

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

[redacted]
[redacted]
[redacted]

[redacted]

February 14, 1992

DIRECT DIAL NUMBER: (00) 299-5124

Federal Trade Commission, Room 303

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

a subsidiary of S, Inc. S, Inc. has 100% of the interests in S, Inc. S, Inc. was 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

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.

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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(e)(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.

assets may be deemed to constitute the acquisition of all or substantially all of the assets of an entity. Nevertheless, under Interpretation 24, which governs the reporting requirements of the Act, the acquisition of assets may be deemed to constitute the acquisition of all or substantially all of the assets of an entity.

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, [redacted] S, Inc.'s assets, or any of the undeveloped assets, does not constitute the acquisition of all or substantially all of the assets of S, Inc.

§ 7A(e)(1). Cf. Interpretation 14 in the Manual.

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As we mentioned to you, the above-described transaction
closed in approximately [redacted]

Sincerely yours

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 expended
from the acquisition price ~~since~~ under \$801.15 since it qualified
as "realty." [redacted] confirmed that these six parcels were part

the consideration for such realty could be ~~used~~ ~~applied~~ ~~used~~ ~~used~~
\$801.15. there is no requirement to add it back in even though

setting person. [redacted]
Practice Manual may have been the PTM Office's view in 1985
but it does not reflect its view today.

RS Smith