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#38 in  
Premerger Notice  
802.1

FEDERAL TRADE  
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July 7, 1995

[REDACTED]

Mr. Victor Cohen  
Federal Trade Commission  
Bureau of Competition  
Premerger Notification Office  
6th and Pennsylvania Avenue N.W.  
Room 303  
Washington, D.C. 20580

Re: Request for Exemption from the Report and Wait Requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976

Dear Mr. Cohen:

I am writing to request your concurrence with respect to our interpretation of the applicable requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") and Section 802.30 of Part 16 of the Code of Federal Regulations (the "Regulations") promulgated under the Act by the Federal Trade Commission ("FTC").

The factual background from which our issue arises is as follows:

A [REDACTED] real estate investment trust (the "Trust"), currently taxed pursuant to the real estate investment trust ("REIT") provisions of sections 856 et seq. of the Internal Revenue Code (the "Code"), plans on incorporating as a [REDACTED] corporation. The Trust holds solely real estate and realty related assets in accordance with the REIT provisions of the Code. The transaction will involve (1) the formation of a new [REDACTED] corporation (the "Corporation"), wholly owned by the Trust, (2) the transfer of all of the Trust assets to the Corporation in exchange for the Corporation's stock, (3) the distribution of the Corporation's shares to the existing shareholders of the Trust in exchange for all

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shares of the Trust (at a 1:1 exchange ratio) and (4) the liquidation of the Trust. The exchange is intended to qualify as a mere change in place of organization under Section 368(a)(1)(F) of the Code (meaning the exchange will be tax free to the Trust, the Corporation and the shareholders of the Trust).

The purpose of the transaction is to incorporate the Trust as a [REDACTED] corporation in order to modernize and streamline the Trust's governance procedures by adopting a form of organization used by more recently established REITs. The incorporation will provide the Trust with flexibility which is not afforded by its current declaration of trust, such as the ability to issue different classes of stock which may enhance the ability of the Trust to raise capital in the future.

We believe that the transaction should be exempt from the requirements of the Act under Section 7A(c)(10) of the Clayton Act and should constitute an "Intraperson transaction" under the Act pursuant to section 802.30 of the Regulations.

Section 7A(c)(10) exempts from the from report and wait requirements of the Act:

acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer[.]

Section 802.30 of the Regulations further provide that:

An acquisition (other than the formation of a joint venture or other corporation the voting securities of which will be held by two or more persons) in which, by reason of holding of voting securities, the acquiring and acquired persons are (or as a result of formation of a wholly owned entity will be) the same person, shall be exempt from the requirements of the act.

Since each beneficiary of the Trust will acquire exactly the same per centum interest in the Corporation that the person held in the Trust before the transaction, the resulting reorganization will essentially make the "acquiring and the acquired persons . . . the same person." It would appear that the transaction contemplated by the Trust to incorporate as a [REDACTED] corporation fits squarely within the exemption provided by Section

  
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7A(c)(10) of the Act and the definition of an "intraperson transaction" under the Regulations. See Letter to Mary Ann Dunaitas [sic] (Mar. 22, 1982), in Premerger Notification Practice Manual, at 33-34 (Bruce J. Prager, ed. 1991) (Letter request for exemption from the Act for a merger between preexisting and newly formed entities where ultimate shareholders of preexisting and newly formed entities are identical). In addition, we believe the transaction should be exempt from the report and wait requirements of the Act for the following reasons:

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The Reorganization Transaction Does Not Cause a Result the Antitrust Laws are Intended to Prevent

The purpose of the Act is to provide the antitrust enforcement agencies with a procedure to assist them in enforcing Section 7 of the Clayton Act. S. Rept. No. 803, 94th Cong., 2d Sess. 8 (1976); H.R. Rept. No. 1373, 94th Cong. 2d Sess. 5 (1976). The Clayton Act essentially prohibits acquisitions, "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18; see also U.S. v. Pabst Brewing Co., 384 U.S. 546 (1966).

The transaction contemplated by the Trust will not have the effect of changing the concentration of ownership in any asset held by the Trust. The transfer of the assets from the Trust to the Corporation in exchange for stock of the Corporation and the exchange of Trust interests for shares in the Corporation by the beneficiaries will all take place within a short period of time. The ultimate result will leave the beneficiaries of the Trust owning the same percentage interest in rights to the income from and assets of the Corporation that they held in the Trust before the transaction.

Because the assets to be acquired by the Corporation will be the same assets as are currently held by the Trust and since the shares of the Corporation will be held by the beneficiaries of the trust, there will be no effect on competition in the market. The shareholders will not have an interest in any more assets than they held prior to the incorporation. The transaction essentially will not come within the prohibitions of the federal antitrust laws and the reporting requirements under the Act should not be implicated.

