

Sheinberg, Samuel I.

From: HSRHelp
Sent: Tuesday, September 13, 2022 2:20 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Fetterman, Michelle
Subject: FW: Question about determining size of the transaction

From: Shaffer, Kristin <kshaffer@ftc.gov>
Sent: Tuesday, September 13, 2022 2:20:24 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: Question about determining size of the transaction

[REDACTED]
No, the acquisition price is not determined. Therefore the acquiring person will need to determine the fair market value pursuant to Rule 801.10(c)(3).

Best regards,

Kristin

Kristin Shaffer

Attorney

Premerger Notification Office

Federal Trade Commission

202-326-2388 | kshaffer@ftc.gov

From: [REDACTED]
Sent: Tuesday, September 13, 2022 10:43:26 AM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Subject: Question about determining size of the transaction

Hello,

I have a question about determining the size of the transaction when there is an earnout.

Assume Company A will acquire 100% of the voting securities of Company B, a corporation, for \$40 million of cash at closing, plus up to \$60 million of earnout payments. The earnout, if any, will be based on the post-closing financial performance of Company B, and could theoretically range from \$0 to \$60 million (it is capped at \$60 million per the acquisition agreement). Also assume the lowest size of the transaction threshold at the time of closing will be \$101 million, the size of the person tests have been satisfied, Company B's voting securities are not publicly traded or quoted (i.e., Section 801.10(a)(1) is inapplicable) and there are no other voting securities, assets or non-corporate interests that need to be aggregated under Section 801.13.

The size of the transaction will be the value of the 100% of Company B's voting securities to be acquired by Company A in the acquisition, which, under Section 801.10(a)(2), will be the acquisition price, if "determined," or the fair market value, if the acquisition price is not "determined." Based on guidance, if Company A can make a reasonable estimate of the acquisition price at the time of closing, including the earnout, the acquisition price will be "determined" and the value of the voting securities to be acquired will be the acquisition price based on such reasonable estimate under Section 801.10(a)(2)(i). If the earnout is too speculative to be reasonably estimated, the acquisition price will not be "determined," and pursuant to Sections 801.10(a)(2)(ii) and 801.10(c)(3), the value of the voting securities to be acquired must be based on a fair market value determination by Company A's UPE's board.

In this hypothetical, Company A cannot make a reasonable estimate of the earnout, other than that it will be no greater than the \$60 million contractual cap. Thus, while the acquisition price cannot be reasonably estimated as one number, it can be reasonably estimated to be between \$40 million (based on a \$0 earnout) and \$100 million (based on the maximum \$60 million earnout), and such maximum acquisition price is below the lowest size of the transaction threshold.

Per the Premerger Notification Practice Manual (5th Ed.) Int. 61 and this informal interpretation: <https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/0701027>, an HSR filing may be made using a range of valuations so long as the range does not cross a threshold (i.e., different values within the range will not affect whether a filing is required or the amount of the filing fee). By similar logic, can the parties in the above hypothetical consider the acquisition price to be “determined” under Section 801.10(a)(2)(i) as ranging from \$40 million to \$100 million, and therefore decide not make an HSR filing without the need to make a fair market value determination under Sections 801.10(a)(2)(ii) and 801.10(c)(3)?

[Redacted]

[Redacted]
