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Sent: Friday, December 16, 2016 1:28 PM

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Subject: RE: Question about beneficial ownership

[REDACTED]

The accounting treatment under the applicable national rules does not dictate whether an asset is held by an entity. The facts you lay out support a conclusion that beneficial ownership of the vessels does pass to the JV for the Type 2 Lease Vessels and the Owned Vessels.

Regards,

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From: [REDACTED]

Sent: Wednesday, December 14, 2016 4:20 PM

To: Storm, Evan; Walsh, Kathryn E.

Cc: [REDACTED]

Subject: Question about beneficial ownership

Evan and Kate –

I had previously asked you about so-called “Capital Leases” in the context of ocean vessels and you had advised me that the capital lessee of a vessel is normally considered to be the “holder” of the vessel for HSR purposes. The specific facts of my transaction have now become evident and the issue is a bit more complicated. We have concluded that the transaction is NOT reportable, but because this determination rests up on the determination of the beneficial owner of vessels subject to a capital lease by a joint ventureree and then a separate sublease to the JV itself, I wanted to confirm that you agree with our analysis. We have reached this conclusion for three reasons: (1) The JV does not meet size-of-person per 801.40; (2) the transaction is exempt under 802.51(b)(1); (3) the FMV of the voting securities being acquired by the JV is likely well under the SOT threshold. Because the good faith FMV analysis has not been completed, the below discussion focuses on points 1 and 2, but if you disagree with our analysis, I may need to later discuss point 3.

Facts:

- V1 and V2, both non-US ocean shippers, have publicly announced their intention to enter into a JV where they will create JV (a non-US entity that meets the definition of corporate entity per <https://www.ftc.gov/news-events/blogs/competition-matters/2016/05/corporate-or-non-corporate-new-approach-classifying>).
 - o V1 will own a 65% of the shares of JV and will have the right to appoint a majority of the directors. V2 will have a minority in both respects.
- The JV will be responsible for operating a pool of approximately 130 vessels currently owned or leased under three different types of arrangements:
 - o Some are owned by the ship owning subsidiaries of V1 or V2 (“Owned Vessels”).
 - o Others are leased short term (under approximately 5 years) by other affiliates of V1 and V2 (“Type 1 Lease Vessels”). Most of these leases are “time charters” in which the lessor/owner provides the crew and is responsible for maintenance of the vessel. A simple analogy is that a time charter is equivalent to hiring a taxi where the rider pays the fuel.
 - o Others are leased longer term (over approximately 5 years, and up to a period which may be the useful life of the vessel) by the ship owning affiliates of V1 and V2 (“Type 2 Lease Vessels”). Some of these leases are “bareboat charters” meaning they do not come with a crew. A simple analogy is that a bareboat charter is equivalent to how you or I might lease an automobile from a Ford dealer.
 - Some of the Type 2 leases are treated as capital leases for accounting purposes by V1, so the vessels are on their books as an asset.
 - Pursuant to the current accounting standards of V2’s home country, the Type 2 leases are treated as operational leases for accounting purposes, so V2’s Type 2 Lease Vessels are not on its books as an asset.
- All of the vessels are currently operated by “pool” subsidiaries of V1 and V2.
- Under the JV, the relevant subsidiaries of V1 and V2 will sublease each vessel to the JV as a time charter, meaning that the relevant subsidiaries of V1 and V2 will provide the crew and maintain the vessels.
 - o For the Type 1 Lease Vessels, the sublease duration will not exceed the remaining time left on the underlying lease.
 - o For the Type 2 Lease Vessels, the terms of the subleases have not been finalized, but the intention is that the sublease term will be for the duration of the underlying Type 2 Lease.
 - o For the Owned Vessels, the terms of the subleases have not been finalized, but the intention is that the sublease term will be for the useful lifetime of the vessel.
 - o Pursuant to the current accounting standards of the JV’s home country, both the Type 2 Lease Vessels and the Owned Vessels will be treated as operational leases for accounting purposes by JV, so the vessels will not be on their books as assets.
- As to the Owned Vessels and the Type 2 Lease Vessels, the risk of loss of the vessels resides with subsidiaries of V1 or V2, so V1 or V2 entities (and not the JV) will pay insurance on the vessels.
- As to the Type 1 Lease Vessels, in general, the ship owner pays the insurance, but to the extent that V1 or V2 subsidiaries were required to pay the insurance under its lease, it will continue to do so after subletting the vessel to the JV.

