

Sheinberg, Samuel I.

From: HSRHelp
Sent: Tuesday, January 4, 2022 10:41 AM
To: Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora
Subject: FW: Up-C Questions

From: Shaffer, Kristin <kshaffer@ftc.gov>
Sent: Tuesday, January 4, 2022 10:41:13 AM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Subject: RE: Up-C Questions

[REDACTED]

Based upon the description below, Mr. X can file for the 50% threshold, buy at least one share after the termination of the waiting period, and use 803.7. If Up-C has the good faith intention of crossing the 50% threshold, it can also file. However, if it does not cross within one year of the expiration of the waiting period, it would have to file again and observe the waiting period before it could cross that threshold.

Best regards,
Kristin

Kristin Shaffer

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From: [REDACTED]
Sent: Monday, December 27, 2021 10:34 AM
To: HSRHelp <HSRHelp@ftc.gov>
Subject: Up-C Questions

Dear All,

I have two additional up-C scenarios on which I would appreciate guidance.

After an IPO on the Toronto Stock Exchange, all of the outstanding voting shares of PubCo (a corporation) are held by public shareholders. PubCo has a right to approximately 30% of the profits and assets of OpCo (a limited partnership). PubCo is planning to list its shares in the US, and must complete an internal reorganization prior to such listing. This reorganization is described more fully below.

Mr. X has a right to approximately 70% of the profits and assets of OpCo, he is the General Partner of OpCo, and has the right at any time to exchange his OpCo interest for an interest in PubCo. Mr. X has held his interest in OpCo since its inception, and he has never filed HSR with respect to OpCo or PubCo.

In connection with the reorganization, Mr. X will exchange his General Partner interest in OpCo for 70% of the outstanding voting shares in PubCo. This will result in Mr. X becoming the Ultimate Parent Entity of PubCo, and PubCo will control OpCo. Such shares are valued in excess of the HSR Act's filing thresholds, however, the only thing owned by PubCo before the reorganization is its 30% interest in OpCo, an entity already controlled by Mr. X. Thus, Mr. X's acquisition of PubCo voting securities is exempt from the reporting requirements of the HSR Act.

It is possible that over time, and from time to time, Mr. X's voting security holdings in PubCo will fall below 50%, either due to a) his own sales of voting securities, or b) the issuance of additional voting securities by PubCo i) in an equity raise or ii) in connection with an acquisition by the OpCo where PubCo voting securities are used as consideration. Once his voting security holdings fall below 50%, Mr. X would be required to file HSR and observe the waiting period requirements before buying an additional share of PubCo (e.g., if he falls below 50% and then receives an equity award). Mr. X is concerned about being inadvertently out of compliance with the HSR Act. He would like to file HSR now, and buy one more PubCo voting share within the next year, so that he can go above and below 50% of PubCo's outstanding

voting securities for the next 5 years without potentially missing an HSR filing requirement. Can he file now and buy a share that would satisfy Rule 803.7, even though he is already over 50%? If so, we understand that he will be able to go above and below 50% for the 5 year grace period provided for in Rule 802.21. **Please let us know if you agree.**

One other concern is that because of requirements in the Up-C organizational documents, the issuances of additional PubCo voting shares could, eventually, also cause PubCo's right to profits and assets of OpCo to increase above 50%. Would there be a way for PubCo to file HSR in order to have flexibility to cross over (and fall below) the 50% threshold from time to time for the **next five years**? At a minimum, would an HSR filing allow for multiple crossings of 50% **within the first year after the expiration of the waiting period**?

Thank you for your guidance on these technical questions.

Best regards,

[Redacted]

[Redacted]

[Redacted]