

From: [Whitehead, Nora](#)
To: [REDACTED]; [Walsh, Kathryn E.](#); [Berg, Karen E.](#); [Gillis, Diana L.](#)
Cc: [REDACTED]
Subject: RE: Request for Informal Interpretation - S.C.A.
Date: Thursday, July 21, 2016 2:38:11 PM

In this particular case, we agree that your S.C.A. should be treated as a non-corporate entity. Thanks for laying out your case so thoroughly.

Nora Whitehead
(202) 326-3262

From: [REDACTED]
Sent: Thursday, July 21, 2016 12:48 PM
To: Walsh, Kathryn E.; Whitehead, Nora; Berg, Karen E.; Gillis, Diana L.
Cc: [REDACTED]
Subject: Request for Informal Interpretation - S.C.A.

Dear Kate, Nora, Diana, and Karen,

We are writing to inquire whether to treat an S.C.A., which is a “corporate partnership limited by shares” organized under the laws of Luxembourg, as a non-corporate entity for HSR purposes. On April 13, 2015, the PNO had advised us to treat an S.C.A. as a non-corporate entity. On May 19, 2016, the PNO issued a blog post stating that the test for the classification of a foreign entity is: “Does the entity issue securities that allow the holders to vote for the election of a supervisory board of directors.” If the answer is “yes,” then the entity is treated as a corporate entity; if “no,” then the entity is treated as a non-corporate entity. The blog post advised that “each foreign entity should be evaluated on a case-by-case basis using the new test.” Our question is whether an S.C.A.’s “supervisory board,” which has only advisory powers, should be considered a “supervisory board of directors” under the new guidelines. For the reasons discussed below, we believe it should not.

The S.C.A. is managed by a Manager, similar to a General Partner in U.S. Limited Partnerships. Under the S.C.A.’s by-laws, the Manager has the power to take all action necessary or useful in the interests of S.C.A., other than those actions reserved by law or by-laws to a meeting of shareholders. Actions reserved to shareholders of the S.C.A. (not the Supervisory Board) by law or the by-laws relating to shareholders meetings include, *inter alia*, increasing or reducing share capital or issuing new shares, initiating dissolution of the S.C.A, initiating distributions, determining dividends, converting shares from one class to another, changing the S.C.A.’s corporate objectives, transforming the S.C.A. into another legal form, amending articles, appointing/removing of the Supervisory Board members, or appointing/removing the Manager. In accordance with the by-laws of the S.C.A., however, any decision of the shareholders (including election/removal of members of the Supervisory Board) must have an affirmative vote of the Manager, other than a decision to appoint/remove the Manager.

The S.C.A. has a Supervisory Board, but it has very limited powers when compared to a Board of Directors of a U.S. corporation (under Luxembourg law, shareholders of the S.C.A. could elect that the S.C.A. be supervised by an independent auditor instead of a Supervisory Board). The Supervisory Board of an S.C.A. supervises the business of the S.C.A. and its financial situation, including more

particularly its books and accounts. However, the Supervisory Board and its members are not permitted to participate or interfere with the management of the S.C.A., and may only advise the Manager on such matters as the Manager may determine. As mentioned above, the members of the Supervisory Board are elected by a shareholder resolution, provided the Manager has given its affirmative vote. The Supervisory Board does not have the power to appoint/remove the Manager; the Manager may be removed by a shareholder resolution only in case of fraud, gross negligence or willful misconduct.

Because the S.C.A.'s Supervisory Board does not have the ability to manage the entity's operations and business direction, or to appoint officers, we believe that it is not a "supervisory board of directors" as contemplated by the PNO's May 19, 2016 statement, but rather only an advisory board. The S.C.A. is operated more like a U.S. limited partnership, with the Manager serving the role of a General Partner of the partnership. Therefore, we believe that the answer to the question "Does the entity issue securities that allow the holders to vote for the election of a supervisory board of directors" is "No." Please let us know if you agree with this analysis or have any questions. Thank you.

Regards,

