801.1(f)

Verne, B. Michael

From: [redacted]
Sent: Wednesday, May 18, 2005 11:31 AM
To: Verne, B. Michael
Cc: [redacted]
Subject: Question

Hi, Mike – I was hoping to get your input on the following. Please feel free to call me at [redacted] to discuss (I just thought it would be easier to lay the facts out in writing)...

Company A, our client, is acquiring notes of Company B. The notes do not presently entitle the holder to vote for directors of the issuer but, upon amendment of Company B's charter, the noteholders will have the same voting rights for director as common stock holders of Company B. Company B has agreed, via a Purchase Agreement, to hold a stockholder's meeting and use its reasonable best efforts to obtain a stockholders vote approving the charter amendment as soon as practicable but in no event earlier than a certain date which is a few months away. If the amendment is approved, there is a 5% limitation on voting (e.g., even if the notes would represent 10% of Company B's common stock on an as-converted basis, the charter will limit voting to 5%). Although it is likely that shareholders will approve the amendment, there is no guarantee. By their terms the notes of Company B will become convertible into common stock of Company B on or after a date certain next year. Additionally, Company A currently has a contractual right to appoint one director to the board of Company B.

My Thoughts:
Company A does not hold voting securities until the charter is amended to give Company A the right to vote for directors of the issuer. At such time, however, an acquisition is not deemed to have occurred and no notification is necessary because there has not been a "conversion" in accordance with 801.1(f)(3) (e.g., an exercise of a right inherent in the ownership or holding of particular voting securities to exchange such securities for securities which presently entitle the owner to vote for director of the issuer). In the event of a conversion into common stock, the conversion may be reportable if the jurisdictional thresholds are met (and if they are Company A will need to file and observe a waiting period before receiving common stock).

Thanks – appreciate your help, as always!

[redacted]

I think that A is probably acquiring the notes with the expectation that they will attain voting rights. Given that and the fact that he has time to anticipate this event and file if necessary, I'm inclined to say that when the notes attain voting rights, a potentially reportable conversion has occurred. A could put the notes in escrow until the vote occurs and if the notes attain voting rights, it could file and observe the waiting period prior to taking them out of escrow.

B Michael Verne
N. Ovuka concurs.
5/18/05