802.64

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WRITER'S DIRECT LINE
[redacted]

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BY FEDERAL EXPRESS

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Federal Trade Commission
Premerger Notification Office
6th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Rule 802.64(a)(11) and (12)

Dear Mr. Sipple:

This letter solicits your advice as to whether a holding company which owns a foreign bank ("Company X") may, on the facts set forth below, qualify as a "bank holding company within the meaning of 12 U.S.C. § 1841" for purposes of the institutional investor exemption of Rule 802.64(a)(11) and (12).

Company X is a foreign company that controls a foreign bank which maintains branches and agencies in the United States. Company X also controls, inter alia, U.S. and foreign broker-dealers, U.S. and foreign investment advisors, foreign investment companies and a foreign insurance company, as well as other foreign banks.

As a result of its control of a foreign bank that maintains branches and agencies in the U.S., Company X is subject to certain provisions of the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 et seq. (the "BHCA") by virtue of the International Banking Act of 1978 (the "IBA"), as amended by the Foreign Bank Supervision Enhancement Act of 1991 (the "FBSEA"), 12 U.S.C. § 3101 et seq. The IBA provides in relevant part (12 U.S.C. § 3106(a)):

> Except as otherwise provided in this section (1) any foreign bank that maintains a branch or agency in a State, (2) any foreign bank or foreign company controlling a foreign bank that controls a commercial lending company organized under State law, and (3) any company of which any foreign

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> bank or company referred to in (1) and (2) is a subsidiary shall be subject to the provisions of the Bank Holding Company Act of 1956 [12 U.S.C. § 1841 et seq.], and to section 1850 of this title and chapter 22 of this title in the same manner and to the same extent that bank holding companies are subject to such provisions.*

The purpose of the IBA was to establish the "principle of parity of treatment between foreign and domestic banks in like circumstances" pursuant to the "general policy" of the U.S. that "foreign enterprises operating in the host country are treated as competitive equals with their domestic counterparts." H.R. 95-1073, 95th Cong. 2d Sess. 2 (1978). The purpose of § 3106(a) was "to insure competitive equality by allowing foreign financial institutions to expand their U.S. banking-related activities in accordance with the same standards applicable to domestic bank holding companies." Id. at 15. The purpose of the FBSEA was to "strengthen the Federal Reserve Board's authority under the International Banking Act of 1978 to regulate and supervise the activities of foreign banks in the United States." H.R. 102-330, 102nd Cong. 1st Sess. 105 (1991).

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* The principal distinction under § 3106 between foreign entities treated as bank holding companies pursuant to § 3106(a) and bank holding companies, foreign or domestic, that control a U.S. bank, is that the foreign entities may qualify pursuant to § 3106(c) to be grandfathered so as to continue to engage in certain nonbanking activities in the U.S. which are not permissible for bank holding companies that control a U.S. bank. Company X engages in certain nonbanking activities in the U.S. pursuant to § 3106(c). These activities are conducted exclusively through entities which are themselves institutional investors of the types enumerated in § 802.64 or entities controlled directly or indirectly by Company X and whose activities are in the ordinary course of Company X's business as an institutional investor. Accordingly, the broader scope of activity allowed Company X pursuant to § 3106(c) should be irrelevant for purposes of Rule 802.64.

The enactment of the IBA on September 17, 1978 postdates the September 5, 1978 effective date of the Rules.* That may explain why Rule 802.64, listing categories of entities included as institutional investors entitled to the exemption set forth in that Rule, does not refer to entities covered by § 3106(a) of the IBA. As a matter of logic, fairness and comity, entities covered by § 3106(a) should be treated as bank holding companies within the meaning of § 1841 for purposes of Rule 802.64(a)(11) and (12).

The rationale offered by the Statement of Basis and Purpose ("S.B.P.") to Rule 802.64 for not extending a blanket exemption to foreign banks was that "foreign banks are not covered by the Glass-Steagall Act, 12 U.S.C. 24, and are therefore not prohibited from investing in common stock for their own account." 43 Fed. Reg. 33504. This rationale became factually inaccurate with the passage of the IBA, which subjected entities covered by § 3106(a) to the provisions of section 4(a) of the BHCA, 12 U.S.C. § 1843(a), prohibiting bank holding companies from acquiring "direct or indirect ownership or control of any voting shares of any company which is not a bank."**

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* The Rules and their accompanying Statement of Basis and Purpose were published in the Federal Register on July 31, 1978 (43 Fed. Reg. 33,450) and were republished because of printing error on August 4, 1978 (43 Fed. Reg. 34,443) with their effective date deferred from August 30, 1978 to September 5, 1978.

** Foreign entities subject to the BHCA, either directly or pursuant to § 3106 of the IBA, are treated differently from domestic U.S. bank holding companies in one principal respect, which is not relevant for present purposes. That difference is the ability under certain circumstances of such foreign entities through foreign nonbank subsidiaries to own shares in U.S. companies engaged in the same general line of business or in business activities related to the business of the foreign nonbank; such holdings would be impermissible for U.S. bank holding companies. See section

Footnote Continued

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For the foregoing reasons, we submit that Company X should be treated as a "bank holding company within the meaning of 12 U.S.C. § 1841" for purposes of the institutional investor exemption of Rule 802.64(a)(11) and (12) with respect to acquisitions made solely for the purpose of investment and in the ordinary course of Company X's business as an institutional investor. These would be acquisitions by Company X directly or through entities controlled directly or indirectly by Company X which are themselves institutional investors or entities performing similar or related functions to those performed by institutional investors.*

Please let me know whether, on the basis of the foregoing facts and law, you concur with the conclusion that Company X qualifies as a "bank holding company within the meaning of 12 U.S.C. § 1841" for purposes of the institutional investor exemption of Rule 802.64(a)(11) and (12).

Sincerely,

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8/19/92. Based on the fact scenario set forth in this letter, and the assumed correctness of the [redacted] that John Sipple did research, I advised [redacted] I would take the view that Company X could qualify as a bank holding company for purposes of Rule 802.64(a)(11) and (12). PLBSmith

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** Footnote Continued From Previous Page

2(h)(2) of the BHCA, 12 U.S.C. § 1841(h)(2), as amended by the IBA, 12 U.S.C. § 1301 et. seq., and the Federal Reserve Board's Regulation K, 12 C.F.R. § 211 et seq. This difference is irrelevant for present purposes because any such holdings would not be in the ordinary course of business of the institutional investor within the meaning of Rule 802.64, and no exemption for any such holdings under Rule 802.64 is sought. The grandfather privileges of § 3106(a), which are another exception to this rule, are irrelevant here for the reasons discussed above in the footnote on page 2.

* With respect to acquisitions by entities controlled by Company X which are not institutional investors or entities performing similar or related functions, Company X would agree that such acquisitions not be deemed for purposes of Rule 802.64 to be in the ordinary course of Company X's business as an institutional investor.