

801.1(b)

Verne, B. Michael

From: [REDACTED]
Sent: Saturday, December 17, 2011 2:30 PM
To: Verne, B. Michael; Walsh, Kathryn
Subject: Rule 801.1(b)(2) Question

Mike and Kate

I have a quick Rule 801.1(b)(2) issue that I wanted to confirm with you. I am dealing with a corporation ("Company A") that has one class of voting securities. No person holds a majority of the shares, but a majority of the shares are held in the aggregate by three funds ("Fund A", "Fund B" and "Fund C" and collectively, the "Funds") that might qualify as "associates". Each of the Funds (two limited partnerships and a limited liability company) is its own ultimate parent entity. Company A has a stockholders agreement, which provides that Funds A and B (collectively, but there is no discussion in the agreement of the means by which they need to agree) have the right to designate three directors, the founder of Company A has the right to designate two directors and each of Funds A and B (collectively, but there is no discussion in the agreement of the means by which they need to agree) and the founder has the right to nominate an additional independent director with the other having a consent right over such nominee. Company A's board consists of seven directors. For simplicity, Funds A and B designate three, the founder designates two and they each get to nominate one more director, subject to the consent of the other, not to be unreasonably withheld. Funds A and B in the aggregate own less than a majority of Company A's voting securities, but Funds A and C in the aggregate do own a majority of Company A's voting securities.

There are several informal interpretations (including those below) where the Staff has taken the position that unless a shareholder has an unfettered right to designate directors (i.e. the approval of another shareholder is not required), director nominees that are so limited do not count as directors for whom contractual power to designate exists.

I wanted to confirm that the prior informal interpretations remain accurate, and that in my present situation you concur that the Funds would be considered to only have a right to designate three of the seven directors and therefore the Funds do not individually nor together "control" Company A. I do not believe that the analysis would change if Fund C were also a party to the stockholders agreement and joined with Funds A and B in designating directors.

Please let me know if you agree with the above analysis or have any questions or would like to discuss.

Thanks,

[REDACTED]

<http://www.ftc.gov/bc/hsr/informal/opinions/0911014.htm>

<http://www.ftc.gov/bc/hsr/informal/opinions/0512019.htm>

<http://www.ftc.gov/bc/hsr/informal/opinions/1010002.htm>

<http://www.ftc.gov/bc/hsr/informal/opinions/0808008.htm>

AGREE THAT
NO ONE CONTROLS
Company A.

BM
12/19/11