From: Carson, Timothy

Sent: Monday, December 05, 2016 4:32 PM

To:

Walsh, Kathryn E.; Berg, Karen E.; Gillis, Diana L.; Whitehead,

Nora; Storm, Evan; Shaffer, Kristin

Subject: RE: Question Regarding Reporting Structure

The facts you describe represent two reportable transactions. The Seller UPE must provide a separate filing for each of the transactions: (1) PE Fund A to acquire Target as it exists without Target Carveout from Seller UPE and (2) PE Fund B to acquire Target Carveout from Seller UPE. The parties should use 3(a)/endnotes to describe exactly what is going on and explain the relationship between the parties with regard to the transactions.

Regards,

Timothy (Ty) Carson

Bureau of Competition Federal Trade Commission 400 7th Street, SW Washington, DC 20024 202.326.2627 tcarson@ftc.gov

From:

Sent: Monday, December 05, 2016 7:52 AM

To: Walsh, Kathryn E.; Berg, Karen E.; Gillis, Diana L.; Whitehead, Nora; Storm, Evan; Shaffer, Kristin;

Carson, Timothy

Cc:

Subject: Question Regarding Reporting Structure

All,

We are working on a transaction whereby the full business being sold by Seller UPE (the "Target") will ultimately be acquired by two affiliated purchasers ("PE Fund A" and "PE Fund B") in a series of steps that will all occur essentially simultaneously. PE Fund A and PE Fund B are affiliated (and are associates as defined in 16 C.F.R. 801.1) but are separate ultimate parent entities.

Under the First Agreement, an entity controlled by PE Fund A will acquire all of the stock of the Target from Seller UPE for the full transaction consideration, which is to be paid in cash. A portion of the full transaction consideration will be paid in cash that PE Fund A will have acquired from PE Fund B in exchange for a note (the "Note") with a value equal to the value of the portion of Target that will be held by PE Fund B after the transaction ("Target Carveout Value"). Immediately thereafter, under the Second Agreement, PE Fund A will cause Target to create a subsidiary ("Target Carveout") that will hold a portion of Target's assets. All of the stock of Target Carveout will then be transferred to an entity controlled by PE Fund B in repayment of the Note.

As a result of these transactions, which will occur essentially simultaneously, PE Fund B will hold the Target Carveout and PE Fund A will hold the Target minus Target Carveout. Both PE Fund A and PE Fund B will be acquiring entities whose values exceed the size of transaction threshold, and all applicable size of person tests will be satisfied. The First Agreement contemplates the events occurring under the Second Agreement, and the Second Agreement requires completion of the events occurring under its terms contingent on completion of the events occurring under the terms of the First Agreement. The financing that will be used by PE Fund A and PE Fund B to acquire the entirety of Target is contingent on the events contemplated by the First Agreement and Second Agreement both occurring.

Based on the principles articulated in PNPM (5th) Interpretations #38 and #228, we believe that the parties have two HSR reporting requirements, which are as follows: (1) PE Fund A to acquire Target as it exists without Target Carveout from Seller UPE and (2) PE Fund B to acquire Target Carveout from Seller UPE. This is because, at the end of the day, PE Fund A's ownership of the entirety of Target (*i.e.*, including Target Carveout) is only transitory for a moment in time and, as such, the HSR filings for the transaction should reflect the ownership structure at the end of all the simultaneous, related steps, particularly given that both PE Fund A and PE Fund B will have a reporting obligation for what each will hold after all the steps are completed.

Do you agree?

If you agree, is it acceptable for the Seller UPE to cover both transactions in a single filing or must it provide two separate filings with one to cover PE Fund A's acquisition of Target as it exists without Target Carveout from Seller UPE and a separate filing to cover PE Fund B's acquisition of Target Carveout from Seller UPE?

Thanks,