

7A(c)(10)
801.12

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, June 15, 2011 8:30 AM
To: Verne, B. Michael
Subject: 7A(c)(10); Rule 801.12; retained voting rights

Mike,

Hope that all is well with you. I am working through an IPO transaction where the underwriters have the option to allocate some of the IPO shares to the existing shareholders of the currently private company, and it appears that at least a limited allocation will not trigger a filing due to 7A(c)(10). I set forth below the two basic issues and my analysis. Let me know if you agree, or if you would like to have a call to discuss the analysis.

1. Currently, the company has several classes of shares with different voting rights. As part of the IPO transaction, there will be a charter filing at the closing that will change the voting rights of the various classes of stock (e.g., some classes will have their voting power reduced) so that some of the existing shareholders will have their pro rata share of the voting securities decrease, as calculated by Rule 801.12. This decrease in the pro rata share is in addition to the dilution resulting from the issuance of the IPO shares. Under 7A(c)(10), an existing shareholder can acquire additional shares at the IPO closing as long as the shareholder's pro rata share of the company does not increase. Further, we would use Rule 801.12 to calculate the pre and post closing pro rata shares, taking into account not only the additional shares in the company, but also the changed voting rights of the various classes of stock.
2. One of the current shareholders is a fund that owns its shares directly. The fund has also distributed some shares to its employees, but retained the right to vote those shares. I have not found any interpretations exactly on point, but it seems that the closest are those dealing with proxies. On the one hand, the PNO has attributed the shares underlying an irrevocable proxy to the holder of the proxy for the purposes of determining "control" of the issuer. On the other hand, the PNO has stated the proxy holder does not have beneficial ownership of the shares and therefore does not "hold" them. See ABA Manual, Interpretations 40 and 55. Thus, under this logic, even if the fund employees do not have the power to revoke the fund's rights to vote the employees' shares (and therefore would be similar to irrevocable proxies), for the purposes of performing the pro rata calculations for 7A(c)(10), we should treat those shares as those of the employees and not those of the fund, because only the employees "hold" the shares.

Thanks

AGREE
BM
6/15/11

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