Sheinberg, Samuel I.

From: [redacted]
Sent: Friday, November 13, 2020 9:17 AM
To: Walsh, Kathryn E.; Berg, Karen E.; Carson, Timothy; Sheinberg, Samuel I.; Six, Anne; Musick, Vesselina
Subject: FW: Section 7A(c)(1) Ordinary Course of Business Exemption

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From: Whitehead, Nora
Sent: Friday, November 13, 2020 9:16:53 AM (UTC-05:00) Eastern Time (US & Canada)
To: [redacted]
Cc: [redacted]
Subject: RE: Section 7A(c)(1) Ordinary Course of Business Exemption

We disagree. The assets you describe are not exempt under 7A(c)(1).

From: [redacted]
Sent: Wednesday, November 11, 2020 5:00:38 PM (UTC-05:00) Eastern Time (US & Canada)
To: [redacted]
Cc: [redacted]
Subject: Section 7A(c)(1) Ordinary Course of Business Exemption

Dear PNO Staff,

I hope this finds you well and staying safe. We would appreciate your guidance regarding the applicability of the exemption for acquisitions of goods or realty transferred in the ordinary course of business under the HSR Act, 7A(c)(1), to the transaction described below.

A plans to acquire from B substantially all of the assets of C, a wholly owned subsidiary of B (the "Acquisition"). B is the ultimate parent entity of C and the size-of-transaction and size-of-parties thresholds are met.

A's business is the origination and purchase of equipment leases and portfolios of equipment leases in the transportation sector, including the rail and intermodal markets. A also provides maintenance management and other equipment-management-related services to certain lessees under such equipment leases, and with respect to periodically off-lease equipment.

B is a global transportation finance company which purchases equipment, consisting almost entirely of intermodal shipping containers and railcars, which it leases to its customers. In operating its fleet, B leases, re-leases and disposes of equipment and contracts for the repair, repositioning and storage of equipment and also manages intermodal container equipment for third-party investors. C owns and leases a diverse fleet of specialized railcars for shipping grain and agricultural products, forest products, energy products, industrial products, chemicals, and food.

In the Acquisition, A plans to acquire C's railcar leasing business, consisting of C's fleet of railcars, C's railcar identification marks and the leases associated with the railcars whereby C leases the railcars to third-party lessees (the "Railcar Leasing Business").

While we believe that the railcars included in the Railcar Leasing Business are both "goods [to be] acquired and held solely for the purpose of resale or leasing to an entity not within the acquiring person" and "goods [to be] acquired from an acquired person who acquired and has held the goods solely for resale or leasing to an entity not within the acquired person" (meeting the criteria of the exemption under HSR Rule §802.1(d) for the acquisition of used durable goods in the ordinary course of business on two separate bases), we do not believe the durable goods exemption applies here because all of the assets of an operating unit will be acquired in connection with the Acquisition.

While the Acquisition does not appear to be exempt under HSR Rule §802.1, we seek confirmation that it is exempt under the statutory exemption for "acquisitions of goods or realty transferred in the ordinary course of business" under Section 7A(c)(1) of the HSR Act.

We believe that under an analysis analogous to the PNO's position that the acquisition of financial instruments, such as portfolios of loans, leases, certain kinds of contracts, and servicing rights, could under certain circumstances, qualify for the statutory exemption under Section 7A(c)(1) as an exempt acquisition in the ordinary course of business, the statutory exemption is available in an equipment leasing portfolio sales transaction even if not covered by HSR Rule §802.1. See ABA Premerger Notification Practice Manual, 5th Edition (2015), Interpretation Nos. 99, 100 and 101.

In analyzing whether acquisitions of financial assets such as receivables, leases and loans qualify for the ordinary course of business exemption under Section 7A(c)(1), we understand that the PNO does not employ the operating unit concept where the ultimate parent entity of the acquired entity is not exiting the business entirely. ABA Premerger Notification Practice Manual, 5th Edition (2015), Interpretation 100. We also understand that the PNO construes the business at issue broadly. Here, B is not exiting the transportation equipment leasing business, just the business of leasing railcars. Following the Acquisition, B will continue to be active in the transportation equipment leasing business.

Concluding the Acquisition is exempt under Section 7A(c)(1) on the basis that B (selling entity C's ultimate parent entity) will continue its shipping container leasing business even though it is exiting the railcar leasing business is consistent with Informal Interpretation 0606009 (https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/0606009) holding the ordinary course of business exemption applies to an acquisition of aircraft assets from a seller in the transportation leasing business on the basis that the seller will continue in the business of leasing rail cars even though exiting the aircraft leasing business. See also Informal Interpretations 0805016, 0411006 and 0306007 (https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/0805016, https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/0411006, and https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/0306007).

Thus, because B will remain in the transportation equipment leasing business following A's acquisition of the Railcar Leasing Business from C, we believe this transaction would be exempt from HSR filing requirements under the statutory ordinary course of business exemption under Section 7A(c)(1). Please let us know if you agree with our analysis.

[redacted]

[redacted]