

8021(a)

June 26, 1998

Via Facsimile

Richard B. Smith, Esq.
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 may be exempt from premerger notification requirements as a transaction in the ordinary course of business. 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 agrees that the transaction is exempt.

The transaction involves the sale of rights to service residential first mortgages. The servicing rights are being sold separately from the underlying mortgage notes. Seller is a commercial bank that, in the regular course of its business, makes loans secured by first and junior mortgages on commercial and residential property. Seller also, in the regular course of its business, has sold the rights to service residential mortgage loans. Buyer is a mortgage banking subsidiary of a bank and regularly acquires mortgage servicing rights.

Seller has made the decision that it no longer wants to service first mortgages on residential properties. In this transaction, Seller will transfer to Buyer all residential first mortgage servicing rights that Seller services

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on the effective date of the agreement. However, Seller will continue to hold title to a large portfolio of other first mortgage servicing rights that are currently being serviced for Seller by a third party. Seller plans to sell these other first mortgage servicing rights in a later transaction. But even after the second sale, Seller will remain in the mortgage servicing business. Seller will continue to originate both commercial and residential loans secured by first and junior mortgages, and will continue to service loans of each type other than residential first mortgage loans.

Seller's decision to cease servicing residential first mortgages preceded a merger last summer with another financial institution. As part of that merger, the Seller acquired merged entity's commercial and residential mortgage servicing operations at a particular non-retail office location. Based upon its prior decision, Seller made arrangements to divest the residential first mortgage portfolio and consolidate its commercial mortgage servicing operations to a separate location. Seller also decided to sell the non-retail office location it had acquired through the merger, dispose of the real estate, and redeploy useable assets such as desks and computers.

Although Seller's mortgage servicing operations occur at multiple locations, all of Seller's residential first mortgage servicing takes place at this one location. A single staff at that location handles both residential and commercial first mortgages. In other words, the staff within this location is not organized into separate units based on the type of rights being serviced. The staff handling the rights being sold also handle other types of rights—commercial first mortgage servicing rights—which are not the subject of this transaction.

It is my understanding that the sale of mortgage servicing rights among financial institutions is generally considered to be a transaction eligible for treatment under the ordinary course of business exemption under Section 7A(c)(1) and Rule 802.1. The question seems to be whether (i) Seller's intention that it will no longer service residential first mortgage loans or (ii) the related abandonment of a non-retail office location makes the ordinary course of business exemption inapplicable to this transaction. As to the first point, it is my understanding that the staff has previously

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taken the position that simply ceasing to service certain types of mortgage loans will not, by itself, make a transaction ineligible for the ordinary course exemption where the institution will continue to service other types of mortgage loans. In the language of Rule 802.1, the seller in such circumstances is not viewed as discontinuing a "business undertaking." The fact that the Seller in question here will continue to hold title to a substantial volume of residential first mortgage servicing rights after this transaction should make it even more likely that this transaction would be eligible for an ordinary course of business exemption.

For a combination of reasons, the fact that Seller will also cease operating at this particular location should not take the transaction outside of the ordinary course of business exemption. As an initial matter, while the transaction and the decision to close the location are in some sense related, one did not follow necessarily from the other. Having decided to sell its residential first mortgage servicing rights, Seller could have decided to continue its commercial first mortgage servicing functions there. Doing so would not have been efficient, however. Therefore, those operations will be transferred to another location. In the language of the Statement of Basis and Purpose, because the decisions about the location and the sale were made independently of one another, the location cannot be said to be closing "as a result of the sale." (Nor can the sale be said to be occurring "as a result of" the decision to close the location.)

Based on this, I am hopeful that the Staff will agree that the transaction would be exempt under Section 7A(c)(1) and Rule 802.1. In order to confirm that the Staff concurs with this conclusion, I will plan to call and 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.

Very truly yours,

[Redacted signature]

[Redacted name]

6/27 handwritten note: Seller will hold the first mortgage servicing rights... confirm that, in fact... Seller's existing...
Seller will hold the first mortgage servicing rights... confirm that, in fact... Seller's existing...
a contractual arrangement. He also confirmed that the abandonment of the...
office location will not result in Seller's existing...
in the servicing of other types of mortgages. I understand that the...
would by the... as selling...
RBS