

802.1(c)(1)
802.1(d)(1)

November 26, 1999

VIA FACSIMILE

Nancy M. Ovuka
Premerger Notification Office
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Ordinary Course of Business Exemption

Dear Nancy:

I am writing to seek the Staff's confirmation that the transaction described below would fall within the ordinary course of business exemption contained in 16 CFR § 802.1. I would appreciate if you could review the facts so that I could call you later today to discuss my conclusions.

Buyer is purchasing a portfolio of vehicle fleet and other leases from Seller.¹ Seller, a wholly-owned subsidiary of a commercial bank, is engaged in various lease financing activities, including lease financing of corporate fleets of vehicles. Seller also provides management services such as vehicle purchasing and titling for certain of the fleets it finances. Buyer, the fleet services branch of the commercial finance division of a large conglomerate, also engages in lease financing of corporate fleets of vehicles. In this transaction, Buyer will acquire Seller's beneficial interest in a portfolio of large fleets, with an average fleet size of 550 vehicles. (In July I discussed with you a similar transaction in which Buyer acquired Seller's portfolio of smaller fleets with an average size of 25 vehicles, and which you agreed was non-reportable.) Title to some, but not all of the affected vehicles will be transferred from Buyer to Seller. The transaction will be documented in two parts - a traditional asset purchase agreement covering a portion of the portfolio, and a funding agreement under which Buyer will extend a loan to Seller to fund a transfer of the remaining assets.

As part of the transaction, the parties expect to establish a preferred supplier relationship with Buyer under which Seller will refer requests for commercial fleet vehicle management to Buyer for five years. The acquired portfolio represents the balance of Seller's current large fleet lease financing portfolio, but Seller is not exiting lease financing in general or commercial fleet

¹ Up to one third of the value of the transferred portfolio may be from Seller's portfolio of non-fleet leases (i.e., leases of vehicles for which Seller offers no management services) originated by Seller's middle market lease unit. Seller intends to remain actively involved in that market.

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lease financing in particular. Seller will continue to engage in all aspects of lease financing transactions, including commercial vehicle fleet lease financing. While Seller will not actively solicit pure commercial vehicle fleet lease financing transactions, it may nonetheless continue to provide such lease financing transactions as part of its overall marketing efforts to its customer base. As noted above, if a request also includes management services for the fleet, that request will be referred to Buyer under the preferred supplier arrangement.

The acquired portfolio has operated as a part of Seller's larger leasing group and as such is not a separate organizational unit within Seller. No legal entities are being acquired here and the assets are not held within any legal entity dedicated for that purpose. There are two employees who currently work full time with the portfolio, but Seller intends to retain them and deploy them to other lease financing related work. Buyer may offer positions to three employees who work part-time on generating commercial lease financing business for Seller, but those employees will remain with Seller if Buyer does not make an offer or if the employees choose not to accept the offer. Those remaining with Seller will continue to engage in lease origination, marketing and administrative support for any customers desiring fleet vehicle financing, as well as providing support for other leasing products offered by Seller.

Based on the above facts, it would appear that the transaction qualifies for the ordinary course exemption both under Section 802.1(c)(1) (current supplies) and Section 802.1(d)(1) and (d)(2) (used durable goods), which provide an exemption for goods acquired and held for the purpose of leasing to a third party or acquired from someone who held those goods for leasing to third parties. I understand that the Staff has long taken the position that a seller's decision to cease making certain types of loans in connection with a portfolio sale has not taken those transactions out of the ordinary course exemption. This should be an easier case. The Seller here will continue both to make lease financing loans in general and commercial fleet vehicle lease financing loans in particular. Because of that, and because the assets being acquired are not organized as a separate unit within Seller, the Section 802.1(a) exception to the exemption should not apply, and the transaction should be non-reportable. I would, however, like to call you to provide whatever additional detail you think might be necessary and to confirm that the Staff agrees with my conclusion.

I look forward to speaking with you. Please call if you have any questions.

[Redacted signature block]

cc: [Redacted]