

From: [REDACTED]
To: [Walsh, Kathryn E.](#); [Berg, Karen E.](#); [Carson, Timothy](#); [Sheinberg, Samuel I.](#); [Whitehead, Nora](#)
Subject: FW: Control of Trust under HSR
Date: Monday, May 21, 2018 1:34:17 PM

From: Shaffer, Kristin
Sent: Monday, May 21, 2018 1:34:15 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Control of Trust under HSR

[REDACTED]

Please review informal [1301002](#). If the Trust Protector's role in this case is analogous to that informal, the Trust Protector would not be the UPE.

As for the Grantor, if the Grantor is only able to replace the Trust Protector if the Trust Protector does not appoint its own successor, the Grantor would also not be the UPE. If, however, the Grantor does have the unfettered right (other than the few limitations you have listed that I have highlighted below) to remove and replace either the Trust Protector or the Trustee, then the Grantor would be the UPE of the trust.

Best regards,
Kristin

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From: [REDACTED]
Sent: Thursday, May 17, 2018 6:36:12 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Subject: Control of Trust under HSR

Dear Sir or Madam,

We have several questions regarding UPE determination for HSR purposes under 16 C.F.R. § 801.1. The following is a summary of the relevant trust terms:

The Grantor created the Trust for the benefit of his wife and issue. The Trust holds the acquired entities in the proposed transaction. The Grantor does not have any current interest in the Trust corpus. The Trust has the following fiduciaries: Trustee, Distribution Adviser, Investment Direction

Adviser, and Trust Protector.

The original and current Trust Protector is the Grantor's business partner, who created an identical trust, which owns the other one-half of the corporate assets. The Trust Protector has the power to add and remove beneficiaries of the Trust (without limitation) and to remove and replace the Trustee, Distribution Adviser, and the Investment Direction Adviser. The Trust Protector can appoint a successor Trustee in his own discretion, but he cannot appoint the Grantor, Grantor's spouse, any trust beneficiaries, or any related or subordinate party as Trustee. The Trust Protector may appoint a successor Distribution Adviser in his own discretion, but he cannot appoint the Grantor, Grantor's spouse, any trust beneficiaries, or any related or subordinate parties as Distribution Adviser. The Trust Protector can remove the Investment Direction Adviser (unless the Grantor is serving, as he is now) and must obtain the prior approval of the Grantor to appoint a successor.

The Grantor, in his sole discretion, has the power to remove the Trust Protector. The Trust Protector may appoint his own successor, however, in the event that a successor is not appointed, the Grantor may appoint a successor who is not the **Grantor, Grantor's spouse, any trust beneficiaries, or any related or subordinate party**. Note that the Grantor is the first named individual in a prioritized list of individuals who have the power to remove the Trust Protector, meaning that the Grantor has the power, then the Grantor's wife has the power, followed by the trust beneficiaries. In addition, the Grantor is the current Investment Direction Adviser and he cannot be removed by the Trust Protector.

We reviewed the relevant available informal opinions. Informal Opinion #17011001 provides that a Trust Protector controls the trust where he has the power to remove and replace at least 50% of the Trustees, even where the Trust Protector cannot appoint any related or subordinate replacement Trustees. However, Informal Opinion #1301002 considered additional facts beyond the Trust Protector's ability to remove and replace the Trustees and ultimately concluded that although the Trust Protector had the power to remove and replace Trustees as prescribed to find control under 16 C.F.R. § 801.1, the Trust Protector was not the UPE based on the additional facts pertaining to the Trust Protector's lack of economic interest in the trust and several other factors. It is unclear to us whether the Trust Protector's ability to remove and replace the Trustees is the sole factor in determining who controls the trust, or whether additional facts and circumstances are considered.

Questions:

1. Does the Trust Protector's ability to add current and contingent beneficiaries to the trust, including the Grantor, create a reversionary interest in the Grantor such that the Grantor would control the trust for HSR purposes?
2. Does the Trust Protector's power to remove and replace the trustees cause the Trust Protector to control the trust for HSR purposes?
3. Does the Grantor's power to remove the Trust Protector and appoint a successor, if one has not been appointed, impact the Trust Protector's control over the Trust for HSR purposes?



[REDACTED]