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September 18, 1991

VIA FEDERAL EXPRESS

Mr. Patrick Sharpe
Compliance Officer
Federal Trade Commission
Premerger Notification Office
Bureau of Competition
Room 303
Washington, D.C. 20580

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FEDERAL TRADE COMMISSION
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Dear Mr. Sharpe:

Premerger Office not FTC

I am writing in furtherance of a conversation which we had on September 5, 1991 regarding certain financing transactions which we are evaluating to determine the applicability of the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act (the "Act"). The purpose of this letter is to describe those transactions and obtain confirmation from the ~~Federal Trade Commission~~ that such transactions do not require premerger notification under the Act.

The transactions which we are evaluating are financing techniques involving the sale of assets to business corporations organized solely for the transactions. Depending on the nature of the assets sold, the assets are either leased back to the seller, or, in the case of receivables or other financial instruments, held and collected by the buyer. Following is a more detailed summary of how these transactions might be structured.

vague

1. Transaction Structure. Each transaction would be structured by the creation of a single purpose business corporation (an "SPC") which would be organized for the sole purpose of engaging in the transaction. The SPC would serve as a financing conduit in the transaction for lenders which are financial institutions or for public financing through debt markets such as the commercial paper market. The SPC would be owned by individuals or a corporate entity which would receive servicing or maintenance fees for owning and

IS SPC controlled by anyone



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operating the SPC. In some cases the owner of the SPC would also receive a return on a small equity investment in the SPC. v/s ?

Sale/leasebacks are covered by 902.63 of creditor doing in the ordinary course of business and is not a competitor of essee!

2. Purchase and Sale of Assets. Each transaction would involve the purchase by the SPC of an asset which a third party desires to finance. These assets might include commercial nuclear fuel for power generation, trade or consumer accounts receivable, automobiles and equipment. The transaction sizes and sizes of acquired and acquiring persons might be such as would trigger premerger notification requirements under the Act. If the assets are productive assets, the seller of the assets would probably lease the assets back in order to retain use of the assets. *vague*
Alternatively, the user/lessee of the assets (i.e., the "quasi-borrower" in the transaction) might be an entity other than the seller of the asset.

3. Leaseback, etc. In each transaction, the seller of the assets or other third party user/lessee and the SPC would enter into an appropriate lease agreement, receivables purchase agreement or similar kind of agreement which would result in initial proceeds being paid to the seller in return for a transfer of title to such assets to the SPC. In transactions involving nuclear fuel, for example, the transaction would be structured as a nuclear fuel lease which would provide that the power generating utility which is the seller/lessee would rent or buy from the SPC the energy generated from the nuclear fuel and pay a lease or use charge equal to the financing cost plus amortization of the indebtedness borrowed by the SPC as the nuclear fuel is consumed. In equipment leasing transactions, lease payments would be designed to last over some portion of the useful life of the equipment with residual purchase rights to the equipment being held by the seller/lessee. In trade receivables transactions, the transactions would be structured so that the SPC and its lenders would collect payments due on the receivables *not a productive asset.*

* In this case we believe that there are two distinct transactions involved: the asset acquisition and the financing transaction. Our view is that, even if the asset acquisition were subject to the Act, the SPC would not be an acquiring person for purposes of the premerger notification. Only the user/lessee of the assets (and its affiliates) would be the acquiring person.

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lessor
purchased. Arrangements would be made to provide for losses on collection of the receivables to be borne directly or indirectly by the seller of the receivables.

4. Title and Control. In the above-described transactions, the SPC would hold title to the assets involved. In certain instances the assets would be pledged by the SPC to its lenders and all or substantial rights and control over the assets would be in the hands of the SPC's lenders as secured parties. In all cases where a tangible asset is involved, the asset would be controlled by the user/lessee for use in its business, subject to any rights the SPC or its lenders may have upon the occurrence of defaults under purchase and sale or lease documentation (which would be analgous to defaults under a loan agreement). In the case of receivables purchased by an SPC, control over collection of payments due would be vested with the seller or the SPC's lenders.

usual case in sale lease back

* * *

There may be variations in the structure of the financing arrangements described above. In addition, other assets may be financed using the structure described above. In all cases, however, the transactions would be financing mechanisms which do not involve the SPC controlling the use or allocation of productive goods. As financings, these transactions have no impact on competition and raise no issues under Federal antitrust laws.

not the test! the question is are they exempt from reporting

It is our view that the transactions described above are not subject to the Act. Moreover, it is our view that, even in transactions where the seller of the asset and the user/lessee are different parties, the "sale" effected by those parties for purposes of the Act is a separate transaction distinct from the SPC financing. As such, any premerger notification requirement of such seller and user/lessee under the Act would not require a premerger notification filing by the SPC or its ultimate parent entity as acquiring persons. Among the reasons for our view is our belief that the transactions described in this letter would be exempt under 15 U.S.C. §18a(c)(12) and the rules of the Federal Trade Commission under 16 CFR §802.63, as bona fide credit transactions in which the SPC is acting as a creditor. We also believe that the transactions involve goods transferred in the ordinary course of business of the SPC and therefore are exempt from the Act under 15 U.S.C. §18a(c)(1). — ?

Why not?

Requires that the Commission & DOJ have exempted such by a specific rule (which may be § 802.63)

[REDACTED]
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I would appreciate if you would confirm your agreement with our analysis. Should you not concur, we would like the opportunity to consult further with the Federal Trade Commission as to the applicability and scope of the exemption provisions cited above and other requirements under the Act.

I thank you for your attention to this matter. Should you require any further information please do not hesitate to contact me at [REDACTED] or my colleague [REDACTED] at [REDACTED]

Very truly yours,
[REDACTED]
[REDACTED]

[REDACTED]
Your letter is too vague. It should be fact specific. I need more details in order to give a definitive answer.

(BS) RS concurs

Discussed comments about this letter with [REDACTED] on 9-26-91.