Sheinberg, Samuel I.

From: [redacted]
Sent: Thursday, June 10, 2021 11:36 AM
To: Walsh, Kathryn E.; Berg, Karen E.; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Musick, Vesselina
Subject: FW: Question re bona fide lease transaction

From: Shaffer, Kristin <kshaffer@ftc.gov>
Sent: Thursday, June 10, 2021 11:35:56 AM (UTC-05:00) Eastern Time (US & Canada)
To: [redacted]
Cc: [redacted]
Subject: RE: Question re bona fide lease transaction

[redacted]

We agree that the real property and equipment that is subject to the lease financing would be exempt under 802.63. However, any assets that are not subject to the lease financing and are not otherwise exempt should be valued (e.g., goodwill, IP, contracts, additional equipment). Additionally, if Company B later acquires the property and equipment, a filing may be required.

Best regards,
Kristin

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From: [redacted]
Sent: Wednesday, June 9, 2021 2:52 PM
To: [redacted]
Cc: [redacted]
Subject: Question re bona fide lease transaction

Dear PNO staff,

We would like to get your view on the reportability of the following transaction and specifically to confirm that the parties may rely on prior informal opinions from the PNO advising on similar transactions.

We understand that, consistent with the long-standing position of the PNO, a property and equipment lease financing wherein a bank or a finance company affiliate of a bank or trust ("Bank"), in the ordinary course of its business, acquires real property and equipment and leases to an operator is not HSR reportable by either Bank or the lessee, provided that it is a bona fide lease and does not effectively transfer beneficial ownership of the property to the lessee upon entering into the lease. This is the case even though lessee will be operating the business on the property and assuming all expenses, risks, and responsibilities with respect to that operating business.

In this transaction, Company A owns and operates wholesale data center facilities which Company A leases to large corporate enterprises. Customers lease space to house their own servers in these data centers and customers have access to the space 24 hours a day, 7 days a week. Company A does not use the data centers for the storage of its own servers. Company A does not manage or maintain the servers located in its data centers. Company A manages the HVAC and electrical systems for the data center facilities and is responsible for ensuring the physical security of its facilities. Company A also offers project management services to fit out the leased space with cabling and racks prior to move in to suit a particular customer's needs.

Company B intends to operate the data center facilities of Company A. However, in order to finance the transaction, Company B will enter into an agreement with Bank, pursuant to which Bank will purchase the real estate on which the business is conducted and equipment used in the operation of the business. Bank will then lease the real property and equipment to Company B, pursuant to a lease agreement with Company B. The lease will have a term of approximately 10 years (we expect that the data center has a useful life of at least 20 more years) commencing simultaneously with the purchase by Bank, and will include standard restrictions on lessee's ability to assign without landlord's consent and a purchase option. Neither Company A nor Company B are affiliates or associates of Bank. Company B will not be paying any consideration for any of the assets to Company A. Bank will pay to Company A the full consideration.

Assume that the lease agreement in this transaction is virtually identical to the "synthetic lease" described in Informal Interpretation 0005015, in respect of the material facts stated therein, and similar to two other opinions considering a "synthetic lease" during that time (Interpretations 0005005 and 0009003). Interpretation 0005015 described a synthetic lease in which (i) the acquisition of assets by a trust (i.e. Bank) was exempt from reporting requirements pursuant to Rule 802.63 and (ii) the commencement of the lease was not a reportable event. On (ii), the PNO agreed that prior to any exercise by the lessee of the purchase option under the synthetic lease, the rights and obligations of the lessee under the synthetic lease and the related documents were deemed not an "acquisition" of the leased assets by the lessee, because the lessor (i.e. Bank) retained legal and beneficial ownership of the assets that were the subject of the lease.

Given the fact that the opinions specifically discussing synthetic leases are quite dated, we would like to reconfirm that the parties may rely on these opinions. This outcome would be consistent with other opinions involving retail gas and convenience stores (e.g. 1720005) wherein a REIT acquired beneficial ownership of the real property on which the stores were located and leased the property to the buyer/operator of the stores. In those opinions, the REIT, and not the buyer of the operating business, was deemed to have acquired beneficial ownership of the real property.

In addition to confirming the validity of the 0005015 opinion generally, we would also like to point out one distinction between the present synthetic lease and the one considered in Interpretation 0005015. The prior opinion noted:

"If at the end of the lease the Lessee does not exercise the option, the Lessee is required to pay the Trust as an amount equal to approximately 85%-90% of the Option Price and the Partnership will sell the property to a third party. The sale proceeds would be applied first to pay any portion of the Option Price not paid by the Lessee, and the excess, if any would be remitted to the Lessee."

In the present transaction, if the lessee does not exercise the option, the lessee would be required to pay the Bank an amount equal to 100%, rather than 85-90%, of the option price.

For completeness, we also note that a synthetic lease does not have any of the attributes of a "purchase styled as a lease" line of interpretations published by the PNO (see e.g. PNPM 5th Ed., Int. 24). Under this line of interpretations, a bona fide lease does not transfer beneficial ownership to the lessee, unless the lease agreement is effectively a "purchase styled as a lease" that (1) exhausts the useful life of the leased property or (2) amounts to the present transfer or installment purchase of the underlying assets. For purposes of distinguishing a "purchase styled as a lease" from a routine lease, we understand that the PNO considers whether the term of the lease encompasses the entire useful life of the asset, or includes a rental charge far above market, coupled with an option under which the lessee subsequently may purchase the property at a

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