7A(c)(i); 802.1(b)

December 12, 1994

Richard Smith, Esq.
Premerger Notification Office
Room 303
Federal Trade Commission
Washington, D.C. 20580

Re: Applicability of Exemptions in 15 U.S.C. §§18(a)(3)(B) and 18a(c)(1) to Sale of Assets

Dear Mr. Smith:

I am writing to set forth my understanding of the advice which you gave me in the course of our telephone conversation on December 6.

Our clients are two financial institutions ("Seller A"

have recently concluded an agreement pursuant to which they would sell (the "Sale") certain assets[1] subject to such leveraged lease arrangements[2] to a diversified financial

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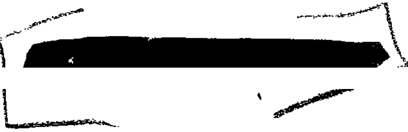
[1] The assets subject to the lease arrangements constitute railroad cars.

[2] One of the leases constitutes a so called "single investor lease" between one of the Sellers and a lessee end user. In this transaction the Seller did not leverage its investment by borrowing part of the purchase price from a third party lender. This lease, however, was a financing arrangement and has substantially all of the other attributes of a leveraged lease financing. Single investor lease transactions represent a very small percentage of the Sellers' portfolio of lease assets.



For Seller A, the assets to be sold represent:

(2) approximately 1 percent (on a net receivable basis) of Seller A's total portfolio of assets subject to leveraged lease arrangements; and

(3) approximately 18.8 percent (on a net receivable basis) of the included in Seller A's portfolio of such assets.

For Seller B, the assets to be sold represent:

(2) less than 1 percent (on a net receivable basis) of Seller B's total portfolio of assets subject to leveraged lease arrangements; and

(3) approximately .8 percent (on a net receivable basis) of the included in Seller B's portfolio of such assets.

For the leveraged leasing activities of the consolidated leasing group of the ultimate parent corporation (which is a financial institution) of which the Sellers are a part ("Consolidated"), the assets to be sold represent:

(1) significantly less than 1 percent of the total assets of Consolidated;

(2) approximately 1 percent (on a net receivable basis) of the total portfolio of assets of Consolidated subject to leveraged lease arrangements; and

(3) approximately 3.74 percent (on a net receivable basis) of the included in the portfolio of such assets of Consolidated.

The in the Sellers' portfolio of assets are not managed separately from the other assets in the portfolio.

In that the Sellers are engaged in the business of

of the assets of a division. I also understood you to say that the Sale[3] would therefore be exempt from the notification

U.S.C. § 18a(c)(1), if the following conditions were also met:

(1) the assets were subject to bona fide lease financing arrangements;

(2) operational and managerial control of the assets would not change as a result of the sale;

(3) the assets were subject to long-term leases or leases renewable at the option of the lessees;

(4) the Purchaser was not a competitor of any of the lessees; and

(5) the transaction was purely financial in nature

As discussed and as I have reconfirmed with the Sellers and Purchaser, all of these conditions are met. Accordingly

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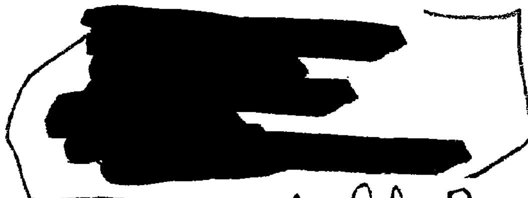
[3] As discussed during our telephone conversation, one group of [redacted] is subject to a single investor transaction (as [redacted]) and with respect to a second group of

of business (the exemption applicable to the bulk of the transaction), under 15 U.S.C. §18(a)(3)(B), the sale of these

Please let me know by close of business on Friday, December 16 if I have misunderstood or mischaracterized the position of the Premerger Notification Office on the above points.



12/14/94 called writer who advised that A + B were selling a portion of controlled by A or B. (He advised that A and B had subsequently in this transaction.) I advised that under this fact scenario, the was non-reportable under 7A(c)(1) and the principles set forth in HSR rules

R.B. Smith

E 12/6/74

PMN Staff -

In the attached letter, a newly formed partnership (which is not controlled by any person and does not have a regularly prepared balance sheet) forms a wholly owned sub (Newco), which forms three wholly-owned corporate subs. The partnership has $39MM in cash and loans to make three acquisitions.

First, the partnership purchases assets from A (a $100MM person) for $32.5. Since the partnership meets the three requirements of 801.11(e), i.e., is newly formed, not controlled and does not have a regularly prepared balance sheet, it can subtract what it will pay for A's assets from its total assets, making it only a $6.5MM person. (Two of the partners are a father and his grown son, who are investing independent funds in the partnership - no need to aggregate their holdings, in my view.)

