

## Sheinberg, Samuel I.

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**From:** [REDACTED]  
**Sent:** Thursday, October 17, 2019 4:13 PM  
**To:** Walsh, Kathryn E.; Berg, Karen E.; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Musick, Vesselina  
**Subject:** FW: Size of Transaction Test

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**From:** Carson, Timothy  
**Sent:** Thursday, October 17, 2019 4:12:54 PM (UTC-05:00) Eastern Time (US & Canada)  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** RE: Size of Transaction Test

The acquiring person will need to determine whether the contingent investment is reasonably certain to occur.

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**From:** [REDACTED]  
**Sent:** Monday, October 14, 2019 8:39:19 AM (UTC-05:00) Eastern Time (US & Canada)  
**To:** [REDACTED]  
**Subject:** Size of Transaction Test

Hi folks.

We have a question about application of the size of transaction test to an acquisition of LLC interests.

X1 and X2 are affiliated entities. However each is its own UPE. They will each acquire interests in LLC. X1 (but not X2) will acquire controlling interests (51%) of LLC. Therefore only X1 could have an HSR filing obligation.

The purchase price that X1 and X2 will collectively pay is \$65 million. There is also a \$35 contingent additional investment obligation contingent on the LLC achieving certain performance criteria in the future. If the contingent additional investment obligation becomes due in the future, X1 and X2 will each acquire additional interests in LLC in exchange for the contingent additional investment. For example, if 100% of the contingent additional investment becomes due in the future, X1 will acquire another 10% of the LLC's interests and as a result will hold about 61% of the LLC. X2 will also acquire additional interests in the LLC but will continue to hold under 50% of the LLC's interests.

Do you agree that if it is uncertain whether the LLC will meet the performance criteria in the future and the contingent additional investment will be due, and thus it is uncertain whether X1 will acquire the additional 10% interest in LLC, for purposes of determining whether X1 would have an HSR filing obligation it is only necessary to determine the value of the 51% interest X1 will acquire? If so, since X1 is paying less than \$65 million for the 51% interest, no HSR filing would be required.

Thanks for your help.

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