
From: Walsh, Kathryn E. <kwash@ftc.gov>
Sent: Thursday, October 27, 2016 1:46 PM
To: [REDACTED] Gillis, Diana L.
Cc: [REDACTED]
Subject: RE: 802.9 & shareholder communications--Quick response appreciated

The letter you describe is inconsistent with passive intent under 802.9.

From: [REDACTED]
Sent: Thursday, October 27, 2016 11:05 AM
To: Walsh, Kathryn E.; Gillis, Diana L.
Cc: [REDACTED]
Subject: 802.9 & shareholder communications--Quick response appreciated

Kate / Diana,

We hope that you can confirm our analysis that the proposed shareholder letter to management described below would not disqualify the investor from relying upon the investment-only exemption for future acquisitions of voting securities. Our client would like to send the letter as early as today. We have tried reaching you by phone as well and are available to discuss.

Facts

Company A has made a publicly announced bid to acquire Company B. Our client is an investment fund manager of funds that own shares in Company B (the "Investor") and is very supportive of the merger. The Investor is concerned that management's agreement to voting conditions allow a single minority shareholder to effectively control the outcome of the transaction. The Investor proposes to send a letter to management that highlights various alternatives – e.g., (1) in return for an increase in purchase price, changing the transaction structure from a tender offer to a merger that would be subject to the approval of a majority of the minority shares actually voting (as used in the Dell buyout); or (2) an increase in the purchase price through the inclusion of a stock component (as in the recent Carmike/AMC transaction). Certain of the alternatives would require shareholder approval.

Analysis

We understand that sending certain types of communications to management may result in an investor becoming ineligible to rely upon the investment-only exemption for future acquisitions of voting securities in the same target. We believe the letter described here does not fall within that category. Although the Investor suggests some alternatives that would require shareholder approval, the Investor is not pressuring or seeking to influence management to take a particular action. The Investor's intent in sending the letter to management is to inform management of options that would preserve the value of Investor's investment in Company B. Accordingly, we believe that sending the described letter to management is consistent with passive investment intent.

Please let us know at your earliest convenience if you agree with the above analysis.

Best regards,
[REDACTED]