

## Sheinberg, Samuel I.

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**From:** HSRHelp  
**Sent:** Tuesday, July 11, 2023 11:34 AM  
**To:** Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Fetterman, Michelle  
**Subject:** FW: Request for Interp. - 16 CFR 802.63 Newco

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**From:** Shaffer, Kristin <kshaffer@ftc.gov>  
**Sent:** Tuesday, July 11, 2023 11:33:32 AM (UTC-05:00) Eastern Time (US & Canada)  
**To:** [REDACTED]  
**Cc:** HSRHelp <HSRHelp@ftc.gov>  
**Subject:** RE: Request for Interp. - 16 CFR 802.63 Newco

[REDACTED]  
Agree, so long as Newco would not have been prohibited from using 802.63 if it had entered into the credit arrangement directly (e.g., it is not a competitor or otherwise would not be able to claim that the acquisition of the debt was in the ordinary course of its business).

Best regards,

Kristin

**Kristin Shaffer**

Attorney

Premerger Notification Office

Federal Trade Commission

202-326-2388 | [kshaffer@ftc.gov](mailto:kshaffer@ftc.gov)

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**From:** [REDACTED]  
**Sent:** Thursday, July 6, 2023 12:46:38 PM (UTC-05:00) Eastern Time (US & Canada)  
**To:** HSRHelp <HSRHelp@ftc.gov>  
**Cc:** [REDACTED]  
**Subject:** Request for Interp. - 16 CFR 802.63 Newco

Dear PNO,

We write to clarify guidance regarding newco formations in connection with debt restructuring under 16 CFR 802.63. We understand that if a Newco is formed and ordinary course debt is transferred to the Newco *post*-bankruptcy petition or *post*-announcement of the intention to file bankruptcy, then the exemption under 16 CFR 802.63 is no longer available. However, we understand based on the below guidance that *pre*-petition (or announcement) reorganization of debt by Lenders, including into a Newco, would not negate the exemption under 16 CFR 802.63. Could you please confirm that pre-petition (or announcement) reorganization of ordinary course debt into a Newco does not negate the exemption under 16 CFR 802.63? Note Newco would not hold any other assets.

- Premerger Notification Practice Manual #164: "Once a debtor-creditor relationship has been created [in the ordinary course of business], even if the debtor's obligation subsequently is transferred to a different creditor, any subsequent foreclosure or acquisition in lieu of foreclosure that satisfies or discharges the debt obligation in whole or in part is generally exempt."
- <https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/0805004> "You further confirmed that the test applicable to so-called "Vulture Funds" is based on whether debt is acquired pre-or post-announcement of an intention to file for bankruptcy and not on the intent of the creditor at the time debt is acquired."
- <https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/1706003> "The vulture fund exception would preclude the use of 802.63 if the LLC is created and the debt is transferred after the announcement of an intention to file for bankruptcy."

- <https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/1505003> and <https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/0907009> “Once a bankruptcy has been announced, creditors cannot reorganize any pre-petition debt such that the debt (or the equity or assets exchanged for the debt) will be held within a separate UPE and rely on the exemption in 802.63.”

Thank you very much!

Best,

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