

802.21

Verne, B. Michael

From: [REDACTED]
Sent: Friday, November 21, 2008 1:24 PM
To: Verne, B. Michael
Subject: Question regarding 802.21

Mike,

Hope all is well.

I have a quick question with reference to

<http://www.ftc.gov/bc/hsr/informal/opinions/8302004.htm>

which is also the basis for #204 in the ABA book (4th ed.).

Here's the question:

(1) Within the last year, X filed to acquire additional voting securities of Y at the \$100 million (as adjusted, currently \$126.2 million) threshold. At the time of the filing, X's holdings of Y were valued in excess of the threshold. X had never filed for this issuer before (its previous acquisitions were exempt under the investment-only exemption (802.9)). The waiting period expired.

(2) The market price of Y has come down substantially. X's holdings are now valued at under \$126.2 million. X may acquire additional shares in the near future, but its holdings after doing so may not meet or exceed \$126.2 million.

Based on informal interpretation 8302004 & #204 in the ABA book, it seems that in all events X may acquire up to the \$500 million threshold (as adjusted) for up to five years following the expiration of the waiting period in respect of X's recent filing for Y because X's holdings at the time of the filing exceeded the \$100 million threshold (as adjusted). Or, put another way, whether or not X acquires any additional shares of Y in the year following the expiration of the waiting period in respect of its filing for Y, X may acquire up to the \$500 million threshold (as adjusted) for up to five years following the expiration of that waiting period.

Please let me know if I have this correct.

Thank you.

[REDACTED]

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11/24/2008

The 1983 letter (and #204) address a situation where the acquiring person filed notification and made an acquisition that crossed the notification threshold within a year. John Sipple opined that the person could file notification at the end of the five year period for the same notification threshold and receive a new five year exempt period to go up to the next higher threshold, even if it did not make another acquisition within the year following expiration of the waiting period for the second filing, based on having made an acquisition within the first year after the initial filing.

Your situation is different, because the acquiring person would not make an acquisition within the first year that met or exceeded the notification threshold. Section 802.21 is couched in terms of "an acquisition" and we have taken the position (other than in the limited circumstance described above) that an acquisition must be made during the one year period, even if the person's holdings already exceed the threshold, in order for 802.21 to be available. If the acquiring person already holds voting securities sufficient to exceed the threshold, it would have to acquire at least one more share to invoke 802.21.

A handwritten signature in black ink, appearing to be "B. Sipple".

11/24/08