

Sheinberg, Samuel I.

From: [REDACTED]
Sent: Tuesday, October 27, 2020 4:26 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Carson, Timothy; Sheinberg, Samuel I.; Whitehead, Nora; Musick, Vesselina
Subject: FW: HSR Question - Engaged in Manufacturing under the Size-of-Person Test of the HSR Act

From: Six, Anne
Sent: Tuesday, October 27, 2020 4:25:27 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: FW: HSR Question - Engaged in Manufacturing under the Size-of-Person Test of the HSR Act

[REDACTED]

If all of the manufacturing is performed by third parties, your client is not engaged in manufacturing for purposes of Section 7A(a)(2) and Section 801.1(j).

Best,
Anne

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[REDACTED]

From: [REDACTED]
Sent: Monday, October 26, 2020 7:03:22 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: HSR Question - Engaged in Manufacturing under the Size-of-Person Test of the HSR Act

Hello,

Our law firm is in process of determining whether or not an HSR filing will be required in connection with a potential merger involving our client. It looks like the determination will turn on whether our client is considered to be “engaged in manufacturing” under the Size-of-Person test of the HSR Act. We have a question for you related to this test.

Our client is in the business of designing, manufacturing and selling certain products. However, our client contracts out its manufacturing work to be performed by third parties pursuant to agreements, so the client doesn’t technically do any of its own manufacturing. Therefore, our specific question is whether this client, who doesn’t do any manufacturing itself, is considered to be “engaged in manufacturing” under the Size-of-Person test. We have looked into this question and have not found conclusive guidance. Note that we have reviewed 16 CFR 801.1 (2)(j), which states that “A person is engaged in manufacturing if it produces and derives annual sales or revenues in excess of \$1 million from products within industries in Sectors 31–33 as coded by the North American Industry Classification System (2002 Edition) published by the Executive Office of the President, Office of Management and Budget.” However, it is not clear whether this definition encompasses an entity that contracts out its manufacturing work. Therefore, we would greatly appreciate any guidance you have on this matter.

Thank you for your assistance.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]