

802.63

Verne, B. Michael

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From: [REDACTED]  
Sent: Thursday, July 16, 2009 11:51 AM  
To: Verne, B. Michael  
Subject: HSR Discussion re 802.63

Mike,

**Thanks for speaking with me yesterday. Below is a summary of the hypothetical fact pattern we discussed and my request for confirmation of the HSR analysis.**

**Fact Pattern: A debtor and creditor enter into an agreement whereby the creditor agrees to modify the terms of the loan by, for example, extending the loan term. In return for such modification, the creditor is given a right, if the debtor should default on a payment in the future, to acquire voting equity of the debtor or entities owned by the debtor.**

**HSR Issue 1: Assuming this transaction is entered into in the ordinary course of the creditor's business, does this qualify as a bona fide debt work-out for purposes of 802.63, even if the receipt of the equity by the creditor would not satisfy the debt obligation?**

**HSR Analysis: This does qualify as a debt work-out. There is no requirement that the debt be extinguished for 802.63 to apply.**

**HSR Issue 2: Does the creditor qualify for the debt work-out exemption as of the time of the modification of the loan terms, so that the vulture fund exception to the debt work-out exemption would not apply even if, prior to receipt of the equity, the debtor goes into bankruptcy?**

**HSR Analysis: The vulture fund exception would not apply provided the agreement to modify the loan terms (including the right to receive equity) is entered into prior to the public announcement of an intention to initiate bankruptcy proceedings.**

**HSR Issue 3: If there are multiple creditors entering into such an arrangement with the same debtor, and the creditors create a Newco entity (e.g., an LLC) specifically for the purpose of holding their respective equity interests (which when aggregated would confer control over the debtor or entities presently controlled by the debtor), would the debt work-out exemption still apply even if the Newco does not itself hold the debt?**

**HSR Analysis: The exemption would still apply. The Newco would be viewed as a conduit for the creditors to hold the equity interests of the debtor or entities presently controlled by the debtor.**

**HSR Issue 4: Alternatively to 3 above, if there is a default and the individual creditors were to acquire their respective equity interests and subsequently transfer those interests to the Newco (instead of the equity going directly from the debtor to the Newco), would there be any filing obligation, assuming that the combined equity interests confer control over the debtor or entities presently controlled by the debtor?**

**HSR Analysis: Still no filing obligation. This would be viewed similarly to the scenario in 3 above, and the debt work-out exemption would apply.**

**Please let me know if this accurately reflects our discussion.**

Regards,

[Redacted]

[Redacted]

AGACE  
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7/16/09

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