

**Haynes, Lanea**

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**From:** [REDACTED]  
**Sent:** Friday, December 29, 2017 9:59 AM  
**To:** Walsh, Kathryn E.; Berg, Karen E.; Carson, Timothy; Shaffer, Kristin; Sheinberg, Samuel I.; Whitehead, Nora  
**Subject:** FW: Question regarding REIT and lease financing exemption

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**From:** [REDACTED]  
**Sent:** Friday, December 29, 2017 9:58:40 AM  
**To:** Walsh, Kathryn E.  
**Cc:** [REDACTED]  
**Subject:** Re: Question regarding REIT and lease financing exemption  
**Auto forwarded by a Rule**

Thank you, Kate.

Happy new year to you and yours.

[REDACTED]

On Dec 29, 2017, at 9:47 AM, Walsh, Kathryn E. <[kwalsh@ftc.gov](mailto:kwalsh@ftc.gov)> wrote:

We agree the REIT exemption applies.

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**From:** [REDACTED]  
**Sent:** Friday, December 22, 2017 3:59 PM  
**To:** Walsh, Kathryn E.; Berg, Karen E.; Carson, Timothy; Shaffer, Kristin; Sheinberg, Samuel I.; Whitehead, Nora  
**Subject:** FW: Question regarding REIT and lease financing exemption

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**From:** [REDACTED]  
**Sent:** Friday, December 22, 2017 3:58:18 PM  
**To:** [REDACTED]  
**Subject:** Question regarding REIT and lease financing exemption  
**Auto forwarded by a Rule**

Dear PNO staff,

We would like to get your view on the applicability of either the “REIT exemption” or the exemption in Rule 802.63(a) to the transaction summarized below.

We previously requested your view on the applicability of the exemption to a similar transaction (please see attached). The current transaction involves a few different facts, and so we are reaching out again to confirm that these different facts do not change your view.

For your convenience, the main distinctions between this current transaction and the prior transaction are the following:

1. Two separate REITs, rather than one, will be acquiring certain real property on which certain gas station and convenience stores are located.
2. With respect to other gas station and convenience stores which are part of the transaction, Buyer will acquire from Seller the business assets of the stores, but Seller will retain the real property on which the stores are located, and lease the real property to Buyer.
3. Buyer will itself acquire certain real property on which certain gas station and convenience stores are located, and will have an option to purchase from Seller substantially all of the leased real property described in 2. above. (In the prior transaction, Buyer did not have an option to purchase any real property, but obtained a right of first refusal to purchase any of the real property if the REIT offered any for sale.)

The full facts are provided below.

Buyer, an owner and operator of branded gas stations with convenience stores, on behalf of itself and its designees, REIT 1 and REIT 2, have entered into an agreement to acquire from Seller substantially all of the assets used in the operation of 273 gas station and convenience stores, located on real property both owned by Seller and leased by Seller from third parties (the “Business”). The stores owned by Buyer and Seller include the retail sale of motor fuels, alcoholic beverages, tobacco products, food and beverages, quick service restaurants, and car washes. Assume that the acquiring and acquired persons meet the relevant SOT thresholds. Buyer does not have any store locations in the same states as those comprising the Business. Both REIT 1 and REIT 2 are traded on the New York Stock Exchange and neither is within the same person as Buyer, and no party is an “associate” of another. Seller is not a REIT.

Pursuant to the agreement, REIT 1 and REIT 2, as Buyer’s designees, will acquire the owned real property respectively on which 58 and 30 of the stores operate, respectively. Seller will retain the owned real property on which 102 of the stores operate. Buyer will acquire substantially all of the other assets comprising the Business at all 273 locations, including the owned real property at the 50 sites on which the remaining stores operate (“Buyer Real Properties”) and, with respect to all 273 store locations, raw materials, work in process, finished goods, products, supplies and other inventories, rights under existing contracts, prepaid expenses, ad valorem taxes, and lease and rental payments, licenses, permits or other governmental authorizations, books and records, customer lists, lists of suppliers, goodwill, and machinery, equipment, furniture, furnishings, office equipment, communications equipment, vehicles, spare and replacement parts, fuel and other tangible personal property (“Business Assets”).

Buyer will designate, pursuant to the agreement, each REIT to acquire its respective real property, together with all improvements, fixtures and appurtenances thereto and rights in respect thereof related to the Business (together the “REIT Real Properties”). At no point will Buyer acquire title to the REIT Real Properties.

