

Sheinberg, Samuel I.

From: HSRHelp
Sent: Tuesday, July 12, 2022 1:56 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Shaffer, Kristin; Sheinberg, Samuel I.; Six, Anne; Fetterman, Michelle
Subject: FW: "Control" - when is determination made?

From: Whitehead, Nora <nwhitehead@ftc.gov>
Sent: Tuesday, July 12, 2022 1:56:08 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: "Control" - when is determination made?

You should rely on the last regularly prepared financial statement prior to closing to determine what entity has control.

From: HSRHelp <HSRHelp@ftc.gov>
Sent: Tuesday, July 12, 2022 12:11 PM
To: Walsh, Kathryn E. <kwalsh@ftc.gov>; Berg, Karen E. <KBERG@ftc.gov>; Musick, Vesselina <vmusick@ftc.gov>; Shaffer, Kristin <kshaffer@ftc.gov>; Sheinberg, Samuel I. <SSHEINBERG@ftc.gov>; Six, Anne <asix@ftc.gov>; Whitehead, Nora <nwhitehead@ftc.gov>; Fetterman, Michelle <mfetterman@ftc.gov>
Subject: FW: "Control" - when is determination made?

From: [REDACTED]
Sent: Tuesday, July 12, 2022 12:11:11 PM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Subject: "Control" - when is determination made?

Good morning:

Question

For a non-corporate entity and with respect to the 801.1(b)(1)(ii) definition of "control", at what point in time is the determination of "having the right in the event of dissolution to 50 percent or more of the assets of the entity" made for determining reportability?

Background

The entity has two 50% owners, but the entity's organizational document does not describe their rights upon dissolution in the simple, direct language stated in 801.1(b)(1)(ii). Rather, they are determined by the status of the owners' capital accounts at any given point in time. These generally will be equal but can vary somewhat from time to time. As of the date of the last audited financial statement (12/31/21), they indeed were in balance, so each owner would have had the right to receive 50% of the assets of the entity upon a dissolution on that date.

Now, one of the owners wants to buy the other's interest in the entity, with closing to occur sometime in 2022. If the acquiring owner is deemed to have "control" of the entity as of closing, the acquisition presumably would be exempt from reporting under 802.30(a) as an intraperson transaction. Can the 12/31/21 financial statement be relied upon for the purpose of determining "control" with regard to the 2022 acquisition? Or must a special financial statement or other reckoning be prepared as of the anticipated closing date? Or is some other process or reference date, required to make this determination?

Thank you for your kind attention.

[REDACTED]

