

Sheinberg, Samuel I.

From: [REDACTED]
Sent: Tuesday, January 29, 2019 3:15 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora
Subject: FW: Inquiry re: Instrumentality in Redemption/Relinquishment

From: Carson, Timothy
Sent: Tuesday, January 29, 2019 3:15:11 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Inquiry re: Instrumentality in Redemption/Relinquishment

The facts shared in your email do not necessarily demonstrate that Investor A is instrumental. If investigated, the agency would look at the totality of the circumstances, so Investor A will need to make the call and be prepared to defend that it in fact was not instrumental.

From: [REDACTED]
Sent: Tuesday, January 29, 2019 8:01:03 AM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Subject: Inquiry re: Instrumentality in Redemption/Relinquishment

Dear PNO,

We are analyzing a transaction that involves a redemption of shares from a current member of an LLC who is departing the company. As background, this would more accurately be described as a relinquishment given the circumstances of the redemption and the nominal consideration being paid for the redeemed shares. Regardless, the transaction will have the unintended consequence of increasing the interests of Investor A, which currently holds 49.9% of the economic interests of the LLC, to 50% or more. Investor A is the only holder of Preferred LLC Units, and under the LLC Agreement, a repurchase or redemption of equity interests requires the written consent of a majority in interest of the Preferred Members. Therefore, a redemption currently cannot be effectuated without Investor A's approval. Our question is whether Investor A is "instrumental" by virtue of this provision in the agreement in causing the redemption/relinquishment of LLC units by the soon-to-be former member of the LLC.

We have received previous guidance from PNO (copied below) indicating that a transaction in which shareholder action was necessary to effect the percentage interest increase did not necessarily make the shareholder instrumental such that the transaction was reportable. In that case, two shareholders were the only members of the board of directors of a company and had to sign a settlement dispute agreement which ultimately resulted in their percentage interest in the company increasing. Similar to that matter, the HSR reportability issue here is a by-product of an event outside of Investor A's control, and Investor A is in no way causing the redemption, even if their action is ultimately necessary for the transaction to occur. In this example, management of the LLC and the soon-to-be departing member are driving the redemption, not Investor A.

Because the increase in Investor A's percentage holdings is solely caused by the redemption and the entity is not acquiring any additional interests, we do not consider Investor A to be instrumental in the redemption such that a filing is required. Please let us know if you agree with this assessment or if we can answer any further questions.

Thanks,

[REDACTED]

From: Whitehead, Nora [<mailto:nwhitehead@ftc.gov>]

Sent: Monday, June 08, 2015 9:45 AM

To: [REDACTED]

Cc: [REDACTED]

Subject: RE: HSR Redemption Question

We agree. Hope you had a good weekend as well.

Nora Whitehead

(202) 326-3262

Check out the [PNO Blog!](#)

From: [REDACTED]

Sent: Monday, June 08, 2015 8:37 AM

To: Walsh, Kathryn E.; Berg, Karen E.; Whitehead, Nora; Gillis, Diana L.

Cc: [REDACTED]

Subject: HSR Redemption Question

Hi all,

I hope everyone enjoyed the weekend.

We are analyzing a scenario which involves a litigation dispute settlement structure that, among other things, conveys back to the plaintiff company a certain amount of plaintiff's own shares. This transaction has the unintended consequence of increasing the percentage interest held by the remaining shareholders because the plaintiff company cannot vote these shares. Plaintiff company (D) has three shareholders (A, B and C). To settle a litigation dispute D will redeem all of C's interest in exchange for cash. A and B are the only members of the board of directors and will sign the settlement dispute agreement in their individual capacity. As a result of the redemption, A and B's percentage interest will increase and A will hold more than 50% of D's voting securities. The increase in A and B's percentage holdings is solely caused by the redemption (neither A nor B are acquiring any additional voting securities). The HSR reportability issue is a by-product of the litigation dispute settlement, not the cause of the redemption.

The question is whether A and B are making an "acquisition" by virtue of seeing their percentage interests increase. Interpretation 142 in the 5th Edition of the Premerger Notification Practice Manual says an HSR *could* be required if a stockholder that is an officer or director of an issuer is instrumental in causing the redemption. That interpretation sites to informal interpretation #0810008 (we have included below copies of the relevant interpretations). In #0810008 the investor had a representative on the board, for legitimate business purposes the company structured a financing/redemption transaction in a way that caused a shareholder's percentage interest to increase. The PNO agreed the redemption was not an acquisition, and therefore, the transaction was exempt from the HSR filing requirements. As in #0810008, the investors here are on the board, hold executive positions and are involved in the settlement dispute (they are signing the settlement dispute in their individual capacities). The redemption has a legitimate business purpose, the settlement of a litigation dispute, the increase in the remaining shareholders percentage interest is an unintended byproduct of the settlement.

