

802.2(c)(1)

[REDACTED]

MAILING ADDRESS

OR FEE DIAL

FILE NO

April 28, 1999

BY FACSIMILE 202.326.2624

Mr. Richard Smith  
Premerger Notification Office  
Federal Trade Commission  
Room 301  
6th Street and Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: Applicability of Exemption for Unproductive Real Property

Dear Mr. Smith:

Thank you for your time today to discuss the potential applicability of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") to a proposed transaction. This letter memorializes our telephone conversation and the advice you gave on April 28, 1999.

Our conversation was about whether the acquisition of certain real property containing timberlands is reportable under the Act. I explained that I represent the owner of a company that is considering selling timberlands to a limited liability company controlled by two individuals. I described the proposed transactions as follows:

- Two individuals, each with total assets greater than \$10 million (the "Purchasers"), will form a limited liability company (Company A) for the sole purpose of purchasing timberlands from Company B.
- Company B has total assets of greater than \$100 million. Its only assets are timberlands.
- The proposed purchases will occur in two separate transactions. The first transaction will be for the purchase of an aggregate amount of approximately 83,400 acres. The second purchase will be for the purchase of an aggregate

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amount of approximately 47,000 acres. The transactions will close within approximately three months of each other.

- The parties have executed a contract for the first transaction and are negotiating a contract for the second transaction.
- The purchase price for the first transaction will be approximately \$78.5 million, and the purchase price for the second transaction will be approximately \$46.5 million.
- The Purchasers are in the business of purchasing timberlands for investment purposes only. The Purchasers hold the timberlands for an undetermined amount of time and then sell tracts of timberlands to third parties for profit.

During our conversation, you indicated that the size-of-the-parties test and the size-of-the-transaction test appeared to be met. You also explained that if the Act applies to this transaction, the parties could aggregate the first and second transactions and report them with one filing because the closing of the second transaction would occur within the 12-month period after the end of the waiting period.

You advised me that the characterization of the Purchasers' business (purchasing timberlands for investment) does not affect the applicability of the Act.

We spent some time discussing exemptions to the Act found in 16 CFR § 802.1 and 16 CFR § 802.2. You explained that § 802.1 applies to goods purchased in the ordinary course of business, and not to realty. Therefore, I have concluded that none of the exemptions found in § 802.1 would apply to the transactions described in this letter, and have so advised my client.

You also explained that the exemption for unproductive real property found in 16 CFR § 802.2(c) would be the only exemption that might apply to the transactions described in this letter. In discussing how to conduct the analysis of whether real property is "unproductive" within the definition of § 802.2(c)(1), you explained that it has been the policy of the Federal Trade Commission ("FTC") to conduct this analysis on a parcel-by-parcel basis. You indicated that the FTC's policy is that physical separation of real property involved in a proposed transaction determines how to analyze the applicability of the § 802.2(c) exemption. In other words, when determining whether the § 802.2(c) exemption applies, each contiguous area of real property should be analyzed to determine whether that particular contiguous area meets the definition of "unproductive real property." The FTC does not require the aggregation of the revenues from all physically separate parcels of real property that are the subject of the proposed transaction to determine whether the \$5 million threshold is met. I understand that this advice reflects the FTC's current policy on the method for determining whether the § 802.2(c) exemption applies to the acquisition of real property.

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After our conversation, I reviewed the proposed transactions described in this letter in light of the FTC's policy for determining whether real property qualifies for the § 802.2(c) exemption. I have determined that the aggregate acreage of timberlands to be conveyed in the first transaction and second transaction is made up of numerous physically separate parcels. No one physically separate parcel involved in either transaction has generated total revenues in excess of \$5 million during the 36 months prior to the acquisition. Thus, based on the FTC's current policy regarding the analysis for determining whether real property is "unproductive," I have concluded that my client would not be required to file a premerger notification report form should it sell these physically separate parcels in the two proposed transactions.

We did not discuss the potential interaction of § 802.1(a) and § 802.2(c), but I would like to raise and dispose of that issue in this letter. As described above, Company B's only assets are timberlands. Company B will sell approximately 95% of those timberlands to Company A in the two transactions. I have assumed that such a sale could be characterized as the sale of an "operating unit," as defined in § 802.1(a). Nevertheless, based on our brief discussion that the exemptions contained in § 802.1 and § 802.2 are separate and distinct, I have concluded that the exemption in § 802.2(c) can apply regardless of whether the unproductive real property being sold might be characterized as an operating unit. Therefore, even if the proposed asset sales are characterized as the sale of an operating unit, those sales would be exempt from the Act's requirements because all of the assets being sold qualify as exempt unproductive real property. If this conclusion is incorrect, I would appreciate your calling me to provide me with the FTC's views on this issue.

If the foregoing does not correctly summarize your advice (or the advice you would give based on the facts set forth in this letter), please call me at your earliest convenience at

Sincerely,

[Redacted signature]

5/3/99 - Writer advises that seller is a timber holder for a paper company which is also a sub of the acquired person. Timber is held in checker-board parcels across VA. No parcel has had sales of \$5MM or more during last 36 months. I agreed that sale of timberland was exempt under 802.2(c) (I said that operating unit had no applicability to the 802 exemption. (Mikene agrees.)

RR Smith