

802.1 (b)

Via Facsimile and U.S. Mail

April 12, 2004

B. Michael Verne, Esq.  
Federal Trade Commission  
Premerger Notification Office  
Bureau of Competition, Room 303  
6th Street and Pennsylvania Avenue N.W.  
Washington, DC 20508

Dear Mike:

I write to confirm the oral advice you gave to me in telephone conversations on April 1, 2004 and April 12, 2004. In the first conversation I explained that our client ("Company B") plans to acquire a contract for the construction of a vessel to be used in the shipping trade. The vessel does not represent all or substantially all of the assets of the acquired person ("Company A"). A special purpose LLC within Company A holds the construction contract and conducts activities related to completing the construction (financing activities, etc.). Aside from relatively minor assets ancillary to the construction, it is our understanding that the contract represents all or substantially all of the assets of the special purpose LLC, and you should assume so for purposes of your analysis. I asked whether the Premerger Notification Office ("PNO") would consider the acquisition to be exempt as the acquisition of goods in the ordinary course of business under § 7A(c)(1) of the Clayton Act and 16 C.F.R. § 802.1.

We discussed whether the vessel would be considered an "operating unit" that removes the acquisition from the scope of the exemption. I highlighted the examples in the Rules that assume without discussion that a vessel such as a cruise ship is not an "operating unit." *Id.* at ex. 7 (sale of cruise ship by cruise ship operator; exemption applies); ex. 8 (sale of fleet of six passenger cruise ships by luxury cruise ship operator; exemption applies). You stated that the PNO's position has been that vessels are not considered operating units for purposes of the exemption. You also stated that the PNO takes the position that the placement of assets within a special-purpose LLC does not render them assets "operated . . . as a business undertaking in a particular location or for particular products or services . . ." so that the exemption does not apply, even if the assets are the only ones held by the special-purpose LLC. *Cf.* § 802.1(a). You stated that, under these facts, the vessel would not be considered an operating unit.

Although we did not discuss it explicitly, we ask that you confirm that the acquisition of a vessel under construction is the acquisition of a new good within the meaning of 16 C.F.R. §

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802.1(b). Example 2 to that exemption concerns the acquisition of new engine components to be used in the manufacture of airplane engines, which the example finds to be the acquisition of new goods. Similarly, the acquisition of a vessel under construction can only be considered the acquisition of a new good, as long as it does not constitute an operating unit. Please confirm whether you agree with this analysis.

In a second call held today with [REDACTED] Esq. of [REDACTED] we asked you whether, in the PNO's view, B's acquisition of a contract for the completion of an exempt asset (in this case, a new vessel) is a potentially reportable acquisition. In our view, if the contract to be acquired is for the acquisition of an exempt asset, then the acquisition of the contract likewise should be exempt. To decide otherwise would draw a distinction with no competitive significance between the direct acquisition of a completed exempt asset and the acquisition of a contract to obtain the exempt asset. In addition, we drew your attention to ABA Interpretation No. 103, which states that, in the context of a real property lease, if the real property subject to the lease would be exempt from acquisition, then an acquisition of the lease interest also is exempt and not valued, even if a premium is paid. In our view, this interpretation implicitly recognizes that a lease interest has no competitive significance apart from that of the asset leased. By analogy, the acquisition of a contract right for construction of an exempt asset has no competitive significance apart from that of the asset being constructed, even if the purchaser will pay a premium in excess of \$50 million to acquire that right. If the acquisition of the completed asset would be exempt, so should the acquisition of the contract to complete construction of the asset. You confirmed that this analysis was correct and that B's acquisition of a contract for the construction of a vessel, even for a substantial premium, would not require a filing under the HSR Act.

Thank you for your consideration of these issues, Mike. Please call me at [REDACTED] to confirm or correct my description of our teleconferences and also to confirm or correct our conclusion that the acquisition of a vessel under construction is the acquisition of a "new good."

Very truly yours,

[REDACTED]

By [REDACTED]

cc: E [REDACTED]

AGREE - THIS IS AN EXEMPT  
ACQUISITION UNDER NEW GOODS -  
802.1(b)

B. Michael Verne  
4/13/04