

## Sheinberg, Samuel I.

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**From:** HSRHelp  
**Sent:** Thursday, September 7, 2023 4:11 PM  
**To:** Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Fetterman, Michelle; Burton, June  
**Subject:** FW: 802.2(g) Question

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**From:** Shaffer, Kristin <kshaffer@ftc.gov>  
**Sent:** Thursday, September 7, 2023 4:10:28 PM (UTC-05:00) Eastern Time (US & Canada)  
**To:** [REDACTED]  
**Cc:** HSRHelp <HSRHelp@ftc.gov>  
**Subject:** RE: 802.2(g) Question

### CONTROLLED

[REDACTED]

We disagree. While Example 11 of Rule 802.2 only mentions slaughtering and processing facilities, subsection (g) excludes packing facilities as well. *See also*, 67 Fed. Reg. 11,898 (Mar. 18, 2002) (Explaining that excluding associated agricultural assets from the exemption “also refocuses the rule on agricultural *real* property which was the initial intent of the exemption when promulgated.”).

Best regards,

Kristin

**Kristin Shaffer**

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**From:** [REDACTED]  
**Sent:** Thursday, September 7, 2023 1:54:38 PM (UTC-05:00) Eastern Time (US & Canada)  
**To:** HSRHelp <HSRHelp@ftc.gov>  
**Subject:** 802.2(g) Question

Dear HSR Help:

Greetings, and I hope this finds you all well.

I am working on a transaction for an asset purchaser which has as its target an in-line egg farm. The description of the operation is virtually the same as in Informal Interpretation 0402004, except for one important detail, further addressed below. The FTC’s 2004 conclusion was that the acquisition was exempt as agricultural property under 802.2(g). As you know, the PNO changed course in 2015 and noted that the 2004 interpretation was no longer the PNO’s position. At the time there was no express explanation given, but there was an intervening Informal Interpretation (1304001) regarding 802.2(g) to which another inquirer in Informal Interpretation 1505002 was directed.

We have studied those interpretations very thoroughly and I cannot reconcile them when laid up against my client’s target’s operation, the language of 802.2(g) and Illustration 11 thereto. The similarity of the target operation here with the Illustration is direct: in the Illustration, the deciding factor in finding non-exempt agricultural property was the “slaughtering and processing facility” such that those items and assets adjacent to

or used in conjunction with them were not exempt.

In the egg *production* operation our client is targeting for acquisition, the eggs are the equivalent of an unslaughtered/unprocessed chicken – in other words, there is no “*processing facility*” – hens lay eggs, the eggs are washed, and the egg are packaged and sent to the next user. Nothing is done to the egg other than cleaning and packing. It is not broken, the egg is not liquified and the white and yolk are not separated, etc.

This is truly a farm engaged in the production of eggs, period. While the purchase price exceeds the current \$111.4M size of transaction threshold, there are no acquired assets adjacent to or used in conjunction with any “*processing facility*” because there is no processing facility. From our reading of the facts reported to the FTC in 2004, it appears that the deciding factor when the FTC changed its position in 2015 has to have been the presence of assets devoted to egg cracking and further processing – and as a result, all of the assets used “adjacent to or in conjunction with” the egg cracking operation lost their exempt status – and it was irrelevant that the cracking assets and operation were no more than 10% of the overall operation.

In our target’s operation, there is no cracking or other processing operation – if there were, it would be akin to a poultry slaughtering facility or a winery – but there is not. If an egg cracks during its movement from hen to package, it is discarded. The shell eggs remain as shell eggs. Under those facts, we believe the 802.2(g) exemption applies to this acquisition as all the assets are agricultural property engaged in only the production of eggs. We write to ask whether you agree with this conclusion.

As always, thank you for your assistance. We would be happy to discuss the issues over the phone.

[REDACTED]



[REDACTED]

[REDACTED]