

801.1(c)

Verne, B. Michael

From: [REDACTED]
Sent: Monday, November 14, 2005 4:18 PM
To: Verne, B. Michael
Cc: [REDACTED]
Subject: Treatment of Swap Agreement

Dear Mike -- Following up on my voicemail, here is some additional information regarding the swap transaction, which, in my view, should not trigger any reporting obligation for "A," assuming that all other filing requirements are met.

A holds \$40 million of C's voting securities. A now enters into a swap contract with investment bank B valued at \$30 million, pursuant to which A realizes a gain or a loss derived from the gain or loss of the underlying voting securities of C. C's stock is traded publicly. The daily closing price is the benchmark for the swap. If C's stock price rises, A receives cash from B. If C's stock price falls, B receives cash from A. In any case, B receives a fee for its services from A. There is no obligation for either A or B to purchase any of C's stock as a result of the swap agreement, even though B is likely to buy stock in C as a hedge. A has no title to or the power to vote or dispose of B's shares in C, and A has no power to instruct B to do any of these things.

In my view, the transaction is not reportable, because A has no beneficial ownership of C's voting securities beyond the \$40 million that it owns outright. The swap agreement does not confer beneficial ownership over those voting securities of C that B may hold to A, because A does not have title to, or the power to vote or dispose of C's shares. The swap agreement is a financial derivative, and A, as the "holder" of the derivative, has only one indicium of beneficial ownership (the upside/downside from the investment) and will not receive any other indicia of beneficial ownership. The situation should be identical to that discussed in Interpretation 55 to Rule 801.1(c)(1) (Premerger Notification Practice Manual, 3rd Ed., p.71).

Please let me know if you agree with my analysis.

Best regards, [REDACTED]

[REDACTED]

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[REDACTED]

Agree -
B. Michael
11/14/05