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Wayne E. Kaplan, Esq.
Staff Attorney
Federal Trade Commission
Pre-Merger Notification Section
Sixth & Pennsylvania Avenue, N. W.
Room 301
Washington, D. C. 20580

Dear Mr. Kaplan:

Reference is made to my letter of September 11 and our telephone conversation of yesterday in which I was joined by representatives of a possible financing institution and some of my own colleagues. Despite appearances we were not trying to overpower you with numbers.

You will recall that the contemplated transaction calls for the acquisition by a financing institution from [redacted] of an [redacted] facility adjacent to [redacted]. The price will slightly exceed \$22,000,000.00. [redacted] financing institution will lease the facility to [redacted] with [redacted] to have an option to purchase at substantially greater than nominal value at the end of a 15-year term. [redacted] will have [redacted] operate the facility with part of its compensation to be the opportunity to sell surplus [redacted] to others. [redacted] will build additional facilities, including those for [redacted] which will be complete in about a year and then sold to the financing institution for incorporation into the leasing and option arrangement.

The representatives of the institution who were with me were taken aback by the conclusion stated in the September 11 letter since they consistently operate under the assurance of an exemption under Section 802.63. One reason for my having so many people on my end of the telephone conversation was to let those representatives hear your point of view and give them an opportunity to present any factors which I had not set forth before.

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After my discussions with the institutional representatives I now believe that I was remiss in not pressing with you the Section 802.63 exemption more strongly than I did on September 11. That section, of course, is based upon Section 7A(c)(11) which provides for exemptions of "acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company or insurance company, of ... (B) assets in the ordinary course of its business". The rule reaffirms this in slightly different language when it states that "An acquisition of collateral ... in connection with the establishment of a lease financing ... shall be exempt from the requirements of the act if made by a creditor in a bona fide credit transaction entered into in the ordinary course of the creditor's business."

I believe we agreed that the more familiar sale and lease-back transaction would clearly be exempt. My understanding is that you and your colleagues distinguished the proposed transaction from that kind of bilateral transaction by reason of the trilateral nature of the former. I am advised by the financial people that these three-cornered transactions are in the ordinary course of leasing activity. It would not be at all unusual for the institution to buy an airplane for over \$15,000,000 from Airline A and lease it to competing Airline B without any thought of submitting an H-S-R filing. The institutional representatives looking at the instant transaction consider it to be of that nature. There is no question that no financial institution wishes to exercise any influence on managerial control and, in fact, may be precluded by law from doing so.

I agree with you that the language in the Statement of Basis and Purpose most pertinent to our problem appears in the full paragraph in column 2 of 43 Fed. Reg. 33502. The proposed transaction is not nearly so complex as the example outlined in that paragraph but in a business sense is substantially identical. Interestingly, that example does not include a sale and leaseback. Furthermore, the emphatic nature of the last sentence thereof in the context of laying to rest the concerns raised by the comments to the revised rule should serve as a basis for recognizing that the proposed transaction is within the intent of Section 802.63.

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Thus, in view of the fact that this proposed transaction would be viewed within the financial industry as a bona fide transaction and it is certainly so viewed by those we have consulted, we strongly urge that it be viewed as coming under the provisions of Section 802.63 of the rules under the Hart-Scott-Rodino Act.

I will be available at [redacted] and look forward to hearing from you as soon as possible.

Very truly yours,
[redacted]