

801.1(b)

**Verne, B. Michael**

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**From:** [REDACTED]  
**Sent:** Tuesday, July 24, 2007 3:58 PM  
**To:** Verne, B. Michael  
**Subject:** Veto Over Appointment of Directors (Negative Control)

Mike,

Corporation X has two classes of shares -- A (voting) and B (non-voting, but convertible into voting). Holders of B shares have an absolute veto over the directors selected by A. Does a holder of 100% of the B shares control Corporation X for HSR purposes?

I believe the answer is "no" for the following reasons:

1. The holder of the B shares does not have the right to designate anyone. The definition of control references a right "presently to designate". All B can do is veto those designated by others.
2. If the by-laws of a corporation required a 2/3rds super-majority vote for the election of directors, a shareholder with 34% of the voting shares would have a de facto absolute veto over the appointment of the directors. Such "de facto" control has not been viewed as conferring control (see Informal Staff Opinion 0404018). There does not appear to be reason to treat an explicit veto right any differently.

As always, I am grateful for your guidance.

Regards,

[REDACTED]

[REDACTED]

AGREE THIS IS NOT CONTROL  
BW  
7/25/07

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