

801.1(d)(2)

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, September 22, 2011 7:05 PM
To: Verne, B. Michael
Subject: HSR - "Associate" scope question [REDACTED]

Hi, Mike-

I have a question relating to the staff's perspective on the scope of the definition of "associate" in 16 C.F.R. 801.1(d)(2) in the context of a series of investment funds, and would appreciate your thoughts on the analysis below (in which I conclude that an investment fund's only associate is its general partner).

Facts

An investment fund ("Fund A") is making an acquisition of Target that requires a Hart-Scott-Rodino filing. Fund A is organized as a limited partnership and is its own ultimate parent entity. The general partner of Fund A ("GP A") is organized as a manager-managed limited liability company and has two managing members, both natural persons. Investment decisions for Fund A are made by an investment committee that is comprised of a subset of the members of GP A, all of whom are natural persons. The managing members are authorized to make all non-investment-related decisions on behalf of GP A with respect to its management of Fund A.

Corporation has taken a preferred membership interest in GP A which entitles Corporation to receive all management fees paid by Fund A to GP A. Pursuant to a Services Agreement between GP A and Corporation, Corporation employs each of the members of GP A, including both managing members. The members of GP A are designated by the president of Corporation and the president of Corporation sets their compensation. Corporation A also provides certain support services to Fund A (as well as to Fund B and Fund C, which are described below) which are similar in nature to the services provided by "CORP" in Example 12 of 16 C.F.R. 801.1(d)(2).

Fund B and Fund C, also both limited partnerships, each has its own general partner (GP B and GP C, respectively), and both are organized as manager-managed limited liability companies. Investment decisions for Fund B are made by an investment committee of GP B. The investment committee of GP B with respect to Fund B is composed of the same natural persons as the investment committee of GP A with respect to Fund A, and this committee has been granted essentially identical investment authority as the investment committee for Fund A.

Investment decisions relating to Fund C are made by the managing member of Fund C and certain other members of Fund C, each of whom is employed by Corporation (as all members of GP B and GP C, as with GP A, are employed by Corporation on an at-will basis). Corporation has taken a preferred interest in both GP B and GP C, which entitles Corporation to receive all management fees paid by Fund B to GP B and by Fund C to GP C.

No person controls either of GP A or GP B. Mr. Z controls GP C and is its managing member, and also is a managing member of each of GP A and GP B.

Analysis

GP A is an associate of Fund A, GP B is an associate of Fund B and GP C is an associate of Fund C, in each case as a "managing entity" under 16 C.F.R. 801.1(d)(2)(A).

The support services provided by Corporation do not make Corporation an associate of GP A, GP B or GP C because they are similar in nature to the services provided by "CORP" in Example 12 of 16 C.F.R. 801.1(d)(2), and in that example CORP is deemed not to be an associate. The contractual arrangement between Corporation and each GP does not give Corporation any investment or operational decision-management authority, except to the extent that Corporation is empowered to determine the members of each GP. Corporation's contractual ability to select the employees of each GP is tenuous enough that, while it may have been picked up by the definition of an associate under the originally proposed

definition of "associate" (in the September 17, 2010 proposed rule), Corporation would not be deemed an associate under the narrower definition of that term as codified by the final rule adopting 16 C.F.R. 801.1(d)(2).

None of GP A, GP B or GP C has any employees. The members of the investment committees for Fund A and Fund B and the investment decision-makers of Fund C are similar to Mr. Y in Example 11 of 16 C.F.R. 801.1(d)(2) in that they actually make the investment decisions for each of the Funds, and do so without a management contract with any of the GPs. Similarly, the managing members of each of the GPs are analogous to Mr. Y (or in the alternative, to the directors of Corporation A in Example 7) and therefore should not be considered associates of any of the Funds.

As a result, none of GP A, GP B or GP C is an associate of any other GP, of any managing member or investment committee member of such GPs, or of the Corporation, and as a result, Fund A, in its acquisition of Target, would not need to include in its Hart-Scott-Rodino filing information about any other entity (in such entity's capacity as an associate) other than GP A.

If you could confirm that the staff agrees with this analysis by e-mailing me or calling me at (414) 277-5817, I would very much appreciate it. Of course, please let me know if any additional information would be helpful.

Very Truly Yours,

[Redacted signature]

AGREE -
B
9/26/11

[Redacted signature]

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