

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

November 15, 1991

BY HAND

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

Dear Mr. Smith:

The purpose of this letter is to confirm our telephone conversation of Tuesday, November 12, 1991, in which [REDACTED] and I requested your advice as to whether a transaction under consideration by our respective clients is subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act ("the Act"). [REDACTED] represent the seller in the proposed transaction and I represent the buyer. The transaction satisfies the size-of-persons and size-of-transaction tests established in the Act and would be otherwise reportable unless there is an applicable exemption in the Act or the premerger regulations. Based on our description, you agreed that the proposed transaction is exempt as an acquisition of assets "in the ordinary course of business."

The transaction in question involves the sale of equity interests in certain assets that are the subject of lease financing agreements. The assets consist of railroad cars, engines and related equipment. The assets are currently under lease to several different parties, including railroads, a steel company, a chemical company and, in one instance, a lease financing company that has subleased a railroad car to an end user. The original terms of the different leases range from 12-25 years. As we discussed over the telephone, the leases in question are typical of a type of transaction in which leases effectively serve as financing vehicles for users of railcars (as well as other types of assets). In each case, the existing lessee of the asset will remain in control of the asset after the sale is consummated.

[REDACTED]

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The buyer is a large financial institution that, among other activities, originates lease financings and regularly buys and sells assets that are subject to finance leases. The buyer does not compete with the companies that presently use the assets that are the subject of the transaction.

The seller is a large corporation that also regularly originates lease transactions and has regularly purchased and sold equity interests in leased assets in the ordinary course of its business. The assets that are the subject of this transaction account for less than 20% of the seller's portfolio of leased railroad-related assets and well under 10% of its entire lease portfolio. The seller has no present intention of exiting the leasing business.

Section 7A(c)(1) of the Act exempts acquisitions of assets in the ordinary course of business. You have advised [REDACTED] and me that this exemption extends to transactions involving the sale of assets subject to financing leases if the following conditions are met: (1) the assets are subject to a bona fide financial lease; (2) while title to the leased assets will pass to the buyer, control of the assets will remain with the existing lessee; (3) the assets must be subject to a long-term lease or a lease renewable at the lessee's option; (4) the acquiring person (*i.e.*, the new lessor,) does not compete with the existing lessee and (5) the seller is not exiting the leasing business, but intends to continue in its leasing activities. Accordingly, the transaction described above is exempt from the reporting and waiting period requirements of the Act.

Please call me if you have any questions or if the above does not accurately reflect your advice.

Sincerely yours,
[REDACTED]

cc: [REDACTED]

11/18/91 - called [REDACTED]. He confirmed that this proposed sale did not involve the sale of substantially all of the assets of a division of the seller and that the buyer's purchase of these lease financing leases was for financial purposes, *i.e.*, in order to receive lease payments. I advised that sale was exempt under our interpretation of 7A(c)(1).
RBSmith