

801.1 (b)
801.1 (c)

Verne, B. Michael

From: [Redacted]
Sent: Monday, March 17, 2008 1:30 PM
To: Verne, B. Michael
Subject: A different version of one I asked you about recently

Mike:

Suppose that three parties form a corporate joint venture and take back stock of Newco 48%, 48%, 4%.

The stock itself has voting rights for election of directors and doesn't say anything about appointments of directors outside of an election context.

However, the parties in their agreement to form Newco include provisions allowing each of the 48% shareholders to designate half the directors.

I understand that, following the formation transaction, each of the 48% holders would be viewed as having a contractual power to control.

But does the agreement among the shareholders convert the acquisitions of the 48% interests into acquisitions of voting securities conferring control on the 48% holders?

Or is the formation acquisition viewed as governed by the terms of the voting securities, and the shareholder agreement viewed separately as conferring control, but not through acquisition of voting securities?

I have seen similar deals where, say, voting securities are issued 50/50 to two forming shareholders, and a third party puts in cash and takes back preferred stock that is nominally non-voting, but (again, via the formation agreement) the preferred shareholder is given the power to designate more than half the directors of Newco.

I take it the two 50/50 forming shareholders are viewed as each acquiring a controlling interest in voting securities, and the power in the preferred shareholder to designate more than half the directors does not "oust" the 50/50 shareholders from also controlling Newco. But is the preferred shareholder viewed as acquiring voting securities because he gets to name some directors? Or is he viewed as a controlling shareholder of Newco, but not as an acquirer of voting securities in the formation transaction?

Thanks.

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In the 48-48-4 formation, the two 48% holders will control post-formation, but are not acquiring a controlling interest in voting securities in the formation.

In the 50-50 + preferred non-voting, the preferred shareholder is not acquiring voting securities. All three shareholders will control post-formation.

Bm
3/12/08