

## Haynes, Lanea

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**From:** Berg, Karen E.  
**Sent:** Friday, September 01, 2017 12:58 PM  
**To:** Gillis, Diana L.  
**Subject:** FW: HSR Questions Re: Size of the Person Test

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**From:** Berg, Karen E.  
**Sent:** Thursday, August 24, 2017 3:48 PM  
**To:** [REDACTED]  
**Cc:** [REDACTED] Carson, Timothy; Shaffer, Kristin; Sheinberg, Samuel I.; Gillis, Diana L.; Walsh, Kathryn E.; Whitehead, Nora  
**Subject:** RE: HSR Questions Re: Size of the Person Test

[REDACTED]

You need to begin by applying rules 801.10 and 801.11 to analyze the separate, not combined, holdings of each of A and B (unless they are spouses). It may be that one meets the size of person and the other does not, in which case a filing will be required for the one that does. Interpretation 94 is instructive - in particular Scenario 1, as A and B do not have regularly prepared balance sheets. Note, however, that the portion of Interpretation 94 that states “401(k), Roth and traditional individual retirement accounts (IRAs), and other similar retirement investment funds need not be included unless held in a trust controlled by the natural person” does not represent the position of the PNO. Potential filers must assess who has the indicia of beneficial ownership of the investments within these accounts when determining who holds the investments for HSR purposes. See Rule 801.1(c).

If you still have questions after applying the rules, or you’d like us to confirm your conclusions, email us again.

Karen

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**From:** [REDACTED]  
**Sent:** Friday, August 18, 2017 1:45 PM  
**To:** Berg, Karen E.  
**Cc:** [REDACTED]  
**Subject:** HSR Questions Re: Size of the Person Test

Dear Ms. Berg:

Our firm represents two natural persons (Person A and Person B) in the potential acquisition of an operating company (the Acquired Company), which is a subsidiary of a large public company (the UPE of the Acquired Company). As currently contemplated, a limited liability company (the Acquiring Company) will acquire 100% of the LLC membership interests of the Acquired Company. The Acquiring Company is newly formed and has no assets other than the purchase price for the acquisition. The Acquiring Company is controlled by both Person A and Person B, as they each have the right to 50% of the profits of the Acquiring Company. The Size of the Transaction exceeds \$80.8 million and the UPE of the Acquired Company meets the higher of the Size of the Party test. The question therefore is do the UPEs of the Acquiring Company (Persons A & B) meet the lower of the Size of the Party test? Person A and B’s combined “annual sales” are below \$16.2 million. We are trying to determine the value of their combined total assets. Neither Person A or B have a regularly prepared balance sheet.

We understand that when calculating the total assets of a natural person you only include their investment assets (as defined in Sec. 801.1(i)(2)), voting securities and other income producing property. Persons A & B are both long-time executives of the UPE of the Acquired Company, and as such, a substantial portion of their assets is tied to the stock of the UPE of the Acquired Company, including stock options, performance stock units (PSUs) and deferred compensation. Please note however the neither Person A nor Person B “controls” the UPE of the Acquired Company.

In order to determine the value of these assets for HSR purposes, we have the following questions:

1. How are the stock options valued? Do you simply multiply the number of options held by the current price of the underlying stock or do you back out the exercise/strike price from the total value?
2. What is the impact of taxes on a possible option exercise? For example, do you assume the options are exercised on a cash-less basis and then back out the taxes payable on the amount of shares surrendered in connection with such cash-less exercise?
3. What about the taxes payable on the number of acquired shares? Do you assume those shares are sold upon exercise at the current stock price and reduce the value of the options by the taxes payable on those shares to come up with an overall value for the options?
4. What about unvested options? Are they included when calculating the total assets of a natural person, and if so, how are they valued?
5. With respect to PSUs, Persons A & B have three tranches – one covering fiscal years 2014 to 2016, one covering fiscal years 2015 to 2017 and one covering fiscal years 2016 to 2018. The 2014-2016 PSUs are in the money, however they will not be paid out until 2018 and there is a slight risk of forfeiture (if Persons A and/or B are no longer employed at the Acquiring Company). How are these PSU valued and does the valuation take into account the taxes payable on them? As for the 2015-2017 and 2016-2018 PSUs, Persons A & B will not know if those PSUs are in the money until 2018 and 2019, respectively. Are they included when calculating the total assets of a natural person, and if so, how are they valued?
6. With respect to their deferred compensation, those plans are fully vested, but have not yet been paid out. How are they valued and is there a deduction for the future taxes to be paid on these amounts?

Furthermore, Persons A & B have assets in a 401(k) Plan and Individual Retirement Account (IRA). Both the 401(k) Plan and IRA are held by and administered by a third-party financial institution selected by the UPE of the Acquired Company and neither Person A nor Person B have any control over the selection of such administrator. Please confirm that, pursuant to Interpretation 94 in the ABA Premerger Notification Manual (Fifth Edition), these assets would not be included in the calculation of a natural person’s total assets for HSR purposes. However, if you conclude that these assets should be included, how are they to be valued? Would the value be determined by the amount set forth on the last regularly prepared account statement or some by other method?

Please let us know if you have any questions or need further details. Thank for your assistance.

Regards,

