[redacted]

August 11, 1992

VIA HAND DELIVERY

Victor L. Cohen, Esq.
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Room 310
6th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Cohen:

The purpose of this letter is to follow up on the telephone conversation that you had last Thursday with [redacted] of [redacted] and me in which we discussed whether a transaction involving the acquisition of assets that are subject to a financial (or "leveraged") lease must be reported under the Hart-Scott-Rodino Act. The acquisition satisfies the "size-of-persons" and "size-of-transaction" tests set forth in the Act. We agreed in our conversation that [redacted] and I would describe the transaction in writing so that the Premerger Staff could determine whether the transaction is exempt as an acquisition of assets "in the ordinary course of business." In addition, since last Thursday, [redacted] and I have determined that the acquisition is likely exempt under Rule 802.50 of the Premerger Rules because it is an acquisition of assets "located outside the United States, to which no sales in or into the United States are attributable. . ." We also request that the Premerger Staff confirm that the transaction is exempt under Rule 802.50.

The proposed transaction involves the acquisition of [redacted] The beneficial owner of the [redacted] is a [redacted] limited partnership ("Partnership A") that was formed solely to purchase and hold the [redacted] for investment purposes. The ownership of each [redacted] is vested in a separate Trust, which is also the lessor of the [redacted] Each Trust is controlled by Partnership A. Each [redacted] has been leased to the same [redacted] for a period of twenty years (until the year 2007). The leases are typical "financial" leases, i.e., the owner/lessor is a passive investor and the lessee retains complete control over the use of the [redacted] throughout the lives

of the leases. The leases contain purchase options commencing in the year 2002 that enable the lessee to purchase one or more of the [redacted] at regular intervals over the course of the leases. The lessee [redacted] company has subleased all [redacted] to another [redacted] company. The proposed transaction will have no effect on the terms of the leases or subleases, on the use of the [redacted] or on the lessee's purchase option. Finally, to the extent it may be relevant to the Staff's analysis of Rule 802.50, both [redacted] companies (the lessee and the sublessee, are U.S. corporations).

[redacted] and I represent one of two U.S. companies that intend to form a general partnership ("Partnership B") that will acquire both the limited and general partnership interests in Partnership A. The two companies will each own 50% of Partnership B and both are financial services companies that regularly originate lease financings and regularly buy and sell interests in assets that are subject to financial leases. Both the general and limited partners of Partnership A also are financial services companies that regularly engage in financial lease transactions. However, as we discussed with you over the telephone, the limited partner of Partnership A is, as part of a bankruptcy proceeding, presently undertaking to dispose of its entire portfolio of interests in leased assets. The proposed transaction, however, does not involve all or substantially all of the assets of the limited partner's existing lease portfolio.

As originally contemplated, Partnership B would acquire only the 90% interest in Partnership A held by its limited partner, and not the 10% interest held by Partnership A's general partner. That transaction would have been exempt from Hart-Scott-Rodino reporting requirements under longstanding Premerger Staff interpretations of the HSR Act and implementing regulations governing acquisitions of less than a 100% interest in a partnership. See Premerger Notification Manual Interpretation No. 93 (ABA 1991). However, as you confirmed over the telephone, the acquisition of 100% of the partnership interests in Partnership B would be considered an acquisition of the assets of the Partnership, and therefore would be subject to the Act.

We believe that the proposed transaction should be exempt under the ordinary course of business exemption set forth in Rule 802.1. The Premerger Staff has previously decided that this exemption extends to transactions involving the sale of assets subject to financing leases if the following conditions are met: (1) the assets are subject to a bona fide financial lease; (2) while title to the leased assets will pass to the buyer, control of the assets will remain with the existing lessee; (3) the

assets must be subject to a long-term lease or a lease renewable at the lessee's option; (4) the acquiring person does not compete with the existing lessee; and (5) the seller is not exiting the leasing business but intends to continue in its leasing activities. February 12, 1991 letter to Victor L. Cohen, Esq., Premerger Notification Office.

