

The value of a contract transferred to another person whose name is [REDACTED] is exempt under 7A(CX1) would be what is paid for the contract above + beyond any reimbursement of installment payments made to the manufacturer.

person whose name is [REDACTED] contracted for product acquisition  
February 21, 1992

BY TELECOPIER: 202-326-2050

Victor Cohen, Esq.  
Premerger Notification Office  
Bureau of Competition  
Federal Trade Commission  
Washington, D.C. 20580

Re: Hart-Scott-Rodino Filing Requirements

Dear Mr. Cohen:

This is to confirm our telephone conversation of today, during which we discussed the following hypothetical transaction.

A builder enters into a contract with Company A for the purchase of a vessel to be constructed by the builder for in excess of \$15,000,000. Prior to completion of the vessel, Company A assigns its contract right to Company B. Subsequently, Company B assigns its contract right to Company C, who intends to take delivery of the vessel directly from the builder when it is completed.

Based on our conversation and my review of No. 13 in the ABA Premerger Notification Practice Manual to which you referred me, it is my understanding that the assignment or sale of the contract right to take delivery of the vessel would not be a reportable transaction, unless the price to be paid by Company C to Company B is in excess of \$15,000,000 more than the price of the vessel charged by the builder. Thus, the value of the contract right, which is to be assigned to Company C, is the amount that Company B is able to charge over and above the purchase price stated in the contract between the builder and Company A.

Please call me immediately if I have misunderstood your position. Thank you for your assistance in this matter.

Very truly yours,

[REDACTED SIGNATURE]

[REDACTED]

[REDACTED]

## III. PREMIER NOTIFICATION PRACTICE MANUAL

**12** Applicable subsection of the Act: § 7A(c)(1).

*Brief statement of the question or problem:* Whether the purchase of locomotives and inventory of a bankrupt railroad by a company engaged in the business of buying and refurbishing (or scrapping) used locomotives is exempt under § 7A(c)(1) as a purchase of goods in the ordinary course of business.

*Interpretation and discussion:* The FTC staff agreed that it was.

*Documents pertaining to this issue:* Letter to John Truitt, Esq., dated May 30, 1980.

*Commentary:* See also, letter to Ms. Sandra Vidas dated September 16, 1981 (sale and leaseback of a computer exempt under § 7A(c)(1)). Availability of the exemption normally would not be affected by the use of a sale and leaseback arrangement, but would instead depend upon whether the sale would itself be exempt under a § 7A(c)(1) analysis.

**13** Applicable subsection of the Act and rules: § 7A(c)(1), § 802.1(b).

*Brief statement of the question or problem:* A charter airline, having discontinued its operations and sold its fleet of planes, retains only the right to take delivery on two DC-10's which it had previously ordered. If it does take delivery and then sells the two planes, will that transaction be exempt under § 7A(c)(1) as a sale of "goods" in the ordinary course of business?

*Interpretation and discussion:* The FTC staff noted that, since the right to take delivery of the DC-10's was the company's only asset, sale of the planes would not be in the "ordinary course of business," by reason of § 802.1(b).

*Documents pertaining to this issue:* Memorandum to File from M.R. Chandler (Subject: Call from [deleted]), dated August 11, 1978.

*Commentary:* Since an issue under § 802.1(b) would not otherwise arise, it is probably implicit in the staff advice that the purchase of a DC-10 would be in the ordinary course of business for the buyer (e.g., a commercial airline, but see *ltr #1*), since the sale of a new DC-10 would not necessarily be in the ordinary course of business for a charter operator.

The FTC staff memorandum notes that, if the company had been able to transfer the right to take delivery on the planes, rather than transferring the planes themselves, the value of the transaction would have been lower and might therefore not have been reportable. The planes were currently valued at \$13.5 million apiece, but the delivery price was lower because the order had been placed by the charter company some years before.

The memorandum did not address the question whether only one of the two planes could have been transferred in the ordinary course of business.

**14** *Applicable subsections of the Act and rules:* § 7A(c)(1), §§ 801.14, 801.15. *Brief statement of the question or problem:* Purchaser has signed an agreement to purchase for less than \$15 million certain real property and other assets from Seller and to continue the business currently carried on by Seller at that location. In order to do so, Purchaser wishes separately to purchase all of Seller's inventory associated with that business, for a price of less than \$15 million. Both Purchaser and Seller regularly purchase and sell this kind of inventory in the ordinary course of their respective businesses. As a result of these transactions, Purchaser will hold all or substantially all of the assets of an operating division of the Seller. Is the inventory purchase exempt under § 7A(c)(1) as a transfer of goods in the ordinary course of business?

*Interpretation and discussion:* The letter cited below indicates that the FTC staff agreed that the exemption applied. Consequently, the value of the two transactions was not aggregated, and neither required notification.

*Documents pertaining to this issue:* Letter to Premerger and Notification Office (sic), Attention Mr. Thomas Hancock, dated September 8, 1980.

*Commentary:* We have doubts about the correctness of this interpretation. The staff has adopted the position that purchases of goods or real estate exempt from notification under § 7A(c)(1) may be separated from other related non-exempt purchases. Aggregation with the non-exempt transfers is then avoided by reason of § 801.15(a).

However, in this case the letter indicates that the two purchases would together account for substantially all of the assets of an operating division of Seller. Section 802.1(b) precludes "ordinary course of business" exemption for any transfer that results in the purchaser's holding of all or substantially all of the assets of the transferring entity or an operating division thereof.

The letter revealed that the purchase of real property and other assets was valued at \$14.5 million, and that the proposed inventory purchase was worth another \$13 million. If the latter were not exempt under § 7A(c)(1), and if the two amounts related to a single purchase, § 801.14(b) would require their aggregation. Similarly, if the "throwback" provisions of § 801.13(b)(2)(ii) applied, the two must be aggregated, even if they were regarded as separate purchases.

**15** *Applicable subsection of the Act:* § 7A(c)(1).

*Brief statement of the question or problem:* Whether the purchase of several oil and gas drilling rigs is exempt under § 7A(c)(1) where both buyer and seller

purchase of locomotives  
used in the business of  
leasing is exempt under  
the ordinary course of  
business.

Esq., dated May 30.

September 16, 1981  
(1). Availability of the  
lease and leaseback  
the sale would itself be

(c)(1), § 802.1(b).

e, having discontinued  
the right to take delivery  
does take delivery and  
it under § 7A(c)(1) as a

since the right to take  
possession of the planes would  
be under § 802.1(b).

file from M.R. Pfunder

not otherwise arise, it is  
of a DC-10 would be in  
commercial airline, but see  
readily be in the ordinary

company had been able to  
rather than transferring the  
could have been lower and  
were currently valued at  
higher because the order had  
gone.