

VC 802.636
Exemption
limited to contract

if insurance + not
extend to investment
of premiums.

January 30, 1988

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PRE MERGER
NOTIFICATION
OFFICE

Victor H. Cohen, Esq.
Premerger Notification Office
Room 308
Federal Trade Commission
Six Pennsylvania Avenue
Washington, DC 20580

Dear Mr. Cohen:

This letter relates to a proposed transaction (agreed upon by both of the parties) which was discussed with you earlier today, in which call both [redacted] for the [redacted] company buyer, a client of [redacted] and [redacted] for the seller participated. The matter concerns an acquisition which would appear to fall within exemptive Clause (c)(11)(B) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, (the "Act") which reads as follows:

"(11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business;"

The transaction under agreement calls for the sale of a shopping center by a partnership composed of institutional investors, none of which is an ultimate parent entity of the partnership, to a partnership (the "Acquiring Partnership") in which more than 50% of the voting interests will be held by a [redacted] company. The [redacted] company ultimate parent entity (hereafter the [redacted] company") will, through this partnership vehicle, acquire the controlling interest in the shopping center and either hold it for its own account or place it in a pooled

account (within the company) which the [REDACTED] company manages for pension funds.

The [REDACTED] company will acquire the controlling interest in the assets for investment. This is clear because its controlling partnership interest will be held in an account for the benefit of its [REDACTED] or in a pooled account which it manages for pension funds. Moreover, it is contemplated that the management of the acquired shopping center would be the responsibility of the other partner in the Acquiring Partnership which is part of the [REDACTED] company ultimate parent entity, and accordingly, the ultimate parent [REDACTED] company's role with respect to the investment will be passive.

The acquisition will be in the ordinary course of the [REDACTED] company's business. This is clear because the most important parts of [REDACTED] company's ordinary course of business are [REDACTED] the [REDACTED], holding or disposition of these investments and [REDACTED] from the proceeds of such investments. Clearly, each of these major parts of the [REDACTED] company's business is important and necessary to its proper operation in the ordinary course of business.

It had been stated (in an earlier conversation between Mr. Sharpe of the FTC Pre-Merger Staff and [REDACTED] relating to another transaction in which the contemplated buyer in this present matter was not involved) that the "real estate" exemption under Clause (c)1 of the Act (and the related exemptive rule) was not applicable in general to the sale of a shopping center--because the sale of a revenue producing asset was not regarded by the Pre-Merger Staff as being in the ordinary course of business of any seller under that particular exemptive clause. We do not take issue with the Staff's position with respect to Clause (c)1, which is not here involved.

However, I believe that exemptive Clause (c)(11)(B) of the Act should be available in the case at hand. I believe it is clear that, although the concept of "ordinary course of business" in the real estate exemption in Clause (c)1 may be read to apply to both the seller and the buyer or at least to apply to the seller because it refers to the "transfer" of goods or realty as well as the "acquisition" of goods or realty, the concept of "ordinary course of its business"--as used in the exemption in Clause (c)(11)(B)--applies only to

the ordinary course of business of the particular bank, trust company, investment company or insurance company that is making the acquisition of assets for investment under Clause (c)(11)(B). To be specific, Clause (c)(11)(B) refers only to acquisitions (not acquisitions and transfers); it only encompasses acquisitions of assets for investment (not all acquisitions); and it refers to acquisitions by any of the named types of companies in the "ordinary course of its business". The use of the word "its" makes it clear beyond question that it is only the ordinary course of business of the acquiring [REDACTED] or other named type of financial acquirer which is relevant under this exemption. Thus, the ordinary course of business concept as developed under Clause (c)1 is inapplicable to Clause (c)(11)(B).

Moreover, since Clause (c)(11)(B) is limited to acquisitions for investment, and since a [REDACTED] company typically acquires investment assets with revenue producing characteristics (as in the case here), we believe it is clear that acquisition of assets by this [REDACTED] company for investment must necessarily include the acquisition of a shopping center (which is a revenue producing property) for investment, in the manner described above.

Finally, I note that Congress must have intended Clause (c)(11)(B) to address a very different set of circumstances than those addressed by Clause (c)1. The institutions enumerated in Clause (c)(11)(B)--insurance companies, banks, trust companies, and investment companies--are each closely regulated by governmental bodies. For example, statutes in each state in which a [REDACTED] company does business and the regulations of the [REDACTED] of such states significantly control and regulate the types of investments [REDACTED] companies can make. Accordingly, one can readily see why this limited group of [REDACTED] institutions should, as a policy matter, be entitled to the benefits of the Clause (c)(11)(B) exemption, since the anticompetitive potential of such asset acquisitions for investment is truly remote.

Both I and inside counsel for my client, [REDACTED] inside counsel for the real estate adviser to the seller, would very much appreciate your further review of this matter and the conclusion set forth above to the effect that exemptive clause (c)(11)(B) would be available to the particular transaction described above.

Accordingly, I would very much appreciate a call back from you after you have had an opportunity to review this letter. If any additional details on the transaction would be useful to your consideration, please call me.

I am sending this letter both by fax and hand delivery on Monday morning.

Sincerely,

[REDACTED]

[REDACTED]

cc:

[REDACTED]