

Gillis, Diana L.

Subject: FW: 802.9

From: Gillis, Diana L.
Sent: Monday, April 27, 2015 1:21 PM
To: [REDACTED] Walsh, Kathryn E.; Whitehead, Nora
Cc: [REDACTED]
Subject: RE: 802.9

Hi [REDACTED]

The interpretation you cite is out of date. Where an individual is involved with a sub such that he could not claim passive intent with the sub, he similarly cannot claim passive intent with the parent, so 802.9 would not be available in this circumstance.

-Diana

From: [REDACTED]
Sent: Monday, April 27, 2015 11:30 AM
To: Walsh, Kathryn E.; Whitehead, Nora; Gillis, Diana L.
Cc: [REDACTED]
Subject: 802.9

Kate, Nora and Diana –

We would like to confirm whether an acquiring person can determine that his acquisition of voting securities is exempt pursuant to 802.9 under the following circumstances:

- Company A, a public company, is planning to acquire Company B in a stock-for-stock transaction. Company B's founder will receive greater than \$76.3 million of Company A stock, but we expect his total percentage holdings will be less than 1%.
- Company B will be a subsidiary of Company A after closing. Company B's founder will be responsible for the Company B business for at least the next 6-12 months after closing. His responsibilities will include product and engineering, overall business metrics and the financial operating plan of the Company B business. Based on 2014 revenue, Company B will represent approximately 7% of Company A's total revenue.
- Company B's founder will have the title Senior Director. This position is not an officer position. It is one level below the Senior Vice President of Product position. The Senior Vice President of Product reports directly to Company A's CEO.

We believe that the acquisition of Company A stock by Company B's founder as a result of the merger is exempt under 802.9 if he does not intend to participate in the formulation, determination, or direction of the basic business decisions of Company A. The founder will not be an officer or director of Company A. The fact that Company B's founder will continue to be responsible for the Company B business after closing does not preclude the founder from determining he will hold the Company A voting securities solely for purposes of investment. See <https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/9906022>.