This letter was answered, advised that transaction was [illegible] 12/8/88 mm [redacted]

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November 28, 1988

[illegible] Section 7A (h) of the Clayton Act which restricts release under the Freedom of Information Act

Wayne Kaplan, Esq.
Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

Re: Reportability of Formation of [redacted]

Dear Wayne:

This firm is counsel to BCP and BTP in connection with the above-described transactions. In addition, for purposes of this letter we are authorized as well to speak for [redacted] in bringing to your attention the facts set forth below, so that we may consult regarding the reportability of the proposed transactions under the Hart-Scott-Rodino Act.

It is my view as well as that of [redacted] that none of these transactions is reportable. However, in view of the size and complexity of the transactions, we felt it best to review them with the Premerger Office.

<u>Overview of Proposed Transactions</u>. This transaction involves the transfer by [redacted] f the businesses of its wholly-owned subsidiaries, listed on Exhibit A to this letter (the "Exhibit A Subs"), to [redacted] an entity whose voting securities will ultimately be held as follows: [redacted] 9%; [redacted] 24.9%; and [redacted] 26.1%.1/ The consideration to be received by

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1/ The management of [redacted] ill have a five percent economic interest in the equity of [redacted] through nonvoting (footnote continued)

[redacted] is approximately $600,000,000 of which $475,000,000 is in cash, and $125,000,000 is in subordinated promissory notes issued by [redacted] In addition, it is estimated that fees and expenses incidental to the transaction will be approximately $22,000,000.

As shown in the table below, [redacted] will borrow approximately $490,000,000 of senior debt from commercial banks and receive $25,000,000 in equity contributions to finance the transaction, pay expenses and repay approximately $18,000,000 of existing debt.[2/]

Source of Funds		Uses of Funds	
Senior Debt	$490 million	Purchase Price	$600 million
Subordinated Promissory Notes	125	Existing Debt	18
Common Stock	25	Est. Expenses	22
Total Sources	$640 million	Total Uses	$640 million

[redacted] is a limited partnership organized approximately one year ago for the purpose of permitting its limited partners (pension funds, banks and other institutional investors) to invest indirectly through various means in investments which offer the possibility of above-average returns utilizing the investment banking skills of its general partner [redacted] (described below). [redacted] is a newly-formed limited partnership, organized for the purpose of permitting its limited partners (pension

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(footnote continued from previous page)
securities. Thus, the economic interest in the equity of [redacted] will be held as follows: [redacted] 24.9%; and [redacted] 26.1%.

2/ To the extent that it is unnecessary to refinance part or all of the $18 million of indebtedness to the outside lenders on the date of the closing of the acquisition (the "Closing Date"), [redacted] will not draw down all of the $18 million on the Closing Date but it will draw down that amount after the Closing Date when it is required to refinance such indebtedness by the outside lenders.

funds, banks, other institutional investors and affiliates of [redacted] to invest indirectly in [redacted].

[redacted] the general partner of [redacted] and [redacted] is an affiliate of [redacted], a private investment banking firm founded as a New York partnership in 1985 that specializes in advisory services to industrial corporations and financial institutions in the United States and abroad. The six general partners of [redacted] currently are [redacted] will be the general partner of both [redacted] and [redacted] and will have a one percent equity interest in [redacted] and in [redacted].

At this point, the identity of the limited partners that will invest in the limited partners of [redacted] has not been fully established, but it is clear that no single entity (and no person, i.e., group of entities under common control for purposes of the Hart-Scott-Rodino Act) will have the right to 50 percent or more of the profits, or the right, in the event of dissolution, to 50 percent or more of the assets, in both [redacted] and [redacted]. It follows, of course, that there is no entity or person that will simultaneously have "control" over [redacted] and [redacted] within Section 801.1(b)(1)(ii). Moreover, because [redacted] and [redacted] are partnerships, not corporations, the alternative test of "control" set forth in Section 801.1(b)(2) is inapplicable as to these two entities. [redacted] and [redacted] will have the same general partner and may accordingly be expected to take similar actions with respect to their respective investments in [redacted] 3/ but it is our understanding that these facts alone do not establish common "control."

[redacted] and [redacted] will be separate economic entities, managed for the benefit of their respective investors, and will keep separate books and records. [redacted] will not be the beneficial owner of any assets or voting securities held by [redacted] and vice versa, nor will any person or entity be the beneficial owner of the assets or voting securities held of record respectively by [redacted] and [redacted].

There will, however, be overlap between the investors in [redacted] and those in [redacted]. It is presently anticipated, and for purposes of this letter you should assume, that the direct and indirect investors in [redacted] will number about 30, and those in [redacted] no more than 75. Of the investors in the two entities, it is anticipated that up to 25 investors will hold interests in both [redacted] and [redacted] that up to 84

3/ There will, however, be no contract or other agreement obligating [redacted] and [redacted] to act together with respect to their interests in [redacted].

percent of the equity of [redacted] will be held by investors that will simultaneously hold interests in [redacted] and that up to 84 percent of the equity of [redacted] will be held by investors that will simultaneously hold interests in [redacted]

In deciding to form [redacted] as a separate entity to invest in [redacted] along with [redacted] and [redacted] were not motivated by any intent to avoid premerger reporting under the Hart-Scott-Rodino Act. The reason for the formation of [redacted] is that the regulations of the Maritime Administration and the U.S. Coast Guard forbid non-citizens from owning or holding interests in excess of twenty-five percent in certain types of businesses including some of the businesses involved in the transactions described herein. In the present situation, [redacted] had foreign interests aggregating slightly higher than 25% of the total economic interest in [redacted] hence it was decided to form [redacted] with only domestic limited partners as a means of permitting the foreign investors in [redacted] to take up to a 24.9% interest in [redacted]

In view of the facts set forth above, it is our view that the Hart-Scott-Rodino Act and regulations relating thereto do not require the aggregation of voting securities of [redacted] held by [redacted] with those held by [redacted] i.e., that [redacted] and [redacted] or its controlling person, if any) are separate "persons" not under common control, and hence are separate "acquiring persons" for Hart-Scott purposes.

