

802.2(g)

**Verne, B. Michael**

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**From:** [REDACTED]  
**Sent:** Wednesday, July 23, 2008 1:59 PM  
**To:** Verne, B. Michael  
**Subject:** Application of Rule 802.2(g) Exemption to Flower Business

Mike, I have a question regarding the scope of the 802.2(g) exemption. Assume a situation in which the company to be acquired derives all or substantially all of its revenues under NAICS Code 111422 -- Floriculture Production (which includes producing flower seeds and cuttings). A substantial part of its assets include greenhouses, equipment and other assets used to conduct research, development and breeding activities, contracts, intellectual property, certain genetic lines, seed inventories and related accounts receivable. Also, Company X does not provide research and development services to third parties but does license some of its flower varieties to distributors for sales in the U.S.

My understanding is the fact that the code at issue here (111422) falls within Sector 11 and more specifically into 111 ("Crop Production") would lead to its being covered under 802.2(g). "Agricultural property" includes "real property that primarily generates revenues from the production of crops, fruits, vegetables, livestock, poultry, milk and eggs (certain activities within NAICS Sector 11).

Also while the Rule refers to real property, it has been applied to assets used in research and development activities. In particular, in Informal Staff Opinion 0004001 (April 4, 2000), the purchaser was planning to acquire certain assets used in a poultry research and development business as well as a hatchery that sold baby chickens. <http://www.ftc.gov/bc/hsr/informal/opinions/0004001.htm>. The assets acquired included real property, improvements, contract rights, equipment, intellectual property and certain genetic lines. Based on the representation the company's research and development activities were all internal, the Premerger Notification Office confirmed the transaction was exempt under Rule 802.2(g). The same reasoning would apply here to exempt Company A's acquisition of Company X. Further, while flowers are not specifically referenced in Rule 802.2(g), our understanding is that it applies to all agricultural activities in NAICS Sector 11 except acquisitions relating to timberland, which have been excluded from the exemption. See, e.g., Informal Staff Opinion 0212005 (December 10, 2002) (12/11 Response/Comments -- "This activity falls within NAICS section 11, therefore the 802.2(g) exemption available.") <http://www.ftc.gov/bc/hsr/informal/opinions/0212005.htm>.

Of course, for the transaction to be non-reportable it would need to satisfy the limitations of 802.4, such that the remaining non-exempt assets (if any) would not be valued in excess of \$63.1 million. But before evaluating that I first wanted to confirm that 802.2(g) would extend to the flower business and the associated assets noted above (i.e., greenhouses, equipment and other assets used to conduct research, development and breeding activities, contracts, intellectual property and certain genetic lines.)

Please let me know whether you agree with this analysis or would like to discuss this matter further.

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█ - this rule was amended in 2002 to only apply to the agricultural land. Everything else is non-exempt. See 67 FR 11898 (March 18, 2002) below

<http://www.ftc.gov/os/2002/03/frn16cfrparts801and802.htm>

*B*  
7/23/08