801.12

From: [redacted]
To: "mverne@ftc.gov" <mverne@ftc.gov>
Date: Tue, Apr 25, 2000 3:08 PM
Subject: 801.12

Mike -- I have another question for you on applying the fun formula in 801.12. I have a situation where X's articles state that the holders of Series A shares voting as a class elect 2 of 5 directors, the holders of Common voting as a class elect 2 of 5 directors, and the fifth director is elected upon the approval of (i) the holders of the majority of the A shares and (ii) the holders of Common Stock voting as a class. If Y just holds A shares, would I calculate Y's percentage as follows?

[[The A shares held by Y divided by all A shares outstanding) times (2 divided by 5)] plus [(the A shares held by Y divided by all A and Common shares outstanding) times (1 divided by 5)]?

I am concerned that application of the formula may not work in a case where the last director must be approved by the majority of the A voting as a class and the majority of the Common voting as a class. Strict application of the formula overstates Y's holdings in X because even if Y holds a majority of the A shares, Y cannot unilaterally elect the fifth director because a majority of the Common could veto his choice.

What do you think?

Thanks,

[redacted]

ADVISED TO USE 1/2 AS THE NUMERATOR IN THE RATIO FOR THIS DIRECTOR. IE: IF YOU HELD 100 OF THE 500 TOTAL SHARES OF CLASS A YOU WOULD CALCULATE AS FOLLOWS:

Phone: [redacted]
Fax: [redacted]
E-mail: [redacted]

$\frac{100}{500} \times \frac{2}{5} = 8\%$

$\frac{100}{500} \times \frac{1/2}{5} = 2\%$

TOTAL [illegible] IS [illegible] %

N. OVUKA & HANCOCK & R. SMITH CONCUR.

(V1.6)

B Michael Verne
4/2[illegible]/00