

Rule 802.1 (b)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

November 6, 1990

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6:50 PM

BY MESSENGER

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Premerger Notification Office
Bureau of Competition
Room 305, Headquarters
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

This material may be exempt from the confidentiality provisions of Section 74 (b) of the Clayton Act which restricts disclosure under the Freedom of Information Act

Re: Request for Clarification Under the Hart-Scott-Rodino Antitrust Improvements Act

Dear Dick:

This letter sets forth the facts underlying a proposed acquisition of land and requests the FTC Staff's view as to whether the parties to the proposed transaction may reasonably take the position that the proposed acquisition is exempt from the notification and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act (the "Act"). A brief summary of the following facts underlying this proposed transaction was first presented to you by telephone on October 17, 1990 by [REDACTED] of this firm. The relevant details of the transaction are as follows:

1. Our client [REDACTED], a real estate developer, owns a parcel of land in fee simple ("Parcel X"). [REDACTED] has leased Parcel X to a lessee ("Lessee") under a 99-year ground lease.-
2. Lessee has constructed, owns and currently operates an office building on Parcel X (the "Improvements").

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3. The Improvements contain office space and certain retail stores and restaurants.
4. [REDACTED] has no current ownership interest in the Improvements; at the expiration of the ground lease (which will occur in approximately 83 years) [REDACTED] will become the owner of the Improvements. Inasmuch as the useful life of the Improvements is far shorter than 83 years, the Improvements have no current value for the [REDACTED]
5. [REDACTED] receives basic rent payments from Lessee pursuant to the ground lease. In addition, [REDACTED] receives additional rent from Lessee based on a percentage of the revenues generated by the Improvements.
6. [REDACTED] proposes to sell Parcel X in fee simple, subject to the ground lease, for \$100 million to a purchaser generally engaged in investing pension fund assets ("Purchaser").
7. The conveyance will consist of the reversionary interest in Parcel X, and the right to receive the ground rent. Purchaser will have no ownership rights with respect to the Improvements until the year 2072.

For the purposes of our analysis, and based upon discussions with the parties, we have assumed that the proposed sale of Parcel X to Purchaser meets the threshold tests of the Act and that absent an applicable exemption the proposed transaction is reportable under the Act.

As [REDACTED] and you discussed by telephone, we believe that the proposed transaction should be exempt from the requirements of the Act under Section 7A(c)(1) as an acquisition of realty transferred in the ordinary course of business. The transaction will not result in the sale of all or substantially all of [REDACTED] assets. You raised the question whether the proposed transaction qualifies for the Section 7A(c)(1) exemption considering that Parcel X generates some income for [REDACTED] in the

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form of the ground rent payments received from the owner of the Improvements.

We understand that the FTC Staff has, through informal interpretations, viewed acquisitions of office buildings as exempt under the Act provided that the value of any retail or other non-office space is \$15 million or less. We also understand that, in order to avoid the potentially anomalous result of having an exempt sale of an office building located on a non-exempt parcel of land, the FTC Staff has proposed that a sale of land similar to the proposed transaction is exempt if a hypothetical sale of the office building would be exempt under the Act (i.e., if such building contains non-office space with a value of \$15 million or less).

Section 801.10(a) of the rules promulgated under the Act (the "Rules") states that the value of assets to be acquired (in the instant hypothetical, the value of the non-exempt portion of the Improvements) shall be the fair market value of such assets or, if determined and greater, the acquisition price. We believe that due to the completely separate ownership of Parcel X and the Improvements, a hypothetical valuation of the entire non-office portion of the Improvements does not represent an accurate or equitable allocation of the value of the non-office portion of the Improvements to [REDACTED] and does not reflect the true nature of this transaction. This is because [REDACTED] has no current ownership interest in the Improvements and no control over the Lessee's use or disposition of the Improvements, and does not derive the economic benefit from the Improvements that the Staff's view would attribute to the transaction.

As previously mentioned, the proposed transaction involves only the sale of land, not the Improvements. Parcel X and the Improvements are owned by different owners. We also point out that in the event of a sale of the Improvements in a reportable transaction, the FTC Staff would have the opportunity to review the transaction in accordance with the provisions of the Act.

We submit that a more accurate valuation of this particular transaction, from the perspective of [REDACTED] and Purchaser, is the fair market value of that portion of the ground lease payments received by [REDACTED] which is attributable to the non-exempt (i.e., non-office use) portion of the Improvements. We have enclosed with this letter an analysis prepared by [REDACTED]

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[REDACTED], a well-recognized firm engaged in the analysis and valuation of investment real estate, which sets forth a detailed analysis of the fair market value of the non-office portion of the revenue received by [REDACTED] under the ground lease, including the percentage rent. [REDACTED] values the non-office portion of the income received by [REDACTED] at approximately \$6.3 million, which is well below the \$15 million threshold.

We submit that under the foregoing interpretation of the Rules the proposed transaction is not reportable under the Act. Inasmuch as [REDACTED] and Purchaser have entered into a binding purchase and sale agreement and Purchaser intends to expend considerable time and resources on an analysis of Parcel X, we would appreciate it if you would inform us by November 16, 1990 whether the FTC Staff will accept our analysis. I suspect that you will have some questions, so please do not hesitate to telephone me at [REDACTED] or, in my absence, [REDACTED]. Your attention to this matter is greatly appreciated.

Sincerely,

[REDACTED]

Enclosure

cc: [REDACTED]

11/7/90 discussed with J.M. Sipple. Above
our view is that sale of fee interest in real
property, from which lease payments are derived
as a result of building on such property, is
exempt under § 2.1 (b), since lease payments
are "incidental" to the ownership of the
real property. Of course, if office building
is bought by Purchaser, [REDACTED] or anyone else, the
purchase would be reportable if greater than
15 MM of non-office space is involved and other
size tests are met.
RBSmith