

## Sheinberg, Samuel I.

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**From:** HSRHelp  
**Sent:** Monday, August 22, 2022 4:13 PM  
**To:** Berg, Karen E.; Musick, Vesselina; Shaffer, Kristin; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Fetterman, Michelle  
**Subject:** FW: Request for Informal Interpretation Concerning Rule 801.11

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**From:** Walsh, Kathryn E. <kwalsh@ftc.gov>  
**Sent:** Monday, August 22, 2022 4:12:37 PM (UTC-05:00) Eastern Time (US & Canada)  
**To:** [REDACTED]  
**Cc:** HSRHelp <HSRHelp@ftc.gov>  
**Subject:** FW: Request for Informal Interpretation Concerning Rule 801.11

We agree that you would count the cash because there is a balance sheet within the acquiring person. You only get to exclude cash if no entity within the person has created a regularly prepared balance sheet.

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**From:** [REDACTED]  
**Sent:** Monday, August 22, 2022 12:05:18 PM (UTC-05:00) Eastern Time (US & Canada)  
**To:** HSRHelp <HSRHelp@ftc.gov>  
**Subject:** Request for Informal Interpretation Concerning Rule 801.11

Dear PNO Staff:

I am considering size of person under Rule 801.11 for an acquiring person for which the UPE is a Fund. Fund is planning to acquire Target 1 first and then Target 2. These two acquisitions are unrelated, separate transactions. Fund is relatively new, but it does have a regularly prepared balance sheet, and it currently satisfies the \$20.2 million size of person threshold. Size of person is relevant for the acquisition of Target 1; however, neither Fund nor the acquired person for Target 1 will satisfy the \$202.0 million size of person threshold at the moment before the acquisition of Target 1 occurs. Therefore the acquisition of Target 1 is not reportable.

When I analyze Fund's acquisition of Target 2, Fund will have a regularly prepared balance sheet, but Fund's balance sheet will not consolidate Target 1, which Fund will control at the relevant time. Target 1 will have a regularly prepared balance sheet that consolidates the entities within Target 1. Therefore, under Rule 801.11, Fund considers a pro forma that consolidates the total assets of Target 1 into Fund (without double counting assets). Under such a pro forma consolidation, Fund will not have \$202.0 million in total assets at the moment before Target 2 occurs. (Fund likewise will not have \$202.0 million in annual net sales under a pro forma consolidation).

However, Fund is effecting the acquisition of Target 2 by creating a Newco Buyer shortly before the acquisition. Fund will call cash from investors immediately before acquiring Target 2 and will contribute the cash down to Newco Buyer, which in turn will acquire Target 2 in exchange for the cash. The cash called to fund the acquisition will not be reflected on Fund's balance sheet and Newco Buyer will not have a balance sheet. If the cash were added to the total assets in pro forma discussed above, Fund will satisfy the \$202.0 million size of person threshold.

This scenario raises the question of whether there is a "regularly prepared balance sheet of [the acquiring] person" within the meaning of Rule 801.11(c)(2) because the "total assets of each entity included within such person" are not consolidated therein within the meaning of Rule 801.11(b)(1). I have discussed this scenario with other practitioners. Unfortunately there appears to be some disagreement as to whether this scenario implicates Rule 801.11(e)(1)(ii) which allows "an acquiring person that does not have a regularly prepared balance sheet described in paragraph (c)(2)" to set aside "all cash that will be used by the acquiring person as consideration" for Target 2. A reasonable reading of the rule could lead one to conclude that Fund will not have a regularly prepared balance sheet as described in paragraph (c)(2) because the "total assets of each entity included within such person are not consolidated therein." However, it is my understanding that PNO currently would treat this scenario as one where the acquiring person in assessing its total assets under Rule 801.11 cannot set aside the cash that will be used as consideration in the acquisition of Target 2.

Must Fund in assessing its total assets under Rule 801.11 include the cash that will be used as consideration in the acquisition of Target 2?

[REDACTED]

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[REDACTED]

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[REDACTED]