802.1 Since A is only selling one type of futures of many in the same category this is [redacted] exempt: if A [redacted] was selling [redacted] an entire segment of its business [redacted] it would not be exempt. VC

WRITER'S DIRECT DIAL NUMBER

801.10 Acquisition price may be computed as stated in letter but must be compared to the assets fair market value. The higher of the two is the valuation for H-S-R purposes

October 29, 1990

Dear Victor:

We would appreciate your views on the following hypothetical question:

A is a $100 million person whose business includes trading a range of commodities. With respect to certain commodities A has made ~~forward con~~tracts with suppliers and customers to purchase and sell the commodities at various prices. These contracts are not traded on commodity exchanges and A expects to receive and make deliveries under them. The contracts will prove profitable or unprofitable in accordance with price levels at the time of delivery. A has decided to dispose of its forward contracts with respect to these commodities, and cease trading in them. (A's forward contracts with respect to other commodities will be kept or transferred to other entities included within A.)

A is arranging for B, a $10 million person, to take over its portfolio of contracts with respect to the group of commodities in issue. B will pay A a price, which the parties currently intend to compute as follows:

1. Add up potential positive dollar margins (at current price levels) from those contracts for which current price levels are more favorable than contract price.

2. Add up potential negative dollar margins (at current price levels) from those contracts for which current price levels are less favorable than contract price.

3. Subtract 2 from 1.

[redacted]

For example, if the potential positive margins total $20 million, and the potential negative margins total $7 million, the price would be $13 million.

B will retain profits earned on any contracts which turn out to be profitable and perform at a loss A's obligations under any contracts which turn out to be unprofitable. B will not acquire rights to any facilities of A or contracts with personnel of A. A remains free to resume trading in the commodities if it decides to do so.

The potential margins used to calculate the amount of B's payment to A are of course not likely to be actual margins. Actual margins are inherently speculative and will depend on price levels in existence at the time of deliveries. The value of the deliveries of the underlying commodities is also speculative for the same reason, but will be less than 0.1% of the value of annual U.S. consumption of the commodities.

In these circumstances it is proposed to treat the transaction as either (1) a transaction in the ordinary course of business because the essence of trading in commodities is the transfer of contract rights and the transaction will not result in B's holding all or substantially all of the assets of A or a division of A, or (2) as a sale of assets which will be non-reportable if the price as computed above, which it is believed fairly reflects the value of the portfolio transferred, is less than $15 million.

We would greatly appreciate your views as to which is the appropriate procedure.

Sincerely yours,

[redacted]

Victor Cohen, Esq.
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