

Sheinberg, Samuel I.

From: [REDACTED]
Sent: Thursday, November 08, 2018 9:09 AM
To: Walsh, Kathryn E.; Berg, Karen E.; Carson, Timothy; Sheinberg, Samuel I.; Whitehead, Nora
Subject: FW: CTO and Merger

From: Shaffer, Kristin
Sent: Thursday, November 8, 2018 9:09:24 AM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: CTO and Merger

[REDACTED]

Buyer should file for the maximum number of shares that it plans to acquire through all mechanisms and steps. Since Buyer will make the cash tender offer for more than 50% of the voting securities, we would treat the entire transaction as a CTO.

Best regards,
Kristin

[REDACTED]

From: [REDACTED]
Sent: Wednesday, November 7, 2018 11:25:16 AM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Subject: CTO and Merger

I would like advice on how to set up an HSR filing for a complex CTO and merger that involves rollovers and conversions. Hopefully the following simplified version of the transaction will provide enough information to advise on whether it is a CTO filing only, a CTO and merger filing (with, per PNPM 224, two waiting periods), or just a merger filing.

Facts: Buyer and Corporation enter into an Agreement and Plan of Merger that contemplates a series of transactions to occur in the following order:

1. Buyer will launch a CTO for all outstanding and issued shares of publicly traded Corporation subject, in part, to the satisfaction or waiver of a condition that requires the tender of a number of Shares of Common Stock that would represent at least one share more than 50% of the Corporation's then outstanding Shares not owned by insiders [rollover shareholders, executive officers and directors of the Corporation]. Buyer and certain shareholders ("rollover shareholders") have agreed that certain Shares held by each will not be tendered but rather acquired in step 3, below. Due to the rollover and the condition noted above, the CTO acquisition would represent 40% of the outstanding and issued Shares at the close of the CTO if the minimum are tendered (the

balance being non-tendered shares and rollover shares) and 60% if the maximum are tendered (the balance at the time being just rollover shares). If relevant, assume that the value of the shares tendered, using the offer price per share and assuming all outstanding Shares being tendered but for the rollover Shares, is less than \$84.4 million.

Post-CTO Consummation

2. The Buyer will convert non-voting shares it holds to voting securities that will represent 30% of the Shares of Corporation upon conversion;
3. The rollover shares will be acquired by Buyer Parent from the rollover shareholders in exchange for Buyer Parent shares; and
4. Buyer merges with and into Corporation, with Corporation surviving as a wholly owned subsidiary of Buyer Parent (the "Merger"). Pursuant to the Merger, shares not tendered and accepted pursuant to the CTO (other than shares held by the parent and merger sub and dissenting shares), will receive cash consideration in an amount equal to the CTO offer price.

Assume for these purposes that the total transaction value is in excess of \$8.4.4 million.

Taking the entire transaction, it appears that I have the following acquisitions (and should check the following boxes under Item 2(b)):

- 801.30(3) (cash tender offer)
- 801.30(5) (rollover but with the company as a party to a merger agreement)
- 801.30(6)
- a merger
- an acquisition of voting securities.

How would this be treated for 803.5 purposes and waiting period purposes?

Is it correct that the only agreement required to be submitted is the Agreement and Plan of Merger and that the agreements with the rollover shareholders are not required to be included with the filing as long as the Acquired Person/Entity are not also a party to the agreements?

Thanks,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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