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Verne, B. Michael

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**From:** [REDACTED]  
**Sent:** Thursday, January 03, 2013 9:55 AM  
**To:** Verne, B. Michael  
**Subject:** Question concerning what is properly treated as consideration

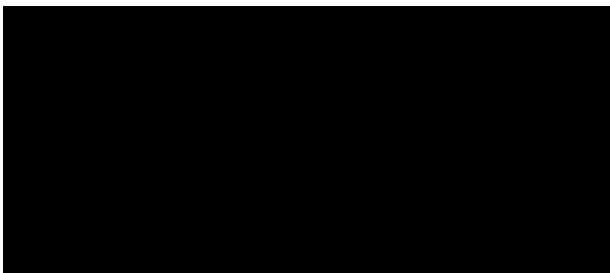
Mike,

I had a question about whether different types of "transfers" under an agreement to acquire non-corporate interests would constitute "consideration" for purposes of the size-of-transaction test. The Seller is a C Corp. The Target is an LLC.

1. Target will default on a loan before closing. Purchaser will advance \$5 million to the Target to avoid default. The payment is fully refundable if the deal fails.
2. Target owes Seller service \$4 million in fees relating to operations and maintenance, administrative services and other such agreements. These amounts are presently contractually owed by the Target to the Seller. Purchaser will pay (or cause Target to pay) those service fees at closing.
3. \$20 million in upgrade expenditures. The Target needs to commit immediately to make certain capex improvements to its facilities, which will occur after Purchaser acquires Target. Purchaser will accrue all the benefits post closing. Seller would not make these expenditures since it is selling, but since the expenditures need to be paid for now, the Purchaser is pre-funding them.

(1) Would seem like consideration since Purchaser is relieving Target of debt. On the other hand, one might argue that the agreement is simply the assumption of liabilities associated with the acquisition of non-corporate interests and so the value of that assumption of liability is reflected in the purchase price. The difference is that the liability is being "pre-paid" but is forfeitable if the deal collapses. (2) appears to be just a commitment to pay an existing liability and so is an assumption of liability. (3) does not appear to be consideration since no value is being imparted to the Seller.

Thanks for your help.



AGRE  
BN  
1/3/13

L. WALSH CONCURS

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