The Rights of the Beneficiaries will not be Impaired by the Reorganization

While the main purpose of the Act is not to protect shareholder's rights, it should be noted that the percentage

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interests of the beneficiaries will be exactly the same before and after the transaction described above. Because the Corporation will still be treated as a REIT for tax purposes, the Corporation's books, accounts and cash distribution methods will remain the same.

As a result of the transaction, it is believed that the rights of the beneficiaries of the Trust will actually be enhanced as shareholders in the Corporation. The shareholders of the Corporation will be entitled to all of the statutory rights and protections granted to [REDACTED] corporation shareholders. Currently, the rights of the beneficiaries are governed solely by the Declaration of Trust; the statutory scheme in [REDACTED] provides little in the way of guidance or protection with respect to a trust's beneficiaries.

In addition, the beneficiaries of the Trust will be asked to approve the transaction before the incorporation takes place. The Trust will register the transaction with the Securities and Exchange Commission ("SEC") and the disclosures presented to the beneficiaries of the Trust will meet all applicable SEC requirements. Following full and complete disclosure, the beneficiaries will vote on whether or not to incorporate the Trust as a [REDACTED] corporation. Because of these safeguards, it is believed that the beneficiaries'/shareholders' rights will not be impaired in any way.

#### Realty Transferred in the Ordinary Course of Business

Section 7A(c)(1) of the Act exempts "acquisitions of goods or realty transferred in the ordinary course of business" from the Act. Section 802.1 of the Regulations provides that an acquisition of the voting securities of an entity whose assets "consist or will consist solely of real property and assets incidental to the ownership of property shall be deemed an acquisition of realty." 16 C.F.R. § 802.1(a).

While the Regulations are not explicit as to whether an exemption exists for the transfer of all of the shares of an entity

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<sup>1</sup>In fact the Internal Revenue Service has ruled that the reorganization of a REIT pursuant to Section 368(a)(1)(F) did not end an entity's taxable year. The provisions of sections 856 et seq. applied to the new entity as though there had been no reorganization. See Rev. Rul. 77-218, 1977-1 C.B. 209 and P.L.R. 8729076 (Apr. 24, 1987).

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holding only realty, that conclusion can rationally be reached. Section 802.1(b) generally states that the acquisition of all the assets of an entity will not be "in the ordinary course of business." However, the parenthetical in Section 802.1(b) excludes entities holding only realty from this limitation. Therefore, the regulation can be read to characterize the transfer of all of the shares of an entity holding only realty as a transfer in the ordinary course of business and thus exempt from the report and wait requirements.

Also, the recent Notice issued by the Federal Trade Commission ("FTC") on March 23, 1995 indicates that the FTC is proposing to expand the exemptions from the Act's requirements in the area of realty transactions. The type of transaction contemplated by the Trust, which holds only realty and real estate related assets, would appear to be of the type that should be included under the exemption provided by Section 802.1.

For all of the foregoing reasons, we believe that the incorporation of the Trust as a [REDACTED] corporation should be exempt from the Act's report and wait requirements, and respectfully request that you concur with our interpretation. If you have any questions or comments with respect to anything discussed in this letter, please call [REDACTED] at [REDACTED].

Very truly yours,  
[REDACTED]

[REDACTED]

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The incorporation of a trust and issuance of voting securities to the former trust certificate holders is not exempt under 7A(c)(10) and therefore, may give rise to a reportable transaction. A trust does not issue voting securities as stated by the Commission in its SBP of July 31, 1978 at page 33459. The exemption afforded in 7A(c)(10)/802.10 and as explained in letter no. 38 in the Premerger Notification Practice Manual relates to situations where one corporation is being "replaced" by another corporation thus, voting stock is being issued to replace other voting stock. Since a trust (as well as a partnership) does not issue voting stock 7A(c)(10)/802.10 does not apply to the instant factual situation.

The exemption under 802.30 "Intraperson transactions" also does not apply since this exemption is based upon the holding of voting securities where the acquiring and acquired person are the same person. Also, the acquiring person/acquired person are not the same person. The exemption under 802.1, based upon 7A(c)(1) may apply. An acquisition of voting securities of an issuer which holds exempt realty would be exempt. Exempt realty is residential realty and office buildings with less than \$15MM of retail space in any one SMSA. The facts of the letter do not spell out what realty is held by the trust and thus, we cannot tell if the 802.1 exemption applies.

In regard to the alleged fact that the proposed transaction would not violate the anti-trust laws, that the rights of the beneficiaries would not be impaired and that the Commission may exempt such acquisitions in the future based upon its press release with proposed rules dated March 23, 1995, these arguments do not relieve a person from its duty to file a premerger notification and report form.