

Sheinberg, Samuel I.

From: Sheinberg, Samuel I.
Sent: Wednesday, January 26, 2022 9:12 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Aggregation/Option Question

[REDACTED]
We agree with your analysis.

Sam

From: HSRHelp <HSRHelp@ftc.gov>
Sent: Tuesday, January 25, 2022 2:07 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>
Subject: FW: Aggregation/Option Question

From: [REDACTED]
Sent: Tuesday, January 25, 2022 2:06:37 PM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Subject: Aggregation/Option Question

Dear PNO Staff –

Would appreciate some guidance on an unusual fact pattern. Buyer A is purchasing the equity in Company A, and simultaneously entering into a trademark license agreement with Company B pursuant to which Buyer has the option to purchase the trademarks at any time between 1-4 years, but must purchase the trademarks at the end of 4 years if the option has not been previously exercised. Company A and Company B have the same ultimate parent entity – UPE A. There are certain tax reasons that led UPE A and Buyer A to settle on this transaction structure.

The purchase price for the equity in Company A is well below the reporting threshold. The fair market value of the assets to be purchased from Company B is also below the reporting threshold. However, the fair market value of the assets to be purchased from Company B, when aggregated with the value of the equity in Company A under 801.13, would exceed the reporting threshold.

Generally, our understanding of options to purchase is that a filing obligation is not necessary until the option is exercised, at which point the parties must file and obtain clearance prior to the closing of the option. Based on analogous previous informal guidance, if the Buyer knows that they will exercise the option within one year of the initial purchase, the Buyer may file prior to the closing of the initial equity purchase and the exercise of the option. However, in this case, Buyer A does not expect to exercise the option until well after one year of the equity purchase, which would in any event require a new filing even if Buyer A obtained clearance initially.

Based on this guidance, we believe that the Buyer may close on the equity purchase, but will have to determine prior to exercise of the option whether the aggregation of the value of the assets with the previously purchased

securities exceeds the then-existing size-of-transaction test and, if so, make a filing prior to closing on the exercise of the option.

Please let us know if you agree with this analysis or if there is any guidance we may have overlooked.

Thanks in advance,

[Redacted signature block containing a name, title, and contact information, partially obscured by black bars.]