

## Haynes, Lanea

---

**From:** Shaffer, Kristin  
**Sent:** Friday, July 21, 2017 3:28 PM  
**To:** [REDACTED] Walsh, Kathryn E.  
**Cc:** Carson, Timothy; Berg, Karen E.; Gillis, Diana L.; Storm, Evan; Whitehead, Nora; [REDACTED]  
**Subject:** RE: Request For Assistance

[REDACTED]

The vines are not exempt (see PNPM 115). Rule 802.2(g) only covers agricultural property and assets incidental to its ownership (such as cash, prepaid taxes or insurance, rental receivables and the like). Rule 802.2(g) does not cover associated agricultural assets, which are assets related to the “agricultural business activities conducted on the property, including inventory (e.g., livestock, poultry, crops, fruit, vegetables, milk, eggs), structures that house livestock raised on the real property, fertilizer, and animal feed.” 67 Fed. Reg. 11,898 at 11,898 (Mar. 18, 2002).

The cold storage facility cannot be exempted under 802.2(h), since substantially all of the assets of Company B are being acquired.

Best regards,  
Kristin

---

**From:** [REDACTED]  
**Sent:** Friday, July 21, 2017 8:31 AM  
**To:** Shaffer, Kristin; Walsh, Kathryn E.  
**Cc:** Carson, Timothy; Berg, Karen E.; Gillis, Diana L.; Storm, Evan; Whitehead, Nora; [REDACTED]  
**Subject:** RE: Request For Assistance

Dear Kristen,

Thank you for your email. I have two follow-up questions.

First, as the cold storage facility is used simply to store the grapes and keep them from spoiling until they are shipped, does it qualify as a warehouse that is exempt under Section 802.2(h)?

Second, aren't the vines agricultural property just as the poultry farm in example 11 to Section 802.2?

Thank you and best,

[REDACTED]

[REDACTED]

[REDACTED]

---

**From:** Shaffer, Kristin [<mailto:kshaffer@ftc.gov>]

**Sent:** Thursday, July 20, 2017 2:44 PM

**To:** [REDACTED] Walsh, Kathryn E. <[kwalsh@ftc.gov](mailto:kwalsh@ftc.gov)>

**Cc:** Carson, Timothy <[tcarson@ftc.gov](mailto:tcarson@ftc.gov)>; Berg, Karen E. <[KBERG@ftc.gov](mailto:KBERG@ftc.gov)>; Gillis, Diana L. <[dgillis@ftc.gov](mailto:dgillis@ftc.gov)>; Storm, Evan <[estorm@ftc.gov](mailto:estorm@ftc.gov)>; Whitehead, Nora <[nwhitehead@ftc.gov](mailto:nwhitehead@ftc.gov)>; [REDACTED]

**Subject:** RE: Request For Assistance

[REDACTED]

We agree that the agricultural property is exempt under 802.2(g). However, the vines, inventory, machinery, equipment, cold storage facility, and similar assets are not exempt under 802.2(g). These assets must be aggregated with any other non-exempt assets being acquired to see if the transaction is reportable (see also 801.13).

Best regards,  
Kristin

**Kristin Shaffer**

Attorney  
Premerger Notification Office  
Federal Trade Commission  
202-326-3434 | [kshaffer@ftc.gov](mailto:kshaffer@ftc.gov)

---

**From:** [REDACTED]

**Sent:** Wednesday, July 19, 2017 6:02 PM

**To:** Walsh, Kathryn E.

**Cc:** Carson, Timothy; Berg, Karen E.; Gillis, Diana L.; Shaffer, Kristin; Storm, Evan; Whitehead, Nora; [REDACTED]

**Subject:** Request For Assistance

Dear Kate,

We would greatly appreciate your confirmation that the following proposed transaction is not subject to the filing requirements of the HSR Act and Rules. Please assume that both the size-of-person test and size-of-transaction test are met.

Company A proposes to purchase all of the assets of Company B pursuant to an Asset Purchase Agreement. Company B grows and sells table grapes. The acquired assets include real property owned by Company B, and vineyards, inventory, machinery, equipment and a cold storage facility that are on Company B's real property. Some of Company B's vineyards and other assets are on real property that is leased by Company B. Company A is also acquiring Company B's lease interests as well as Company B's assets that are on the leased property.

Pursuant to 16 CFR 802.2(g)(1), the acquisition of "agricultural property and assets incidental to the ownership of such property" is exempt from HSR reporting, with the exception of (i) the acquisition of "[p]rocessing facilities such as poultry and livestock slaughtering, processing and packing facilities," (ii) "[a]ny real property and assets either adjacent to or used in conjunction with processing facilities that are included in the acquisition," and (iii) timberland.

Here, none of the three exceptions in 16 CFR 802.2(g)(1) applies. Exception 16 CFR 802.2(g)(1)(iii) plainly does not apply as the transaction does not involve timberland. Exceptions 16 CFR 802.2(g)(1)(i) and (ii) also do not apply because Company A is not acquiring any processing or packing facilities, as explained below.

Company B's grapes are picked and packed into boxes by workers in the field. The boxes of grapes are transported to a cold storage facility. The cold storage facility is a large warehouse where the boxes are kept until they are ready to be loaded onto trucks and shipped. See attached picture. There is no processing or packing equipment or machinery in the cold storage facility. The facility is a large empty room where the grapes are kept cool and preserved using sulfur dioxide gas.

Workers at the cold storage facility will occasionally re-pack grapes into a new box if a box breaks, or if good product needs to be separated from bad product, or in order to combine different colors of grapes into a single bag or box. Workers also occasionally label or relabel certain boxes, or add padding to boxes. All of these examples are infrequent, and performed only by workers, without the aid of any equipment or machinery. The purpose of the cold storage facility is simply to store the grapes and keep them from spoiling until they are ready to be shipped.

As Company A is acquiring agricultural property and incidental assets, and not acquiring any packing or processing facilities, we believe that this transaction is exempt under 16 CFR 802.2(g) and not reportable. Although Company A is acquiring certain lease interests and related assets from Company B as part of the transaction, the distinction between owned and leased property does not make a difference for purposes of 16 CFR 802.2(g). See PNPM Int. 53 ("Note that if the real property subject to the lease would be exempt from acquisition under Section 802.2, the acquisition of the lease interest is also exempt, even if a premium is paid.")

Please let us know whether you agree with our conclusion. As always, thank you for your assistance and advice.

Best regards,

■

[Redacted signature block]

[Redacted signature block]

[Redacted signature block]