

Verne, B. Michael

From: [REDACTED]
Sent: Monday, April 30, 2007 3:07 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Question about "investment only" exemption

Mike

We had a question whether the following situation qualifies for an exemption from filing. It deals with the "investment only" exemption.

There is a corporate reorganization of a Bermuda company. As a result, one U.S. shareholder will obtain more than 10% of the shares that carry voting rights. However, under the by-laws of the Bermuda company, a U.S. shareholder can NEVER exercise voting rights that amount to more than 9.8% of the company's total voting rights. This by-law is, apparently, triggered by the tax-free status of Bermuda reinsurers and for that reason is unlikely ever to change.

The result is that this shareholder will never be able to vote more than 9.8% of the outstanding voting shares. He simply will never be able trigger the corporate control or influence concerns that were behind the 10%+ provision. He is not involved in management and therefore qualifies for the investment exemption on every other ground.

Since, as a matter of fact and law, he is a shareholder with a maximum of 9.8% in voting rights, it seems that he should be exempt from an HSR filing requirement.

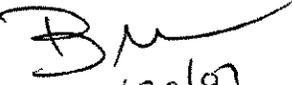
We spoke with James who thought this sounded right but asked us to verify with you. We would appreciate your guidance.

[REDACTED]

[REDACTED]

=
This e-mail, including attachments, contains information that is confidential and may be protected by the attorney/client or other privileges. This e-mail,

The restricted voting rights are not the result of a contractual arrangement, they are contained in the bylaws of the corporation. This would potentially be an argument that as a practical matter the stock only represents 9.8% of the outstanding voting securities. However, Section 801.12(b) states "Whenever the act or these rules require calculation of the percentage of voting securities of an issuer to be held or acquired, the percentage shall be the sum of the separate ratios for each class of voting securities, expressed as a percentage." This leads me to the conclusion that if the percentage calculated under 801.12 exceeds 10% (which appears to be the case here), the solely for purpose of investment exemption would not be available. I have run this by Marian Bruno who agrees.


4/30/07

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, May 01, 2007 9:57 AM
To: Verne, B. Michael
Subject: RE: Question about "investment only" exemption

Thanks Mike.

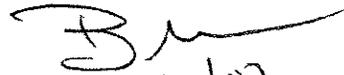
But doesn't the logic of 801.1 (f)(1)(i) support our argument. The test there is stock that "at present" entitles the owner to vote. This stock has not, does not now, and presumably will never entitle the shareholder to vote more than 9.8%. Using that definition, "at present," isn't that stock non-voting?

[REDACTED]

Voting securities. The term voting securities means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer, or of an entity included within the same person as the issuer.

[REDACTED]

I'm not sure it does, because it is the bylaws that limit the number of voting securities (the percentage of the total) that can be voted. Presumably the stock instrument itself for each individual voting security carries the same right of one vote per share for the election of directors. If any of the voting securities of that shareholder were sold to a third person, wouldn't they have the "present right to vote" regardless of which voting securities they received?



5/11/07

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, May 01, 2007 2:04 PM
To: Verne, B. Michael
Cc: Bruno, Marian; Berg, Karen E.; Walsh, Kathryn
Subject: RE: Question about "investment only" exemption

Mike

Sorry to continue this. I agree with you that there is no incapacity on the shares themselves, just on the holder. But the rule on investment focuses specifically on the holder, not the shares: the exemption is personal and is triggered by his/her individual present intention. In other words, it's not the objective nature of the shares that determines the exemption, it's the context between the holder and the shares.

Applying that criteria, doesn't that suggest that the by-law restriction, that creates a non-voting incapacity for that shareholder above 9.8%, should result in these shares being considered non-voting.

I don't see how any of the HSR controls are lost here. If he would transfer the shares to someone else who isn't subject to the restriction, then a filing might be necessary. But otherwise, you're requiring a filing based on the 10% voting rule for someone who can NEVER achieve that voting level. The purpose of the Act is never triggered and can't be unless he transfers the shares to a non-American holder.

I just thought I would ask you to re-consider one last time. Thank you for your patience.

[REDACTED]

(i)(1) Solely for the purpose of investment. Voting securities are held or acquired "solely for the purpose of investment" if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.

The argument is not whether the holder of the voting securities satisfies the passive intent prong of the definition of "solely for purpose" of investment in Section 801.1(i), it is whether he satisfies the "as a result of the acquisition, the acquiring person would hold ten percent or less of the outstanding voting securities of the issuer" requirement in Section 802.9.

We agree that the individual's voting rights are restricted by the bylaws as opposed to a shareholder agreement, which is an arguably stronger restriction, however, the fact remains that the individual holds more than 10% of the outstanding voting securities of the issuer, as calculated under Section 801.12.

If this was a shareholder's agreement that took away the right of an individual to vote some percentage of his voting securities (even if irrevocable) we would still say that all of the shares he holds are voting securities and should be included in the 801.12 calculation. We can't justify coming out differently in this scenario.

BM
5/2/07

M. BRUNO, K. BERG } K. WALSH
CONCUR