

802.9

Verne, B. Michael

From: [Redacted]
Sent: Monday, April 07, 2014 3:56 PM
To: Walsh, Kathryn; Verne, B. Michael
Subject: 802.9 Question

Kate and Mike –

I have a question concerning whether a venture capital fund is eligible for the 802.9 exemption if a founder of the firm serves as an independent director of the target, but the fund otherwise meets the indicia of passivity.

The facts are that Firm A is a venture capital firm. Firm A holds voting securities of Company B through a group of 8 affiliated investment funds. Each of these funds is its own UPE.

Public Company has entered into a merger agreement to acquire the voting securities of Company B. Public Company intends to issue new shares of voting securities as merger consideration for the acquisition of Company B. As a result of the transaction, two funds will acquire and hold greater than \$75.9 million of Public Company voting securities. Each fund will hold less than 1% of the issued and outstanding voting securities of Public Company. Neither fund will acquire a board seat, and both funds intend to hold their shares solely for purposes of investment.

Firm A does not currently hold voting securities of Public Company. However, one of the principals and a co-founder of Firm A has served as an independent director of Public Company for more than five years, and will continue to serve as an independent director after the closing of Public Company's acquisition of Company B. This principal is also a member of the GP of each fund that will acquire shares of Public Company as a result of the proposed transaction.

On these facts, are the two funds able to determine that they have a passive investment intent – and therefore conclude their acquisition of Public Company stock is exempt under 802.9 - even though a member of the GP of each fund holds an independent board seat on Public Company?

Please let me know if you need any additional facts.

Thanks very much.

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We think being a director and member of the GP is an automatic exclusion from using the exemption.

Bmw
4/8/19

KW CONCURS