

801.10

Verne, B. Michael

From: [REDACTED]
Sent: Tuesday, June 16, 2009 11:32 AM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: 801.10 Question

Dear Mike -

[REDACTED] and I are hoping you have time for a short call today concerning the following questions.

Background. Our clients A and B are negotiating a merger agreement whereby a subsidiary of Co. A will merge with and into Co. B, with Co. B surviving as a wholly-owned subsidiary of Co. A. Co. A is a public company, and Co. B is private. The merger consideration will consist of newly-issued shares of Co. A. These shares will be issued in a fixed-ratio exchange as follows:

- Common shares - to be issued at closing directly to Co. B shareholders, and constituting approximately 30% of the outstanding shares of Co. A following the merger.
- Holdback shares:
 - These shares will constitute approximately 20% of the outstanding shares of Co. A following the merger, and will be issued at the time of the merger to and registered in the name of, and held by, an Escrow Agent pending achievement of certain milestones by specified dates;
 - Each Co. B shareholder will be entitled to direct the Escrow Agent to vote the Holdback shares held in escrow on account of such shareholder;
 - Each Co. B shareholder can transfer all or a portion of the Holdback shares held in escrow on its account, subject to the requirement that the transferee must agree in writing to be bound by the Escrow Agreement.
- Milestone shares:
 - These shares will constitute approximately 20% of the Co. A shares following the merger, and will also be issued at the time of the merger to and registered in the name of, and held by, an Escrow Agent pending achievement of certain milestones by specified dates;
 - No Co. B shareholder will be entitled to vote the Milestone shares held in escrow on account of such shareholder - instead, the Escrow Agent will vote such shares on any item in the same percentage as the other Common shares are voted (e.g., 35% yes, 65% no);
 - No Co. B shareholder can transfer the Milestone shares held in escrow on its account, except as required by law or according to the applicable law of descent and distribution upon the shareholder's death.

In addition, the following provisions are applicable to both the Holdback and Milestone shares:

- Any dividends and distributions will be issued in the name of the Escrow Agent and deposited into the Escrow Account;
- Such dividends and distributions will be released from escrow to the Co. A shareholders if the milestones are achieved by the specified dates; if the milestones are not met within the specified periods, then such dividends and distributions would be returned to Co. A and the shares would be forfeited or cancelled.
- For Canadian and U.S. tax purposes:
 - The Holdback and Milestone shares shall be treated as issued and outstanding to the Co. B shareholders;
 - The Co. B shareholders shall be treated as receiving the shares on the Closing Date;

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1) I don't think the fact that the shares are newly issued means that you can't calculate market price if within 45 days. The fact that these specific shares have not previously been traded is irrelevant. They are the same voting securities as the ones that are trading.

2) I think this does mean that the acquisition price is undetermined, so A will have to do a fair market valuation of B's voting stock.

3) B shareholders would only calculate market price for the shares received at closing. Prior to receiving any of the milestone or holdback shares, they would have to re-calculate market price based on what they already hold and what they will be issued to determine if a filing is required.

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K. WALSH } K. BEAG CONCERN