

7A(C)(1)

July 17, 2009

**VIA E-MAIL**

Mr. Michael B. Verne  
Federal Trade Commission  
Bureau of Competition  
Premerger Notification Office  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Dear Mr. Verne:

This letter is a follow-up to our e-mail exchanges on July 14, 2009, regarding the reportability of a proposed transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (as amended) (the "HSR Act").

Summary of Transaction

Party A and one or more of its wholly-owned subsidiaries (collectively, "Party A") manufacture and sell outdoor power equipment and related parts and accessories (collectively, "Products") to distributors and dealers in the United States and Canada. Party A generally sells its Products to dealers for resale to end users. In certain circumstances Party A also sells products to wholesale distributors who subsequently sell to retail dealers as well as end user customers. Most of its distributors, and certain of its dealers, obtain (i) "floor plan" financing for the purchase of equipment from Party A through a wholly-owned subsidiary of Party A ("Party A Credit Sub"), and (ii) "open account" financing for their purchase of related parts, accessories, software and services from Party A. Most of the dealers obtain (i) "floor plan" financing for the purchase of equipment from Party A through a third party ("Third Party Financing Co."), and (ii) "open account" financing for their purchase of related parts, accessories, software and services from Party A. Party A has a financing agreement in place with Third Party Financing Co. that facilitates "floor plan" financing for its dealers.

Party A also sells Products to mass market retailers, to a distributor that is a wholly-owned subsidiary of Party A, to distributors and dealers located outside of the United States and Canada, and to governmental entities, on an "open account" financing basis, but those customers and the related "open account" financing are not subject to the proposed transaction at this time.

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For purposes of this letter, (i) "floor plan" financing transactions involve those in which the invoiced amount for a certain piece of equipment is due to Party A from Party A Credit Sub or Third Party Financing Co., as applicable, when the equipment is sold; and (ii) "open account" financing transactions involve those in which the invoiced amount for parts, accessories, software or services is due to Party A within a specified period of 30 to 90 days, as applicable (i.e., the commercially standard practice of selling goods to customers on an accounts receivable basis).

With respect to sales made by Party A to distributors or dealers that obtain "floor plan" financing from Third Party Financing Co., Party A ships the ordered equipment to the distributor or dealer and simultaneously sends the applicable invoice to Third Party Financing Co., who then pays Party A the invoiced amount. The distributor or dealer then has sole responsibility for paying Third Party Financing Co. for the purchased equipment, along with interest at an agreed upon rate. Party A does not guaranty the obligation of a distributor or dealer to repay Third Party Financing Co., although Party A often agrees to pay the interest charges that accrue during an initial period following the sale by Party A to its distributor or dealer and also agrees to repurchase a small percentage of the inventory financed by Third Party Financing Co. if that inventory is repossessed or otherwise returned to Third Party Financing Co. Party A Credit Sub provides "floor plan" financing to distributors and dealers on a substantially similar basis.

Party A proposes to form a joint venture with Party B, a financial institution. The joint venture will be conducted through a limited liability company ("JVLLC"), with Party A indirectly owning 45% of the membership interests in JVLLC and Party B indirectly owning the remaining 55% of the membership interests. Party A and Party B will contribute, in the aggregate, approximately 11% of the estimated cash required to enable JVLLC to provide "floor plan" financing to Party A's distributors and dealers, and JVLLC will borrow from either Party B or an affiliate of Party B the remaining approximately 89% of the estimated required cash.

After the formation of JVLLC, in one or more transactions, (i) Party A Credit Sub will sell to JVLLC all or substantially all of its "floor plan" financing receivables as well as related "open account" financing receivables, and (ii) Party A will sell to JVLLC all or substantially all of its "open account" financing receivables from customers who obtain floor plan financing from Third Party Financing Co. The aggregate purchase price of "floor plan" receivables and "open account" receivables purchased by JVLLC from Party A Credit Sub and Party A, as applicable (the "Purchased Receivables"), will be in excess of \$65.2 million, and generally will be equal to, or substantially equal to, the face amount of the Purchased Receivables. After the purchase by JVLLC of the Purchased Receivables, (i) Party A Credit Sub will cease providing "floor plan" financing to Party A's distributors and dealers and will be contractually obligated to refer to JVLLC all distributors and dealers who request a "floor plan" financing arrangement, and (ii) JVLLC will exclusively provide the "floor plan" financing that Party A Credit Sub used to provide. At that time JVLLC will also commence providing "open account" financing of parts and accessories for Party A's distributors and dealers.

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In addition, Party A expects to terminate its agreement with Third Party Financing Co. and, accordingly, the distributors and dealers of Party A that are currently obtaining "floor plan" financing from Third Party Financing Co. will also obtain this financing through JVLLC. At such time, JVLLC may attempt to acquire the existing portfolio of "floor plan" financing receivables related to Party A's business from Third Party Financing Co. At that time, it is anticipated that the JVLLC would also commence "open account" financing of parts, accessories, software and services for substantially all of Party A's dealers located in the United States and Canada.

