

7A(c)(1) - YES

This material may be subject to the confidentiality provisions of Section 7A(h) of the Clayton Act which restricts release under the Freedom of Information Act.

October 20, 1995

VIA FEDERAL EXPRESS

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Federal Trade Commission
Premerger Notification Office
Bureau of Competition, Room 303
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Washington, D.C. 20580

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FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

Dear Mr. Smith:

The purpose of this letter is to confirm our telephone conferences on October 5, 1995 and October 13, 1995, relating to the Federal Trade Commission ("FTC") staff's interpretation of the ordinary course of business exemption (the "Ordinary Course of Business Exemption") within Section 7A(c)(1) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act"), and Section 802.1(b) of the rules promulgated thereunder, as they apply to the proposed acquisition of a hotel by a partnership whose ultimate parent entity is a real estate investment trust ("REIT"). The factual assumptions, as we discussed them, are as follows:

Person A is a recently-formed corporation that intends to qualify as a REIT for federal income tax purposes under the Internal Revenue Code. A's intention to qualify as a REIT is evidenced by: (a) A's articles of incorporation which contain the requisite REIT provisions; (b) A's filing of a registration statement with the Securities and Exchange Commission ("SEC"), which states that A intends to operate so as to qualify as a REIT for federal income tax purposes; and (c) A's obtaining of a tax opinion stating that A will qualify as a REIT.

Through wholly-owned subsidiaries, A holds approximately 84.6% of the interests (right to profits, right to assets upon dissolution) in an operating partnership which will acquire a hotel. A is the only ultimate parent entity of

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the partnership.

In our telephone conversations, you related the FTC staff's interpretation that all acquisitions where the ultimate parent entity of the acquiring person is a REIT are covered by the Ordinary Course of Business Exemption. You also indicated that an acquisition by an acquiring person whose ultimate parent entity intends to qualify as a REIT, but which has not yet made an official REIT election because it has not yet completed its first tax year, is also covered by the same exemption, provided that the ultimate parent entity (a) has articles of incorporation containing the requisite REIT provisions, (b) files a registration statement with the SEC describing itself as a REIT, and (c) obtains a tax opinion stating that it will qualify as a REIT. You finally indicated that it does not matter who the seller is, as the exemption applies where the REIT is the acquiring person.

You therefore concluded that the hotel acquisition described above would be exempt from the reporting requirements of the Act pursuant to the Ordinary Course of Business Exemption.

Please call either [REDACTED] immediately should the position of the FTC staff with regard to this matter be different from that set forth above. In addition, please retain this letter in your files. I appreciate very much your assistance and helpful advice in this matter.

Very truly yours
[REDACTED]

10/24/95 - Advised co-author that letter reflects position of Premerger Office concerning realty purchases by REITs which have not yet qualified with IRS. Noted that should REIT fail to qualify the anticipated REIT exemption is lost and a registration filing would need to be made.
RBSmith