

801.1(b)

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, August 26, 2008 5:03 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: 801.1(b)(2) Control Question

Mike,

I, along with [REDACTED], are trying to run down confirmation of our understanding of the control rules under 801.1(b)(2). We'd both appreciate getting your thoughts on the scenario posed below and, if needed, could schedule a call to answer any questions that you have at a time that works best for you - ideally at some point tomorrow -- with availability after 1 p.m. your time on Wednesday or at any time Thursday.

The scenario involves a shareholder ("Shareholder A") which holds approximately 46% of an Issuer ("Corporation X"). That part is easy, given that Shareholder A does not hold 50% or more of the outstanding voting securities of Corporation X. However, Shareholder A also has entered into a Shareholders Agreement with another shareholder which holds approximately 23% of the voting shares of Corporation X ("Shareholder B") in which the following rights have been granted with respect to its 5 member Board of Directors

- o Shareholder A has the right to designate two board members
- o Shareholder B has the right to designate one board member
- o One board member is the Chief Executive Officer; and
- o One board member is mutually designated by Shareholder A and the Chief Executive Officer (as an aside, the Chief Executive Officer was already serving in this capacity before Shareholder A acquired any stake in Corporation X)

Our understanding is that, for the purposes of 801.1(b)(2), this leaves Shareholder A with the contractual right to appoint 2 out of the 5 board members -- a result that's not changed by the fact that Shareholder A also has a shared right to appoint a third director (a right which it shares with the Chief Executive Officer). See <http://www.ftc.gov/bc/hsr/informal/opinions/8807006.pdf> and <http://www.ftc.gov/bc/hsr/informal/opinions/0604027.htm>.

Thanks in advance. Your help is appreciated, as always.

CORPORATION X IS ITS
OWN UPE.

Ben
8/27/08