

## Sheinberg, Samuel I.

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**From:** HSRHelp  
**Sent:** Tuesday, June 27, 2023 11:27 AM  
**To:** Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Shaffer, Kristin; Sheinberg, Samuel I.; Six, Anne; Fetterman, Michelle  
**Subject:** FW: Irrevocable Proxy and Investment-Only Exemption

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**From:** Whitehead, Nora <nwhitehead@ftc.gov>  
**Sent:** Tuesday, June 27, 2023 11:26:53 AM (UTC-05:00) Eastern Time (US & Canada)  
**To:** [REDACTED]  
**Cc:** HSRHelp <HSRHelp@ftc.gov>  
**Subject:** RE: Irrevocable Proxy and Investment-Only Exemption

We agree with #1. As to #2, as you are in possession of all the facts related to this inquiry, you will need to make the final call and be prepared to defend any decision not to file and observe the waiting period if the Bureau's Compliance Division investigates.

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**From:** HSRHelp <HSRHelp@ftc.gov>  
**Sent:** Tuesday, June 27, 2023 9:22 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>  
**Subject:** FW: Irrevocable Proxy and Investment-Only Exemption

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**From:** [REDACTED]  
**Sent:** Tuesday, June 27, 2023 9:21:39 AM (UTC-05:00) Eastern Time (US & Canada)  
**To:** HSRHelp <HSRHelp@ftc.gov>  
**Subject:** Irrevocable Proxy and Investment-Only Exemption

Dear PNO Staff,

Shareholder A currently owns in excess of \$111.4 million of the voting securities of Corporation B. Shareholder A intends to purchase \$10 million of Corporation B voting securities from another shareholder of Corporation B. (Note: The size-of-person test is met.)

Shareholder A has granted the founder of Corporation B an irrevocable right to vote its shares, including voting for the election or removal of members of the board of directors. (Note: This includes the \$10 million of shares that will be acquired.)

We understand that an irrevocable proxy impacts the control analysis under 16 C.F.R. § 801.1(b). However, the founder is not deemed to beneficially control the voting securities held by Shareholder. Therefore, Shareholder A is deemed to hold these voting securities under the HSR Rules.

### Questions

Our understanding is that even though Shareholder A will have no present right to vote for the directors of Corporation B due to the grant of the irrevocable proxy, Shareholder A is still deemed to hold voting securities and will be acquiring voting securities that will require notification under the HSR Act, unless another exemption applies. Please confirm that our view is correct.

Shareholder A will hold less than 10 percent of the voting securities of Corporation B. The ultimate parent of Shareholder A has a wholly-owned subsidiary that does business with Corporation B and subjectively may be viewed as a competitor in a broad sense to Corporation B even though our position is that they do not operate in the same antitrust relevant market. We understand that the PNO has taken the position that being a competitor creates an irrebuttable presumption to using the investment-only exemption in 16 C.F.R. § 802.9. In the past, we understand that the PNO has stated that a vendor-

vendee relationship does not preclude the use of the investment-only exemption but that the PNO has changed its opinion. Despite these potentially horizontal and vertical relationships, is Shareholder A precluded utilizing the investment-only exemption in 16 C.F.R. § 802.9 even though it has granted all of its voting rights, including director voting rights, irrevocably to the founder of Corporation B?

Thank you,

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