

Sheinberg, Samuel I.

From: HSRHelp
Sent: Wednesday, March 6, 2024 9:17 AM
To: Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Shaffer, Kristin; Sheinberg, Samuel I.; Six, Anne; Fetterman, Michelle; Burton, June; Larson, Peter
Subject: FW: Section 802.9 -- Solely for the purpose of investment

From: Whitehead, Nora <nwhitehead@ftc.gov>
Sent: Wednesday, March 6, 2024 9:16:50 AM (UTC-05:00) Eastern Time (US & Canada)
To: [REDACTED]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: Section 802.9 -- Solely for the purpose of investment

[REDACTED]

We disagree. 802.9 is precluded in the hypothetical you describe.

From: HSRHelp <HSRHelp@ftc.gov>
Sent: Tuesday, March 5, 2024 12:31 PM
To: Walsh, Kathryn E. <kwash@ftc.gov>; Berg, Karen E. <KBERG@ftc.gov>; Musick, Vesselina <vmusick@ftc.gov>; Shaffer, Kristin <kshaffer@ftc.gov>; Sheinberg, Samuel I. <SSHEINBERG@ftc.gov>; Six, Anne <asix@ftc.gov>; Whitehead, Nora <nwhitehead@ftc.gov>; Fetterman, Michelle <mfetterman@ftc.gov>; Burton, June <jburton@ftc.gov>; Larson, Peter <plarson@ftc.gov>
Subject: FW: Section 802.9 -- Solely for the purpose of investment

From: [REDACTED]
Sent: Tuesday, March 5, 2024 12:30:20 PM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Subject: Section 802.9 -- Solely for the purpose of investment

Hi PNO.

We are seeking your advice on whether the 16 C.F.R. 802.9 exemption could apply under the fact pattern below.

Facts

Fund 1 and Fund 2 are in the X family of funds. Each is its own ultimate parent entity ("UPE"). Fund 1's general partner is GP1 and Fund 2's general partner is GP2. Each of GP1 and GP2 is its own UPE. GP1 and GP2 have each contracted with Management Co (an LLC) to manage the investments of Fund 1 and Fund 2, respectively.

Management Co is its own UPE. Management Co's decisions are controlled by six managing members who are also managing members or directors of the GPs for Fund 1 and Fund 2. They also are entitled through their role in GP1 and/or GP2 to certain economic incentives (akin to profit interests) in Fund 1 and Fund 2.

Fund 1 is a current stockholder of Issuer. It has a management rights agreement with Issuer and has also designated one member to Issuer's board of directors, Mr. A. Mr. A is entitled to certain economic incentives in Fund 1 and Fund 2. He owns no interests in Management Co. and is not an officer of Management Co. Mr. A is not an officer of any of the X family funds nor any of their GPs. Mr. A does sit on the boards of other entities in which Fund 1 and other funds in the X family have invested.

Fund 2 is not a current stockholder in Issuer but plans to acquire in an upcoming financing round Issuer voting shares with a value in excess of \$119.5 million. The size of person test would be satisfied. Fund 1 will not be participating in Issuer's upcoming financing round.

Fund 2 will hold significantly less than 10% of Issuer's voting shares following the new financing round. It will not get a board seat but will get a board observer seat. It (along with its GP) has the subjective intent to be a passive investor in Issuer and does not intend to influence Issuer's management or directors. Its board observer will be Mr. B. Mr. B does not own any interests in Management Co and does not have HSR control of any fund in the X family or any GP of any such fund.

Although Management Co manages investments for all the funds in the X family including Fund 1 and Fund 2, it implements different investment strategies for different funds, which can result in differing intentions (active vs. passive) with respect to investments in the same issuers. As an investment adviser, Management Co owes fiduciary duties to all the funds it advises, including Fund 1 and Fund 2. In addition, GP1 and GP2 owe fiduciary duties to Fund 1 and Fund 2, respectively. These fiduciary duties obligate GP1, GP2, and Management Co to separately implement each fund's investment strategy in the best interests of that fund's investor base – rather than viewing all the funds as an aggregated whole.

Fund 1 invests in early-stage companies. Its investment strategy is high-risk, high-reward. Many of Fund 1's portfolio companies have neither products nor customers at the time of Fund 1's investment, and as a result, they benefit from active management to shape their growth. Therefore, GP1 and Management Co make decisions for Fund 1's investments which often result in Fund 1 acquiring rights and taking actions with respect to its investments which have the effect of disqualifying Fund 1 from the passive investor exemption.

Fund 2, on the other hand, invests in late-stage pre-IPO companies. Fund 2's investors assume less risk than Fund 1's investors and in return expect to earn lower returns than Fund 1. These late-stage companies typically already have significant products, revenues, and customer bases supported by fully established corporate governance functions. Fund 2's investment in such late-stage companies generally is to provide needed cash to the companies, not to impose any control or guidance over the companies' operations or management. This means that GP 2 and Management Co. implement an investment strategy primarily focused on properly valuing companies and deploying capital to them. The intent is not to provide input to such companies to increase their performance. Thus GP 2's and Management Co's investment decisions for Fund 2 can have the effect of Fund 2 being a passive investor in issuers, with no rights to a board seat, no management rights agreement, and the subjective intent not to influence management.

Question

We understand that we are in possession of the specific facts relevant to whether the Section 802.9 exemption would apply. However, do you agree that the hypothetical above does not preclude Fund 2 from relying on the Section 802.9 exemption in connection with its acquisition of Issuer voting shares?

As always, thanks for your guidance.

Best regards,

[Redacted]

[Redacted]

[Redacted]

[Redacted]