributions on the FNMA Certificates pledged to secure the two series of CMOs and reinvestment income thereon and (b) debt service on the two series of CMOs and related administrative expenses (such difference being referred to herein as "residual cash flow"). To date, Seller has distributed all of the residual cash flow it has received as dividend payments to its banking parent.

Seller's banking parent is not in compliance with its regulatory net worth requirement and is operating under the supervision of its regulators. In an effort to improve its financial position, Seller's parent is considering the sale of substantially all of Seller's assets in the manner described below. It will be a condition to the consummation of the proposed transaction that it be approved by the parent's federal and state banking regulators.

Under the terms of the proposed sale, Seller will sell to Buyer substantially all of its assets and Buyer will assume substantially all of Seller's liabilities. The assets to be sold consist of approximately \$158,601,900 principal amount of FNMA Certificates, \$660,000 face amount of deposit receipts representing stripped Treasury securities held in a reserve fund to cover expenses and a small amount of undistributed cash. The FNMA Certificates, deposit receipts and cash are held in trust by the Indenture Trustee for the benefit of the holders of the CMOs. The liabilities to be assumed consist of \$158,553,649 principal amount of CMOs which remain outstanding as of November 2, 1988. As a condition to consummating the sale, Buyer will be required to enter into a supplemental indenture with the Indenture Trustee pursuant to which Buyer will succeed to Seller's obligations under the CMO Indenture, including its obligations under the CMOs. The assets to be purchased will continue to be held in trust by the Indenture Trustee for the benefit of the holders of the CMOs. As the new CMO issuer, Buyer will be entitled to all future residual cash flow generated as a consequence of the two CMO transactions.

2. While Buyer technically would be acquiring assets of over \$100,000,000, if a deduction were made for the CMO debt incurred  
(footnote continued)

Section 18a(c)(2) of the Hart-Scott-Rodino Act exempts from the premerger reporting requirements transactions involving "acquisition of bonds, mortgages, deeds of trust, or other obligations which are not voting securities." There is nothing in the statute which denies the availability of the exemption (assuming it is otherwise available) to transactions involving the sale of substantially all of an entity's assets. It is our view that the sale of the FNMA Certificates securing the two series of CMOs (together with a de minimus amount of non-voting deposit receipts and cash) should be treated as falling within the four corners of the exemption. FNMA Certificates are non-voting obligations issued by FNMA that represent ownership of pools of mortgage loans that meet FNMA's eligibility requirements. FNMA guarantees to the registered holder of each FNMA Certificate that it will distribute amounts representing scheduled principal and interest on the mortgage loans in the pool represented by such FNMA Certificate, whether or not received, and the full principal amount of any foreclosed or other finally liquidated mortgage loan, whether or not received. FNMA, a federally chartered privately owned corporation, is perceived by Standard & Poor's Corporation and Moody's Investors Service as having the equivalent of an AAA/Aaa credit rating. Accordingly, collateralizing a CMO with FNMA Certificates eliminates the requirement for expensive credit enhancement features which are typically required for CMOs collateralized with mortgage loans. For purposes of the Hart-Scott-Rodino Act investment in a FNMA Certificate is the functional equivalent of investment in the underlying pool of mortgage loans.

We are further of the view that the proposed transaction would not diminish competition among CMO issuing entities and nothing would be gained by subjecting the proposed transaction to the premerger notification requirements. There is currently an active market for sales of investments in CMO issuances. Indeed, within the past three years at least eight publicly traded real estate investment trusts have been organized for the purpose of investing in residual cash flow generated from CMO transactions.

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(footnote continued from previous page)  
to finance such assets, the resulting acquisition would amount to \$708,251. The purchase price of the assets (which was determined on the basis of the parties' expectations of the amount of residual cash flow to be generated over the life of the two CMO issuances) is expected to be approximately \$1,150,000. Viewed from such a perspective, the size of the transaction would not be sufficient to trigger the premerger notification requirements.

In addition to such companies, a large number of other entities make such investments as a component of their regular business activities.<sup>3</sup>

On the basis of the foregoing, we are of the view that the proposed transaction is not subject to the premerger reporting requirements of the Hart-Scott-Rodino Act, and we respectfully request that you confirm our conclusion. As the parties to the transaction are under extreme scheduling pressure to conclude the transaction, we would be grateful for a response at your earliest convenience.

Please call either of us at [REDACTED] if we can be of any assistance.

Very truly yours,

[REDACTED]

302.1 or

This cannot be exempt under the c-2 exemption because substantially all of the assets of the acquired entity will be acquired. As a result, a "business" will be acquired. Thus, this cannot be in the ordinary course. It may be exempt under C-8 if applicable. Also, the 10-day waiting

3. The development of the mortgage related securities market was enhanced in recent years as Congress passed the Secondary Mortgage Market Enhancement Act (Pub. L. No. 98-440, 98 Stat. 1689 (1984)) and provided for the creation of real estate mortgage investment conduits (26 U.S.C. §860A et seq.) as part of the Tax Reform Act of 1986. Among other things, such legislation was intended to facilitate trading of derivative mortgage products.

period for bankruptcy may apply. Called [REDACTED] 11-22-88 and informed him of the above. B.S., W.K. concurs