

Sheinberg, Samuel I.

From: HSRHelp
Sent: Thursday, April 14, 2022 3:48 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora
Subject: FW: CONFIDENTIAL

From: Shaffer, Kristin <kshaffer@ftc.gov>
Sent: Thursday, April 14, 2022 3:47:44 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Subject: RE: CONFIDENTIAL

[REDACTED]

So long as Company B is not involved in the operation or management of the data center business, we agree that the acquisition of the building is exempt. If Company B acquires the business of the data center operation, that acquisition may be separately reportable.

Best regards,

Kristin

Kristin Shaffer

Attorney

Premerger Notification Office

Federal Trade Commission

202-326-2388 | kshaffer@ftc.gov

From: [REDACTED]
Sent: Thursday, April 14, 2022 10:06 AM
To: HSRHelp <HSRHelp@ftc.gov>
Subject: CONFIDENTIAL

Dear PNO staff,

A number of years ago, DC Operator built two data centers for its own use. Soon after building the sites, DC Operator sold them to Company A in a sale-leaseback transaction. Following that transaction and continuing to this day, Company A became the landlord and DC Operator became the tenant/operator at the two sites, with DC Operator continuing to use the data centers for DC Operator's own account. Pursuant to triple-net leases on each site, Company A has no obligations whatsoever with respect to any maintenance, repair, or operating expenses at the sites and does not, in fact, take on any of those responsibilities. Company A's only function with respect to the sites is to collect rents from DC Operator and maintain commercial general liability insurance, although this does not replace DC Operator's obligation to be fully insured as well with respect to the operation of the sites.

Company A now contemplates selling its interest in the sites to Company B. Assume that the jurisdictional thresholds are satisfied. Pursuant to the contemplated transaction, Company B would step into the shoes of Company A as the landlord under the existing triple-net leases, which are scheduled to expire in the year 2031. The leases give DC Operator multiple consecutive options to renew the leases, at its own exclusive discretion, for 5-year terms at a time. Other than in the event of DC Operator's default under a lease, the landlord must accept a renewal (assuming timely notice) and cannot simply terminate the lease. If and when the leases were terminated, DC Operator would have the right to take with it all personal property currently used by DC Operator for the operation of a data center at both sites (these include proprietary operating systems, signage, demountable walls, audio visual equipment, Primus lock cores, data and telephone networking equipment, software, all information technology equipment, any special equipment used for imaging, printing/inserting/mailling or payment remittance, and any other items of personal property used by DC Operator in its operation, management or maintenance of the sites as data services centers).

Following the contemplated transaction, Company B's intention is to continue collecting rent on the sites from DC Operator, just as Company A has done to date. Just like Company A, Company B would have no obligations of any kind

with respect to the maintenance, repair, or operating expenses at the properties and would not, in fact, take on any of those responsibilities. All Company B plans to do with respect to the properties is collect rent from DC Operator. Recognizing that the PNO has generally viewed the investment real property exemption under 802.5 as inapplicable to data centers (see 1609006), we believe the exemption applies to the particular facts of this case. Company A has neither built nor outfitted the data centers and does not carry out any functions relating to the operation, maintenance, or repair of the data centers. All Company A does is collect rent from DC Operator pursuant to triple-net leases, and it now effectively wants to sell its right to collect those rents to Company B. Company B would continue to rent the properties to DC Operator, who is entirely independent and not within the same "person" as Company B (or Company A).

Your thoughts, as always, would be welcome.

Best regards,

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[Redacted signature]

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