

March 24, 1998

Via Hand Delivery

Federal Trade Commission
Premerger Notification Office
Bureau of Competition
(Attn: Richard Smith, Esq.)
7th & Pennsylvania Avenue, N.W.
Room 303
Washington, D.C. 20580

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Pub. L. 94-435, 90 Stat. 1590 (1976) (codified as amended at 15 U.S.C.
Sec. 18A) (the "HSR Act") to Pending Transaction

Dear Mr. Smith:

On behalf of our client, a party to a pending transaction (as described in this letter, the "Transaction"), we are writing to ascertain whether the Federal Trade Commission ("FTC") concurs with our analysis that the Transaction is exempt from the filing requirements of the HSR Act under 16 C.F.R. §802.1. The current §802.1 was adopted in 1996 as a clarification and expansion of the prior "ordinary course of business" exemption. Within the revised section, however, certain terms are not defined and there is presently little publicly available guidance on how that section should be applied in various instances other than what may be discerned from reading the various examples which are provided following the text of the regulation.

A. The Parties: The following parties are participating in the Transaction:

"Airline A", which is an "ultimate parent entity," as defined by 16 C.F.R. §801.1(h)(3), and has total assets exceeding \$100 million. Airline A will be the "acquired person" in the Transaction. The core business of Airline A is to run a commercial passenger airline and as a necessary part of that business, Airline A regularly and continually acquires,

various vacation periods, with lower passenger traffic during other periods of the year.

Leasing Company B ("LeaseCo B"), is an "ultimate parent entity," as defined by 16 C.F.R. §801.1(b)(3), and has total assets exceeding \$100 million. LeaseCo B is primarily engaged in the financing and management of commercial jet aircraft engines, components and spare parts for both airlines and overhaul/repair facilities, worldwide. As a vendor, LeaseCo B leases and sells jet engines, and sells components and spare parts within the aircraft industry, including to Airline A. LeaseCo B has purchased used aircraft on prior occasions to be "cannibalized" for their engines, components and other parts for use in its business. LeaseCo B does not carry passengers or freight, and it has no revenues in the SIC code related thereto.

B. The Transaction. Airline A and LeaseCo B have entered into a letter of intent under which LeaseCo B shall acquire from Airline A 12 [REDACTED] commercial aircraft, each with 4 aircraft engines of a specific type. The aggregate purchase price for the 12 aircraft

and return each certificate of airworthiness or airframe dataplate to Airline A. Each engine will be delivered "as-is" with the engine dataplate, without any specified remaining useful life for the most limiting life-limited internal engine component. Each aircraft will be delivered to LeaseCo B on a date following the specified retirement date for such aircraft, provided that Airline A can adjust the retirement date for the purpose of its use of the aircraft in its passenger-carrying operations. The first two aircraft are scheduled for delivery in April 1998, and the last aircraft, in December 2000.

with the purchase price being reduced in that event by approximately \$5 million per aircraft, with Airline A having the option to sell to LeaseCo B either or both of the retained aircraft at a reduced purchase price, depending upon the date of Airline A's exercise of its option to require LeaseCo B to buy such aircraft.

The 12 [REDACTED] aircraft being sold to LeaseCo B were built during the 1970's. Airline A has contracted to acquire a fleet of new [REDACTED] aircraft, which are bigger and more reliable than the older [REDACTED]. Airline A has already begun taking delivery of the [REDACTED] aircraft. After each new aircraft is delivered to Airline A, such aircraft will be put through appropriate testing by Airline A prior to being placed in service in passenger operations. As those aircraft are brought on-line, the aircraft being sold to LeaseCo B will be retired, with retirement dates being adjusted, if necessary, due to the passenger-load requirements of the season. During the time period beginning six months prior to the delivery of the first [REDACTED] to LeaseCo B and ending six months after the delivery of the

specifically "goods acquired and held solely for the purpose of resale or leasing to an entity not within the acquiring person (e.g., inventory), and "goods acquired to be incorporated in

LeaseCo B's spare parts business or that may be installed in aircraft engines to be leased in LeaseCo B's spare parts business. The engines, components and spare parts business

parts and components will not be sold or leased to any entity included within LeaseCo B for "use" by such entity.

Consequently, the exemption available in §802.1(c), which focuses on the "acquiring person," LeaseCo B, is available to LeaseCo B with respect to its purchase of aircraft from Airline A for use in LeaseCo B's jet aircraft engines, components and spare parts business.

2. Exemption under §802.1(d), "Used Durable Goods". As mentioned above, the aircraft being acquired by LeaseCo B do not comprise an "operating unit" of Airline A. The aircraft do not, as operating aircraft, comprise "durable goods" because the certificates

the refurbished engines will be expected to exceed one year, thereby qualifying as "durable goods" under §802.1(d). Other components and parts of the aircraft will also comprise "durable goods" with a useful life of greater than one year. The engines, components and parts are being acquired by LeaseCo B for the purpose of resale or leasing to entities not included in LeaseCo as the acquiring person, thereby qualifying the Transaction for

Furthermore, as explained above, Airline A has already contracted to replace, and is replacing, the aircraft being sold to LeaseCo B. It is not canceling flights nor discontinuing services to particular locations because, with prudent corporate planning, the new replacement aircraft will be received, flight-checked and placed in service prior to or at the time the old aircraft are retired from service. Under §802.1(d)(3) the acquired person must have replaced "all or substantially all of the productive capacity of the goods being sold within six months of that sale . . ." Based on example 9 following §802.1, the phrase "within six months" appears to mean that the replacement property must be received by the acquired person and placed in service during the period beginning six months prior to the retirement of the old property and ending six-months following such retirement. In the present instance, there is a time period during which the old aircraft are being retired, and a

entity of the type . . .

last, Airline A expects to take possession of 11 new [REDACTED]. Although Airline A took possession of a 12th [REDACTED] seven months prior to the delivery of the first [REDACTED] to LeaseCo B, during the sale period and the six month "window" before and after such period, there is not a one-for-one matching between the replacement aircraft and the retired aircraft.

capacity" so that no diminishment shall occur, the Transaction qualifies for exemption under §802.1(d)(3).

* * * * *

We will telephone you soon to confirm that you received this letter and to inquire whether you need any additional facts to ascertain whether the Premerger Notification Office agrees with our conclusion that the Transaction is exempt under §802.1. In the meantime, if you have any questions, please telephone me at my number set forth above. Thank you for your assistance in this matter.

Very truly yours,
[REDACTED]

*applicable to the purchase of used airplanes and the transaction is
exempt under that rule. However, we do not think that the
technical requirements of 802.1(d) have been met. (TH and ME
concur in this result).*

RTB/Smith