

801.1(f)  
802.30  
7A(c)(3)  
7A(c)(10)

From: [REDACTED]  
To: "mverne@ftc.gov" <mverne@ftc.gov>  
Date: 12/5/01 3:55PM  
Subject: question re voting securities

A couple of days ago, we talked about the notion that nominally non-voting convertible securities may be viewed as voting securities if coupled with a contractual arrangement under which the acquiror/holder of the nominally non-voting securities obtains a unilateral power to elect (e.g., pursuant to a voting agreement with other shareholders) a number of directors corresponding with the number of directors that the acquiror/holder could elect if he/she converted the securities into common stock. We said that the power to elect half or more of the directors "corresponds" with the right to convert into half or more of the issuer's outstanding voting securities (i.e., a controlling number of directors corresponds with a controlling quantity of voting securities, even if the controlling percentages aren't the same).

So, I've got a shareholder who holds these non-voting securities, which are convertible into a majority of the voting stock of the issuer, and this shareholder has an agreement with other shareholders conferring the ability unilaterally to elect more than half the directors. My question is this: if and when the shareholder converts his/her nominally non-voting shares into voting common, does (c)(3) and/or (c)(10) and/or 802.30 apply? That is, are these nominally non-voting securities viewed as voting securities for at least as long as the voting agreement remains in place? And therefore this is different from a contractual power to designate half or more of the directors, which doesn't depend upon holding any securities, voting or non-voting?

That will teach you to take off a couple of days.

[REDACTED]

AGREE THAT THIS COMPARISON BETWEEN BEING ABLE TO UNILATERALLY ELECT A MAJORITY OF THE BOARD UPON CONVERSION & THE CURRENT UNILATERAL RIGHT TO CONTRACTUALLY DESIGNATE A MAJORITY OF THE BOARD WOULD CAUSE THE NOMINALLY NON-VOTING SECURITIES TO BE VIEWED AS CURRENTLY

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HAVING VOTING POWER. AS LONG AS THE CONTRACTUAL RIGHT IS IN PLACE THESE SECURITIES ARE DEEMED TO BE VOTING SECURITIES & ANY APPLICABLE EXEMPTION RELYING ON THE HOLDING OF VOTING SECURITIES, IS AVAILABLE.

CC: [REDACTED]

B. Michael Verne  
12/6/01