

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

June 8, 1991

Richard B. Smith, Esq.
Premerger Notification Office
Room 312, Headquarters Building
Bureau of Competition
Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Applicability of "Ordinary Course of Business"
Exemption To Sale of Lease and Loan Receivables

Dear Mr. Smith:

Pursuant to our telephone conversations of May 28 and June 6, 1991, we are seeking your advice respecting the applicability of the "ordinary course of business" exemption under Section 7A (c)(1) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") to a proposed transaction involving two companies engaged in lease and loan financing. As we discussed, our firm represents [REDACTED]

[REDACTED] and its subsidiary, [REDACTED] (collectively, the "Sellers"). The Sellers are engaged in financing and leasing a variety of commercial and industrial equipment. Typically, the Sellers buy equipment selected by a customer, then lease that equipment to the customer.

Sellers are presently contemplating the sale of substantially all of the portfolio of lease and loan receivables held by [REDACTED]. (As you will recall, [REDACTED] recently concluded the sale of [REDACTED] portfolio of [REDACTED] loan receivables to another financial organization in a non-reportable transaction.) The remaining portfolio of [REDACTED] to be sold consists of [REDACTED] (75%), [REDACTED] (13%) and miscellaneous equipment (12%) (no category of which composes 5% or more of the portfolio).

[REDACTED]

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The Acquiring Person in the proposed transaction is [REDACTED] a subsidiary of [REDACTED]. The value of the consideration to be paid for the [REDACTED] lease/loan receivables would be approximately \$60 million and the Size of Person Test would be met. We are advised that [REDACTED] like Sellers, is engaged in commercial lease financing. Further, as part of its financing business, [REDACTED] purchases and sells lease/loan portfolios of the type involved here with some frequency.

The proposed acquisition would involve the transfer of Seller's rights in bona fide lease and loan financing arrangements, together with all of Seller's right, title and interest in the underlying assets. Taking into account the type of equipment financed, these leases/loans are considered to be long term, rather than short term operating leases, in the context of the equipment being leased or financed. The identity of the lessees would not change upon sale of this portfolio. We are further advised that neither [REDACTED] nor any other entity within the proposed Acquiring Person is in competition with providers of [REDACTED] or [REDACTED] (which together account for 88% of the dollar value of the assets financed in the portfolio to be sold, based on the net outstanding amounts owed; the remaining 12% of the portfolio consists of a wide variety of types of equipment which we have not attempted to analyze or categorize.)

Finally, the proposed acquisition would not result in the acquisition of all or substantially all of the assets of [REDACTED] or any operating division thereof. Although substantially all of the assets of [REDACTED] would be acquired, this unit is not separately incorporated and is not an "entity" as that term is defined in § 801.1 (a) (2) of the Rules implementing the Act. Moreover, the unit is customarily referred to by Sellers as a "group" rather than a "division." We note also that [REDACTED] writes leases and loans on behalf of both [REDACTED] and [REDACTED]. Further, [REDACTED] will continue after the acquisition to engage in the leasing and financing of various types of equipment from its headquarters in [REDACTED] and from certain other sales offices in the U.S. Although it is not considered likely unless the company is able to develop a relationship with a manufacturer, [REDACTED] would be willing to lease [REDACTED] or [REDACTED] assuming the economic terms of any proposed leases fit the company's then-existing financial requirements.

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Based upon the foregoing facts, it is our understanding that the proposed acquisition is exempt from the premerger reporting requirements of the Act by virtue of the "ordinary course of business" exemption set forth in Section 7A (c)(1) of the Act. If our understanding is incorrect, or should you have additional questions, we would very much appreciate hearing from you within the next three business days. If we have not heard from you within that time, we will assume that the staff of the FTC's Premerger Notification Office concurs in our understanding of the applicability of the exemption.

Once again, your thoughtful guidance and assistance is very much appreciated.

Sincerely yours,

6/10/91 Talked to

Advised that I discussed with J/S, who stated that if acquired person still in lease financing business and no entity, or substantially all of the assets of a division or entity, were being sold, then transaction is exempt under 7A (c)(1) and our view of 802.100 (b).¹ Even if one were to assume that [redacted] computed with the leases of the 12% of the portfolio, this transaction would only have a value of 7.2 MM since the other leases are being bought in the ordinary course of business.

RB Smith

¹ new ABA letter #16 notwithstanding