Sheinberg, Samuel I.

From: HSRHelp
Sent: Friday, December 22, 2023 1:52 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Fetterman, Michelle; Burton, June; Larson, Peter
Subject: FW: Investment Rental Property Exemption

From: Shaffer, Kristin <kshaffer@ftc.gov>
Sent: Friday, December 22, 2023 1:52:01 PM (UTC-05:00) Eastern Time (US & Canada)
To: [redacted]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: Investment Rental Property Exemption

CONTROLLED

[redacted]
Based upon the information provided, the data center building and its land qualify for 802.2(c). You will need to value any additional assets, including the lease and any equipment, to determine whether the transaction is reportable.
Best regards,
Kristin

Kristin Shaffer
Attorney
Premerger Notification Office
Federal Trade Commission
202-326-2388 | kshaffer@ftc.gov

From: [redacted]
Sent: Tuesday, December 19, 2023 2:12:29 PM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Subject: Investment Rental Property Exemption

Dear PNO.
I am writing to confirm that the two data centers under construction described below qualify for the unproductive real property exemption (16 C.F.R. Section 802.2(c)).
Relevant Facts

1. X and Y will form LLC.
2. X will contribute about $125 million in cash to LLC and in exchange will acquire LLC interests entitling X to over 50% of the profits and over 50% of the assets upon dissolution of LLC.
3. Y will contribute two data centers that are presently under construction to LLC and in exchange will receive minority interests in LLC and cash. The cash will be distributed to Y from X's cash contribution to LLC and will likely account for over 65% (but less than 100%) of X's cash contribution to LLC. The two data centers are collectively valued in excess of $125 million.
4. When Y contributes the two data centers under construction to LLC, neither will be complete or operational.

At the closing, it is anticipated that it will take another seven months to complete Data Center #1 and the post-closing investment required to do so will be approximately $129 million.

At the closing, it is anticipated that it will take another three months to complete Data Center #2 and the post-closing investment required to do so will be approximately $83 million.

5. All of the operational space at the two data centers will be initially leased to one third party – C. Although the data centers are still under construction and not yet operational, C has already signed leases to occupy both data centers when they are operational.

HSR Assessment

Y will not have an HSR filing obligation as an acquiring person because it will not acquire HSR control of LLC (defined as being entitled to at least 50% of the profits or at least 50% of the assets of LLC).

X will acquire HSR control of LLC and will hold in excess of $111.4 million of LLC interests. However, it will not have an HSR filing obligation (whether the transaction is analyzed as a formation of LLC or as X's acquisition of the data centers from Y) if the two data centers qualify for an HSR exemption.

We understand that the unproductive real property exemption (16 C.F.R. Section 802.2c) would apply to the two data centers under construction so long as they are not considered turnkey facilities and so long as they did not collectively generate at least $5 million in revenues during the 36 months preceding their contribution to LLC. In Informal Interpretation #1511001 (November 2, 2015) the PNO explained that if the relevant asset "is substantially complete" it does not qualify for the unproductive real property exemption. Thus, if the facility "will be ready to operate at closing or shortly thereafter, it is a 'turnkey' facility .... Turnkey facilities, i.e., new facilities capable of commencing operations immediately with minimal additional capital investment, are excluded from the unproductive real property exemption." In our case neither data center will be operational until months after each is contributed to LLC (approximately seven months for Data Center #1 and approximately three months for Data Center #2). In addition, the post-closing capital expenditure needed to complete each data center is certainly much more than a minimal capital investment (estimated to be approximately $129 million for Data Center #1 and approximately $83 million for Date Center #2). Therefore the two data centers under construction are not turnkey facilities and since they (including the realty on which they sit) did not generate at least $5 million in revenue during the 36 months preceding their contribution to the LLC, we understand that they qualify for the unproductive real property exemption. See Informal Interpretation #1605002 (May 5, 2016).

Do you agree?

As always, thanks for your guidance.

[redacted]

[redacted]

[redacted]

[redacted]