

## Sheinberg, Samuel I.

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**From:** HSRHelp  
**Sent:** Wednesday, October 23, 2024 11:13 AM  
**To:** Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Shaffer, Kristin; Sheinberg, Samuel I.; Six, Anne; Fetterman, Michelle; Burton, June; Larson, Peter  
**Subject:** FW: Control of a Corporation (Board Appointment)

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**From:** Whitehead, Nora <nwhitehead@ftc.gov>  
**Sent:** Wednesday, October 23, 2024 11:12:57 AM (UTC-05:00) Eastern Time (US & Canada)  
**To:** [REDACTED]  
**Cc:** [REDACTED] HSRHelp <HSRHelp@ftc.gov>  
**Subject:** RE: Control of a Corporation (Board Appointment)

Confirmed.

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**From:** HSRHelp <HSRHelp@ftc.gov>  
**Sent:** Tuesday, October 22, 2024 2:37 PM  
**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: Control of a Corporation (Board Appointment)

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**From:** [REDACTED]  
**Sent:** Tuesday, October 22, 2024 2:36:21 PM (UTC-05:00) Eastern Time (US & Canada)  
**To:** HSRHelp <HSRHelp@ftc.gov>  
**Cc:** [REDACTED]  
**Subject:** Control of a Corporation (Board Appointment)

[REDACTED]

Dear Premerger Notification Office,

We are writing to confirm your position on control of a corporation via the contractual right to appoint members to the corporation's board of directors.

### Background

Company A is a corporation. At the time of a contemplated transaction, no person, entity or commonly controlled entities together will hold 50% or more of Company A's voting securities.

There is a group of five entities (Company B, Fund C, Fund D, Fund E, and Fund F) (collectively, the "Group") that share the right to appoint directors to Company A's board. No person, entity or commonly controlled entities together has the unfettered right to appoint 50% or more of the board. Fund C, Fund D, and Fund E are each controlled by Company B, but Fund F is not.

The initial board will be comprised of 7 directors: (i) 3 directors appointed by the Group, (ii) 2 directors appointed by the founder of Company A, and (iii) the CEO and CFO of Company A (such CEO and CFO being appointed by the holders of a majority of Company A's voting securities, subject to the consent of the Group). In addition, 1 non-executive independent director may be nominated by the Group (with consultation from the founder of Company A who also has a veto right over the initial recommendation by the Group), with such non-executive director (and any other further directors) only being appointed by the holders of a majority of Company A's voting securities, subject to the consent of the Group.

### Application

We understand from Informal Interpretation #0808008 (Aug. 27, 2008), Informal Interpretation #1112005 (Dec. 1, 2011), and Informal Interpretation #0911016 (Dec. 8, 2009) that if the right to appoint a director is shared, no one entity or person would be deemed to control as "[s]uch control would exist only if one or the other has the absolute power to appoint" 50% or more of the board as "unless a shareholder has an unfettered right to designate directors (i.e., the approval of another shareholder is not required), director nominees that are so limited do not count as directors for whom contractual power to designate exists."

In our fact pattern, neither Fund F on its own nor Company B, Fund C, Fund D, and Fund E in the aggregate as part of the same control group would have the absolute or unfettered power to appoint 50% or more of the board. The right to appoint the three Group directors is shared across all five entities, and the right to nominate the non-executive independent director is shared across the Group and with the founder and the appointment of that and any further directors requires the approval from the holders of a majority of Company A's voting securities. Please confirm that Company A is its own ultimate parent entity under these facts.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]