The proposed transaction satisfies the "ordinary course of business" criteria for financial lease acquisitions with one exception. While the 10% general partner of Partnership A will continue in the leasing business, Partnership A's 90% limited partner will not. We submit, however, that the exemption still should be available. To begin with, as originally structured, only the limited partner's 90% interest in Partnership A was to be acquired. As discussed above, that transaction would have been exempt. Moreover, any subsequent acquisition of the remaining 10% partnership interest would have satisfied all five criteria, and therefore been an exempt "ordinary course transaction." We submit that HSR filings should not be required merely because the structure has changed so that both partnership interests will be acquired simultaneously.1/

In addition, it appears that in considering whether a sale of assets subject to a lease financing is exempt, the Staff has not necessarily required that each of the factors listed above be satisfied. Rather, the Staff evidently takes each factor into consideration in determining whether a particular transaction complies with Rule 802.1. See Premerger Notification Manual, Interpretation No. 25, Commentary, (listing factors Staff considers in determining whether sale of assets subject to lease is exempt). Where, as here, four of the five factors listed above clearly are satisfied, the exemption should be made available. This is particularly so in a transaction in which one of the sellers will retain substantial leased assets, and will

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1/ The fact that Partnership A is disposing of all its assets has no bearing on the analysis. Although the sale of all or substantially all of the assets of an "entity" typically takes a transaction outside the scope of the ordinary course exemption, the Staff has recognized that, in leveraged lease transactions, it is common to establish a corporation, trust or other entity to hold a discrete set of leased assets. Accordingly, the sale of all or substantially all of the assets of a partnership created to hold assets subject to financial leases may still be exempt under Rule 802.1, if the five criteria set forth above are satisfied.

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ultimately exit the business only because of a bankruptcy proceeding.

We believe that the proposed transaction is also exempt under Rule 802.50(a) of the Premerger Rules because it is "an acquisition of assets located outside the United States, to which no sales in or into the United States are attributable . . ." All [redacted] were built in [redacted]. Since the [redacted] were launched in [redacted] they have [redacted]. Presently, all [redacted] operate on the same route in [redacted]. One [redacted] leaves weekly on a [redacted] with stops at several [redacted] ports, and back to [redacted]. The vessels primarily serve as [redacted] transporting goods from small [redacted] to larger [redacted] in [redacted] markets. The bulk of the goods transported on the [redacted] is are manufactured in [redacted] although it is possible that some U.S. produced goods also are carried on the [redacted] at times. Routine maintenance of the [redacted] takes place in [redacted] outside the United States.

While all [redacted] are [redacted], none has ever sailed in the [redacted]. The [redacted] is necessary to qualify for certain U.S. government "Operating Differential Subsidies" applicable to building and operating costs of [redacted]. Consistent with ODS regulations, [redacted] maintenance, while performed overseas, is performed by U.S. nationals. The ODS eligibility of these [redacted] is scheduled to expire in [redacted] at which time the lessee or sublessee would be free to "reflag" the [redacted] under the laws of another country. (The [redacted] program itself is scheduled to expire in 1997).

In the past, the Staff has not considered the country of registration, or the nationality of the crew (here American) to be determinative in considering whether [redacted] are assets located in the United States. Premerger Notification Manual, Interpretation No. 269 (foreign-owned and registered [redacted] with [redacted] determined to be located in the United States for purposes of Section 802.51(b), where tickets for [redacted] were sold almost exclusively in the U.S., and [redacted] frequently called on [redacted]. Rather, it also has considered such factors as where the [redacted] are generally located, the frequency and duration of stays in [redacted] where the [redacted] are serviced, and, most importantly, the source of revenues generated by the [redacted]. Id. See also 43 Fed. Reg. 33450, 33497 (1978) (exemption of foreign assets acquisition by U.S. person turns entirely on U.S. sales, if any, attributable to

[redacted]



the assets). Applying these factors to the [redacted] in question, it is clear that they should be considered assets located outside the United States.

We appreciate your assistance in this matter. Please call me after you have had an opportunity to review this letter to let me know whether you agree that the proposed transaction is exempt from the reporting and waiting period requirements of the HSR Act.

Sincerely yours,

[redacted]

cc: [redacted]