

Sheinberg, Samuel I.

From: HSRHelp
Sent: Monday, January 22, 2024 1:50 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: Trust Analysis - Shared Replacement/Removal Power

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Sent: Monday, January 22, 2024 1:50:21 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: Trust Analysis - Shared Replacement/Removal Power

[REDACTED]

[REDACTED]

Based upon the facts you have provided, A and B each have the power to remove and replace the trustees. Since they do not need to consult with one another or jointly act, that power is not "shared." Therefore, each would be a UPE of the corpus of the trust.

Best regards,

Kristin

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From: [REDACTED]
Sent: Monday, January 22, 2024 7:59:00 AM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Subject: Trust Analysis - Shared Replacement/Removal Power

Dear all - hoping that 2024 is off to a great start. I'm looking to get confirmation that the language in the commentary to [Informal Interpretation #1106005](#) continues to govern and would apply to the facts described below to make the trust described here its own Ultimate Parent Entity.

The facts involve an irrevocable trust which grants (through a Power of Attorney) the power to two siblings, A and B, to each exercise the powers of the grantor - including his power to replace and remove all of the trustees of the trust, with or without cause.

As the commentary to Informal Interpretation #1106005 reads -

"When the power to remove and replace 50% or more of the trustees is shared or subject to the consent of a third party, no one person has the power to appoint 50% or more of the trustees and no one person is deemed to control the trust." (emphasis added)

In my scenario, both A and B "share" the removal/replacement power which (other than certain limitations on who can come in as a replacement) is absolute. And they may both unilaterally exercise that power without consultation or coordination with one another in its exercise - although as a practical matter each exercises an absolute veto on the *actual* ability to remove/replace trustees - since any move that is not to the liking of the other can be immediately undone (and then redone) endlessly as both hold that full removal/replacement right. The plain reading of the commentary to #1106005 would lead to the same conclusion here - that of no control existing over the trust, based on this dual removal/replacement power.

Note that even if the control link were not severed by virtue of this shared power, there remain potential other avenues to break the chain - limitations on "who" can come in as a replacement trustee extend a bit more broadly than usual in terms of who constitutes an "independent" replacement trustee, and the power of removal/replacement conferred on persons A and B was conferred by means of a revocable Power of Attorney (although with facts here that unfortunately raise questions about whether grantor who has retained that right could legally exercise it, given mental competence issues).

More details on those other elements to come if needed to further establish a break in the chain of control over the trust. But I'm hopeful that, following the language of the commentary, the approach to "shared" powers is sufficient - on its own - to drive the "not controlled" conclusion.

Thanks in advance for your help, and please let me know if you have any questions.

Best,

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