

Sheinberg, Samuel I.

From: HSRHelp
Sent: Thursday, December 14, 2023 12:14 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Fetterman, Michelle; Burton, June; Larson, Peter
Subject: FW: HSR § 802.4

From: Shaffer, Kristin <kshaffer@ftc.gov>
Sent: Thursday, December 14, 2023 12:13:51 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: HSR § 802.4

CONTROLLED

[REDACTED]

The transaction must be analyzed as the acquisition of the target at closing. While 802.4 is always available, it must be applied to the target as it exists at the moment of closing, disregarding any subsequent actions that will be taken, and should analyze the valuation of any goodwill.

Best regards,

Kristin Shaffer

Attorney
Premerger Notification Office
Federal Trade Commission
202-326-2388 | kshaffer@ftc.gov

From: HSRHelp <HSRHelp@ftc.gov>
Sent: Wednesday, December 13, 2023 6:33 PM
To: Walsh, Kathryn E. <kwalsh@ftc.gov>; Berg, Karen E. <KBERG@ftc.gov>; Musick, Vesselina <vmusick@ftc.gov>; Shaffer, Kristin <kshaffer@ftc.gov>; Sheinberg, Samuel I. <SSHEINBERG@ftc.gov>; Six, Anne <asix@ftc.gov>; Whitehead, Nora <nwhitehead@ftc.gov>; Fetterman, Michelle <mfetterman@ftc.gov>; Burton, June <jburton@ftc.gov>; Larson, Peter <plarson@ftc.gov>
Subject: FW: HSR § 802.4

From: [REDACTED]
Sent: Wednesday, December 13, 2023 6:33:03 PM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Cc: [REDACTED]
Subject: HSR § 802.4

Deal All,

We're working on a transaction for a client and would like to confirm with you that the transaction is exempt from the requirements of the HSR Act under § 802.4.

Factual Background

The client, an investment vehicle controlled by an individual ("Investor"), intends to invest in excess of \$445.5 million in cash in a publicly traded corporation ("Target"), along with other investors ("Minority Investors") who are expected to invest, in the aggregate, less than \$111.4 million. Investor will receive voting securities of Target valued in excess of \$445.5 million, as well as warrants. Upon the closing of the investment, Investor will become the majority shareholder of Target. Under the investment agreement, Investor has the right to

contribute certain assets to Target in lieu of cash ("Contributed Assets") and reduce its portion of the cash investment by a corresponding amount.

Shortly after the closing of the investment ("Closing"), Target will spin off ("spin-off") all of its existing business and assets to the shareholders of Target as of a record date that is expected to be one day prior to the Closing ("Pre-Investment Shareholders"). As a result of the spin-off, all of the pre-Closing assets of Target will be owned by a new company ("SpinCo") entirely owned by Pre-Investment Shareholders. Investor will not own any voting securities or other interests in SpinCo. Therefore, after the Closing and the spin-off, Investor will own the majority of the voting securities of an entity whose only asset will be the cash invested by Investor and the Minority Investors (and, potentially, any Contributed Assets that Investor may contribute to Target in lieu of cash).

Analysis

While the spin-off will occur shortly after the Closing, we believe that the substance of the transaction is that Investor will acquire voting securities valued at more than \$445.5 million in an entity whose only asset is cash (and, potentially, any Contributed Assets). The acquisition of cash is exempt under § 801.21, and, to the extent applicable, the acquisition of Contributed Assets would be exempt under § 802.30. Therefore, we believe that, pursuant to § 802.4, Investor's acquisition of voting securities of Target is exempt from the HSR Act.

Under a more formalistic analysis, one could take the view that, since the spin-off will occur shortly after the Closing, at the Closing and for a very short period of time thereafter Investor will control Target with its pre-Closing assets. Even under this approach, we think the transaction is exempt under § 802.4. Target currently has a total market capitalization of substantially less than \$111.4 million, which Investor believes reflects the fair market value of all of Target's existing assets. About a third of the assets on Target's balance sheet are cash and cash equivalent, the acquisition of which is exempt pursuant to § 801.21. The fair market value of the remaining assets—the non-exempt assets—is therefore substantially less \$111.4 million. As a result, since Target and all entities it controls do not hold non-exempt assets with an aggregate fair market value of more than \$111.4 million, the transaction is exempt under § 802.4. In this regard, it is worth noting that the value of Investor's investment in Target—in excess of \$445.5 million—has nothing to do with the fair market value of Target's existing assets, as it cannot be considered the "price" that Investor will pay for Target's existing assets, given that such assets will be entirely spun off shortly after the Closing of the investment.

Question

We would be grateful if you could please confirm that you agree that Investor's investment in Target, as described above, is exempt for the requirement of the HSR Act.

Many thanks and best regards,

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