

Verne, B. Michael

801.10

From: [REDACTED]
Sent: Wednesday, July 16, 2008 11:05 AM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: size of transaction question

Mike,

I have checked the informal opinions (some of which are linked below) but can't seem to find anything directly on point for the following scenario. Can you let me know how the PNO would view #2 and #3 below purposes of determining the size of the transaction? You can assume the size of person test is met.

- 1) "A" would invest \$40.5 million in existing retailer "B" in exchange for 50% of the preferred stock of the company.
- 2) B's existing shareholders would also receive a \$7.5 million seller note that would be (i) fully earned at closing, (ii) paid in three equal installments beginning on the first anniversary of the closing, and (iii) accrue interest at the rate of 8% per year.
- 3) Upon closing, A would call on lenders it has worked with in the past to secure a \$25 million senior term loan for B. Approximately \$3 million would be used to pay off current debt, \$3 million would go to bank fees/expenses/CAA fee, and the remaining \$19 million would be distributed to B's existing shareholders. The shareholders would not be expected to repay this amount. The Company, B, would take on the repayment obligation.

Should the \$7.5 million seller note and the \$19 million distribution from the senior term loan be considered in determining the size of the transaction for HSR purposes?

<http://www.ftc.gov/bc/hsr/informal/opinions/0412002.htm>
<http://www.ftc.gov/bc/hsr/informal/opinions/0709001.htm>
<http://www.ftc.gov/bc/hsr/informal/opinions/0503018.htm>

As always, thank you in advance for your guidance.

[REDACTED]

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Yes - both the \$7.5 MM and the \$19 MM would be included in the size of transaction.

BM
7/16/08