

7A(b); 801.1(g)(1); 801.1(c)(4)

[REDACTED]

[REDACTED]

December 12, 1994

**Via Facsimile and U.S. Mail**  
**202-326-2624**

Mr. Richard B. Smith  
Premerger Notification Office  
Federal Trade Commission  
Washington, D.C. 20580

DEC 16 5 12 PM '94  
FEDERAL TRADE COMMISSION  
PREMERGER NOTIFICATION

Re: Request for Interpretation

Dear Mr. Smith:

As a follow up to our conversation on December 6, 1994 and on behalf of our client (the "Acquiror"), we are writing to request that you confirm your preliminary analysis that the Acquiror's proposed acquisition of beneficial interests in seven business trusts is exempt from the premerger notification and waiting period requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a (1976) (the "Act").

release under the Freedom of Information Act

I. Relevant Facts

The Acquiror is a major [REDACTED] with total assets or annual net sales of \$100 million or more. The Acquiror is entering into the proposed transaction for investment purposes only. In the proposed transaction, the Acquiror intends to purchase in a secondary market transaction 100% of the beneficial interests in seven Delaware business trusts for a total cash purchase price of approximately \$3.2 million. All of such beneficial interests are currently owned by one entity. Each trust owns separately a parcel of real property and leases such property to a retail store operator. Each trust was organized as a single-purpose entity for the purpose of separately financing the property owned by such trust. In connection with the financing by each trust, the trust borrowed money and secured the notes it issued by a first mortgage on its property. The financing documents related to one trust do not contain any cross-default provisions to those of another trust. Each trust assigned its rights under its lease and all rental payments to its lender. The lenders have the right to administer the lease. If a trust defaults in its obligations as landlord under its lease, such a default by a trust would not

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affect any lease or financing documents of any other trust. The value of the assets held by each trust is less than \$15 million, and the aggregate value of all the trusts' assets is approximately \$55 million.

A trust company acts as the institutional trustee for each of the trusts and in certain cases an individual acts as co-trustee. Each trust agreement that is the governing instrument of a trust, provides that the owner of the beneficial interests of the trust or, if there is more than one owner, all owners acting unanimously, may remove the trustee without cause by written notice to the trustee. The holders of the beneficial interests may appoint a successor trustee that is a bank or trust company with a principal place of business in the State of [REDACTED] and has a combined capital and surplus of at least \$50 million or the performance of its obligations under the trust agreement is guaranteed by a bank or trust company having a combined capital in surplus of at least \$50 million. The trust agreements further provide that the respective trust agreement may only be amended or supplemented subject to the applicable provisions of the financing documents related to each property. The financing documents also contain a negative covenant that states that the trust may not amend or modify its documents of formation (i.e., the trust agreements) or other constituent documents without the consent of the lenders under the financing documents.

In connection with the proposed transaction, title to the assets of the trust will not be transferred and the properties will continue to be owned by each trust, the liabilities on the notes issued by each trust will continue to be liabilities of such trust and the property owned by such trust will continue to be encumbered by the mortgages securing its notes.

Although we do not believe that the beneficial interests should be regarded as voting securities as defined in the Act, if they are deemed to be voting securities, it is our opinion that the trusts should be regarded as their own ultimate parent under the Act and that the acquisition of the beneficial interests in each trust be viewed separately.

## II. Discussion

### A. Are beneficial interests in the trust "voting securities?"

It is our view that the beneficial interests in the trusts are not "voting securities" as defined under subsection (b) of § 18a of the Act. As a general rule, the owner of a beneficial interest in a trust is not deemed to own voting securities. In the proposed transaction, the general rule should continue to apply.



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Voting securities in subsection (b) of the Act provides that:

The term "voting securities" means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

In general, owners of beneficial interests in trusts do not have the right to elect persons who perform a function equivalent to that of directors of a corporation or to vote on matters affecting the assets or the business of the trust. The settlor of the trust and an appointed trustee enter into a trust agreement which governs the rights, duties and obligations of the trustee with respect to the management of the trust. Our client is purchasing the beneficial interests in the trust in a privately negotiated transaction and is not the settlor of the trust.

The beneficial interests being purchased do not carry any other indicia of voting securities. They are not publicly tradable or freely alienable. The interests are subject to significant restrictions on transferability pursuant to the terms of the applicable financing documents related to the properties of the trust. A substantive nonconsolidation legal opinion and an estoppel certificate from the trustees are required prior to any transfer of the interests.

