

Sheinberg, Samuel I.

From: HSRHelp
Sent: Monday, January 27, 2025 12:24 PM
To: HSR Auto Forward List
Subject: FW: Question about 801.13(b)

From: Whitehead, Nora
Sent: Monday, January 27, 2025 12:23:53 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Question about 801.13(b)

Given that the instant acquisition and the future acquisition are part of the same agreement with the same seller, they are treated as one transaction for HSR purposes. If the buyer plans to acquire assets under the agreement, it must file HSR for the entire transaction.

From: HSRHelp <HSRHelp@ftc.gov>
Sent: Wednesday, January 22, 2025 7:41 PM
To: HSR Auto Forward List <HSRAutoForwardList@ftc.gov>
Subject: FW: Question about 801.13(b)

From: [REDACTED]
Sent: Wednesday, January 22, 2025 7:41:14 PM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Cc: [REDACTED]
Subject: Question about 801.13(b)

Dear PNO:

We have a question regarding the applicability of the HSR rules to a rather unusual structure involving the acquisition of multiple assets.

More than a year ago, the parties entered into a multi-billion dollar agreement covering a number of assets that contemplates closing in 2028. Should this transaction ultimately be consummated, an HSR filing will be required.

A provision of the agreement allows the seller to require the buyer to acquire certain of the assets that are otherwise covered by the agreement if certain events occur and the seller chooses to invoke the provision. In other words, if these events occur and the seller invokes this provision, the seller can require the buyer to acquire the assets sooner than it would have acquired them under the original agreement. Once this happens, the assets that have been “put” in this way are in effect removed from the agreement since they cannot be acquired twice.

The seller has chosen to invoke this provisions as to one small group of assets, valued at approximately \$1 million, which represents less than 0.1% of the total amount of assets that will be acquired.

The question is whether the parties are required to aggregate this small bit of assets with the other assets that are covered by the agreement.

We do not think aggregation is required in these unusual circumstances for several reasons.

First, by invoking the “put” provision, the seller in effect is creating a new acquisition agreement that is limited to the particular assets that are the subject of the “put.” As noted, the original agreement was entered into more than 180 days ago.

Second, these assets are valued at less than the size-of-transaction test.

Third, if a filing were required now for all of the assets covered by the original agreement, it would lead to the perverse result that the filing would expire prior to the closing of that agreement, thus necessitating a second filing closer to the time that the second agreement is to be closed. The agencies would accordingly have to review the transaction twice, and the parties would be put to the expense of two filings (and two filing fees), which would make no sense.

We are, of course, aware of the aggregation requirements of 16 CFR 801.13(b). Under 801.13(b), if any further assets are “put” to the buyer within 180 days of the closing of the \$1 million transaction, they would need to be aggregated with the assets in the \$1 million transaction to determine if a filing is required. (See Example 2 to 16 CFR 801.13(b).) It seems plain, however, that the purpose of 801.13(b) was to require aggregation of assets that are acquired *inside* the 180-day window, not a year or more later as would be the case here. In addition, 801.13(b) on its own terms only requires aggregation with assets covered by an agreement or letter of intent that was entered into within the previous 180 days. Here, the agreement at issue was entered into more than 180 days ago, and closing is not expected until 2028.

Given the size-of-transaction of the \$1 million transaction does not meet the size-of-transaction test and we do not believe anything else from the agreement needs to be aggregated with the \$1 million transaction, we do not think an HSR filing would be required at this time for the \$1 million transaction. Please let us know if that is correct. Thank you.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]