

Verne, B. Michael

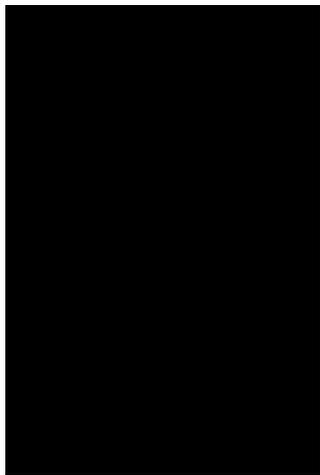
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From: [REDACTED]
Sent: Friday, October 03, 2008 5:36 PM
To: Verne, B. Michael
Subject: HSR Question
Attachments: DOC_000014fb.pdf; DOC_00001507.pdf

Mike, I thought an email would be the easiest way to ask for clarification on an informal opinion. I found the attached Informal Opinion 0503024, where a convertible notes coupled with the right to appoint directors was not treated as voting securities. However, it is unclear to me if it was because the right to appoint was not in the actual convertible note, or because it was a contractual right to appoint directors and did not involve a proxy or a voting agreement. Could you clarify that for me? What raised this question was Informal Opinion 0602018, also attached, which states a contractual right to appoint does not change a convertible note into a voting security. This latter opinion seem to run counter to Interpretation 66 in the Fourth Edition of the Premerger Notification Manual which mentions the contractual right to appoint directors.

I am working on a transaction with a fact pattern similar to Informal Opinion 050324 but it involves a voting agreement and not the contractual right to appoint. The voting agreement is in the Note Purchase Agreement and not in the actual Convertible Note.

Thanks in advance!



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It doesn't matter whether the right to appoint directors is in the convertible note or is a contractual right, that alone would not make it a voting security. Generally, the only time that a convertible security is deemed a voting security prior to conversion is if the security carries an irrevocable proxy to vote the underlying shares as if the conversion had already occurred. The only other instance I can think of in recent times is where an investor held all of a class of securities that on its own could elect one director when converted and voted, and the security also contained a right to designate one director prior to conversion.

BM
10/7/08