

Sheinberg, Samuel I.

From: HSRHelp
Sent: Tuesday, July 12, 2022 1:25 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Fetterman, Michelle
Subject: FW: Request for Informal Interpretive Advice

From: Shaffer, Kristin <kshaffer@ftc.gov>
Sent: Tuesday, July 12, 2022 1:24:32 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Subject: RE: Request for Informal Interpretive Advice

[REDACTED]

To determine control of a corporation, you must look at both the voting rights inherent in the voting security itself, i.e., those provided in the bylaws or formation documents for the corporation, as well as the rights designated by contract. Rule 801.12 is applicable to the rights of the security, and thus the analysis for 801.1(b)(1)(i). The analysis of contractual rights of control for 801.1(b)(2) should reflect the practical right of any person to designate 50% or more of the directors. This analysis is separate from Rule 801.12.

Best regards,

Kristin

Kristin Shaffer

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From: [REDACTED]
Sent: Monday, July 11, 2022 3:34 PM
To: HSRHelp <HSRHelp@ftc.gov>
Subject: Request for Informal Interpretive Advice

L Draft: 5/3/22

All,

We have a quick question regarding the application of Rule 801.12 to the following situation. Corporation P has two series of common stock, Series A and Series B. The shares of Series A and Series B common stock each have one vote per share. There are at present five (5) directors of Corporation P. The holders of Series B common stock, voting as a separate class, have the contractual right to elect one director. The holders of the Series A common stock, voting as a separate class, have the contractual right to elect the other four (4) directors.

No person holds 50% or more of the outstanding shares of Series A common stock. Two persons each hold 50% of the outstanding shares of Series B common stock. Corporation P also has outstanding stock options representing the right to purchase 5.53% of its Series A common stock on a fully-diluted basis.

More specifically, the largest shareholder of Series A common stock, X, holds 46.2% of the shares of Series A common stock and no shares of Series B common stock. The two shareholders of Series B common stock, Y and Z, each hold 50% of the shares of Series B and no shares of Series A common stock. None of X, Y and Z hold any options to purchase shares of Series A common stock. It is our understanding that convertible voting securities such as these stock options are disregarded in calculating the percentage of voting securities.

Applying Rule 801.12(b), the percentage of Corporation P common stock held by (1) X is 36.96% ($46.2\% \times 4/5$); (2) Y is 10% ($50\% \times 1/5$); and (3) Z is 10% ($50\% \times 1/5$).

Based on the foregoing, it appears that no person (1) holds 50% or more of the outstanding voting securities of Corporation P or (2) has the power presently to elect 50% or more of the directors of Corporation P, and that, as a result, Corporation P is its own ultimate parent entity.

Please let us know if you agree with this analysis and conclusion.

Thank you.

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