

802.9

**Verne, B. Michael**

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**From:** [REDACTED]  
**Sent:** Tuesday, August 27, 2013 10:35 AM  
**To:** Verne, B. Michael  
**Subject:** HSR 802.9 Questions

Dear Mike,

I have some requests for confirmation of advice provided by you in the below email to [REDACTED] dated April 8, 2013, relating to the rule 802.9 passive exemption as applied to an otherwise passive investor who makes an investment with a non-passive manager. In particular, I would like to confirm whether certain variations in the investment structure provided by [REDACTED] would still qualify for the passive exemption. Below I provide the variations for your review. I would like to set up a call to discuss the application of the passive exemption to these variations at your convenience. Please let me know what times might be convenient for such a call. The basic facts consistent with [REDACTED] email are as follows. Assume a proposed greater than \$70.9 million acquisition of less than 10% of the voting securities of a company ("Company X") by an investment fund (corporate or non-corporate entity) (the "Fund"). The Fund is controlled (within the meaning of rule 801.1(b)) by the ultimate parent of Person A, and managed by a third party (the "Manager") pursuant to an investment management agreement. Person A, itself an investment fund, is managed by an investment adviser (the "Adviser") that is unaffiliated with the Manager.

The Manager has non-passive investment intent and makes all decisions about non-passive activities independent of Person A/the Adviser. Person A/the Adviser itself has passive intent, e.g., no intent itself to participate in the formulation, determination, or direction of the basic business decisions of Company X. Person A/the Adviser is aware that the Manager intends to invest in Company X and the fact that the Manager will have non-passive intent. The Manager periodically reports on its activities to Person A/the Adviser and Person A/the Adviser does its own internal analysis of Company X and the investment implications of the Manager's strategies. No entity included within Person A holds a minority interest in a company competing with Company X other than minority interests which qualify for the §802.9 exemption.

You advised Paul on the above facts that the Manager's non-passive intent would not be imputed to Person A. Thus, the ultimate parent of Person A would not be disqualified from relying on the §802.9 investment only exemption based on the Manager's non-passive intent and actions.

Can you please confirm that the following Fund investor variations would not disqualify the ultimate parent of Person A from relying on the §802.9 exemption when the Fund acquires voting securities of an issuer valued above \$70.9 million but 10% or less of the outstanding voting securities of that issuer:

- A. Fund is controlled by the ultimate parent of Person A. Person A invests in the Fund alongside one or more other entities or accounts that are not controlled by Person A but are managed by the Adviser (which is unaffiliated with the Manager). Again, Person A and its Adviser are passive.
- B. Fund is controlled by the ultimate parent of Person A. Person A invests in the Fund alongside one or more other entities or accounts that are not controlled by Person A but are managed by the Adviser or another adviser affiliated with the Adviser ("Affiliated Adviser") (which are unaffiliated with the Manager). Person A, its Adviser and the Affiliated Adviser are passive.
- C. Fund is controlled by the ultimate parent of Person A. Person A invests in the Fund alongside one or more other entities or accounts that are not controlled by Person A but are managed by the Adviser or an Affiliated Adviser (which are unaffiliated with the Manager). In addition, third-party clients of the Manager invest in the Fund. Person A, its Adviser and the Affiliated Adviser are passive.
- D. Fund is controlled by the ultimate parent of Person A. Person A invests in the Fund alongside one or more other entities or accounts that are not controlled by Person A but are managed by the Adviser or an Affiliated Adviser (which are unaffiliated with the Manager). In addition, the Manager and/or its principals/employees also make investments in the Fund. Person A, its Adviser and the Affiliated Adviser are passive.

E. Fund is controlled by the ultimate parent of Person A. Person A invests in the Fund alongside one or more other entities or accounts that are not controlled by Person A but are managed by the Adviser or an Affiliated Adviser (which are unaffiliated with the Manager). In addition, third-party clients of the Manager, and the Manager and/or its principals/employees also make investments in the Fund. Person A, its Adviser and the Affiliated Adviser are passive.

Many thanks,

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From: Verne, B. Michael [mailto:MVERNE@ftc.gov]  
Sent: Monday, April 08, 2013 3:29 PM  
To: [REDACTED]  
Subject: RE: Request for Confirmation of Telephone Informal Interpretation

Yes

From: [REDACTED]  
Sent: Monday, April 08, 2013 3:27 PM  
To: Verne, B. Michael  
Subject: RE: Request for Confirmation of Telephone Informal Interpretation

Thanks Mike.

One additional point of clarification related to paragraph 4 regarding any holdings in competing entities. Given that the Fund referred to below is managed by an unrelated third party manager, our understanding is that the relevant inquiry would be whether Person A (including all entities within Person A) holds interests in competing entities. And that the inquiry would not extend to identifying possible Associates (as defined in 801.1(d)(2)) of Person A and then examining whether any such Associates hold interests in competing entities.

Do you agree with this analysis?

Thanks again.

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]  
Sent: Monday, April 08, 2013 2:18 PM  
To: [REDACTED]  
Subject: RE: Request for Confirmation of Telephone Informal Interpretation

This looks fine [REDACTED]

From: [REDACTED]  
Sent: Monday, April 08, 2013 1:34 PM  
To: Verne, B. Michael  
Subject: Request for Confirmation of Telephone Informal Interpretation

Dear Mike:

Thank you for speaking with me on Thursday, April 4, 2013, about the 16 C.F.R. §802.9 solely for the purposes of investment exemption as applied to an otherwise passive investor who signs an investment management agreement with a non-passive manager. I am writing to confirm the advice you provided.

The facts we discussed are as follows. Assume a proposed >\$70.9 million acquisition of <10% of the voting securities of a company or companies ("X") by an investment fund (corporate or non-corporate entity, or managed account) (the "Fund"). The Fund is controlled by the ultimate parent of Person A, but managed by an

unrelated third party ("the Manager") pursuant to an investment management agreement. The Manager has non-passive investment intent and makes all decisions about non-passive activities independent of Person A. Person A itself has passive intent, i.e., no intent itself to participate in the formulation, determination, or direction of the basic business decisions of the issuer.

1. You advised that the Manager's non-passive intent would not be imputed to Person A. Thus, Person A would not be disqualified from relying on the §802.9 investment only exemption based on the Manager's non-passive intent and actions.
2. You further advised that where the management agreement between A and the Manager states that one of the investment objectives of the Fund is to achieve higher value through utilization of the Manager's activist strategies, including attempting to influence management and possibly participating in management, that would also not disqualify Person A from being able to rely on the §802.9 exemption.
3. Further, you advised that the fact that the Manager periodically reports on its activities to Person A, or that Person A does its own internal analysis of X and the investment implications of the Manager's strategies, does not disqualify Person A from relying on the §802.9 exemption.
4. Further, you advised that where any entity included within Person A holds a minority interest in a company competing with X, but that minority interest qualified for the §802.9 exemption, Person A would not be disqualified from claiming a §802.9 exemption with regard to X.

Please let me know if I have accurately described the advice you provided. And thanks for your time and assistance!

Our take is that as long as Person A (the UPE of Fund), A's Advisor and the Affiliated Advisor are passive, the exemption is available for acquisitions made by A. The fact that Manager (of Fund) is non-passive, and principals and employees of Manager and clients of Manager are investing in Fund, does not impute non-passive intent on A for investments made outside of Fund. So, in all of your scenarios, the exemption would be available.

Ben

9/9/13

KW concurs.