

Sheinberg, Samuel I.

From: Sheinberg, Samuel I.
Sent: Monday, April 18, 2022 1:51 PM
To: [REDACTED]
Cc: HSRHelp
Subject: RE: Request for Informal Guidance with Respect to Determining the UPE of the Acquired Person

The Husband and Wife jointly control 64% of the company. This includes each of their 14% interest in the revocable trusts and the Wife's 36% interest in the irrevocable trust - because she can remove and replace trustees at any time - meaning together they are the UPE of the Company.

From: HSRHelp <HSRHelp@ftc.gov>
Sent: Friday, April 15, 2022 2:19 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>
Subject: FW: Request for Informal Guidance with Respect to Determining the UPE of the Acquired Person

From: [REDACTED]
Sent: Friday, April 15, 2022 2:17:38 PM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Subject: Request for Informal Guidance with Respect to Determining the UPE of the Acquired Person

Ladies and Gentlemen:

I am writing the PNO to request its informal guidance in determining who the UPE of the acquired person is in a transaction for which we will be filing a Notification and Report Form next week.

We represent the two "owners" of an LLC (the "Company"), a husband ("H") and wife ("W") who from the Company's inception on June 1, 2018, were the Company's sole equity holders, with each owning 50% of the Company. However, in late 2020, the H and W transferred their equity to four trusts, two that are revocable and two that are irrevocable, with the H and W having one of each. Each revocable trust owns 14% of the Company, and each irrevocable trust owns 36% of the Company. The analysis for the revocable trusts is easy; the H and the W will each be deemed to be the owner of the 14% of the equity held by his or her's revocable trust. The situation with respect to the irrevocable trusts is more complicated, and it is with respect to that situation that I seek your guidance.

The W's irrevocable trust, for which an unrelated attorney is the trustee, is for the benefit of the H and any of W's descendants (currently there are none). At the H's death, the remaining trust assets will be distributed first to any living descendants, second to certain persons, and third the rest to a non-profit charitable foundation organized by the H and W. Thus, the W has no reversionary interest in the trust corpus; however, during her lifetime she can remove the trustee of her irrevocable trust at any time and for any reason and can fill any trustee vacancy. (If the W removes the current trustee, the H would be the replacement trustee unless he chose not to so serve.) The question is whether the W's ability to remove the trustee at any time and for any reason makes her the owner of the trust corpus (the 36% interest in the Company). If it does, then she owns 50% of the Company. If it does not, then the W only owns 14% of the Company and her irrevocable trust owns 36% of the Company.

The H's irrevocable trust, for which the W serves as trustee, is for the benefit of the W and any of H's descendants (currently there are none). At the H's death, if the W is still alive, the trust corpus is transferred to two trusts for her benefit. If the W does not survive the H, then then the remaining trust assets will be distributed first to any living descendants, second to certain persons, and third the rest to the same charitable foundation organized by the H and W. Thus, the H has no reversionary interest in the trust corpus; however, during his lifetime he can remove the trustee of his irrevocable trust but only for Cause (a defined term) and he can fill any trustee vacancy. The question is whether the H's ability to remove the trustee for Cause makes him the owner of the trust corpus (the 36% interest in the Company). If it does, then he owns 50% of the Company. If it does not, then the H only owns 14% of the Company and his irrevocable trust owns 36% of the Company.

So here are what I think are the scenarios as to who is the UPE for the acquired person.

1. The H and W each as a 50% owner.
2. The W as a 50% owner, with the H owning 14% and his irrevocable trust owning 36%.
3. The Company, with the H and W each owning 14% and each of their irrevocable trusts owning 36%.

Your guidance would be greatly appreciated.

Best regards, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]



[REDACTED]

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