Questions as to V1:

1. Does the accounting treatment under the applicable national rules dictate whether an asset is “held” by an entity?
 - If so, we can skip to the “conclusions” because the JV will not book the vessels for accounting purposes.
 - If not, Question 2 is the relevant question.
2. Under the circumstances described above, does the JV “hold” any of the vessels.
 - Our conclusion is that the JV will not have beneficial ownership of any of the vessels, so it does not “hold” them.
 - As of today, V1 is the “holder” of at least some of the Type 2 Vessels because it leases them pursuant to leases that are equivalent in length to the useful life of the vessel and because it has all of the indicia of beneficial ownership:

- i. V1 bears the risk of loss of or damage to the vessels (see PNPM Int. 23);
 - ii. V1 pays the insurance (id.);
 - iii. In the case of those that are bareboat charters, V1 provides the crew and maintains the vessels;
 - iv. V1 benefits from a gain in value or is harmed by a loss in value of the vessel (id.).
 - v. If the vessels become no longer commercially useful for any reason during the duration of the lease, the JV will nevertheless be responsible for the lease payments. (See PNPM Int. 25)
 - However, under the sublease arrangement between V1 and the JV, even though some of the leases may be for the useful life of the vessel, beneficial ownership will not transfer to the JV because:
 - i. The vessels are being subleased as time charters, meaning that the relevant subsidiaries of V1 and V2 will be responsible for staffing and maintaining them;
 - ii. The relevant subsidiaries of V1 and V2 bear the risk of loss or damage to the vessels;
 - iii. The relevant subsidiaries of V1 and V2 will pay the insurance on the vessels;
 - iv. The relevant subsidiaries of V1 and V2 bear the risk of loss of value of the vessel or benefit from a gain in value of the vessel;
 - v. If the vessels become no longer commercially useful for any reason during the duration of the lease, the JV can essentially return the vessel to the ship owning subsidiaries of V1 or V2, who will be responsible for the resulting financial consequences.
 - Assuming that the answer to Question 1 is “no”, the same analysis would apply to the vessels sublet to the JV by V2.
 - In sum, even though it will have long term leases on some of the vessels, the JV enjoys none of the indicia of beneficial ownership, so it does not “hold” the any of the Owned Vessels or Type 2 Lease Vessels for HSR purposes.

Conclusions:

- Based on the fact that the JV does not hold any of the vessels, we conclude that the transaction is not reportable by V1 because: (1) The JV does not meet size-of-person per 801.40; (2) the transaction is exempt under 802.51(b)(1).
- Assets held or potentially held by the JV:
 - o FFE and other assets contributed by V1 and V2 are worth far less than \$15.6M.
 - o Customer contracts do not hold material value, particularly in light of the fact that both V1 and V2 have been operating at losses under these and similar contracts.
 - o The vessels are “held” by third party vessel owners (most of the Type 1 Lease Vessels) or V1/V2 (the Owned Vessels and many of the Type 2 Vessels), so do not factor into the analysis. The leases themselves are at FMV, so they are not assets with value.
- The JV does not therefore meet the size of person test as set forth in 801.40 because will not hold assets in excess of \$15.6M.
- The transaction would also be exempt under 802.51(b)(1) because:
 - o Both the acquirer (V1) and the JV are foreign; and
 - o The JV will not hold assets in excess of \$78.2M; and
 - o The JV did not have sales in excess of \$78.2M in the last fiscal year.

I would very much appreciate you confirming the above analysis. Again, if you disagree, I may need to further discuss SOT with you.

If anything is not clear, I am available to answer any follow-up questions that you may have.

Regards,

[REDACTED]