The total cash purchase price for the acquisition of the Buyer Real Properties, Business Assets, and REIT Real Properties exceeds the SOT threshold. REIT 1 and REIT 2 will collectively pay to Seller the substantial majority of the purchase price in consideration for the acquisition of the REIT Real Properties. Buyer will pay to Seller the remaining purchase price, in consideration for the acquisitions of the Buyer Real Properties and Business Assets. This remaining consideration will not exceed \$80.8 million.

Under two separate agreements, each of REIT 1 and REIT 2 will lease their respective REIT Real Properties to Buyer in the form of a "triple-net" lease in which Buyer incurs all expenses, risks, and operational responsibilities, including taxes, insurance, maintenance, repairs and replacements, and all environmental matters, with respect to the leased properties. Buyer, as lessee, would have autonomy to alter and improve the REIT Real Properties. Under the terms of the leases, each REIT receives lease payments and is entitled to receive certain Buyer financial information, but neither REIT will have the right, contractual or otherwise, to play any active role in the governance or management of Buyer or the businesses operated on or at the REIT Real Properties.

Similarly, under another separate agreement, Seller will lease to Buyer the owned real property on which 102 of the stores operate ("Seller Properties"). The lease with Seller differs from an aforementioned "triple-net" lease in the following respects: (1) Seller will arrange for landscaping maintenance, waste removal, HVAC maintenance, pest control, roofing repairs, and pay real estate taxes and insurance ("Property Services"); and (2) Buyer may request Seller to develop, at Seller's sole cost and expenses, certain other parcels owned by Seller as a gas station and convenience store (with the intent, once so developed, of Seller leasing such property to Buyer). Buyer will incur the expenses for the Property Services in that the rent received by Seller will be in consideration for both property rental and the Property Services. Buyer, as lessee, would have autonomy to alter and improve the Seller Properties, subject to customary landlord approval rights for projects involving over \$250,000 in improvements. Seller will not, post-closing, have the right, contractual or otherwise, to play any active role in the governance or management of Buyer or the businesses operated on or at the Seller Properties, other than to provide the Property Services. Buyer will have an option to purchase 97 of the Seller Properties at a purchase price approximating the fair market value of the Seller Properties, within the first three years, and additionally, in the 60-day period following the fifth anniversary of the lease.

It is contemplated that the lease transactions between Buyer and each REIT, and between Buyer and Seller, will close on the same day as the transaction between Buyer and Seller for the acquisitions of the Buyer Real Properties and Business Assets.

The lease terms described above will be as follows:

With REIT 1: An initial term of 15 years, with four separate options to extend the term for 60 months each.

With REIT 2: An initial term of 20 years, with four separate options to extend the term for 60 months each.

With Seller: An initial term of 15 years, with six separate options to extend the term for 60 months each.

Buyer informs us that the computation of rent in each of the three lease agreements equates to market rent. Buyer's assignment of any of the three leases will require approval of the lessor not to be unreasonably withheld. Buyer understands based on past transactions of this type that, under current GAAP financial reporting standards, REIT 1, REIT 2, and Seller, and not in any case Buyer, will be recording all of the respective real property assets subject to the leases on its books.

We believe that the acquisitions of the REIT Real Properties by the REITs are exempt from reporting under Section 7A(c)(1). Alternatively, those acquisitions are exempt under 802.63 as lease financing transactions, entered into the ordinary course of the REITs' businesses.

We further believe that the lease transaction between Buyer and Seller involving the lease of the Seller Properties is a bona fide lease and not a transfer of beneficial ownership of the Seller Properties to Buyer, because (1) the lease terms are in line with market practice, (2) the annual rental payments are within market rates, and Buyer's option to purchase certain of the Seller Properties is for the market value of the properties and not a "nominal" additional payment, (3) Buyer's assignment of the leases would require Seller's consent and (4) Seller, and not Buyer, will record all of the real property subject to the leases on its books.

As such, neither the value of the REIT Real Properties nor of the Seller Properties needs to be attributed to the value of the acquisitions by Buyer for SOT purposes, even though Buyer will be operating the Business on the REIT Real Properties and Seller Properties and assuming all expenses, risks, and responsibilities as stated above.

The value of the remainder of the transaction – the acquisition of the Buyer Real Properties and Business Assets – does not exceed the SOT threshold.

The below opinion supports the view that the above-referenced transactions are not reportable by any of Buyer, Seller, or the REITs.

<https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/0006009>

We would appreciate your views at your earliest convenience.

Best,

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