

Sheinberg, Samuel I.

From: [REDACTED]
Sent: Wednesday, April 14, 2021 3:02 PM
To: Berg, Karen E.; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Musick, Vesselina
Subject: FW: Instrumentality

From: Walsh, Kathryn E. <kw Walsh@ftc.gov>
Sent: Wednesday, April 14, 2021 3:01:48 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: FW: Instrumentality

As you are in possession of all the facts related to this analysis, you will have to make the call on instrumentality and be prepared to defend it if the agency investigates. We note that we think it would be very hard to argue that Mr. Y isn't instrumental given his position at X.

From: [REDACTED]
Sent: Tuesday, April 13, 2021 8:30:18 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Subject: Instrumentality

Hi folks.

I hope you are all doing well.

I am writing to confirm that Fund A and Mr. Y are not instrumental in the transaction described below and therefore do not have an HSR filing obligation in connection with the transaction.

Fund A

Fund A, a minority stockholder of Company X, currently holds X voting shares valued in excess of \$92 million. Fund A has a contractual right to designate a representative to serve on X's board. Fund A's representative (Mr. A) is one of four directors on X's board.

Some of X's senior management have decided to sell some of their X shares to obtain liquidity and X has decided to repurchase such shares. As a result, and as an unintended consequence of such repurchase, Fund A's percentage of X's voting shares would increase.

In addition, X will likely enter into purchase agreements to acquire other selling stockholders' shares of X pursuant to a right of first refusal ("ROFR"). These stockholders are also looking for liquidity. As a result, and as an unintended consequence of such repurchases, Fund A's percentage of X's voting shares would increase.

We do not believe that Fund A should be considered instrumental in causing or financing the buybacks. Fund A and Mr. A were not involved in persuading the selling stockholders to sell their shares. Even if Mr. A, as a director of X, votes in favor of X entering into repurchase agreements or exercising its ROFR with the selling stockholders, we understand that

such a vote would not in and of itself cause Fund A to be instrumental in the buyback. See Informal Interpretation #1901001 (January 29, 2019) reproduced below.

There is also a chance that the stockholders of X could be asked to vote to approve some of X's buybacks from some of the selling stockholders, but it is not yet certain whether any such vote will occur.

Questions

Do you agree that even if Mr. A votes as a director in favor of X's purchases from the selling stockholders, Fund A would not necessarily be deemed instrumental in causing these buybacks? See Informal Interpretation #1901001 below.

If Mr. A's affirmative vote as a director standing alone could make Fund A instrumental, do you agree that Fund A would not be instrumental if Mr. A abstains from voting as a director for the buybacks?

Do you agree that if X's stockholders (including Fund A) actually vote for any of the buybacks, Fund A would not necessarily be deemed instrumental in causing these buybacks? See Informal Interpretation #1901001 below.

If not, do you agree that Fund A would not be instrumental if it abstains from voting as a stockholder for the buybacks?

Mr. Y

Although Mr. Y is a minority stockholder in X, he is X's UPE because he has the right to designate at least 50% of X's directors. Mr. Y is also a director of X and is X's CEO. He holds X voting shares with a value in excess of \$92 million and his percentage of X's voting shares will increase when the Company buys the shares to be sold by the selling stockholders as described above.

Like Fund A, Mr. Y did not try to persuade the selling stockholders to sell their shares. Upon learning that the selling stockholders intended to sell some of their shares, however, he was involved in the Company's decision to repurchase the shares and also to enter into the repurchase agreements with the selling stockholders.

For all the reasons described above and in the informal interpretation reproduced below, we do not believe that Mr. Y is instrumental in causing the selling stockholders to sell their shares and his involvement in deciding that the Company should acquire shares from the selling stockholders, with its unintended consequence of causing the percentage of voting shares he holds in X to increase, should not result in him being deemed instrumental and having an advance HSR filing obligation.

Do you agree?

Thanks for your help.



1901001 Informal Interpretation

QUESTION

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.

[REDACTED]

[REDACTED]

[REDACTED]