

Johnson, Janice C.

802.63

From: [REDACTED]
Sent: Friday, August 03, 2012 1:08 PM
To: Johnson, Janice C.
Cc: [REDACTED]
Subject: HSR Inquiry Re Proposed Sale-Leaseback Transaction

8/8/12
informal written
that this transaction
is exempt under
802.63 of the
Rules
J Johnson
Kwalst
&
K Benz
concur

Janice:

Thank you for speaking with us by telephone a few moments ago. As promised, this email summarizes the proposed transaction our clients are contemplating. We ask whether you concur with our assessment that the transaction as described is not reportable because it falls within the exemption set forth in 16 CFR 802.63(a). Of course, we recognize that your comments are based only on the information in this summary.

The acquired party, A, is a non-refiner distributor of motor fuel that also owns a number of real estate parcels improved with convenience stores and retail gasoline facilities. A supplies gasoline to these facilities, which are operated by independent dealers under lease and franchise agreements with A. A is controlled by a holding company, A1, and A1 in turn is owned and controlled by A2, a private equity firm.

The acquiring party, B, is a real estate investment firm that is owned and controlled by B1, a privately-held investment bank and capital management firm. B specializes in sale-leaseback transactions, and has entered into such transactions in a variety of different sectors. At least one other B sale-leaseback transaction involved multiple real estate parcels improved with convenience stores and retail gasoline facilities, and several others involved real estate parcels improved with grocery stores. These and other transactions by B have involved so-called "triple-net" leases in which the seller/lessee retains virtually all expenses, risks, and operational responsibilities with respect to the leased properties. Under the terms of the leases, B receives lease payments and is entitled to receive lessee financial information, but B does not play, and does not have the right, contractual or otherwise, to play an active role in the governance or management of the lessee or the businesses operated at the leased properties.

Based on our analysis, the parties meet applicable size-of-party tests and the transaction meets the size-of-transaction test.

Under the proposed transaction, A would sell to one or more special-purpose entities created by and controlled by B a total of 112 real estate parcels improved with convenience store/retail gasoline facilities for the sum of \$300 million. B would then lease the properties back to A pursuant to one or more "triple-net" master leases in which A would retain responsibility for all costs related to taxes, insurance, maintenance, repairs and replacements, and all environmental matters. A, as lessee, would have substantial autonomy to alter and improve the properties. As with its other transactions, B would be entitled to receive financial information but would have no right of control or active participation in the business of A or in the convenience store/retail gasoline businesses located at the subject properties. The initial term of the master lease(s) would be 20 years, and A would have the right to renew the lease(s) for up to five (5) subsequent five (5) year terms. A1 would unconditionally guarantee A's obligations under the leases. The various franchise agreements in place between A and its independent dealers would remain in place and would not be affected by the transaction. Thus, A would be able to maintain the dealer leases in place and supply the facilities for up to 45 years.

Our reading of the HSR statute, regulations and informal opinions leads us to conclude that the intended transaction falls within the exemption to reportability set forth in 802.63(a). We read that exemption as applying in general to bona fide sale-leaseback transactions not involving a change in beneficial ownership. Our understanding is that the FTC treats sale-leaseback transactions as exempt where an acquiring person takes title to property and then

leases the property back to the seller in a bona fide transaction, engages in such sale-leaseback transactions in the ordinary course of its business, and does not compete with the person to whom the property is leased. In this instance, B would take title to the properties and lease them back to A in a bona fide transaction, and it would do so as part of the ordinary course of its sale-leaseback business. Neither B nor B1 compete in A's line of business or operate businesses that compete in A's line of business, and neither will have any ownership or control of A's business or the businesses conducted at the leased properties. Furthermore, based on the indicia to which the FTC and HSR inquirors have looked in the past, A would remain the beneficial owner of the properties. Specifically: A would retain control of the properties and the businesses thereon; A would continue to bear the risk, expenses and responsibilities associated with the properties; and the term of the master lease(s) would extend for 20 to 45 years, with A1 guaranteeing A's lease obligations. With no transfer of beneficial ownership from A to B in the transaction, there should be no need for HSR filings.

Please let us know if we can provide other information that may help you decide whether you concur with our assessment that the proposed transaction is not reportable under the exemption set forth in 16 CFR 802.63(a). If you have doubts or disagree with our conclusion, of course please let us know why so that we may respond appropriately. Thank you again for your time and review of this inquiry. Feel free to contact us by reply email or by calling at my number shown below. Thank you in advance for your time and review of this inquiry.

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[REDACTED]

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