

Verne, B. Michael

802.9

From: [REDACTED]
Sent: Thursday, July 03, 2014 11:31 AM
To: Verne, B. Michael; Walsh, Kathryn E.
Cc: [REDACTED]
Subject: Questions Regarding Rule 802.9

Mike and Kate,

We would appreciate your advice about the applicability of the 802.9 exemption to the following transaction.

Corporation A and Corporation B are proposing a merger in which the combined entity, Corporation C, will issue new shares. A and B will be filing a HSR notification for the merger.

As part of the transaction, shareholders of B will be able to redeem their voting securities of B for voting securities of C on a one-for-one basis.

This conversion of shares will result in several shareholders of B obtaining voting securities of C worth more than \$75.9 million. None of these shareholders will hold more than ten percent of voting securities issued.

Our questions focus on two groups of these shareholders.

1. The shareholders of B who will obtain voting securities of C worth more than \$75.9 million include Shareholder S1, who currently serves as the CEO of B, and Shareholder S2, who currently serves as B's CFO. Both S1 and S2 will remain officers of C. As future officers of C, are S1 and S2 disqualified from relying upon the passive investor exemption?
2. Other shareholders who will obtain voting securities of C worth more than \$75.9 million include institutional investors and investment advisers that have declared their intention to remain passive investors by filing Schedule 13G in lieu of Schedule 13D with the Securities and Exchange Commission pursuant to 17 C.F.R. § 240.13d-1. We understand that a person may only file Schedule 13G if the person has acquired their securities in the ordinary course of business and without the purpose or effect of changing or influencing the control of the issuer. Is an entity's decision to file Schedule 13G in lieu of Schedule 13D sufficient to allow the entity to rely upon the passive investor exemption?

Thank you,

1. Neither shareholder can claim the exemption
2. While we would not view the filing of a Schedule 13-G with the SEC as dispositive in claiming the solely for purpose of investment it may be one suggestion that the exemption may be claimed. We are not familiar enough with SEC regulations to be certain that they view passive investment the same as we do. As long as the shareholders are not engaging in any of the activities inconsistent with investment purpose described in the SBP for the 1978 final rules, or attempting to influence the basic business decisions of the issuer in any other way, the exemption is available.

[M]erely voting the stock would not be considered evidence of an intent inconsistent with investment purpose. However, certain types of conduct could be so viewed. These include but are not limited to: (1) nominating a candidate for the board of directors of the Issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the Issuer; (5) being a competitor of the Issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the Issuer. 43 FR 33450 (July 31, 1978)


7/31/78

KW CONCURS