Sheinberg, Samuel I.

From:	HSRHelp
Sent:	Friday, February 25, 2022 1:12 PM
To:	Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora
Subject:	FW: Question about Transaction

From: Shaffer, Kristin <kshaffer@ftc.gov> Sent: Friday, February 25, 2022 1:12:25 PM (UTC-05:00) Eastern Time (US & Canada)</kshaffer@ftc.gov>
To: Cc:
Subject: RE: Question about Transaction
Based upon your description, we agree that the Trust should be treated as a non-corporate entity, as described in your second analysis.
Best regards,
Kristin
Kristin Shaffer
Attorney
Premerger Notification Office
Federal Trade Commission 202-326-2388 <u>kshaffer@ftc.gov</u>
From:
Sent: Thursday, February 24, 2022 12:03 PM
To: HSRHelp <hsrhelp@ftc.gov></hsrhelp@ftc.gov>
Cc:
Subject: Question about Transaction
Dear Staff:

We would appreciate your assistance in determining whether an HSR filing would be required under the following facts, which as you will see involves the proper analysis of what amounts to a voting trust.

- 1. A is the Ultimate Parent Entity and holder of ~65% of the voting securities of Corporation, a Mexican publiclytraded corporation. The remaining ~35% of its shares are held by the public. B is a US person.
- 2. A and B will enter into a Trust Agreement to establish an irrevocable management trust ("Trust") under Mexican law. The Trust Agreement will identify the Trust's initial trustee. Neither A nor B will have the right to remove and replace the trustee unilaterally going forward.
- 3. Simultaneously with the creation of Trust, (i) A will contribute to Trust all of its Corporation shares (the "A shares"), valued above the applicable HSR size of transaction threshold; and (ii) B will contribute cash to the Trust's corpus.
- 4. The terms of the Trust Agreement will require the Trust to use the cash to commence a tender offer for the remaining 35% of Corporation's shares held by the public (the "B shares"), which are valued above the HSR size of transaction threshold. (Assume no other exemption applies.)
- 5. Pursuant to the Trust Agreement (i) A will be able to direct the Trustee on how Trust must vote the A shares and will incur the economic benefits (i.e., dividends) of the A shares; and (ii) B will be able to direct the Trustee on how to vote the B shares and will incur the economic benefits (i.e., dividends) of such shares.

- 6. Trust will grant Units to A and B that contain the "Trust Rights", e.g., the rights to the A and B shares, respectively set forth in #5. The Units are transferrable to third parties in certain circumstances; the transferee steps into the shoes of the transferor.
- 7. The Trust Agreement specifies that the Trust is not a business trust.
- 8. The Trust will terminate after 20 years (unless A and B agree to extend); upon A or B ceasing to hold any Units; or upon the agreement of A and B, who will instruct Trustee to terminate the Trust. Upon termination of the Trust, A shares will revert to A and B shares will revert to B (or possibly to a third party if any Units have been transferred).

Analysis

This seems like the same situation encountered in e.g., <u>1503001</u>. There the PNO appeared to agree with the proposition that "the UPE of an entity having a group of shareholders who had formed and transferred a majority of the entity's shares to an irrevocable voting trust was the voting trust itself." The PNO added that "since the voting trust [in that situation was] irrevocable, it would be the UPE." The PNO further advised that earlier interpretation that the settlors, by virtue of their ultimate reversionary interest, would be deemed to hold the voting securities at issue were "outdated." This leads us to conclude that the Trust is its own UPE in our circumstances as well.

From there, the analysis seems straightforward:

- The acquisition of 65% of the voting securities of Corporation is exempt under 802.71 ("Acquisitions resulting from a gift, intestate succession, testamentary disposition or transfer by a settlor to an irrevocable trust shall be exempt from the requirements of the act.")
- 2. The later acquisition by Trust of the remaining 35% via tender offer is exempt as an intraperson transfer under 802.30.
- 3. Should A or B or anyone else ever receive shares via dissolution of Trust, those would be considered acquisitions and potentially subject to the HSR Act, with the assessment to be made at that time.

In theory another possibility is that the trust is a "unit trust" and therefore is treated as a non-corporate entity for HSR Act purposes. We do not think that would affect the ultimate analysis, however:

- 1. A would be the UPE of Trust by virtue of its right to 65% of the profits of Trust and 65% of its assets on dissolution.
- 2. B's acquisition of Trust Units (35%) would be exempt because the acquisition would not confer control over Trust in terms of having the right to 50% or more of the profits of trust or the right to 50% or more of the assets of Trust on dissolution.
- 3. The acquisition of 65% of the voting securities of Corporation by Trust would be exempt because A (Trust's UPE) already holds those voting securities.
- 4. The later acquisition by Trust (the UPE of which would be A, which is also the UPE of Corporation) of the remaining 35% via tender offer would be exempt as an intraperson transfer under 802.30.
- 5. Should A or B or anyone else ever receive shares via dissolution of Trust, those would be considered acquisitions and potentially subject to the HSR Act, with the assessment to be made at that time.
- 6. Acquisitions of Trust Units would be potentially subject to the HSR Act and would need to be considered individually, although no such acquisition would be reportable unless, at a minimum, the acquiring person would as a result of the acquisition have the right to 50% or more of the profits of trust or the right to 50% or more of the assets of Trust on dissolution.

Please let us know how the PNO would view this transaction (whether under the first analysis, the unit trust analysis, or in some other way). If you need more information to complete your assessment, please do not hesitate to ask. Thank you as always for your assistance

