

## Sheinberg, Samuel I.

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**From:** HSRHelp  
**Sent:** Thursday, September 12, 2024 3:47 PM  
**To:** Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Shaffer, Kristin; Sheinberg, Samuel I.; Six, Anne; Fetterman, Michelle; Burton, June; Larson, Peter  
**Subject:** FW: Request for Informal HSR Guidance

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**From:** Whitehead, Nora <nwhitehead@ftc.gov>  
**Sent:** Thursday, September 12, 2024 3:46:27 PM (UTC-05:00) Eastern Time (US & Canada)  
**To:** [REDACTED]  
**Cc:** HSRHelp <HSRHelp@ftc.gov>  
**Subject:** RE: Request for Informal HSR Guidance

[REDACTED]

Based on the facts provided, we agree that Sponsor is not a UPE of Buyer Corp. That said, it is worth mentioning that any ownership arrangement designed to evade the requirements of the HSR Act runs afoul of 801.90.

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**From:** HSRHelp <HSRHelp@ftc.gov>  
**Sent:** Thursday, September 12, 2024 11:52 AM  
**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: Request for Informal HSR Guidance

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**From:** [REDACTED]  
**Sent:** Thursday, September 12, 2024 11:52:06 AM (UTC-05:00) Eastern Time (US & Canada)  
**To:** HSRHelp <HSRHelp@ftc.gov>  
**Subject:** Request for Informal HSR Guidance

[REDACTED]

Hi All:

We have encountered a question concerning the interpretation of 801.1(b)(2). Your guidance on this would be very much appreciated.

Our client is a newly formed LLC ("Parent LLC"). Parent LLC is its own UPE. Parent LLC will acquire 100% of Target through a newly-formed wholly-owned subsidiary corporation ("Buyer Corp."), a for-profit corporation. We have concluded that an HSR filing is required in connection with Buyer Corp.'s acquisition of Target with Parent LLC as the acquiring UPE.

Under its operating agreement (the "Operating Agreement"), Parent LLC is governed by a 3-member board of managers. While no one has the right to appoint more than one manager to the board, the Sponsor of Parent LLC has the right to designate a manager to the board with votes equal to the sum of the number of managers appointed by the other investors plus one. In other words, the Sponsor's designee would individually have a majority of the votes in any board decision. As an LLC, the composition and structure of Parent LLC's board is not relevant to the determination of whether it is controlled by another entity. Sponsor does not have the right to 50% or more of Parent LLC's profits or assets upon dissolution and so it does not control Parent LLC (which, as noted above, it is own UPE).

However, Parent LLC's Operating Agreement provides that any wholly-owned subsidiaries of Parent LLC, including Buyer Corp., must have a board of directors/managers that mirrors the board of Parent LLC. So while Sponsor will not have the

contractual right to designate 50% or more of Buyer Corp.'s board of directors, Sponsor's designee on Buyer Corp's board will have a majority of the votes in board decisions.

801.1(b)(2) defines "control" to include, among other things, "the contractual power presently to designate 50 percent or more of the directors of a for-profit or not-for profit corporation." Strictly speaking, Sponsor does not have the right to designate 50 or more of the directors of Buyer Corp., in which case Sponsor is not a UPE of Buyer Corp. Here are our questions:

1. Is this the correct reading of the rule or is it the PNO's view that, under the circumstances described above, the control determination would be based on board votes rather than the number of directors?
2. If the latter is correct, would Sponsor and Parent LLC each be required to submit their own HSR filing, as acquiring UPEs, in connection with Buyer Corp.'s acquisition of Target?

Thank you.

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