

Sheinberg, Samuel I.

From: HSRHelp
Sent: Thursday, October 7, 2021 1:52 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Sheinberg, Samuel I.; Six, Anne; Musick, Vesselina; Shaffer, Kristin
Subject: FW: HSR Question - Acquired Person and 803.5(b)

From: Whitehead, Nora <nwhitehead@ftc.gov>
Sent: Thursday, October 7, 2021 1:52:14 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: HSR Question - Acquired Person and 803.5(b)

We agree that the Acquired Person would be LLC X under the circumstances that you describe. Please review section 801.30(5) as a way to file without an agreement between the filing parties.

From: HSRHelp <HSRHelp@ftc.gov>
Sent: Wednesday, October 6, 2021 11:02 PM
To: Walsh, Kathryn E. <kwash@ftc.gov>; Berg, Karen E. <KBERG@ftc.gov>; Sheinberg, Samuel I. <SSHEINBERG@ftc.gov>; Six, Anne <asix@ftc.gov>; Whitehead, Nora <nwhitehead@ftc.gov>; Musick, Vesselina <vmusick@ftc.gov>; Shaffer, Kristin <kshaffer@ftc.gov>
Subject: FW: HSR Question - Acquired Person and 803.5(b)

From: [REDACTED]
Sent: Wednesday, October 6, 2021 11:01:22 PM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Subject: HSR Question - Acquired Person and 803.5(b)

Hello,

Please assume Person A, Person B, and Person C (each of which are their own UPE) each hold 33.33% of the non-corporate interests in LLC X, a limited liability company. Person A and Person C have executed a letter of intent whereby Person C will acquire all of the non-corporate interests in LLC X held by Person A. As a result of the transaction, Person C will hold 66.66% of the non-corporate interests of LLC X, and will control LLC X. Please assume that the size of transaction and size of person tests are met.

My analysis is that the acquired person in the transaction is LLC X, and not Person A, pursuant to 16 CFR 801.2(f)(1)(i) ("In an acquisition of non-corporate interests which results in an acquiring person controlling the entity, that person is deemed to hold all of the assets of the entity as a result of the acquisition. The acquiring person is the person acquiring control of the entity and the acquired person is the pre-acquisition ultimate parent entity of the entity.") Here, the pre-acquisition ultimate parent entity of LLC X is LLC X, because Person A, Person B, and Person C each held 33.33% of the non-corporate interests in LLC X, and none of Person A, Person B, or Person C controlled LLC X. Pursuant to 16 CFR 801.2(f)(1)(i) (cited immediately above), Person C is the acquiring person. **Please confirm whether you agree that the acquired person in the transaction is LLC X, not Person A.**

If LLC X is the acquired person, it will be the entity making an HSR notification filing along with the acquiring person. Person A and Person C have executed a letter of intent describing the transaction, but LLC X has not executed the letter of intent and does not plan to execute a letter of intent or a definitive purchase agreement. For LLC X's affidavit for purposes of 16 CFR 803.5(b), my analysis is that LLC X does not need to execute an agreement with Person C for purposes of making its HSR filing, because 16 CFR 803.5(b) does not state that the acquired person must be party to the executed agreement ("the notification required by the act shall contain an affidavit, attached to the front of the notification, or with the DVD submission, attesting that a contract, agreement in principle or letter of intent to merge or acquire has been executed, and further attesting to the good faith intention of the person filing notification to complete the transaction").

Rather, my analysis is that LLC X's 803.5(b) affidavit may state that Person A and Person C have executed a letter of intent, and that LLC X has the good faith intention to complete the transaction as reflected in such letter of intent. **Please confirm whether you agree that for LLC X to comply with Section 803.5(b), LLC X does not need to execute a letter of intent or agreement with Person C.**

Similarly, my analysis is that for Item 3(b) of the HSR form, LLC X may attach the letter of intent executed by Person A and Person C, and that for purposes of Item 3(b) of the HSR form, LLC X does not need to execute an agreement with Person C. **Please confirm whether you agree that for purposes of Item 3(b) of the HSR form, LLC X does not need to execute an agreement with Person C.**

Thank you in advance for your consideration of these questions.

[REDACTED]

[REDACTED]

[REDACTED]