Although the holders of the beneficial interests in the trusts have the right to remove the trustee and to replace the trustee, the exercise of such right is subject to the consent of the lenders to the trust. As stated above, the financing documents do not permit the trust agreements to be amended or modified without the consent of the lenders to the respective trust. In addition, by their own terms, the trust agreements may not be amended or supplemented without compliance with the applicable financing agreements.

**B. Is the purchase an acquisition of the trust assets?**

In our view, the purchase of the beneficial interests in the trusts is not an acquisition of the trust assets. The Acquiror is purchasing beneficial interests in the various trusts and will not have legal title to any part of the property held by any trust. Each trust is a separate legal entity formed under the laws of the State of [REDACTED] and each trust was formed for the sole purpose of financing the property held by such trust. The trusts are single purpose entities and may not engage in any other business activity.

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Ownership of 100% of the beneficial interests in a business trust does not affect the separate legal existence of the trust. The trust is not deemed to be effectively dissolved, by law, contract or otherwise, by virtue of holding all of the beneficial interests in the trust. The trust terminates on January 1, 2053, unless the holders of the beneficial interests elect to extend the term of the trust. In addition, the trust may be terminated by the holders of beneficial interests after the end of one year and one day following satisfaction and discharge of the financing documents related to the particular property of the trust or upon the conveyance of all the trust property. Neither the bankruptcy, death or other incapacity of any owner of beneficial interest nor the transfer, by operation of law or otherwise, of any right, title or interest of the holders of the beneficial interests in and to the property of the trust or under the trust agreement will operate to terminate the trust agreements or the trusts created thereby.

In addition, the holders of beneficial interests are not liable for any liabilities or obligations of any trust (including those arising under the relevant financing documents) or for the performance of the trustee under the applicable trust agreement. The notes issued by each trust are secured by the mortgages encumbering such trust's property. The notes are not subject to cross-defaults. As a result, a default by one trust under the notes issued by it would not cause a default under the other notes issued by the other trusts, and a default by a trust as landlord under its lease would not cause a default under the leases of the other trusts. The monthly rent payable under the respective leases is equal to the principal and interest payable on the notes issued by each trust. No distributions from the trusts are contemplated to be made to the holders of the beneficial interests so long as the notes remain outstanding.

Any sale or other conveyance of trust property or any part thereof by the trustee, pursuant to the terms of the applicable trust agreement or the financing documents, is binding upon the holders of the beneficial interests and is effective to transfer or convey all rights, title and interest of the trustee and the holders of the beneficial interests in and to the trust property or such part thereof. In other words, the owner of beneficial interests in the trusts may not prevent a transfer or conveyance of trust property that is required under the financing documents, nor may the owner of beneficial interests compel the trustee to transfer or convey trust property.

We believe that the proposed transaction should properly be viewed as an acquisition of the beneficial interests in the trusts for an aggregate purchase price of approximately \$3.2 million and should not be deemed to be an acquisition of the underlying assets of the various trusts.



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III. Conclusion

Based upon the foregoing facts and analysis, we are of the view that the proposed transaction described herein is exempt from provisions of the Act, and we respectively request that you communicate with the undersigned as soon as practicable to confirm your view of the issues addressed herein. Our client intends to close this transaction as soon as possible and unless you inform us otherwise, we will proceed on the basis that your preliminary conclusions are unchanged. Your prompt attention to this matter will be greatly appreciated.

If you have any questions regarding the proposed transaction or would like to discuss the contents of this letter, please telephone the undersigned at [REDACTED]

Very truly yours,  
[REDACTED]

cc: [REDACTED]

12/22/94 - After discussing with John Sepple, I left voice mail for writer advising that the PNN office did not view the beneficial interests in the trusts as voting securities. Also they did not appear to transfer beneficial ownership of the assets held by the various trusts since the holder of the beneficial interest does not have the absolute and unrestricted right to remove the trustee (such agreement condition) and can only replace trustees with certain pre-selected and certain size entities. (However, if in the future the holder of the beneficial interests in the trusts takes assets from any one trust whose value exceeds \$5MM, then that event could be reportable.) The present transaction is viewed by the PNN office as the purchase of an intangible asset.

RBSmith