

Int. 15

From: [REDACTED]
 To: Nancy OVUKA (E-mail) <novuka@hrc.gov>
 Date: Wed, Nov 28, 2001 3:24 PM
 Subject: HSR

Version 1 A and B form New LLC, and each contribute \$10 million cash to New LLC for 50% membership interests in New LLC. New LLC borrows \$40 million from bank, and then pays C \$60 million for assets.

Conclusion: The formation of New LLC is exempt. The acquisition of assets from C is reportable (because the purchase price, and presumably the fair market value, of the assets is \$60 million).

) yes

Version 2. [This version is the most likely. It will be used if the parties think that there is a good chance that New LLC will not be able to borrow \$40 million from the bank. The parties have time pressures which may make it necessary to do the deal before the amount of bank financing can be determined.] On the closing date, A, B and C form New LLC. A and B each contribute \$10 million cash to New LLC, and receive 50% of the common interests in New LCC. C contributes \$60 million of assets and receives preferred membership units entitling C to receive \$60 million in aggregate (but only after the capital contributions of A and B have been returned to them, and before any other distributions are made to the members). New LLC is obligated to redeem approximately \$20 million of these preferred units from C on the closing date (by using the \$20 million cash contributed by A and B). New LLC also has try to redeem as much as possible of the remaining \$40 million of C's preferred units as soon as possible (and to try to borrow funds from a bank for that purpose). For example, if New LLC is able to borrow \$25 million two weeks after its formation, then New LLC would use that \$25 million to redeem an additional \$25 million of C's preferred units, leaving C with \$15 million of preferred units.

Under this approach, the parties would not know (at least at the time of the HSR filing, if one is made) how much preferred units would be redeemed. Nor would they know whether the bank borrowing (and redemption of preferred interests) would occur on the closing date or on a later date.

Among other things, it is possible under this Version 2 that: (1) New LLC would be able to borrow \$40 million on the closing date and buy out all \$60 million of C's preferred units on the closing date, (2) New LLC would be able to borrow \$35 million on the closing date, and buy out \$55 million of C's preferred interests on the closing date, leaving C with \$5 million of preferred interests, (3) New LLC would be able to borrow \$25 million on the closing date, and buy out \$45 million of C's preferred interests on the closing date, leaving C with \$15 million of preferred interests, or (4) New LLC would not be able to borrow anything on the closing date, and would redeem just \$20 million of C's preferred interests on the closing date, leaving C with \$40 million of preferred units.

Conclusion:

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11/29/01
 Version 2 appears to be an installment purchase. Cash being paid to C after formation. A & B should file as acquiring persons for C's assets. MV & RS concur