

**From:** [Storm, Evan](#)  
**To:** [REDACTED]  
**Subject:** RE: Question about 802.2(h)  
**Date:** Wednesday, September 21, 2016 2:32:29 PM

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[REDACTED]

We do not view the operation of data centers as analogous to the rental of investment property. Neither 802.2(h) nor 802.5 is available as exemptions to a data center operator.

Regards  
Evan

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**From:** [REDACTED]  
**Sent:** Wednesday, September 21, 2016 12:56 PM  
**To:** Storm, Evan  
**Subject:** RE: Question about 802.2(h)

Evan, thank you. Given 802.2(h) does not work, would you think that 802.5 would work on the basis that Company A is not involved in the business conducted on the property (customers manage their own servers) and its income primarily relates to rental income for space leased at the data centers, with the exceptions being the pass through income to cover electricity costs and the income relating to fitting out the data center space prior to the start of a lease for customers who select that service? Charging to fit out the space with racks etc. prior to move in seems a case of a landlord preparing a rental unit for a tenant move in. Note, all customers now leasing the space are third parties, and that is expected to be the case after Company A is sold.

Many thanks,

[REDACTED]  
[REDACTED]

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**From:** Storm, Evan [<mailto:estorm@ftc.gov>]  
**Sent:** Wednesday, September 21, 2016 12:27 PM  
**To:** [REDACTED]  
**Subject:** RE: Question about 802.2(h)

[REDACTED]

We do not agree that data center facilities are warehouses, thus 802.2(h) does not apply. Furthermore, a business is being acquired here, which bars the use of 802.2(h) (see example 12 under 802.2).

Regards  
Evan

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**From:** [REDACTED]  
**Sent:** Tuesday, September 20, 2016 2:57 PM

**To:** Walsh, Kathryn E.; Gillis, Diana L.; Shaffer, Kristin; Storm, Evan  
**Subject:** Question about 802.2(h)

Dear All,

I would like to confirm that the sale of a business is exempt under 802.2(h). The acquired entity (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, and as such these data center facilities are a type of warehouse. 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. Instead, customers locate some of their own employees in leased space at the data center facilities to maintain and manage their own servers. This space is either ancillary to the warehouse business, or separately exempt as office property under 802.2(d). 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. In no event does Company A provide servers or networking gear to customers.

Income streams to Company A primarily consist of lease income for the rental of data center space by third party customers. Other income streams are as follows. In the event customers elect to have Company A project manage the fit out of the data center space with racks and cabling consistent with customer specifications prior to move in, Company A will charge for such project management services at no mark up. Company A charges customers for their electricity usage, on a reimbursement pass through basis and Company A itself earns no net income from these charges. Company A charges telecommunications carriers such as Verizon if that carrier wants to provide service to Company A customers using on site equipment, and this income is itself a rental income for the space utilized by those carriers. Company A offers customers a service to reset servers as a first line of defense should a customer's servers go down. Company A has contracted with a third party to provide this service and offers it to customers on a pass through basis with no mark up. To date, no customer has requested this service and there is thus no income stream associated with it. Company A also offers customers, at no charge, an on-line view only portal of the environmental conditions of their data center facility.

Based on the above, do you agree that the assets of Company A are exempt under 802.2(h), as the assets consist of warehouses for the storage of customer servers along with assets incidental to the ownership of the warehouses?

Many thanks,

[REDACTED]  
[REDACTED]