

Haynes, Lanea

From: Gillis, Diana L.
Sent: Tuesday, August 22, 2017 4:05 PM
To: [REDACTED]
Cc: Shaffer, Kristin; Carson, Timothy; Walsh, Kathryn E.
Subject: RE: HSR UPE analysis

[REDACTED]

You look at the votes for director and B is its own UPE.

-Diana

From: [REDACTED]
Sent: Monday, August 21, 2017 11:48 PM
To: Walsh, Kathryn E.
Cc: Berg, Karen E.; Carson, Timothy; Gillis, Diana L.; Shaffer, Kristin; Sheinberg, Samuel I.; Whitehead, Nora
Subject: HSR UPE analysis

Kate,

The following is a question regarding determining whether Company A will “control” the issuer, Company B, a corporate entity with 8 directors.

Company B has a single class of voting securities, Class A Shares, and no one person or entity will hold 50% or more of the voting securities.

There will be, however, two classes of directors – Class I directors and Class II directors. For all matters that come before the board, each Class I director will have 3 votes and each Class II director will have 1 vote.

There will be a stockholders agreement in place and pursuant to the stockholders agreement, Company A will have the right to designate 3 Class I directors. The non-Company A stockholders vote as follows – they must elect the CEO and CFO as directors, and the CEO and CFO will be Class II directors. The non-Company A stockholders may then elect the remaining three Class II directors free of the stockholders agreement.

Based on Section 801.12, it appears that you look only at the number of votes for directors and not at how many votes the directors have, but because these facts are unusual, I would appreciate your view. Is Company B its own UPE because no one person or entity will hold 50% or more of the voting securities and no one person or entity will have the right to designate at least 50% of the directors? Alternatively, does Company A “control” Company B because you need to multiply Company A’s votes by 3 on the basis of the voting power of the classes of directors?

Thanks.

[REDACTED]