

Sheinberg, Samuel I.

From: HSRHelp
Sent: Monday, March 20, 2023 1:35 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Shaffer, Kristin; Sheinberg, Samuel I.; Six, Anne; Fetterman, Michelle
Subject: FW: Question about 16 CFR 801.1(b)(1)(ii)

From: Whitehead, Nora <nwhitehead@ftc.gov>
Sent: Monday, March 20, 2023 1:34:59 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: Question about 16 CFR 801.1(b)(1)(ii)

Confirmed.

From: HSRHelp <HSRHelp@ftc.gov>
Sent: Sunday, March 19, 2023 7:00 PM
To: Walsh, Kathryn E. <kwash@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>; Fetterman, Michelle <mfetterman@ftc.gov>
Subject: FW: Question about 16 CFR 801.1(b)(1)(ii)

From: [REDACTED]
Sent: Sunday, March 19, 2023 7:00:03 PM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Subject: Question about 16 CFR 801.1(b)(1)(ii)

Good morning

I hope you are all well.

I'm very sorry to trouble you with a question about control of an LLC for UPE purposes.

We have an LLC with an investor agreement that allows one of the investors the right to appoint the majority of the board. That investor **does not** have the right to 50% of the dividends or 50% of the assets on dissolution. If that is the correct analysis, the LLC is its own UPE and does not meet the size-of-person test.

801.1(b)(2) does with contractual arrangements to appoint a majority of the board but it does not apply here because the entity is an LLC and not a corporation. However, we are concerned because there is still de facto control, although not as defined by the rules. If the LLC were controlled in an HSR sense, the investor would be the UPE and the UPE would exceed the size-of person test.

Our client is concerned about the appearance of literal form over substance. Can you please confirm that the current enforcement policy is to apply 16 CFR 801.1(b)(1)(ii) strictly, so that a contractual power to designation a majority of LLC directors is irrelevant to the control analysis? Thank you.

Best wishes