

Sheinberg, Samuel I.

From: [REDACTED]
Sent: Friday, June 07, 2019 12:32 PM
To: Berg, Karen E.; Carson, Timothy; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Olson, Eric
Subject: FW: Question re Withdrawing an HSR Filing

From: Walsh, Kathryn E.
Sent: Friday, June 7, 2019 12:32:06 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: [REDACTED]
Subject: FW: Question re Withdrawing an HSR Filing

[A party can withdraw a filing at any time, for any reason. See 803.12\(a\).](#)

From: [REDACTED]
Sent: Wednesday, June 5, 2019 12:46:18 PM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Subject: Question re Withdrawing an HSR Filing

Hi everyone,

We are seeking your advice about withdrawing a pending HSR filing.

Assume that X LLC and various X Corps (whose only holdings are minority interests in X LLC) will be consolidating with Y (a publicly traded entity) and various Y entities. Because the transaction is a consolidation, it is analyzed as the X entities' acquisition of the Y entities and the Y entities' acquisition of the X entities. The HSR value of the Y entities is less than the \$200 million as adjusted threshold. Because the parties do not satisfy the HSR size of person test, they did not file an HSR form to report the X entities' acquisition of the Y entities.

The parties did file an HSR form, however, to report the Y entities' acquisition of the X entities. The form stated that the fair market value of the X entities was in excess of the \$200 million as adjusted threshold. However, after the filing was made and while the HSR waiting period is still pending, the parties have discovered that the valuation stated in the HSR form was incorrect.

First, the valuation stated in the HSR filing included the value of X LLC's units that are debt instruments rather than non-corporate interests ("NCIs") because their holders only participate in the asset or profit distributions until they receive their payment for such units with interest.

Second, the fair market valuation described in the HSR notification relied upon the closing price for Y shares on two days in which the consolidation of the parties was already publicly rumored or announced. By pegging the valuation to these closing prices for Y shares, Y effectively used the market's valuation of the consolidation as a proxy for the fair market value of X LLC's NCIs. We understand that Y should have determined what a third party would pay in an arm's length transaction for X's NCIs valuing X LLC as a standalone entity.

Assuming that the proper HSR value for X LLC's NCIs is now and was at the time of submission below the \$200 million as adjusted threshold, and the size of person test therefore applies and is not satisfied, may the parties withdraw their pending HSR filing? Is there any reason your answer would differ if the parties have received a Second Request?

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]