

Answered 03/28/89

[REDACTED]

Advised that this  
is a reportable  
transaction -

[REDACTED]

March 27, 1989

acquisition of an  
entire business  
or division is  
not within "ordinary  
course of business"

FAX #202/326-2050

Jeffrey Kaplan, Esq.  
Pre-Merger Office  
Federal Trade Commission  
Washington, D.C.

(JK)

Re: Proposed Acquisition by [REDACTED] of Fixtures and  
Inventory from [REDACTED]

Dear Mr. Kaplan:

This will confirm the request made to you by telephone this  
afternoon by [REDACTED] and me concerning the question whether  
the "ordinary course of business" exemption is available in the  
context of the above-described transaction. The facts which we  
related to you on the telephone are as follows:

[REDACTED] line of business is the operation of [REDACTED]  
departments in discount department stores. That is to say, it  
operates [REDACTED] departments for such department stores as [REDACTED]  
[REDACTED]. The public does not know it is dealing  
with [REDACTED] and assumes that it is purchasing [REDACTED] from the  
department store in question. The relationship between [REDACTED]  
and the department store is one of licensor/licensee. One of  
[REDACTED] largest licensors is [REDACTED]

[REDACTED] recently acquired all of the stores in the [REDACTED]  
[REDACTED]. Historically, [REDACTED] had operated its  
own retail [REDACTED] departments and did not utilize licensees such  
as [REDACTED]. [REDACTED] wants to continue utilizing the services of a  
licensee in connection with its recently-acquired [REDACTED] stores  
and proposes to expand its License Agreement with [REDACTED] to  
cover those [REDACTED] stores. In connection with expanding the  
license, [REDACTED] would transfer to [REDACTED] the fixtures in each of  
the [REDACTED] stores, as well as the [REDACTED] inventory in each of  
those stores. It is contemplated that [REDACTED] would pay [REDACTED]

[REDACTED]

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approximately \$7 Million for the fixtures and approximately \$55 Million for the inventory.

We believe that the purchase of the inventory qualifies for the "acquisition of goods...in the ordinary course of business" exemption found at Sec. 7A(c)(1) of the Hart-Scott-Rodino statute. This is merely an extension of the current business relationship between [REDACTED] and is viewed by both parties as a continuation of their normal, ongoing business relationship. Furthermore, inasmuch as it is [REDACTED] practice not to operate its own [REDACTED] departments, it can be said that it is in the normal course of [REDACTED] business to turn over the [REDACTED] inventory which it acquired with the [REDACTED] stores to [REDACTED]. Under the expanded License Agreements, [REDACTED] will be buying and selling the inventory in the [REDACTED] departments on an on-going basis as licensee, and the purchase of the inventory (as well as the assumption of existing [REDACTED] purchase orders for the acquisition of new inventory) is, effectively, nothing more than a transitional step.

We believe that our position on "normal course" is supported by Interpretation No. 14 which is contained in the American Bar Association Pre-Merger Notification Manual. That interpretation deals with the question whether an inventory purchase was "exempt...as a transfer of goods in the ordinary course of business." There, as here, both the purchaser and the seller regularly deal in the type of inventory in question in the ordinary course of their respective businesses. Although the commentary to Interpretation 14 indicates that the ABA expressed "doubts" about the availability of the exemption, those doubts were based on the fact that there, unlike here, the acquisition was of substantially all of the assets of the seller. Accordingly, we conclude that the availability of the exemption is more appropriate in the [REDACTED] situation.

We would appreciate it if you could advise us as soon as possible as to your views of this issue. Thank you very much for your cooperation.

[REDACTED]

[REDACTED]