

Sheinberg, Samuel I.

From: [REDACTED]
Sent: Monday, April 5, 2021 10:23 AM
To: Walsh, Kathryn E.; Berg, Karen E.; Sheinberg, Samuel I.; Six, Anne; Musick, Vesselina
Subject: FW: HSR Question re: investment rental property exemption

From: Whitehead, Nora <nwhitehead@ftc.gov>
Sent: Monday, April 5, 2021 10:22:35 AM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: HSR Question re: investment rental property exemption

Confirmed.

From: [REDACTED]
Sent: Friday, April 2, 2021 1:50:14 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: HSR Question re: investment rental property exemption

Dear PNO:

We have a transaction that we believe is exempt from the HSR reporting pursuant to Section 802.5 (the investment rental property exemption) (via Section 802.4) and would like your confirmation that this exemption applies.

Facts

Buyer is acquiring 100% of REIT X, a US REIT. Buyer is not a US REIT, so the REIT exemption does not apply. However, we believe that the Section 802.4 exemption would apply.

REIT X's assets consist of the following:

1. Cash which is exempt under Section 801.21.
2. Land that REIT X leases to third parties who own and operate cell towers. For some assets in this category, the rent is a fixed figure. In others, the rent is, in part, calculated using the gross revenue derived from the telecom tower by the third party.
3. Office leasehold interests and office equipment used by REIT X to operate its business which are exempt under Section 802.2(d).

4. A handful of towers that REIT X owns and leases to telecom providers. These towers are not exempt, but their current fair market value is well below \$92 million.
5. Easements that REIT X acquired from third parties to the roofs of the third parties' buildings or structures. REIT X uses these easements, and Buyer will continue to use these easements post-closing, to lease access to the roofs to telecom lessees who install, maintain, and operate their own telecom equipment on such roofs. The rental payments associated with these easements are fixed.

Analysis

We believe that categories (2) and (5) are exempt under Rule 802.5. As noted above, we also believe categories (1) and (3) are exempt for the reasons stated.

Category (2)

This category is exempt regardless of whether the lease payment is based on a percentage of the revenue earned by the leasing customer because the underlying assets are exempt under Rule 802.5. This land is exempt because REIT X acts solely as a landlord with respect to such land and Buyer plans to do the same after it acquires REIT X. Therefore, in all cases for the Category (2) assets, the facts are the same as the last example provided by the FTC in its July 20, 2015 blog on the Rule 802.5 investment rental property exemption. See <https://www.ftc.gov/news-events/blogs/competition-matters/2015/07/hsr-rule-8025-investment-rental-property-exemption> ("Say 'B' is a landowner who holds a parcel of land that is leased to 'Y,' the telecom tower company that owns the tower constructed on the land. 'X' proposes to acquire the land from 'B.' As a result of the transaction, 'X' will take 'B's' place as the landowner, and will not control any telecom towers or otherwise compete in the telecom or colocation business. After the transaction, 'X' will continue to lease the land to 'Y.' This is an exempt acquisition of investment rental property.")

Category (5)

These easements fit into the last example from the FTC's 2015 blog cited in (2) above and are therefore also exempt. See Informal Interpretation #1201001 (January 3, 2012) ("... the PNO staff indicates that a stock transaction to acquire a business whose assets consist of ground easements, ground leases and, in some cases, fee simple title to real estate (such as land, rooftops and other structures) that either supports telecommunications towers or directly hosts telecommunications antennae is exempt under Rule 802.5. The July 28, 2011 informal interpretation also indicates that the acquisition of ground easements and leases (as opposed to fee simple title) would be exempt under Rule 802.5 where a transfer of the real estate underlying those easements and leases would have been exempt under Rule 802.5").

Please confirm you agree with the above analysis.



