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**From:** Walsh, Kathryn E.  
**Sent:** Friday, January 15, 2016 10:56 AM  
**To:** [REDACTED]  
**Cc:** [REDACTED] Whitehead, Nora  
**Subject:** RE: Follow up question about foreign services under Rule 802.51 (Informal Staff Interpretation 0502013)

[REDACTED]

When we wrote #152, we had in mind the entities that provide transportation (e.g., NAICS 483111), not leasing (532411). We see leases as contracts to provide a service, and thus the analysis falls under how we look at services.

In the context of services, it matters where the contracts to provide the services (here, leases) are entered into and where the services (here, leasing services) are provided (see #155). In your situation, all of that is happening outside the US, so there are no revenues in or into the US. It would be different, however, if some of the contracts were entered into in the US and/or the (leasing) services were provided in the US. Having a US establishment could have an impact as well, depending on how closely tied the US establishment is to a real US presence. For instance, if everything is going on outside the US, and there's an office in the US that accepts payment, that likely wouldn't be enough to create a nexus with the US. But, if some of the contracts are entered into in the US, and/or if the (leasing) services touch the US, the US establishment becomes more important and we would have to evaluate that.

I hope that's helpful.

Kate

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**From:** [REDACTED]  
**Sent:** Tuesday, January 12, 2016 4:09 PM  
**To:** Walsh, Kathryn E.  
**Cc:** [REDACTED]  
**Subject:** Follow up question about foreign services under Rule 802.51 (Informal Staff Interpretation 0502013)

Kate,

Best wishes for the New Year.

I am writing to revisit the hypothetical described in my September 27, 2011 email to Mike Verne (provided below) to determine whether Mike's conclusion (the company had no sales in or into the United States) would be different in light of (a) changes in the company's operations since 2011, and (b) Interpretation Number 152 (Premerger Notification Practice Manual (Fifth Edition)), relating to revenues derived from the operation of freight vessels.

Our client is a foreign corporation that owns a fleet of container ships that it provides to shipping line customers under fixed rate leases (time charters or bare boat charters) of three years or more. The client has no offices (or any other establishments) in the United States. The ships are all foreign flagged. The lessees are foreign shipping lines. In some cases the client also provides the lessee with a crew to operate the ship.

The shipping line customers decide how they will use the ships - that is, which types of customer cargo to carry (computers versus furniture, etc.), how much to charge for transportation of their customers' goods, the selection of foreign and U.S. ports of call, etc. Our client's income (lease payments by the shipping lines) is not affected by any of these decisions, which are outside our client's control.

There are several issues:

First, because the vessels are flagged overseas, under Interpretation No. 152, they constitute "foreign assets" for purposes of Rule 802.50.

Second, for HSR purposes, our client is in the business of transportation asset leasing, NAICS Code No. 532411, Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing, not maritime transportation services, NAICS Industry Code No. 483111, Deep Sea Freight Transportation.

Third, because the client has no control over the actual use of the assets, its revenues for HSR purposes consist of total payments under the leases, without regard to the extent to which those payments reflect voyages to and/or from U.S. ports. (Please note that through a review of ships logs the client could determine the number of sailing days during which the leased vessels had been used to transport cargo to and from United States ports.)

Fourth, can we conclude that, because our client has no "establishments" in the U.S., it has no "operations conducted within the United States" and therefore it derives no lease revenues from sales "in or into the United States"? In this regard, the FTC's Item 5 tipsheet at <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/reporting-revenues-item-5> indicates that for non-manufacturing revenues, only revenues derived from U.S. operations are to be reported. "U.S. operations" are not defined in the HSR rules, but the HSR form instructions state "[t]he Form requests dollar revenues and lines of commerce for non-manufactured and manufactured products with respect to operations conducted within the United States" (emphasis added).

Finally, can we assume that if the client had a U.S. establishment for the receipt of payments, total revenues from the client's shipping line customers would be considered "sales in or into the United States" (again without regard to the extent to which the leased vessels had transported goods to or from U.S. ports)?

Thanks for your attention to these questions. Please call if you have questions or need more information.

Regards,

| [REDACTED]

[REDACTED]

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**From:** Verne, B. Michael [mailto:MVERNE@ftc.gov]

**Sent:** Tuesday, September 27, 2011 2:26 PM

**To:** [REDACTED]

**Subject:** RE: Follow up question about foreign services under Rule 802.51 (Informal Staff Interpretation 0502013)

I would say you have no sales in or into the US

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**From:** [REDACTED]

**Sent:** Tuesday, September 27, 2011 2:07 PM

**To:** Verne, B. Michael

**Subject:** Follow up question about foreign services under Rule 802.51 (Informal Staff Interpretation 0502013)

Mike,

A quick follow up question regarding services "in or into the United States." Our client is a foreign firm that owns a fleet of container ships that it provides to shipping lines under long term fixed rate leases (three years or more).

The ships are manned and operated by another foreign firm associated with, but not controlled by our client. Neither firm has offices (or other establishments) in the United States. Some of our client's shipping line customers have offices in the United States. Some of the cargo originates in the US. All payments by shipping line customers (in the US and abroad) are made to our client's offices outside the United States.

Our shipping line customers themselves decide how they will use the ships - that is, who their own customers will be (computer makers versus furniture makers, etc.), how much to charge for their services, which foreign and US ports to serve, etc. Some of these customers are located in the United States. But our client's income (long term fixed rate lease payments by the shipping lines) is not affected by any of these issues, which are outside our client's control.

I assume that for HSR purposes, our client is in the business of transportation asset leasing, not transportation services. Can we conclude that, because our client has no "establishments" in the US, it derives no revenues from sales "in or into the United States"? Or do we need to quantify the value of payments from those shipping line customers who send payments to our client from offices located in the United States?

Thanks.

[REDACTED]

[REDACTED]

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**From:** Verne, B. Michael [<mailto:MVERNE@ftc.gov>]

**Sent:** Wednesday, December 29, 2010 1:41 PM

**To:** [REDACTED]

**Subject:** RE: Question about foreign services under Rule 802.51 (Informal Staff Interpretation 0502013)

I agree

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**From:** [REDACTED]  
**Sent:** Wednesday, December 29, 2010 10:47 AM  
**To:** Verne, B. Michael  
**Subject:** Question about foreign services under Rule 802.51 (Informal Staff Interpretation 0502013)

Mike,

We represent a foreign firm (Company A) that is considering buying a foreign transportation management company (Company B) that currently provides services to Company A. The services take place on board container ships owned by Company A and used to ship cargo throughout the world. Some of that cargo is delivered to United States ports from abroad.

As I understand Informal Staff Interpretation 0502013, revenues derived by Company A from shipping services would not be considered sales "in or into the United States" unless the paying customer is a U.S.- located entity (which is not the case) or if the cargo originated in the U.S. (also not the case). Revenues derived by Company B from services provided to Company A would be considered sales "in or into the United States" only if Company A's paying entity is U.S.- located *and* payment took place through that entity.

Please let me know if you disagree.

Regards,

[REDACTED]

