

801.1 (c)

Verne, B. Michael

From: [REDACTED]
Sent: Friday, August 13, 2004 11:00 AM
To: Verne, B. Michael
Subject: HSR Question: Acquisition of When Issued Stock

Mike--

Does the staff have a position on the acquisition date of "when issued stock" for HSR purposes?

In a bankruptcy reorganization, holders of debt (bank debt, notes or debentures) will often be entitled to receive stock of the reorganized issuer. Once the plan is confirmed, the stock begins trading on a "when issued" basis, that is a holder of debt sells the stock that it is entitled to receive when the plan is consummated. There are actually two questions here:

- 1) Is the seller of the "when issued" stock ever deemed to hold it for HSR purposes? *NO*
- 2) When is the buyer of the "when issued" stock deemed to acquire it for HSR purposes? *UPON ISSUE*

The answer to these questions could be of relevance for determining HSR filing requirements in the following scenario (an actual situation with which I may be confronted):

Holder has notes which entitle it to receive \$40MM worth of stock of the reorganized issuer on consummation of the bankruptcy plan. Holder purchases \$20MM worth of issuer stock on a "when issued" basis. Because of the mechanics of settlement procedures, Holder will not receive its "when issued" stock until several weeks after consummation of the plan. It is Holder's intention to--and Holder actually does--sell \$15MM dollars of stock on a "when issued" basis after acquiring the \$20MM on a "when issued" basis, but prior to consummation of the plan. Would Holder be deemed to be holding in excess of \$50MM of issuer stock at the time of consummation of the plan?

I am aware of Interp 25 of the Practice Manual regarding regular way settlement, but I think this is sufficiently different.

Assume for these purposes that the stock is voting stock and that 802.63 is unavailable.

Best regards.

[REDACTED]

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Partner

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*SEE NOTES ABOVE.
B. Michael
8/13/04
N. OVURA CONCURS*