Steps in the Transaction. The following steps will occur:

(1) [redacted] will be incorporated as a wholly-owned subsidiary of [redacted] In addition, [redacted] will cause to be incorporated 15 direct and indirect wholly-owned subsidiaries, which will be "mirror image" subsidiaries of the Exhibit A Subs.

(2) [redacted] will acquire the assets presently held by the Exhibit A Subs by means of the merger of each Exhibit A Sub with and into its "mirror image" subsidiary of [redacted] [5/] The "mirror image" subsidiaries of [redacted] will be the surviving corporations of such

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4/ [redacted] will contribute $25,000,000 to [redacted] in return for 100% of [redacted] voting securities and 90% [redacted] nonvoting securities.

5/ Among the assets to be transferred by [redacted] will be approximately $20 million in cash, to be used by [redacted] as part of its working capital; the remainder of the cash presently held by the Exhibit A Subs will be dividended out to [redacted] immediately prior to the mergers.

mergers, and their voting securities will be wholly-owned directly or indirectly by [redacted], which will continue at stage (2) to be wholly-owned [redacted]

(3) Subsequently, very shortly after the occurrence of steps (1) and (2), the following actions will be taken simultaneously: (a) [redacted] will sell (i) 24.9% of the voting and nonvoting securities in [redacted] to BCP in exchange for a purchase price of $6,552,623 and (ii) 26.1% of the voting securities and nonvoting securities in [redacted] to [redacted] in exchange for a purchase price of $6,868,421; and (b) [redacted] will (i) issue $125,000,000 aggregate principal amount of its subordinated promissory notes to [redacted] and (ii) borrow $490 million from a syndicate of banks with Chemical Bank as the agent thereof. The sources and uses of funds are set forth on p. 2 above.

Formation of [redacted]. When formed, [redacted] will be a wholly-owned subsidiary of [redacted]. Hence, its formation could be regarded as exempt under the intra-person exemption, Section 802.30. Alternatively, because [redacted] is being formed for the purpose of serving as an acquisition vehicle in corporate form, its formation may be deemed to be subject to Section 801.40. If so, the transaction does not meet one of the threshold tests set forth in Section 801.40(b), namely, the size-of-transaction test. For purposes of Section 801.40, there will be three "persons" contributing to the formation of

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6/ [redacted] have petitioned the Interstate Commerce Commission (the "ICC") for an exemption from the Interstate Commerce Act for the transfer of common control of those Exhibit A Subs which are regulated by the ICC. The parties to the proposed transaction intend to obtain such ICC exemption before steps (2) and (3) occur. [redacted] are also in the process of applying for approval from [redacted] for the transfer of ownership of certain of the vessels of [redacted], one of the Exhibit A Subs. That approval also will be obtained before steps (2) and (3) hereof occur.

The Fleet operates under the bulk commodity exemption of 49 U.S.C. § 10542 and therefore is not subject to the ICC's jurisdiction. There are six other Exhibit A Subs that are not regulated by the ICC [redacted]. The assets of those seven Exhibit A Subs which constitute approximately one-quarter of the [redacted] assets to be transferred to [redacted], will be outside the scope of ICC approval.

[redacted] namely [redacted] and [redacted]. None of these persons will acquire voting securities conferring control or voting securities valued at $15 million or more.[7] Thus, the acquisitions by [redacted] and [redacted] all fall within the minimum dollar value exemption set forth in Section 802.20(b).[8]

[redacted] of the Exhibit A Subs. Inasmuch as the formation of [redacted] is exempt under Section 801.40, the related transfer of the businesses of the Exhibit A Subs to [redacted] one of the persons contributing to the formation of [redacted], may be exempt. Alternatively, the transfer to [redacted] appears to be exempt under the size-of-person test, by reason of the provisions of Section 801.11(e)(1). At the time of the [redacted] will not have a regularly prepared balance sheet. Moreover, [redacted] assets, excluding (1) cash that will be used as consideration in the [redacted] from [redacted] and (2) cash that will be used for expenses incidental to the transaction, will be substantially less than $10 million.

[redacted] I wish to thank you in advance for your attention to this inquiry. If we have not heard to the contrary within ten days of today's date, we will assume that the Premerger Office agrees that the transaction is not reportable. In any event, we will call you in a few days to discuss the matter.

Sincerely yours,

[redacted]

Enclosures

7/ See the section in this letter entitled "Steps in the Transaction" for the allocation of the purchase price of the voting securities of [redacted].

8/ For the same reasons, if the transaction is viewed as (1) the formation of [redacted] in a transaction exempt from Section 802.30, and (2) the acquisition of voting securities in [redacted] pursuant to the normal rules applicable to the acquisition of voting securities, these transactions are likewise exempt under Section 802.20(b).