

Sheinberg, Samuel I.

From: HSRHelp
Sent: Thursday, September 15, 2022 1:54 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Fetterman, Michelle
Subject: FW: 801.11 Natural Person Clarification on SOP Test

From: Shaffer, Kristin <kshaffer@ftc.gov>
Sent: Thursday, September 15, 2022 1:53:49 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: 801.11 Natural Person Clarification on SOP Test

[REDACTED]
Rule 801.11(d) relates to assets held directly by the natural person, and is not applicable to the assets of entities controlled by the natural person.

Since two natural persons control the target entity, each needs to attribute 100% of the assets of the target entity (as reflected in the last regularly prepared balance sheet prior to closing) to his or her own "person" for the purpose of determining whether the size of person test is met. No adjustments can be made to the total assets of the entity. If the target entity on its own does not meet the size of person threshold, then each UPE should then analyze whether additional assets that he or she holds, when added to the target entity's assets, results in the size of person test being met. If either UPE controls other entities, he or she must again use the total assets reported on that entity's balance sheet, if there is one (using the last regularly prepared balance sheet prior to closing). Assets held directly by either natural person (e.g., not through an entity) should be analyzed using Rule 801.11(d).

Best regards,

Kristin

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From: [REDACTED]
Sent: Wednesday, September 14, 2022 5:55:30 PM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Subject: 801.11 Natural Person Clarification on SOP Test

I have a couple of questions/clarifications on the size of person test.

Here are my facts: The seller has two UPEs (50-50 owners), which are natural persons. Neither has a regularly prepared balance sheet. The UPEs are not engaged in manufacturing and we are trying to determine if the two UPEs meet the size of person asset test.

My understanding is that where the natural person does not have a regularly prepared balance sheet, and is not certain whether the relevant Size of Person threshold is or is not met, he/she must prepare a pro forma balance sheet.

In determining the size of a natural person, 801.11(d) states that "No assets of any natural person or of any estate of a deceased natural person, other than investment assets, voting securities and other income-producing property, shall be included in determining the total assets of a person." This is clear.

We are trying to determine what assets from the entity that both UPEs control would be included on each of his/her pro forma balance sheets. The entity that the two UPEs control has a list of assets on its regularly prepared balance sheet

that actually overstates the assets of the company as it includes assets that constitute the basis of a liability. For instance, the entity receives certain trust money from clients which are used for a certain purpose, and is therefore shown as a corresponding liability. There are specific entries that delineate the asset and the liability so it is truly not an asset of the company or the UPEs.

My thought is that when preparing the pro forma balance sheets for the natural persons, we can net out these entries to reflect the true and correct asset holdings of each natural person. Please confirm if this is correct.

Second, in a situation where there are two natural person UPEs, my initial thought was that 100% of the assets from the entity's regularly prepared balance sheet should be included on each natural person's pro forma balance sheet, but since they are 50-50 owners, would it be more correct to include only 50% of the assets that are listed on the entity's regularly prepared balance sheet on each natural person's pro forma balance sheet?

Let me know your thoughts.

