802.64

[redacted]

WRITER'S DIRECT LINE
[redacted]

August 10, 1992

BY FEDERAL EXPRESS

John M. Sipple, Jr., Esq.
Assistant Director
Federal Trade Commission
[redacted]
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 [redacted]

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 [redacted]

[redacted] 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 [redacted]

[redacted]

[redacted] 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

[redacted]

[redacted]

> 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

[redacted]

The enactment of the IBA on September 17, 1978

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

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

* The Rules and their accompanying Statement of Basis and

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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 engage 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

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

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).

** 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