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From: [REDACTED]
Sent: Wednesday, April 12, 2006 9:58 AM
To: Verne, B. Michael
Subject: Re: Question

801.1(b)

I know that the irrevocable proxy to vote 50% or more confers control. I was confused because in the original scenario, the person's proxy was for less than 50%. He only reached 50% by combining his ownership with his proxy and I always understood that you had to EITHER own OR have the contractual right. Can you confirm that it is correct to combine direct ownership votes with proxy votes? This really has nothing to do with my current question, but it threw me for a loop and I want to be clear particularly since it has broader ramifications. For example, if an executive shareholder owns 48% and has proxies for another 12%, is he now the UPE? Does it hinge only on whether the proxies are irrevocable? I believe in the executive scenario, we have been told that the executive shareholder is not the UPE. I don't know, though, if those proxies were irrevocable.

I also want to be clear that the shareholder who owns at least 50%, but cannot vote the shares that it owns because they are subject to an irrevocable proxy held by another still is considered a UPE.

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The combination of irrevocable proxies with direct holding of voting securities that results in the ability to vote 50% or more of the shares does confer control.

I think that the analysis in your original hypothetical is a different issue. In your example, A was acquiring control of D's corp through the conversion of non-voting stock to voting securities. Because D's only holdings consisted of minority interests (44%) in B and C, the acquisition of D voting securities is exempt under 802.4 because the value of the minority interests do not count toward the \$50 MM (as adjusted) limitation for non-exempt assets in that exemption. However, the secondary acquisitions of B and C stock are potentially reportable, and going forward, A will control both B and C by virtue of holding 54% of the voting securities of each. I'm not sure from our initial exchange of e-mails why control of B and C was an issue. D controls both, but that doesn't affect the reportability of D's corp voting securities by A??

Yes the key is that the proxies are irrevocable. It has always been my understanding that most proxies are revocable, so that is probably what was going on in your executive example.

I also can confirm that a person that holds 50% of the voting securities of an issuer still controls even if it has given away the right to vote the shares by irrevocable proxy.

B. Michael
4/12/06