Second, the partnership, through a wholly owned sub, will acquire the voting stock of a sub of B for cash and voting (and non-voting) securities of Newco. B is not a $100MM person and the partnership is, at most, only a $35MM person (the value of the assets purchased from A ($32.5MM) plus the remaining cash not to be used for the purchase of B's sub ($6.5MM minus $4MM = $2.5MM); the Newco voting and non-voting [illegible] and would not appear as such on its

Third, the partnership, through a [illegible] stock of a sub of C, with C not being a $100MM person. The [illegible]

[illegible] which will not make the partnership a $100MM person.

Assuming the three events go done in this order, I do not think any filings are needed.

Please let me know your thoughts.

Thanks,

Dick

CC: John Sipple.

Based upon our conversation and as previously indicated by the staff, it is our understanding that the staff takes the position that when debt acquired by an institutional investor [illegible]

issuer in a bankruptcy proceeding, such acquisition of voting Securities is not deemed to be "as a result of an acquisition" for purposes of Section 7A(a)(3) of the Act and the relevant Rules. Stephen M. Axinn, et al., Acquisition Under the Hart-Scott-Rodino Antitrust Improvements Act, §6.09[3] (rev. ed. 1993). As you explained, the rationale for this result is the passive nature of the acquisition, similar to a stock dividend or stock split. See 16 C.F.R. §802.10 (1994).

Furthermore, we understand that it is the staff's position that if the institutional investor acquired the debt prior to and not in contemplation of a bankruptcy proceeding of an issuer solely for the purpose of investment in a bona fide credit transaction entered into in the ordinary course of such investor's business, then the institutional investor's subsequent change of intention, triggered by the anticipated conversion of its debt into Voting Securities as a result of the bankruptcy proceeding, does not eliminate the exemptions provided in either Section 7A(c)(11) or Rule 802.63.

4. **Rule 801.13(a); Rule 801.15.**

Rule 801.13(a) provides, in relevant part:

"Subject to the provisions of §801.15 . . ., all voting [illegible]

[illegible] following:

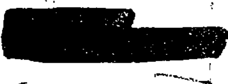
"Notwithstanding §801.13, for purposes of section 7A(a)(3) and §801.1(h), none of the following will be held as a result of an acquisition:

[illegible]

. . .

(2) Sections . . . 802.63 . . . ; and

(c) Voting securities the acquisition of which was [illegible]



7A(c)(11)(A) unless additional voting securities of the

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4. **Rule 801.13(a); Rule 801.15.**

Rule 801.13(a) provides, in relevant part:

> "Subject to the provisions of §801.15 . . ., all voting securities of the issuer which will be held by the acquiring person after the consummation of an acquisition shall be deemed voting securities held as a result of the acquisition."

However, Rule 801.15 excludes certain voting securities from such aggregation requirement by providing, in relevant part, the following:

> "Notwithstanding §801.13, for purposes of section 7A(a)(3) and §801.1(h), none of the following will be held as a result of an acquisition:
>
> (a) Assets or voting securities the acquisition of which was exempt at the time of acquisition . . . , or the present acquisition of which is exempt, under - . . .
>
> (2) Sections . . . 802.63 . . . ; and
>
> (c) Voting securities the acquisition of which was

[illegible]
will acquire an option to purchase all of the underlying assets of the broadcast facility owned by A.

B is not just acquiring an income stream from A. It is also acquiring a right to direct the programming of the broadcast operations of A.

Is this such a diluted acquisition that it is not an acquisition of an asset at all? Perhaps it is merely the purchase of some of the beneficial ownership of an asset. After the acquisition, beneficial ownership of the broadcast facilities remains with A as long as the option is not exercised.

According to the dollar value figures provided in the letter, this exclusive right being sold represents 80% of the value of the broadcast business. I think that this is an acquisition of an intangible asset that is a part of the broadcast business and reportable under H-S-R.

[illegible]

Input from
PS, JS, RS, NO,

[illegible]

The entering into the LMA agreement between A + B is not reportable. The subsequent acquisition (exercise of the option) is potentially reportable. It is the purchase of the whole business (including the airtime under the LMA agreement). After the exercise of the option, B will beneficially own the whole business.

7A(c)(11)(A) unless additional voting securities of the same issuer have been or are being acquired."

B is acquiring an exclusive right for substantially all of the air time of a broadcast facility owned by A. In addition, B will acquire an option to purchase all of the underlying assets of the broadcast facility owned by A.

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According to the dollar value figures provided in the letter, this exclusive right being sold represents 80% of the value of the broadcast business. I think that this is an acquisition of an intangible asset that is a part of the broadcast business and reportable under H-S-R.

What do you think?

Input from PS, JS, RS, NO, TH, VC & HR.

staff meeting 5-13-94.

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