

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

October 28, 1991

VIA TELECOPIER

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 conversation of October 24, 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] and its subsidiaries, [redacted] and [redacted].

Seller is engaged in financing and leasing a variety of commercial and industrial equipment.

Seller is presently contemplating the sale of a portfolio of lease and loan receivables held by Seller's [redacted]. The portfolio to be sold consists of equipment and real estate financing for [redacted] (74.4% of the portfolio, based on net outstanding amounts owed); equipment and real estate financing for a chain of [redacted] stores (13.4%); general equipment financing (including the financing of modular office furniture, [redacted] equipment and [redacted] equipment) (9.3%); and general business and miscellaneous financing (including, for example, the financing of

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office copiers, office computers and general office equipment) (2.9%).

The entity which will acquire the portfolio ("Purchaser") and the Acquiring Person of which it is a part engage in both asset-based lending and commercial leasing. The value of the consideration to be paid for the portfolio will be approximately \$36 million and the Size of Person Test will be met. We are advised that Purchaser frequently and routinely purchases receivables, both from leases and loans, in portfolios of approximately \$5 million. Purchaser has from time to time purchased portfolios comprised of receivables aggregating in excess of \$15 million.

Purchaser intends to acquire Seller's rights to the loans and leases comprising the subject portfolio. Purchaser will not, however, acquire ownership of the equipment and other assets which secure payment of the loans and leases. The loan receivables in the portfolio arise from transactions in which the borrowers are owners of the underlying assets or collateral. For those transactions, Seller is assigning to Purchaser its security interests in the underlying collateral. The lease receivables in the portfolio arise from true leases in which Seller retains ownership of the underlying assets and the end-users of the goods are truly lessees. As to those transactions, Seller is not transferring its ownership of the leased assets to Purchaser. Purchaser may seize the assets and foreclose on them, but only to the extent necessary to satisfy payment of the lease receivables. Purchaser seeks only a lender's return for its money and has no interest in the residual or excess value, if any, of the underlying assets.

Taking into account the type of equipment financed, the leases in the portfolio 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 will not change upon sale of this portfolio. We are further advised that neither Purchaser nor any other entity within the proposed Acquiring Person competes with operators of [redacted] operators [redacted] establishments, providers of [redacted] services or sellers of [redacted] (As indicated above, the foregoing types of lessees and borrowers have executed leases or loans accounting for over 97% of the dollar value of the portfolio to be sold.)

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. Only a small portion of the assets of [redacted] would be acquired, and, in any event,

[REDACTED]

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this unit is not separately incorporated nor is it an "entity" as that term is defined in § 801.1 (a) (2) of the Rules implementing the Act. Moreover, the unit has been customarily referred to by Seller as a "group" rather than a "division." We note also that [REDACTED] is not exclusively related to any one entity within Seller and may write leases and loans on behalf of [REDACTED]

Further, Seller will continue after the acquisition to engage in the leasing and financing of various types of equipment from their headquarters in [REDACTED] and from certain other sales offices in the U.S. Seller would be willing to provide equipment and real estate financing of the type represented in the portfolio to be sold, assuming the economic terms of any such proposed leases or financings fit the company's then-existing financial requirements.

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 as soon as possible. As indicated to you in our telephone conversation, closing of the subject acquisition is presently scheduled for October 31, 1991. If we have not heard from you before 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.

As always, your guidance and assistance is greatly appreciated.

Sincerely yours,  
[REDACTED]

10/29/91 - Advised [REDACTED] that transaction appeared exempt. While it is possible that buyer may compete in sale of equipment used by lessees which make up 2.97% of transaction, this as a percentage of total deal (\$36MM) would be non-reportable excluding the exempt purchases. While it appears that both accounts receivable and lease financing arrangements are being bought, they are both standing alone or in the aggregate, exempt under the rules presented. Also, it appears that beneficial ownership of the leased or financed or leased equipment will not be transferred, providing another avenue for possible non-reportable event. BRB:ll