

802.1(c); 801.15 ; 7A(c)(1)

February 14, 1992

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Federal Trade Commission, Room 303
Sixth Street and Pennsylvania Ave., N.W.
Washington, D.C. 20580

VIA TELECOPIER

Dear Dick:

This letter is written pursuant to your suggestion made earlier today during a telephone conversation involving you, [REDACTED] and me. As you know [REDACTED] is counsel to the buyer, and I am counsel to the seller, in the following transaction:

B (an entity controlled by a person meeting the \$100 million size test), has entered into a contract to purchase certain assets from S, Inc. (an ultimate parent entity that meets the \$10 million size test) and P (a natural person and a shareholder of S, Inc.). S, Inc. and P are the partners in S, L.P., an entity newly formed for substantial business reasons. S, Inc. is the ultimate parent of S, L.P.

On or before the closing date, S, Inc. will have contributed to S, L.P. the assets of an operating [REDACTED] business, consisting of several [REDACTED] plants and the associated real property, trucks, and equipment. At closing, S, Inc. will transfer its interest in S, L.P. to B, and P will transfer his interest in S, L.P. to B or an affiliate of B designated by it, for an aggregate consideration of \$ [REDACTED] million. In addition, S, Inc., P and certain other shareholders of S, Inc. will enter into non-competition covenants in return for \$ [REDACTED] million.

S, Inc. will also transfer six parcels of undeveloped land to B for about [REDACTED] million. These parcels contain reserves of [REDACTED] S, Inc. acquired the parcels at various times between 15 and 25 years ago, and S, Inc. has never mined any of them. One of the sites contains a relatively small excavation that was dug for an indeterminate purpose many years ago, prior to S, Inc.'s ownership of the site. As of closing, the [REDACTED] business will

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constitute substantially all of the assets of S, L.P., and the undeveloped land and a partnership interest in S, L.P. will constitute substantially all of the assets of S, Inc.

It is counsel's view that the parties may treat the acquisitions of the [REDACTED] business and the undeveloped realty as separate and allocate the value of the property between those parts that are developed and those that are not. Pursuant to § 7A(c)(1) of the Clayton Act (the "Act") and 16 C.F.R. § 801.15, the undeveloped land may be considered realty acquired in the ordinary course and need not be categorized as assets held as a result of an acquisition. Accordingly, since the portion of the acquisition price allocable to the purchase of the revenue-producing assets is less than \$15 million, both transactions are exempt from the reporting requirements of the Act.

We recognize that the foregoing position appears to be in tension with Interpretation 24 in the 1991 edition of the Premiermer Notification Practice Manual (the "Manual"), to the extent that the acquisitions of revenue-producing and non-revenue producing assets may be deemed to constitute the acquisition of all or substantially all of the assets of an entity. Nevertheless, insofar as Interpretation 24 might be read to require a filing under the Act in these circumstances, it appears inconsistent with § 801.15 and therefore incorrect. We would very much appreciate it if you would advise us whether you concur with this position.

We also believe that Interpretation 24 is distinguishable from the factual situation set forth above. In particular, we note that, as of closing, one entity (S, Inc.) will own the non-revenue producing assets, while a distinct entity (S, L.P.) will own the [REDACTED] business assets. The fact that the assets of two distinct entities are being acquired provides a clear basis for separating the transactions. Thus, in the alternative, we request your concurrence with our position that Interpretation 24 does not govern the instant situation.

For the record, I should note a minor issue that I believe was resolved during our telephone conversation: On the facts set forth above, the existence of an old excavation, antedating S, Inc.'s ownership, on one of the undeveloped parcels does not transform the property into an income-producing one or negate the availability of the exemption under § 7A(c)(1). Cf. Interpretation 14 in the Manual.

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As we mentioned to you, the above-described transactions are scheduled to be closed in approximately six weeks. Consequently, we would appreciate hearing from you as soon as practicable. Please feel free to contact me at the number shown above or [redacted] with any questions you may have. Thank you very much for your consideration.

Sincerely yours
[redacted]
[redacted]

cc: [redacted]

2/21/92 - Advised [redacted] that the PTM Office was of the view that the consideration paid for the six parcels of undeveloped land, i.e., 9.4MM, could be excluded from the acquisition price as "realty." [redacted] confirmed that these six parcels were not contiguous to the associated real property under the [redacted] plan. Since the consideration for such realty could be ~~and~~ excluded under § 801.15, there is no requirement to add it back in even though the total transaction constituted substantially all of the assets of the selling person. (The view expressed in Section 24 in the ABA Practice Manual may have been the PTM Office's view in 1985 but it does not reflect its view today.)

RR Smith