

Sheinberg, Samuel I.

From: HSRHelp
Sent: Tuesday, August 17, 2021 10:27 AM
To: Walsh, Kathryn E.; Berg, Karen E.; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Musick, Vesselina
Subject: FW: Section 802.9

From: Shaffer, Kristin <kshaffer@ftc.gov>
Sent: Tuesday, August 17, 2021 10:27:20 AM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: Section 802.9

[REDACTED]
We view entering into an agreement that allows for the right to expand the board and appoint a member as incompatible with 802.9.

Best regards,

Kristin

Kristin Shaffer

Attorney

Premerger Notification Office

Federal Trade Commission

202-326-2388 | kshaffer@ftc.gov

From: [REDACTED]
Sent: Monday, August 16, 2021 10:30 AM
To: HSRHelp <HSRHelp@ftc.gov>
Subject: Section 802.9

[REDACTED]
We have a question about 16 C.F.R. Section 802.9 – the solely for the purpose of investment exemption.

Fund will acquire and hold less than 10% of the voting shares of Issuer X. Assume that Fund has the subjective intent to be passive and not influence management of X and Fund has “no intention of participating in the formulation, determination, or direction of the basic business decisions of” X. 16 C.F.R. § 801.1(i)(1). Also assume that Fund does not hold at least 10% of any competitor to X, does not have any directors on any competitor to X, and otherwise qualifies as a passive investor of X.

X, Fund, and certain other stockholders of X (the “Stockholders”) will be entering into a stockholders’ voting agreement (the “Agreement”). Fund will not have any present right to designate any directors under the Agreement. However, under the Agreement for so long as Fund holds a majority of a certain class of preferred stock of X, Fund will have the right to request in writing to X that X’s board be increased by two directors. Should Fund do so, under the Agreement X has agreed to “promptly approve, and each Stockholder agrees to promptly vote, or cause to be voted, all Shares owned by such Stockholder, or over which such Stockholder has voting control, to approve all actions necessary to create two (2) additional Board seats ... , one (1) of which Additional Seats shall be held by a member designated by” Fund.

Assume that Fund holds a majority of the class of preferred stock described in the Agreement. However, Fund has no intent at the time it acquires shares of X to exercise the right described above which would increase the size of X’s Board and give Fund the right to designate one of the new X directors. Fund’s right to designate a director is not a present right but only materializes upon Fund, X, and the Stockholders taking the actions described in the preceding paragraph. This differentiates the present facts from those described in Informal Interpretation #2008005 (August 20, 2020).

Please confirm that the right described above under the stockholders’ voting agreement does not preclude Fund from relying on the Section 802.9 exemption assuming all other elements of the exemption are satisfied.

Thanks for your help.

Best regards,

[Redacted]

[Redacted]

[Redacted]

[Redacted]