

FILE NO.

August 11, 1988

Federal Trade Commission
6th Street and Pennsylvania Avenue
Washington, DC 20580
Room 303

ATTENTION: Richard Smith

Dear Mr. Smith:

This material may be subject to the Commission's provision of Section 7A (h) of the Clayton Act which restricts release under the Freedom of Information Act

We are writing to request determination that the following acquisitions are not subject to the notification requirements of Section 7A of the Clayton Act (hereinafter "The Act").

FACTS

We represent [redacted] (hereinafter [redacted]) a Massachusetts Corporation which is engaged in the supermarket business with net sales in excess of \$100,000,000. [redacted] intends to purchase in excess of 15 percent of the assets of [redacted] (hereinafter [redacted]) and [redacted] (hereinafter [redacted]) both Connecticut Corporations. Such assets include leasehold interests, leasehold improvements, equipment, fixtures, motor vehicles and inventory. Both entities are engaged in the supermarket business.

The voting stock of [redacted] is owned 50 percent each by two individual shareholders. The voting stock of [redacted] is held by 11 different individual shareholders, two of whom are the owners of the voting stock of [redacted]. No Shareholder (taking into account the holdings of spouse and minor children) own 50 percent or more of the voting stock of [redacted]. Neither corporation owns 50 percent or more of the stock of any other corporation.

The total value of the assets of [redacted] is approximately \$3,000,000, and its net sales are less than \$25,000,000.
The total value of the assets [redacted] are approximately [redacted]

not subject to notification

6/2/88

50,000,000

*assets < 3M
sales < 25M*

*total assets 5M
sales > 25M*

(total)

annual net sales

\$5,000,000, and its assets exceed \$25,000,000.

ISSUE I

In determining whether the acquisitions described above are subject to the notification requirements of Section 7A of the Act, are [redacted] and [redacted] considered the same person?

CONCLUSION

No.

THE LAW

Under Regulation Section 801.1(a), the term "person" includes an ultimate parent entity and all entities which it controls directly or indirectly and an "ultimate parent entity" is defined as an entity which is not controlled by any other entity. Section 801.1 (b) defines "control" as holding 50 percent or more of the outstanding voting securities of an issuer.

DISCUSSION

Since the ultimate parent entity ^{is} of [redacted] ^{and} is its two individual shareholders and the ultimate parent entity of [redacted] is [redacted] the two entities are not under common control and are not deemed the same person within the meaning of the Act.

ISSUE II

Is either acquisition subject to the notification requirements of Section 7A.

CONCLUSION

No.

THE LAW

Section 7A(a) provides that:

no person shall "acquire, directly or indirectly, any voting securities or assets of

any other person, unless both persons...file notification...if

(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce;...

(A) (2) (B) any voting securities or assets of a person not engaged in manufacturing which has total assets of \$10,000,000 or more are being acquired by any person which has total assets or annual net sales of \$100,000,000 or more; or

(C) any voting securities or assets of a person with annual net sales or total assets of \$100,000,000 or more are being acquired by any person with total assets or annual net sales of \$10,000,000 or more; and

(3) as a result of such acquisition, the acquiring person would hold

(A) 15 per centum or more of the voting securities or assets of the acquired person, or

(B) an aggregate total amount of the voting securities and assets of the acquired person in excess of \$15,000,000.

Regulation, Section 802.20, provides that:

[a]n acquisition which would be subject to the requirements of the [A]ct and which satisfies [S]ection 7A(a)(3)(A), but which does not satisfy [S]ection 7A(a)(3)(B) shall be exempt from

Acquiree has: 150 MM or more in net sales or total assets
Example: 10 MM or more in net sales or total assets and is engaged in commerce

the requirements of the [A]ct if as a result of the acquisition the acquiring person would not hold:

- (a) assets of the acquired person valued at more than \$15 million; or
- (b) voting securities which confer control of an issuer which, together with all entities which it controls, has annual net sales or total assets of \$25 million or more.

*what is the correct
being priced value
of assets to be acq
is fair market value
(not book value) or
§ 1.16(b) greater than fair
acquisition value,
acquiring person's
determination*

DISCUSSION

[REDACTED] is engaged in an activity affecting commerce; the assets of [REDACTED] including the assets of its ultimate parent entities, its two shareholders, exceeds \$10,000,000; annual net sales of [REDACTED] and \$100,000,000; and as a result of this acquisition, [REDACTED] would hold 15 percent or more of the assets of [REDACTED] [REDACTED] would not hold an aggregate total amount of the voting securities and assets of [REDACTED] in excess of \$15,000,000

Were it not for the exemption under Regulation Section 802.20, this transaction would be subject to the notification requirements. However, since the acquisition satisfies the requirements of Section 7A(a)(3)(A) but not the requirements of Section 7A(a)(3)(B) and as a result of the acquisition [REDACTED] would not hold assets of [REDACTED] valued at more than \$15,000,000 or voting securities of [REDACTED] the transaction is exempt. || 2

DISCUSSION

[REDACTED] is engaged in an activity affecting commerce; since [REDACTED] is the ultimate parent entity and its assets do not equal \$10,000,000 and its net sales do not equal \$100,000,000, it does not appear to meet the requirements of Section 7A(a)(B) or (C); as a result of the acquisition, [REDACTED] would hold 15 percent or more of the assets of [REDACTED] but would not hold an aggregate total amount of [REDACTED]

fair market value here

the voting securities and assets of [REDACTED] in excess of \$15,000,000.

Assuming that this acquisition does in fact meet the notification requirements under the statute, it would nevertheless be exempt under Regulation Section 802(20). Thus, the acquisition satisfies Section 7A(a)(3)(A) of the Act but does not satisfy Section 7A(a)(3)(B), and as a result of the acquisition [REDACTED] would not hold assets of [REDACTED] valued at more than \$15,000,000, nor is [REDACTED] acquiring voting securities of [REDACTED].

Based on the above, we request a determination, at your earliest convenience, that neither the [REDACTED] acquisition nor the [REDACTED] acquisition are subject to the notification requirements of Section 7A of the Clayton Act.

Thank you for your cooperation. We also want to express our appreciation for your telephone assistance in analyzing the statute.

Sincerely,

[REDACTED]

[REDACTED]

talked to [REDACTED]
8/18 confirmed that these
were both secret transactions;
advised that if fair market value or, if
higher, the acquisition price,
is \$15 MM or less for each
entity ([REDACTED] doing its own
[REDACTED] and [REDACTED] having two separate
persons [REDACTED], then 805.20(a)
would apply and no filings
are needed.

FRB