

7A(c)(1)

[REDACTED]

[REDACTED]

[REDACTED]

This transmission contains 5 pages.
Our Facsimile Number [REDACTED]
Any Problems [REDACTED]

November 10, 1992

VIA FAX--202-326-2050
Nancy Ovuka, Esq.
Federal Trade Commission
Premerger Notification Office
Washington, DC 20580

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FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION

Re: [REDACTED]
Our File No. [REDACTED]

Dear Ms. Ovuka:

Further to our telephone conversation yesterday, this letter requests an informal interpretation from the staff as to the applicability of §§7A(c)(2) and 7A(a)(3)(B) of the Clayton Act, as amended (the "Act"), to the acquisition of a lease portfolio consisting of [REDACTED]

FACTS

Our client, a [REDACTED] company which is a subsidiary of a [REDACTED] ("Purchaser"), is intending to acquire the [REDACTED] of another [REDACTED] company which is also a subsidiary of a [REDACTED] ("Seller"). The portfolio consists of [REDACTED] of obligations. These are [REDACTED]

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The Secured Loans

In the case of the Secured Loans, Seller acts as lender to [redacted] which are the title holders to the [redacted] in question. The equipment is [redacted] by those [redacted] to end-users as [redacted]. The Secured Loans are typically evidenced by non-recourse promissory notes or other evidence of debt, security agreements perfected by Uniform Commercial Code ("UCC") filings with respect to both the [redacted] and the [redacted], and assignments of [redacted] to Seller, acknowledged by the [redacted] in question. The payments by the [redacted] to the equipment [redacted] under the leases generally match the payments to be made by those [redacted] to Seller under the loans, and in most cases the [redacted] pay Seller directly.

Title to the [redacted] is held by the [redacted], but the [redacted] are responsible for and control the [redacted]. In the event of a default under the loan by an [redacted] (who is Seller's obligor), Seller has the right to demand that the [redacted] make payment directly to Seller (if the [redacted] is not already paying Seller directly), and Seller is entitled to exercise its remedies under the UCC with respect to the [redacted] which, however, remains subject to the [redacted].

*title
is held
by the
[redacted]
but the
[redacted]
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for and
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[redacted]*

Purchaser will acquire from Seller the debt owed by the [redacted] to Seller and will assume Seller's security interests in the [redacted] and the [redacted].

The Financing Leases

In the case of the Financing Leases, Seller is the title holder to the [redacted] which is leased to the end-users of the [redacted] as [redacted]. The [redacted] are responsible for and control the [redacted] use and insurance. In the event of a default in payment, Seller may terminate a [redacted] and repossess the [redacted] in question.

which [redacted]

Purchaser will acquire Seller's title to the [redacted] subject to the Financing Leases.

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FEDERAL TRADE COMMISSION PREMENCO DIVISION

FEDERAL TRADE COMMISSION

Value of Secured Loans and Financing Leases

The value of the [REDACTED] subject to the Secured Loans and the Financing Leases exceeds \$15 million in the aggregate. However, the value of the [REDACTED] subject to the Financing [REDACTED] alone may be less than \$15 million.¹

QUESTION PRESENTED

Assuming that the value of the [REDACTED] subject to the [REDACTED] equals less than \$15 million, is the acquisition of the Secured Loans and the Financing Leases exempt under §7A(c)(2) and 7A(a)(3)(B) of the Act.

DISCUSSION

Section 7A(c)(2) and the Secured Loans

With respect to the Secured Loans, under §7A(c)(2) of the Act, acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities are exempt from the Act's notification requirements. Under §7A(a)(3)(B), acquisitions which aggregate less than \$15 million of an issuer's assets are not subject to the Act's notification requirements.

The staff has previously taken the position that the acquisition of a leveraged [REDACTED] is not exempt from the Act under §7A(c)(2) on the ground that the acquisition of the lease is tantamount to the acquisition of the [REDACTED] asset. See ABA Premerger Notification Practice Manual, Item 25. However, it is unclear whether the staff in taking that position has been presented with the situation where the portfolio consists both of secured loans and financing leases. The Secured Loans should be distinguished from the Financing Leases on a number of grounds.

First, in the case of the Secured Loans, Purchaser does not acquire title to the [REDACTED] equipment. The Purchaser only acquires a loan which is secured by a security interest in the [REDACTED] and the [REDACTED] to which it is subject. Purchaser cannot acquire title to the [REDACTED] subject to a [REDACTED] unless its borrower (the [REDACTED])

1. We are currently uncertain of the actual value of the [REDACTED] subject to the [REDACTED] since our review is not yet complete but believe it may be well less than \$15 million.

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defaults and, in exercising its UCC remedies, Purchaser acquires and retains title to the [redacted] on account of its loan.²

Second, the purchase of the Secured Loans is very similar to the purchase of commercial loan accounts and of mortgages which the staff has previously deemed exempt from the Act. See ABA Premerger Notification Practice Manual, Item 26. As with commercial loans and mortgages, the Purchaser will have no right to proceed against the assets which secure its debt unless there is a default in payment to it. If it does proceed, Purchaser must act in a commercially reasonable manner under the UCC. (UCC §9-504) Therefore, it should be concluded that in acquiring the Secured Loans, Purchaser is buying "obligations" which are exempt from the notification requirements under §7A(c)(2) of the Act.

§7A(a)(3) and The Financing Leases

With respect to the [redacted], the staff has previously taken the position that the acquisition of the lessor's position in a [redacted] would be deemed the acquisition of the underlying [redacted]. However, the value of the [redacted] subject to the [redacted] here may not reach the \$15 million threshold set by §7A(a)(3)(B).

Under 15 CFR §801.21(b), the value of the Secured Loans as "obligations" is not to be aggregated with the value of the [redacted] in determining whether the threshold under §7A(a)(3)(B) has been met:

Neither voting or nonvoting securities nor obligations referred to in section 7A(c)(2) shall be considered assets of another person from which they are acquired.

Therefore, in the event the value of the equipment subject to the [redacted] alone does not equal \$15 million, the acquisition of the [redacted] should not be subject to the Act's notification requirements.

2. The usual practice of most secured lenders of [redacted] however, under the UCC is to sell the [redacted] at either public auction or private sale and to retain the proceeds on account of the debt.

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Thank you for your kind consideration. We look forward to receipt of the staff's informal interpretation as soon as practicable. In the meantime, you should feel free to telephone me with any questions or comments.

Sincerely,

[Redacted signature]

11/13/92

Called [Redacted] Both "secured loans" and "financing leases" are lease financing transactions. In "secured loans", lender does not have "title", but does have a security interest in leased equipment. Question: Is entire lease portfolio of sub being acquired? If not, exempt under FA(c)(1). Smith & Sharpe concure.

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nmo

[Redacted]