Haynes, Lanea

From: [redacted]
Sent: Monday, January 29, 2018 4:16 PM
To: Walsh, Kathryn E.; Berg, Karen E.; Carson, Timothy; Shaffer, Kristin; Sheinberg, Samuel I.; Whitehead, Nora
Subject: FW: HSR Question on 802.9

From: Shaffer, Kristin
Sent: Monday, January 29, 2018 4:15:30 PM
[redacted]
Subject: RE: HSR Question on 802.9
Auto forwarded by a Rule

[redacted]

Please see responses in red, below.

Best regards,
Kristin

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From: [redacted]
Sent: Thursday, January 25, 2018 3:22:59 PM
To: [redacted]
Subject: HSR Question on 802.9

Hi folks,

I am trying to better understand a couple of notations dated 2016 on past informal interpretations related to 802.9 saying that the earlier staff response no longer represent the position of the PNO. It is not clear whether these notes mean the PNO staff position is now the opposite, or whether there is no particular view one way or the other and reportability depends on additional facts. Both of these seem relevant to my current question, which is Question Three below.

Question One:

1403011 March 20, 2014. This says it is no longer the PNO position that "[w]e have set a bright line that holding more than 10% of a competitor by either the target (of a competitor of the acquiring person) or the acquiring person (of a competitor of the target) is presumed to be non-passive." https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1403011

Does this mean there is no bright line anymore and that one can hold more than 10% of a competitor with no presumption on intent as to the purchase less than 10% of the stock in a competing issuer (i.e., the actual intent of the acquiring person is now considered)?

The analysis for 802.9 is highly fact-specific and focuses on whether intent is truly passive. Interpretation 1403011's characterization of a "bright line" for minority holdings in competitors is not consistent with this approach. As a result, the informal was withdrawn. Depending on the totality of the circumstances, the presumption may be rebuttable.

Question Two:

1308003 September 4, 2013. This says it is no longer the PNO position that a non-passive intent will not be imputed to the owner of an investment fund who has a passive intent but hires a fund manager who manages other funds in which the manager and the owners of the other fund have a non-passive intent. https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1308003

Does this mean that the non-passive intent of the manager will automatically be imputed to the other (passive) fund owner? Is it imputed, or viewed as a rebuttable presumption? Does it matter what the non-passive activity of the manager is (e.g., holding a board seat, starting a proxy fight, owning a competitor, etc.)?

The intentions of a manager of a fund are generally attributed to the funds it manages. However, the non-passive intent of a third party investment manager, where the manager is not within the same family of funds as the investor, creates a rebuttable presumption that investor's intent is not solely for the purpose of investment. To rebut the presumption, the investor should be able to demonstrate that it did not intend to participate in the formulation, determination, or direction of the basic business decisions of the acquired issuer, either directly or through its manager.

Question Three:

This is a new question that is a mix of elements of the two questions above as to potential imputation of presumptions in applying 802.9.

Facts:

Assume two investment funds, Fund A and Fund B, which are each their own separate UPE and meet the size of persons test. Both are managed by Manager X. Fund A owns 25% of Issuer 1 and has a board seat on Issuer 1. Fund B now wants to acquire 2% of Issuer 2 for $90 million, and has an investment-only intent. Both Issuer 1 and Issuer 2 are competitors. Manager X has a passive intent with regard to holdings of Issuer 2 in all of the funds (each with a different UPE) that it manages or owns. (Assume that the acquisition of voting securities of Issuer 2 by the other funds managed by Manager X is not reportable due to a different HSR exemption not available to Fund B, and the acquisition of all of Issuer 1's voting securities (by anyone) would be exempt under a different exemption that does not apply to Issuer 2.)

Analysis:

Since the UPE of Fund B (Fund B itself) does not own the voting securities of any competitor of Issuer 2, and Fund B has a purely passive investment-only intent with respect to its holdings of Issuer 2, It would appear that Fund B can avail itself of the investment-only exemption of 802.9 for acquisitions of less than 10% of Issuer 2. Can you confirm that is the case?

In all instances involving acquisitions solely for the purpose of investment, the burden is on the investor to demonstrate that its intent is truly passive, e.g., that it has no intention of participating in the formulation, determination, or direction of the basic business decisions of the acquired issuer, including outsourcing such functions to a manager. That said, the facts you have presented do not preclude the use of 802.9.

Thanks,

[redacted]