

Gillis, Diana L.

From: Gillis, Diana L.
Sent: Friday, May 22, 2015 8:57 AM
To: [REDACTED] Walsh, Kathryn E.
Subject: RE: 802.63 Exemption for an Acquisition of Assets

Tracking: **Recipient** **Read**
[REDACTED]
Walsh, Kathryn E. Read: 5/22/2015 8:57 AM

Hi [REDACTED]

All of the pre-petition debt is exempt under 802.63. However, the post-petition debt (unless it is in fact reorganized pre-petition debt), is not.

-Diana

From: [REDACTED]
Sent: Wednesday, May 20, 2015 5:14 PM
To: Walsh, Kathryn E.; Gillis, Diana L.
Subject: 802.63 Exemption for an Acquisition of Assets

Dear Kate and Diana,

I am writing to confirm that the Section 802.63 exemption covers the proposed asset acquisition by a group of creditors of a target's assets where the target is in bankruptcy. Informal opinions No. 1202009 and No. 0907009 (see links below) are somewhat dated but seem on point. Please advise whether the exemption applies to the proposed transaction presented below and whether these informal opinions continue to represent the PNO's current position.

July 16, 2009 - <https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/0907009>
February 15, 2012 - <https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1202009>

Creditor A, Creditor B and Creditor C executed various loan agreements with the issuer several years ago in connection with an acquisition by the issuer. The terms of the credit agreements were modified years later, and the issuer subsequently filed for bankruptcy (a few months after the modification). The bankruptcy court is conducting an auction of the assets (Section 363(b) will apply).

The creditors have two separate pre-petition liens, valued in the aggregate of \$200 million (the first one for approximately \$110 million by Creditor A and Creditor B and the second one for approximately \$85 million by Creditor A and Creditor C). Creditor A has formed an LLC for the benefit of Creditor A and either Creditor B or Creditor C, as applicable, to acquire the assets for approximately \$250 million plus assumed liabilities, pending the bankruptcy auction. It is expected that Creditor A will be deemed to control the LLC for HSR purposes and will contribute cash for the acquisition, but depending on the amount of and manner in which cash needs are funded, the LLC may be deemed to be its own ultimate parent entity ("UPE"). Creditor B or Creditor C, as applicable, may contribute cash or may, in lieu of contributing cash, have its share of equity in the LLC accordingly diluted. The assets also have post-petition debt valued at approximately \$30 million and pre-

petition debt by creditors other than Creditor A, Creditor B and Creditor C valued at approximately \$100 million.

At closing, the LLC will pay cash in an amount equal to the post-petition debt (\$30M) and pre-petition debt (\$100M) by creditors other than Creditor A, Creditor B and Creditor C and either (i) Creditor A and Creditor B will credit bid the first lien debt (\$110M) and the second lien debt will be extinguished pursuant to the rules of bankruptcy or (ii) the LLC will pay additional cash equal to the first lien debt (\$110M) and Creditor A and Creditor C will credit bid a portion of the second lien debt, with the remaining portion of the second lien debt that is not credit bid being extinguished pursuant to the rules of bankruptcy. The assets will be contributed to controlled subsidiaries of LLC that will emerge from bankruptcy with LLC as a holdco.

Each of the creditors entered into the loan agreements in the ordinary course of their business of providing loans to third parties. In addition, the credit agreements were modified before the issuer announced its plan to enter bankruptcy. As such, the parties satisfy the components of section 802.63

Based on the above-referenced informal opinions, it seems that Section 802.63 will provide an exemption from notification for the acquisition of the assets by LLC. The February 2012 opinion indicates that all of the consideration is exempt under Section 802.63 as part of the overall debt workout. Further, this opinion indicates that no additional valuations need to be made regarding cash payments, the assumed liabilities and the fair market value of the assets. Finally, please confirm that the formation of the LLC is not reportable because only cash will be contributed. As indicated, the LLC structure has not been finalized and thus it is possible that LLC will be its own UPE instead of Creditor A.

Please confirm that this proposed transaction (whether Creditor A or the LLC is the UPE) will be exempt under Section 802.63. I am available to answer any questions.

Best,



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Further information about the firm, a list of the Partners and their professional qualifications will be provided upon request.

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