

Verne, B. Michael

801.1 (d) (2)

To: [REDACTED]
Cc: Walsh, Kathryn
Subject: RE: associates

The key factor is being able to manage the investment decisions (acquisitions and divestitures) of the fund. As we have indicated on a number of occasions, the only reason that "operations" is included is that some of the rules team thought that the "managing investment decisions" language alone might not capture general partners, particularly in oil and gas MLP structures, where we would like to see the overlapping holdings of general partners with the MLPs.

From: [REDACTED]
Sent: Thursday, February 23, 2012 12:26 PM
To: Verne, B. Michael
Cc: Walsh, Kathryn
Subject: RE: associates

mm
2/23/12

Thanks Mike and Kate. I was not sure on that point. The informal opinions and guidance key in on authority to acquire and dispose fund portfolio holdings which Advisor does not have (it only advises on those topics). So I thought that is likely end of story, and on this basis alone Advisor is not an associate. However, I noted in the definition of Associate there is language relating to "managing the operations . . . of an acquiring entity" and I thought that could apply to managing the portfolio companies in addition to the Fund itself. Example 12 also states that CORP (Advisor here) is not an associate because its management services do not constitute operational management, presumably of the LP's investments. So I thought that there might be some level of managerial control over the activities of the Fund's portfolio companies (in my view not meet here) that could result in Advisor being an associate notwithstanding the fact that GP manages the Fund and is responsible for decisions relating to Fund acquisitions and dispositions. Is it your view that the control (or not) over acquisitions and dispositions is the key factor in assessing whether these management contracts create associates? That is certainly how I read 1108003 (Aug. 19, 2011 opinion), but I wanted to be sure I wasn't missing anything.

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Thursday, February 23, 2012 12:04 PM
To: [REDACTED]
Cc: Walsh, Kathryn
Subject: RE: associates

We agree with your conclusion that Advisor is not an associate, however, we were wondering why you were focusing on Advisor not having operation control of Fund A's portfolio companies in coming to that conclusion.

From: [REDACTED]
Sent: Wednesday, February 22, 2012 5:52 PM
To: Verne, B. Michael
Subject: associates

Mike,

I would like to confirm a point regarding whether an entity providing certain contract services is an associate. Based on my review of the various informal opinions, I believe that under the following hypothetical the answer is no.

Private equity limited partnership A (Fund A) is managed by corporate GP A (GP A) under the terms of a partnership agreement. Fund A entered into an "advisory agreement" contract with a corporate advisor (Advisor). Advisor provides services to Fund A, including analyzing and recommending potential portfolio company acquisitions and dispositions, structuring acquisitions, monitoring the performance of currently held portfolio companies, and providing certain other services relating to managing the portfolio companies currently held by Fund A. I believe that the latter referenced services of Advisor relating to managing the portfolio companies currently held do not constitute operational management of the Fund A portfolio companies for the following reason. Typically, a portfolio company will have its own officers, none of whom are employees of the private equity company. The private equity company will nominate some of its employees to its available seats on the board. However, decisions as to which private equity employees will be nominated to the board will be made by GP A, not Advisor. It is then the officers and directors of each portfolio company that operationally manage that company, not Advisor. In addition, Advisor has no responsibility relating to the management of Fund A, which shall be the sole responsibility of GP A. In particular, GP A acting in accordance with the partnership agreement has sole responsibility over decisions relating to the acquisition and disposition of Fund A's portfolio investments. I read the informal opinions (particularly 1108003 and 1107007) and other guidance, along with 801.1(d)(2) (particularly examples 9 and 12), to lead to the conclusion that on these facts Advisor is not an associate. Do you agree?

Thanks,

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