

7A(c)(1); 802.1(a)

March 17, 1998

VIA FACSIMILE

Richard B. Smith  
Premerger Notification Office  
U.S. Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: Ordinary Course of Business Exemption

Dear Dick,

A client proposes to enter into the transaction described below, which I believe would be exempt from premerger notification requirements. After you have had an opportunity to review the description of the transaction and my comments, I would like to speak with you to confirm that the Staff concurs with my conclusion.

The transaction involves the sale of third party mortgage servicing rights, i.e., servicing rights that are being sold separately from the underlying mortgage notes. Seller is a homebuilder that takes back mortgages in the course of selling its homes and also originates mortgages outside of its home building operations. Seller has a mortgage servicing operation that services these mortgages. From time to time, Seller has also acquired third party servicing rights that it administered through its mortgage servicing operation. In order to generate capital for its home building business, Seller regularly sells assets from its mortgage portfolio. These assets include third party servicing rights, mortgage notes that carry servicing rights, and mortgage notes sold "service released" (i.e., where Seller retains or separately sells the servicing rights). Buyer is a mortgage banking subsidiary of a bank and regularly acquires third party mortgage servicing rights.

Seller has made the decision that it no longer wants to hold the majority of its third party mortgage servicing rights. In this transaction Seller will transfer to Buyer most of its remaining third party servicing rights. Seller is not,

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however, exiting the mortgage servicing business. Seller is retaining a small amount of third party servicing rights. Seller is not selling the servicing rights to the mortgages in which it continues to hold the underlying mortgage note and will continue to originate mortgages and to service those mortgages while it holds the notes. In addition, Seller will continue to regularly sell third party servicing rights, mortgage notes that carry servicing rights, and "service released" mortgage notes. Finally, when mortgage notes are sold, Seller will continue to service them on a third party basis for some interim period following the sale.

As a result of this sale, Seller anticipates that its overall mortgage servicing needs will decline. As a consequence, some of the staff from its mortgage servicing operations will be either terminated or redeployed to other operations. However, Seller's mortgage servicing business is not organized in such a way that third party mortgage servicing functions are handled by an organizational unit that is distinct from the staff that handles other mortgage servicing functions. The staff to be terminated or redeployed could not be characterized as the "third party mortgage servicing staff."

As an initial matter, it is my understanding that the sale of mortgage servicing rights would be treated by the Staff as the sale of "goods" for purposes of the ordinary course of business exemption under Section 7a(c)(1). See ABA Premerger Notification Manual, Interpretation 20. Also by analogy to Interpretation 20, it appears clear that such asset transfers are eligible for exemption under the ordinary course of business exemption. The question seems to be whether Seller's intention that it will no longer hold significant amounts of third party servicing rights for extended periods of time<sup>1</sup> makes the ordinary course of business exemption inapplicable to this transaction. That question, however, appears to be resolved by reference to Interpretation 23 in the Premerger Notification Manual. That interpretation confirms the relevance of a seller's organizational structure in determining whether a transaction involves the sale of all or substantially all the assets of an operating unit.

<sup>1</sup> As noted, even after the sale the Seller will continue to perform some third party servicing functions. I.e., the Seller is not fully discontinuing its third party servicing operations as a result of this transaction.

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As noted above, Seller does not have a "third party mortgage servicing unit." The third party mortgage servicing functions are carried out by the same staff that has handled, and will continue to handle, all mortgage servicing for Seller. This staff, in its reduced form, will continue to perform all the functions that it performed prior to the transaction, i.e., generating mortgages, servicing mortgages (including some third party servicing), and selling both mortgage notes and mortgage servicing rights. The only difference will be that when future mortgage notes are sold, that sale will always either include the corresponding servicing rights or will roughly coincide with a separate sale of those servicing rights.

Based on this, I believe that the transaction would be exempt under Section 7a(c)(1). I would, however, like to confirm that the Staff concurs with that conclusion. I will plan to call today or tomorrow in order to discuss the matter with you. If you would like to call with any questions or comments, please feel free to do so.

Thank you very much for your attention.

[REDACTED]  
Sincerely,  
[REDACTED]

3/18/98. Advised writer that sales of subject  
notes did not appear to constitute the disposition of a  
"operating unit." Since seller was remaining in the mortgage  
servicing business, the transaction is exempt under 7A(c)(1).  
(N/O steel letter and agree with conclusion)

RBS Smith