The value of a contract transferred to another person where the [is] contracted for product to acquisition is exempt under 7A(c)(1) would be what is paid for the contract above + beyond any reimbursement of installment payments made to the manufacturer. 862.16,

February 21, 1992

BY TELECOPIER: 202-326-2050

Victor Cohen, Esq.

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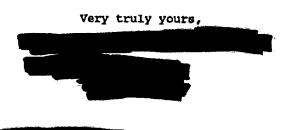
A builder enters into a contract with Company A for the purchase of a vessel to be constructed by the builder for in excess of $15,000,000. Prior to completion of the vessel, Company A assigns its contract right to Company B. Subsequently,
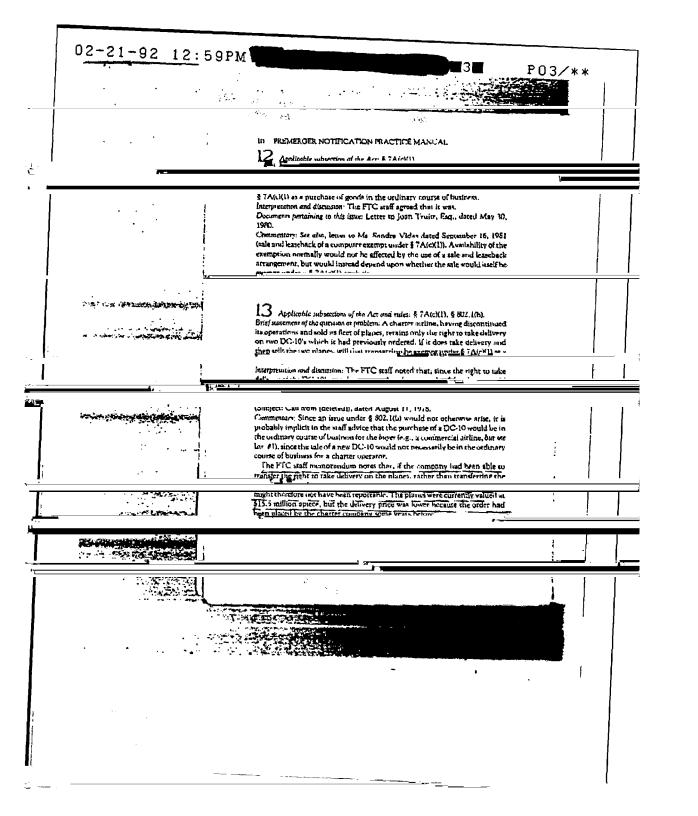
take delivery of the vessel directly from the builder when it is completed.

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

purchase price stated in the contract between the builder and Company A.

position.   Thank you for your assistance in this matter.

Very truly yours,

10   PREMERGER NOTIFICATION PRACTICE MANUAL

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

§ 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 Joan 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

13 *Applicable subsections 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

Interpretation and discussion: The FTC staff noted that, since the right to take

Contact: 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 bar #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

might therefore not have been reportable. The planes were currently valued at $15.5 million apiece, but the delivery price was lower because the order had been placed by the charter company some years before.

two planes could have been transferred in the ordinary course of business.

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ged in the business of
ares is exempt under
e of business.
t was.

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

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

tion. 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 trans-

c(1), § 802.1(b).

does take delivery and
t under § 7A(c)(1) as a

, since the right to take
sale of the planes would
of § 802.1(b).
le from M.R. Pfunder

aor otherwise arise, it is

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 to-gether account for substantially all of the assets of an operating division of any transfer that results in the purchaser's holding of all or substantially all of

mpany had been able to
r than transferring the

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) ap-

were currently valued at
er because the order had
ore.

chases.

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