

Sheinberg, Samuel I.

From: HSRHelp
Sent: Thursday, June 2, 2022 11:23 AM
To: Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Shaffer, Kristin; Sheinberg, Samuel I.; Six, Anne; Fetterman, Michelle
Subject: FW: Foreign Entity -- Corporate or Non-Corporate

From: Whitehead, Nora <nwhitehead@ftc.gov>
Sent: Thursday, June 2, 2022 11:22:55 AM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: Foreign Entity -- Corporate or Non-Corporate

Based on what you know about Foreign Newco and the guidance in the 2016 blog, you should be prepared to make the call as to whether it is a corporate or non-corporate entity.

From: HSRHelp <HSRHelp@ftc.gov>
Sent: Thursday, June 2, 2022 10:01 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: Foreign Entity -- Corporate or Non-Corporate

From: [REDACTED]
Sent: Thursday, June 2, 2022 10:01:06 AM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Subject: Foreign Entity -- Corporate or Non-Corporate

Hi folks.

We have a few questions about the proper way to assess the transaction described below.

X and Y are forming two newcos – Newco US LLC and Foreign Newco. Newco US LLC is a US LLC and X will hold 60%, and be entitled to over 50% of the profits or assets upon dissolution, of Newco US LLC. Y will hold 40% of Newco US LLC. Foreign Newco is a non-US entity. X will hold 40% of Foreign Newco and Y will hold 60% of Foreign Newco. X will have the right under the operating agreement to appoint 2 directors to Foreign Newco’s 5-member supervisory board and Y will have the right under the operating agreement to appoint 3 directors to Foreign Newco’s supervisory board. We do not anticipate that holders of Foreign Newco’s equity will technically have rights to vote such equity for any members of Foreign Newco’s supervisory board, although X and Y, the holders of Foreign NewCo’s equity, each will have the right to appoint a number of members of Foreign NewCo’s supervisory board in proportion to the amount of equity each of X and Y respectively holds. Foreign Newco’s operating agreement will expressly state that X can appoint 2 members and Y can appoint 3 members to Foreign Newco’s 5-member supervisory board.

Question #1.

Would Foreign Newco be treated as a corporate or non-corporate entity under the HSR rules?

In a 2016 blog the PNO announced the following test to determine whether to treat foreign entities as corporate or non-corporate entities under the HSR rules: “Does the entity issue securities that allow the holders to vote for the election of a supervisory board of directors? If the answer is yes, then the entity is treated as a corporate entity for HSR purposes. If the answer is no, then the entity is treated as a non-corporate entity for HSR purposes.”

Foreign Newco will not issue securities whose holders can vote for the election of its supervisory board of directors. However its two owners will have the right under its operating agreement to appoint the number of directors proportionate to their percentage holding in Foreign Newco.

Do you agree that under these facts, the PNO would treat Foreign Newco as a non-corporate entity? If so, X would not have an HSR filing obligation in connection with its formation since X would not be entitled to at least 50% of its profits or assets upon dissolution.

Question #2.

If the PNO instead would treat Foreign Newco as a corporate entity, when assessing whether the Section 802.4/Section 802.30(c) exemption would apply to X's acquisition of 40% of Foreign Newco, we understand that we would just assess whether the non-exempt assets Y will contribute to Foreign Newco would have a value under the HSR rules of less than \$101 million. Thus if such assets were not located in the US and did not collectively generate at least \$101 million of sales in or into the US in their most recent year, X would not have to report its acquisition of 40% of Foreign Newco because the Section 802.50/802.4 exemption and/or Section 802.30(c) exemption would apply. It would not be necessary to aggregate with the non-exempt assets that Y would contribute to Foreign Newco any non-exempt assets that Y would contribute to Newco US LLC (an entity that X would control under the HSR rules) when assessing whether the Section 802.4 or Section 802.30(c) exemption applies to X's acquisition of 40% of Foreign Newco.

Do you agree?

Thanks for your help.

Best regards,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]