

Sheinberg, Samuel I.

From: [REDACTED]
Sent: Wednesday, April 03, 2019 9:14 AM
To: Walsh, Kathryn E.; Berg, Karen E.; Biagioli, Kimberley; Carson, Timothy; Sheinberg, Samuel I.; Six, Anne
Subject: FW: 801.10 and 802.4 Questions

From: Whitehead, Nora
Sent: Wednesday, April 3, 2019 9:14:23 AM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: 801.10 and 802.4 Questions

[Please see below.](#)

[REDACTED]

From: [REDACTED]
Sent: Tuesday, April 2, 2019 1:34:21 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Subject: 801.10 and 802.4 Questions

Dear PNO Team:

I am writing to seek confirmation and/or clarification on the treatment of assumed debt and the calculation of the transaction value for purposes of determining whether the size-of-transaction exceeds the \$90 million threshold.

Assume LLC B proposes to merge with and into LLC A with LLC A being the surviving entity (the "Proposed Merger"). For purposes of this inquiry, assume that LLC A and LLC B are both their own ultimate parent entities and that the size-of-person test is satisfied. As part of the Proposed Merger, LLC A and LLC B have negotiated an Agreement and Plan of Merger which provides that the merger consideration to be paid by LLC A to the members of LLC B (the "B Members") will be a \$1 for \$1 issuance with each B Member receiving \$1 of capital credits and equity interests in LLC A for each \$1 of capital credits and equity interests each B Member holds in LLC B as of the closing date of the Proposed Merger. Based on the inclusion of the consideration provisions in the Agreement and Plan of Merger, the acquisition price has been determined even though the exact acquisition price will not be known until immediately before the closing date. If the PNO team disagrees with this position, please advise.

Based on current projections, it is expected that the acquisition price will be around \$123 million which will exceed the current filing threshold and therefore, the Proposed Merger is a reportable transaction unless exemptions and exclusions bring the acquisition price below the current filing threshold. My inquiries relate to the application of certain exemptions and exclusions and are set forth below:

1. LLC B currently has \$245 million of debt on its financial statements which will be assumed by LLC A upon consummation of the Proposed Merger. In connection with the calculation of the transaction value of the Proposed Merger, can you advise whether the parties may reduce the acquisition price by the assumed debt amount? **No; the parties may only reduce the acquisition price by the amount of debt being retired (not assumed) by the buyer.** Reduction of the acquisition price by the assumed debt amount would be consistent with the PNO position set forth in Informal Interpretation 1303005 (<https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1303005>) and we are just seeking to confirm that this remains the PNO position. **Thank you for bringing this informal interpretation to our attention; it does not accurately reflect the PNO's position on the assumption of debt.** Assuming that this remains the PNO position, reduction of the \$123 million acquisition price by the \$245 million in assumed debt would bring the transaction value to \$0 (actually less than \$0) and therefore, the Proposed Merger would not be a reportable transaction.
2. In connection with the application of HSR Rule 802.4, once the parties have identified the exempt assets and have excluded the exempt assets from the acquisition price, can you advise that whether the position of the PNO set forth in Informal Interpretation 1101001 (<https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1101001>) remains the current PNO position and that for purposes of valuing the non-exempt assets of LLC B, it would be acceptable for the parties to rely on the arms-length negotiated purchase price to be paid to the members of LLC B at closing, less the value of the exempt assets reflected on LLC B's current balance sheet, even though the negotiated purchase price was established for the purchase of non-corporate interests. **Yes, so long as the board of the acquiring person stands by the determination that the fair market value of the non-exempt assets was properly calculated in good faith and using a commercially reasonable method.**

Thanks in advance for your assistance with these questions. It is greatly appreciated.

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