From: Walsh, Kathryn E.
To: [redacted]
Cc: [redacted] Gillis, Diana L.
Subject: RE: Question regarding analysis of "new debt" under new FTC guidance
Date: Monday, October 17, 2016 11:00:52 AM

Your analysis is correct, all three are $60m deals.

From: [redacted]
Sent: Monday, October 17, 2016 9:58 AM
To: Walsh, Kathryn E.
Cc: [redacted]
Subject: Question regarding analysis of "new debt" under new FTC guidance

Kate,

I have a follow-up question about the FTC's new guidance regarding the treatment of debt in the valuation of LBO~~'s~~ transactions, which was posted on the FTC's website on October 6, 2016. https://www.ftc.gov/news-events/blogs/competition-matters/2016/10/lbos-size-transaction-test#comment-414873; specifically, whether, if the buyer refinances the transaction by arranging for a new lender to pay off the target's existing debt and provide additional debt, the entire amount is deemed "new" debt for HSR purposes.

1. By way of hypothetical, assume Company A proposes to buy 100% of the voting securities of Company B, which has an outstanding loan from Bank C for $40 million. Under the stock purchase agreement, Company A will pay $60 million of cash to shareholders of Company B and assume the outstanding $40 million target company debt. This is a $60 million non-reportable transaction because the equity acquisition price falls below the $78.2 million size of transaction threshold. This result would not change if the acquisition agreement was based on a pricing formula consisting of "$100 million, minus Company B's existing debt (whether retired or assumed by Company A)." The "determined" acquisition price under Rule 801.10(a)(2)(i) would still be $60 million.

2. Same facts as in #1 above, but assume Company A will finance the transaction by paying $40 million cash, assume the existing $40 million target company debt, and borrow from a new bank an additional $20 million (the "new debt") through the target company. The sellers will receive $60 million for the voting securities. This too is not a reportable transaction because the buyer's assumption of the existing $40 million target company debt is excluded.

3. Same facts as in #2 above, but assume that Company A will finance the transaction by paying $40 million cash and, instead of assuming the $40 million of existing debt, secure entirely new debt on the target in the amount of $60 million to finance the transaction. Specifically, the buyer will refinance the existing $40 million debt and (as in #2 above) incur an additional $20 million in debt.

   I believe this is also not a reportable transaction because out of the $60 million debt, only $20 million represents additional ("new") debt incurred to finance the transaction. The other $40 million is simply refinancing the debt that exists at closing. Our question here is whether replacing the existing debt (instead of assuming it) and layering on $20 million in "new" additional debt at the target company converts the existing debt to "new" debt under the FTC's new blog interpretation so that the deal is now $100 million and thus reportable.

   Under all three scenarios above, the selling shareholders will receive only $60 million before transaction expenses and other exempt deductions. Therefore, we believe that under all three scenarios, the transactions are not reportable.

Do you agree?

Best regards,

- [redacted]