

801.1 (b)

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, July 29, 2010 11:56 AM
To: Verne, B. Michael
Subject: UPE Question

Mike:

I have a question about identifying the UPE of a corporation. One hundred percent of the corporation's stock is being sold in a transaction that is reportable. Here's the ownership structure:

1. A venture capital firm (VC) has several funds that own voting stock in Corporation. The funds are Fund I, Fund IA, Fund IB, Fund IC, and Fund II.
2. All of these funds are their own UPE.
3. There is also an unrelated fund and several members of Corporation's management that hold voting securities in Corporation.
4. No one has 50% or more of the voting securities of Corporation.
5. A shareholder's agreement allows for the designation of the nine board members as follows:
 - a. one seat is designated by Fund I;
 - b. one seat is designated by Fund II;
 - c. four seats are designated collectively by Fund I, Fund IA, Fund IB, Fund IC, and Fund II; and
 - d. three seats are designated collectively by Fund I, Fund IA, Fund IB, Fund IC, and Fund II, though the board members must be members of Corporation's management.
6. Fund I, Fund IA, Fund IB, and Fund IC all have the same general partner (GPI). It is likely the general partner that actually exercises the various funds' rights to designate board members.
7. Fund II has a general partner separate and apart from the other funds (GPII), though it is likely that the same individuals run both GPI and GPII.

My question is: who is the UPE of Corporation. It seems like the possibilities are either Corporation is its own UPE (i.e., no one controls) or one or both of the general partners. This, of course, turns on how we should treat the collectively designated board members – should I apportion them somehow between GPI and GPII? In that case, it may be that GPI is the UPE, since it is the GP of most of the funds that have a right to designate board members. If you simply split them between GPI and GPII, then both may be the UPE (i.e., each has the right to appoint 50% of the board). Or do you disregard those seven board seats and conclude that no one has the right to appoint 50% or more of the board.

Any guidance you can give would be helpful as I cannot find any interpretations that illuminate on this issue. Feel free to call me at my number below if you would like to discuss further.

CORPORATION IS ITS OWN
 UPE
 B.M.