We are available to discuss by phone at any time that is convenient to you today (or tomorrow). Apologies in advance for the short notice but unfortunately this is proceeding quickly so your prompt attention is sincerely appreciated.

As always may thanks for your guidance.



0810008 Informal Interpretation

Date: October 22, 2008

Rule: 15 USC 18a(c)(10) 7A(c)(10)

Staff: Michael Verne

Response/Comments: I agree that the redemption is not an acquisition your client can rely on (c)(10).

[Original Image File \(70.37 KB\)](#)

Question

From: (redacted)

Sent: Wednesday, October 22, 2008 8:31 PM

To: Verne, B. Michael

Cc: (redacted)

Subject: 7(A)(c)(10) Question

Importance: High

Attachments: 0403003 Informal Staff Opinion -801.10, 801.90.htm

Mike,

(Redacted) and I are analyzing a scenario which involves an investor who is purchasing additional voting securities of an issuer but who, given the simultaneous purchases of voting securities by other investors, will see his percentage of outstanding diluted. Given this dilution we view the transaction as exempt pursuant to 7A(c)(10) but wanted to make sure that additional facts (described below) didn't give rise to a reporting obligation assuming an otherwise jurisdictionally sufficient transaction.

Assume that the investor ("A") is an existing minority shareholder of the issuer ("B") and has a representative on the board of B. For legitimate business reasons unrelated to HSR considerations, B has structured the financing round such that it will use a portion of its proceeds to later repurchase/redeem some of its previously issued voting securities. That future redemption of shares will then increase the percentage of *voting* securities held by A and certain other existing shareholders, although A will not end up controlling B.

The question is whether A is making an "acquisition" by virtue of seeing its percentage of outstanding increase as a result of the redemption. Although we did not see any interpretation directly on point, the attached interpretation provides that the subsequent redemption of shares by a company in such circumstances should be treated as separate, and is not aggregated with the actual acquisition of voting securities by the acquiring party for HSR purposes (where the transactions have been structured for legitimate business reasons, as here, rather than for the purpose of avoidance of any HSR filing obligation).

0403003 Informal Staff Opinion -801.10, 801.90.htm Please confirm that A's board membership on B does not render the later redemption of shares by B an acquisition on A's part. We assume that if these facts render the later redemption to not be an acquisition it doesn't matter whether or not A was "instrumental" in structuring the deal so long as the deal was structured for legitimate business reasons.

If you conclude that the redemption would be viewed as an acquisition please confirm that the time of the "acquisition" would be when the redemption would increase A's voting percentage (meaning that A would be able to make its original, dilutive, acquisition but would need to file and observe a waiting period before the later redemption became effective).

If you need any additional facts or want to discuss this, both Rick and I are available for a call at any time that's convenient to you tomorrow (if you have any availability tomorrow whatsoever). Apologies in advance for the short notice, but the transaction has come together at lightning speed and any delay makes it likely that issuer will simply choose to close on all other investors' pieces of the deal. If it does, that would deprive my client of the pro rata exemption --since its investment would then trail the others and not be diluted by them in a simultaneous closing. Therefore, could you please try to confirm your conclusion on Thursday, October 23rd, if at all possible.

142 Applicable provisions. 802.30, 801.1(c)(3).

Issue. When is a corporation's redemption of its own voting securities exempt? Under what circumstances would a corporation's stockholders have a filing requirement due to a redemption?

Analysis. A corporation's redemption of its own voting securities would be exempt under Section 802.30.

However, stockholders who are instrumental in causing a redemption and whose percentage of the issuer's voting securities increase as a result of the redemption could have a filing obligation if the HSR threshold tests are met and no other exemption applies, even if such stockholders did not actually acquire any additional shares of voting securities of the issuer. For example, stockholders that are officers or directors of the issuer can be instrumental in causing the redemption to occur, as can a shareholder that guaranties or provides funding to be used for consideration for the redemption. In such a case the corporation's UPE would file as the acquired person. *See* Int. 45. *See also* HSR Informal Interpretation Letters, #0806001 (June 3, 2008), *available at* <http://www.ftc.gov/bc/hsr/informal/opinions/0806001.htm> (filing not required where acquiring person is not instrumental in causing the redemption).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]