802.9
CONTINUUM

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From: [redacted]
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To: Verne, B. Michael; Walsh, Kathryn
Subject: Continuum Theory and Solely for Investment Exemption

Mike and Kate,

We represent a private equity company that currently holds shares of a public company, Company A. The shares are held through two investment funds, Fund A and Fund B (collectively, the "Funds"), six associated entities for current and former partners and employees of the private equity company (the "Entities"), and by an individual ("Individual 1"). The Funds, the Entities and Individual 1 are collectively referred to herein as the "Company A Shareholders." The shares owned by the Company A Shareholders represent approximately 34% of the fully-diluted equity of Company A. The two Funds own approximately 26.5% ("Fund A") and 6.7% ("Fund B"), respectively, of the fully-diluted equity of Company A, and the six Entities and Individual 1 own a combined total of approximately 1% of the fully-diluted equity of Company A.

Fund A, Fund B and four of the Entities are their own ultimate parent entities ("UPEs") for HSR purposes; Individual 1 or his spouse are the UPEs of the other two Entities. Individual 1 has indirect control of the Funds and the Entities through his ownership of the entity that controls the general partners of the Funds and the Entities; however, an investment committee composed of Individual 1 and another individual ("Individual 2") has control over acquisition and dispositions by the Funds and the Entities, with acquisitions requiring the unanimous consent of both Individual 1 and Individual 2 and dispositions requiring the consent of either Individual 1 or Individual 2.

A. Transaction Background

Company A has entered into a merger agreement with Company B (an unrelated public company) pursuant to which a new holding company ("Newco") would be formed to hold 100% of the stock of both Company A and Company B. In the merger, the shareholders in Company A will receive cash and voting securities of Newco in exchange for their shares in Company A, and the shareholders of Company B will receive voting and nonvoting securities of Newco in exchange for their shares in Company B. There is a fixed amount of cash (the "cash pool") and a fixed number of Newco voting securities (the "stock pool") that will be paid in the aggregate to the shareholders of Company A. However, there will be a cash and stock election process that will occur prior to the closing of the transaction whereby each shareholder of Company A will be entitled to elect whether such shareholder wants cash or voting securities of Newco for each share of Company A stock held by such shareholder. If all of the elections by the shareholders of Company A (or deemed elections with respect to shareholders who make no election), when aggregated, exceed either the cash pool or the stock pool, then the shares that elected the oversubscribed pool, to the extent of the oversubscription, will be, on a pro rata basis (the "proration process"), automatically converted into the consideration payable from the undersubscribed pool. Because of this proration process mechanism, the amount of consideration in each of the cash pool and the stock pool will always be fully-utilized, but the Company A shareholders whose shares are in an oversubscribed pool will get less cash or stock, as applicable, than they had elected to receive.

The Company A Shareholders are entitled to make the foregoing elections prior to closing just like all other shareholders of Company A. The election process and closing will not occur until the fourth quarter of 2014 or the first quarter of 2015. Thus, it is not possible at this time to predict the percentage ownership of the voting securities that the Company A Shareholders will own in Newco. If the Company A Shareholders were to receive voting securities in Newco based on the Company A Shareholders' current proportionate ownership of

Company A shares, and assuming that neither the cash pool nor the stock pool is oversubscribed, then the Company A Shareholders would own collectively approximately 12.6% of the voting securities of Newco, with Fund A receiving approximately 9.8% of such voting securities valued at approximately $225 million, and Fund B receiving approximately 2.5% of such voting securities valued at approximately $60 million, based on an average trading price of the stock of Company B at the time of execution of the merger agreement. Under the same assumptions, the six Entities and Individual 1 would receive about .3% of the voting securities of Newco valued at approximately $7 million. Because the cash/stock elections will not occur until just prior to closing and the stock price of the stock of Company B will fluctuate until closing, the percentage ownership and value figures above may be substantially different at the closing. Thus, after the closing of the transaction, Fund A may hold more or less than 10% of the voting securities of Newco (although it can be assumed that Fund A will own more than $75.9 million of Newco voting securities after the closing), and Fund B will own less than 10% of the voting securities of Newco, but may hold voting securities of Newco worth more or less than $75.9 million.

The Funds have been liquidating their original, multiple investments for some time because they have passed the date under the applicable partnership agreements of the required dissolution and liquidation of the Funds. Company A is one of the last remaining investments for Funds A and B.. Once the merger transaction is consummated and the Funds and the Entities receive their Newco voting securities, the Funds and the Entities will distribute the Newco voting securities to their limited partners as rapidly as possible, but in an orderly manner to avoid significant disruption of the market price of the Newco voting securities. Each limited partner distributee (there will be approximately 290 distributees) will independently decide whether to hold or sell the Newco voting securities obtained by the distributee in the liquidation process.

