

802.1

August 11, 2005

VIA FACSIMILE

Janice Johnson, Esq.
Premerger Notification Office
Federal Trade Commission
Washington, D.C.

Re: Application of Exemption for Transaction in Ordinary Course of Business

Dear Ms. Johnson:

I am writing as you suggested in our telephone call this morning. Our client, company A, is in the business of designing, manufacturing and selling semiconductors and related software for various uses. Presently the semiconductor "wafers" that are manufactured at Company A's facility are shipped overseas to undergo further manufacturing steps, after which they are sold as component parts to third parties to be integrated into various electronic components such as computers or telephones. The company has announced its intention to close its last wholly-owned semiconductor wafer fabrication plant, which is located in the United States. (Company A will retain a 51% interest in a foreign joint venture that manufactures semiconductors.) Company A was unable to sell the plant as an ongoing business, so it will separately sell the building, land, and equipment; terminate or relocate the employees; and retain the related intellectual property.

The equipment to be sold consists of various high-tech units that are used to fabricate the semiconductor wafers. The company expects to sell all of the equipment together to one buyer. There will be no customer lists or receivables involved in the transaction. You may assume that the value of the equipment is in excess of the \$53 million HSR minimum.

The prospective buyer is a foreign company that is in the nature of a reseller, which is in the business of buying and then reselling or leasing equipment of this type. The buyer is not an end user or a competitor of Company A. We expect the buyer to resell the equipment in separate units or subgroups, not as a whole.

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We would appreciate your confirmation that this transaction qualifies for an exemption under §802.1 of the HSR rules, as an acquisition of goods in the ordinary course of business, or under any other exemption that may apply. First, we believe that the transaction raises no substantive antitrust concerns. Second, we do not believe that this transaction constitutes the sale of the assets of an operating unit in any meaningful sense; the assets are not "the equivalent of a business...." See 61 Fed. Reg. at 13668 (1996). It would be necessary to have real estate, a building, staff, intellectual property, and raw materials in order to produce the product, and those are not part of the contemplated transaction since Company A is not selling the entire factory as a going concern. Nor have the assets been "operated by the acquired person as a business undertaking," Rule § 801.2(a), since Company A has not directly derived revenue from sales to third parties of the wafers manufactured at this plant. See Statement of Basis and Purpose, 61 Fed. Reg. 13,666 at 13,670 (1996). Third, the transaction would constitute the acquisition of used durable goods within the meaning of § 802.1(d)(1) because "the goods are [being] acquired and held solely for the purpose of resale or leasing to an entity not within the acquiring person...." The acquiring person is a bona fide dealer/reseller "whose business is to purchase and sell used goods," 61 Fed. Reg. at 13671, of the same type as these assets. In this regard, the transaction is similar to Examples 6 and 8 in §802.1.

Of course, if you need further information, do not hesitate to contact me by telephone or e-mail. As the parties are hoping to execute a preliminary agreement by the end of next week, we would very much appreciate your prompt attention to this inquiry. Thank you again.

Very truly yours,

[REDACTED]

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Called writer on 8/12/05. This issue is whether all or substantially all of the assets are being acquired. As described in the letter, all of the equipment in the manufacturing plant is being sold by Company A. This constitutes the sale of an operating unit as defined in 802.1(a) of the HSR Rules. Therefore, this acquisition is not exempt as an acquisition of used durable goods. This transaction is potentially reportable.

JJ

NO CONCURS

[REDACTED]