

Sheinberg, Samuel I.

From: HSRHelp
Sent: Tuesday, July 30, 2024 10:29 AM
To: Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Fetterman, Michelle; Burton, June; Larson, Peter
Subject: FW: Premerger Notification Requirements for Stock Sale - Size of Transaction Test Analysis

From: Shaffer, Kristin <kshaffer@ftc.gov>
Sent: Tuesday, July 30, 2024 10:28:48 AM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: Premerger Notification Requirements for Stock Sale - Size of Transaction Test Analysis

[REDACTED],

You are correct that the size of the transaction would be the determined acquisition price or fair market value of the voting securities, as required by Rule 801.10. Note, however, that allocating the total consideration between voting and non-voting securities for the purpose of making the transaction non-reportable would violate Rule 801.90, which prohibits transaction structures designed to avoid HSR reporting obligations. Further, if a fair market valuation is required, the board of directors of the acquiring UPE (or its delegee) must make this determination on a commercially reasonable basis and in good faith. While the PNO does not require or endorse any particular methodology, factors such as the acquiring person's ordinary course documents discussing valuation, and what a third party would pay for just the voting securities, without the acquisition of the non-voting securities (or just the non-voting securities, without the acquisition of the voting securities) may be relevant to the determination.

Best regards,

Kristin

Kristin Shaffer

Attorney

Premerger Notification Office

Federal Trade Commission

202-326-2388 | kshaffer@ftc.gov

From: [REDACTED]
Sent: Monday, July 29, 2024 6:34:37 PM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Subject: Premerger Notification Requirements for Stock Sale - Size of Transaction Test Analysis

To Whom It May Concern,

Upon reviewing the applicable statute, regulations, and informal interpretations, we are writing to confirm the treatment of voting and non-voting shares for purposes of determining if the size-of-transaction test is met. Assume a Corporation is an S corporation with three shareholders. Shareholders 1 and 2 are individuals who each own 49 voting shares and 9,900 non-voting shares. The third shareholder is a Trust which owns 153 voting shares and 0 nonvoting shares and is the UPE of the Corporation. As such, the voting shares comprise approximately 1.2% of the total outstanding shares of the Corporation and the portion held by the Trust comprises 0.7%. Each share, voting or non-voting, has equal financial rights. The capitalization structure of the Corporation has been in place since 2007 and was instituted for reasons independent of the proposed transaction and HSR Act.

The acquiring entity desires to purchase 100% of outstanding shares of the Corporation for approximately \$222 million. We are writing to confirm that for purposes of the size-of-transaction test purposes, only the value of the 251 voting shares being transferred is considered and the value of the 19,800 non-voting shares is disregarded. Further, in accordance with Regulation 801.10, the value of non-publicly traded voting securities is either (1) the acquisition price

or, if not determined (2) the fair market value as determined in good faith by the acquiring UPE board. If so, the value of the voting shares is likely significantly below the filing threshold. As such, the size of transaction test would not be met and no HSR filing would be required.

Thank you in advance for your time and assistance.

Best,

A large, solid black rectangular redaction covers the signature and name of the sender. The redaction is composed of several overlapping horizontal bars of varying lengths, creating a stepped effect on the right side.