As part of the transaction and in connection with the liquidation of the Entities, Individual 1 and his affiliated family entities will receive voting securities of Newco. If Individual 1 and his affiliated family entities were to receive their Newco voting securities based on their current proportionate ownership of Company A shares, and assuming that neither the cash pool nor the stock pool is oversubscribed, and based on an average trading price of the stock of Company B at the time the merger agreement was executed, Individual 1 and his affiliated family entities would receive Newco voting securities valued at approximately $2,000,000. Newco will have 11 board members following the closing of the transaction. Four members of the board will be designated by Company A; it is anticipated that Individual 1 will serve on Newco's board of directors following the closing of the transaction.

As part of the transaction, the Company A Shareholders executed a voting and support agreement which provides that the Company A Shareholders will (a) vote for or consent to the merger and (b) not transfer shares of Company A prior to closing, except that up to 3 million shares of Company A owned by the Company A Shareholders (approximately 14% of the aggregate shares of Company A owned by the Company A Shareholders) can be distributed in liquidation of the Funds and the Entities or sold on the market subject to Rule 144 volume limitations. The voting and support agreement provides that, after the closing, the Company A Shareholders will only transfer the voting securities of Newco to the limited partners of the Funds and the Entities in liquidation of the Funds and Entities, in market transactions subject to Rule 144 volume limitations, or in certain other circumstances, including business combination transactions. The Company A Shareholders have agreed not to participate in certain shareholder activist activities after the closing (e.g., proxy contests), but there are no post-closing restrictions on how the Company A Shareholders may vote the Newco voting securities.

B. HSR Analysis

We represent the Company A Shareholders, not Company A, Company B, or Newco, so my HSR questions only relate to the Company A Shareholders' acquisition of the Newco voting securities at closing.

First, I have assumed that Fund A and Fund B are their own UPEs even though the investment decisions for the two Funds are controlled by the same two individuals (Individuals 1 and 2), and even though Individual 1 indirectly controls the GPs of Fund A and Fund B. Because Fund A (and maybe Fund B depending on the outcome of the cash/stock election process and the value of the Newco voting securities at the time of closing) will receive Newco voting stock with a value in excess of $75.9 million, those acquisitions will exceed the current HSR size threshold. However, Fund B's (and depending on various factors at the time of closing Fund A's) holdings would be less than 10% of Newco shares, and the Funds will hold the Newco shares only for a limited amount of time with the sole intent of distributing them to their investors as soon as possible after closing. Based on the somewhat unique facts of this case, I would like to see if this transaction would be exempt under the PNO's "continuum" principles and/or under the provisions of the 802.9 "Investment Only Exemption."

Fund A and Fund B will distribute the Newco shares in liquidation to their investors as soon as possible consistent with Individual 1's desire not to distribute shares in a manner that might disrupt the market for the Newco shares. This liquidation process could take from several months up to a year or more to complete, depending on the liquidity of the Newco voting securities. These facts are not exactly on point with the Continuum Interpretations 45 and 54 in the PNPM, but the facts seem consistent with the general concepts that (1) the Funds are mere intermediaries (which will distribute the shares to their investors as soon as practical after closing), (2) in the interim the Funds are merely passive investors, and (3) Fund B will definitely hold less than 10% of the Newco voting securities, and Fund A may hold slightly more than 10% for a short time until its distributions get it back down below 10%. In any event, neither Fund A nor Fund B has any intention of participating in the "formulation, determination, or direction of the basic business decisions of the issuer." 801.1(i). To the contrary, the Funds plan on an orderly distribution of Newco voting securities to their limited partners as part of the process of dissolving and liquidating the Funds.

Admittedly, Individual 1 indirectly controls the GPs of the Funds and the Entities and is on the investment committee, and Individual 1 will be a member of the Newco board of directors after closing; however, although Individual 1 can make disposition decisions without the consent of Individual 2, in practice disposition decisions are made jointly by Individual 1 and Individual 2. Also, in practice, voting decisions with respect to securities owned by the Funds are made jointly by Individuals 1 and 2, although Individual 1 could exercise voting authority without the concurrence of Individual 2. Furthermore, the Funds will be distributing the Newco voting securities to their limited partners over time and do not have any interest in trying to manage or influence Newco.

Please let me know if you agree with the application of the "Continuum" and the Investment Only Exceptions in this case. I would be happy to discuss this if you have any questions.

Thanks for your help.

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We think that Individual 1 controlling the GPs of the Funds and the Entities, as well as being a director of Newco negates the exemption for Individual 1, the Funds and the Entities.

Continuum is not applicable because none of the intermediate steps are reportable. Continuum is designed to require a single filing rather than multiple filings on a stepped transaction, not to reduce the number of filings to zero.

5/8/14

KW, DG & SP CONCUR