Following the conclusion of the transactions described in the two preceding paragraphs, Party A will continue to provide "open account" financing to its mass market retailer customers, a distributor that is a wholly-owned subsidiary of Party A, its international (non-US and non-Canadian) distributors and dealers and its government entity customers.

The transactions described above are anticipated to occur over the next six months. The precise timing and order of the transactions remains to be determined. However, the ultimate result of the transactions described above is as follows:

Pre-Formation of JVLLC

- Party A Credit Sub provides "floor plan" financing to most distributors and certain retail dealers of Party A, in an aggregate face amount of approximately \$102,051,000, and Party A provides "open account" financing for parts, accessories, software and services relating to equipment covered by Party A Credit Sub "floor plan" financing, in an aggregate face amount of approximately \$17,474,000.
- Third Party Financing Co. provides "floor plan" financing to many retail dealers of Party A, in an aggregate face amount of approximately \$177,400,000, and Party A provides "open account" financing for parts, accessories, software and services relating to equipment covered by Third Party Financing Co. "floor plan" financing, in an aggregate face amount of approximately \$15,529,000.

Post-Formation of JVLLC

- JVLLC provides "floor plan" financing that Party A Credit Sub currently provides and "open account" financing of parts, accessories, software and services presently provided by Party A
- JVLLC will provide the "floor plan" financing that Third Party Financing Co. currently provides, as well as "open account" financing of parts, accessories, software and services that Party A currently provides.

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- Party A provides “open account” financing to its mass market retailer customers, to a distributor that is a wholly-owned subsidiary of Party A, to its international (non-US and non-Canadian) distributors and dealers and government entity customers, in an aggregate face amount of approximately \$157,446,000.
- Party A will continue to provide “open account” financing to its mass market retailer customers, to a distributor that is a wholly-owned subsidiary of Party A, to its international (non-US and non-Canadian) distributors and dealers and to its government entity customers. Party A may, from time to time, also provide “floor plan” financing and “open account” financing for certain distributors and dealers if they are not accepted by JVLLC.

(All amounts set forth in the preceding table are rolling 12 month averages for the period ending June, 2009)

### Analysis

#### *Formation of JVLLC*

The acquisition of membership interests in JVLLC by both Party A and Party B will be exempt from the reporting requirements under the HSR Act because JVLLC will be its own ultimate parent entity when it issues the membership interests to Party A and Party B, the acquisition price paid by each of Party A and Party B for the membership interests will be less than \$260.7MM and JVLLC will have less than \$13.0MM in assets and sales at the time that Party A and Party B acquire the membership interests.

#### *Sale of the Receivables of Party A Credit Sub and Party A to JVLLC*

The Staff has, in the past, taken the position that the sale of a portfolio of loans (including credit receivables) will be exempt as a transaction in the ordinary course of business under §7A(c)(1) of the HSR Act so long as the seller continues to be in the business of providing other forms of credit after the transaction.

As noted above, Party A currently sells Products (including finished whole good equipment, parts and accessories) to mass market retailers, to a distributor that is a wholly-owned subsidiary of Party A, to distributors and dealers located outside the United States and Canada, and to governmental entities on an “open account” basis, which is the commercially standard practice of giving customers a fixed period of time, usually 30 to 90 days, to pay for the products purchased. Virtually all other customers of Party A finance their purchases from Party A through “floor plan” financing through Party A Credit Sub (in the case of most distributors and certain retail dealers) or Third Party Financing Co. (in the case of most retail dealers). After formation of JVLLC and the completion of the transactions described above, Party A Credit Sub

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will cease providing "floor plan" financing to Party A's customers (except in certain limited circumstances, including those instances where JVLLC does not accept the credit risk for certain distributors or dealers) and Third Party Financing Co. will cease providing "floor plan" financing to Party A's customers. In each case, JVLLC will provide the "floor plan" financing that Party A Credit Sub and Third Party Financing Co, respectively, are currently providing. JVLLC will also provide "open account" financing for parts, accessories, software and services currently provided by Party A for those customers to which either Party A Credit Sub or Third Party Financing Co. is providing "floor plan" financing. Party A will continue to provide "open account" financing to its mass market retailer customers, a distributor that is a wholly-owned subsidiary of Party A, its international (non-US and non-Canadian) distributors and dealers and its government entity customers.

Conclusion

Based on the above analysis, you concluded that because Party A would continue to provide "open account" financing to certain of its customers after the formation of JVLLC, the sale by Party A Credit Sub of its portfolio of "floor plan" receivables and certain "open account receivables" to JVLLC did not cause Party A to "exit" the credit business, and therefore the sale of the "floor plan" receivables by Party A Credit Sub to JVLLC and the sale of the "open account" receivables by Party A to JVLLC will be exempt from the reporting requirements of the HSR Act as a transaction in the ordinary course of business.

Please contact me if you find error in any of the above. Thank you for your time and assistance.

Sincerely,

[Redacted Signature]

AGREE  
B  
7/22/09

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