

**Haynes, Lanea**

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**From:** Berg, Karen E.  
**Sent:** Friday, September 22, 2017 7:59 AM  
**To:** [REDACTED] Walsh, Kathryn E.; Gillis, Diana L.; Shaffer, Kristin; Sheinberg, Samuel I.; Whitehead, Nora; Carson, Timothy  
**Cc:** [REDACTED]  
**Subject:** RE: 801.11(e) query

[REDACTED]  
You are correct that the 802.63 exemption is not available for New LLC in the scenario you describe. In addition, the debt being cancelled in exchange for Company A's assets is not "cash" for the purposes of 801.11(e), and cannot be excluded.

Karen

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**From:** [REDACTED]  
**Sent:** Wednesday, September 20, 2017 5:52 PM  
**To:** Walsh, Kathryn E.; Berg, Karen E.; Gillis, Diana L.; Shaffer, Kristin; Sheinberg, Samuel I.; Whitehead, Nora  
**Cc:** [REDACTED]  
**Subject:** 801.11(e) query

Dear Kate and Team,

We represent three creditors of Company A, which has filed US for bankruptcy protection. Pursuant to the bankruptcy proceeding, the creditors intend form a New LLC to acquire the assets of Company A. Immediately prior to closing the transaction, the creditors will contribute cash and their Company A debt to New LLC in exchange for interests in New LLC. None of the creditors will control New LLC for HSR purposes either before or after the acquisition. Based upon the recent revision to informal interpretation 1505003, it appears that the exemption in HSR Rule 802.63 is not available to this transaction because the assets will be held within a new UPE. Is this correct in the present case, where three unaffiliated creditors are compelled to form a newco to hold the assets post-closing because the only other option is to split the assets among them, which would break up the underlying business?

The value of the assets being acquired is less than \$323 million. New LLC will not have a regularly prepared balance sheet at closing, so its total assets will be determined in accordance with HSR Rule 801.11(e). The cash and debt contributed to New LLC immediately before closing will all be used to pay for Company A's assets. Since the debt is being used as consideration for the assets pursuant to the bankruptcy proceeding and will be exhausted in the acquisition, can the debt be excluded from the calculation under 801.11(e)?

Many thanks for your consideration of this inquiry,

[REDACTED]