801.1(F)(1)

Verne, B. Michael

From: [redacted]
Sent: Thursday, October 25, 2012 2:25 PM
To: Verne, B. Michael
Subject: HSR filing question regarding "convertible voting securities"

Dear Mike,

I am hoping that you can confirm my analysis of the following situation. Corporation X proposes to issue a class of preferred shares of a Corporation to a buyer. The preferred shares to be issued provide in their terms that the right to appoint a certain number of directors by the class vests upon the later of (1) 60 days from the date of issuance or (2) if an HSR filing is required prior to vesting of the right to vote for directors, the expiration of the HSR waiting period.

As I understand the Rules, the acquisition of the preferred shares does not require an HSR Act filing because they are "convertible voting securities", the acquisition of which is exempt under 802.31, since the shares do not, at the time of acquisition, presently entitle its owner or holder to vote for directors of any entity, which is required under the definition of "voting securities" in 801(f)(1)(i).

Of course, if the buyer wants to "convert" its shares to shares with a present right to vote, as noted above, it has to (1) comply with the HSR Act or (2) have determined that the "conversion" to voting securities on day 60 or later does not require an HSR Act filing. (Although the definition of "conversion" contemplates an "exchange" of securities, here, there would be no physical "exchange" of securities. Consistent with interpretation #65 in the Premerger Notification Practice Manual, 4th Ed. wherein it describes the grant of voting rights after one year of holding a stock as a "later conversion", that fact does not change the outcome.)

Also, the conclusion that no filing is required upon the acquisition of the preferred shares would not change if the holders of the preferred shares have an immediate contractual right upon issuance to nominate directors of the Corporation, but still not vote for directors, since the critical attribute in defining a voting security is the right to vote for directors, not nominate directors and also because such contractual right to nominate would not be a term of the preferred shares itself but would be reflected in a separate agreement.

Thank you as always for you input.

Agree - BMV
K. Walsh concurs
10/26/12

Regards,

[redacted]

[redacted]