

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, February 21, 2013 3:08 PM
To: Verne, B. Michael; Walsh, Kathryn
Subject: RE: SOT - Stock Question

Mike,

Thanks. Just to play this out, if the stock price increases in #3, so that the lowest closing price in the 45 days prior to the acquisition is \$150 per share, so that value of the stock held prior to the acquisition is \$150M and already exceeds the \$100 million (as adjusted) threshold, assuming that it is permissible calculate the price based on the 45 days prior to the acquisition. If that is the case, X could lock in the 5-year grace period by acquiring a single share of stock.

Do I have this right?

[REDACTED]

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Thursday, February 21, 2013 2:49 PM
To: [REDACTED] Walsh, Kathryn
Subject: RE: SOT - Stock Question

[REDACTED] - you use the 45 days prior to the 803.5(a) notice for the stock acquired during the year following notification as well as the stock already held. The whole point of calculating it prior to filing is to lock in a value. So the value of the stock held after the acquisition during the first year would be 2.5 MM x \$70 = \$175 MM, exceeding the \$100 million (as adjusted) threshold and allowing additional acquisitions up to the \$500 million (as adjusted) threshold during the 5 year period. The language you reference in #3 of using either the 45 day period prior to the notice or the 45 day period prior to the acquisition is laying out how you value the stock if it is **reportable** (45 days prior to the **notice**) or **non-reportable** (45 days prior to the **acquisition**).

[REDACTED]

From: [REDACTED]
Sent: Thursday, February 21, 2013 2:05 PM
To: Verne, B. Michael; Walsh, Kathryn
Subject: SOT - Stock Question

Mike and Kate:

Thanks, as always, for addressing these questions. Here is a situation I want to run by you.

1. Natural person, X, files an HSR on January 1. X already holds 1,000,000 shares of stock with a current market price of \$70 per share. (Market price being calculated by the lowest price in the 45 days before the 803.5(a) notice is sent).
2. X intends to acquire an additional 1,500,000 in additional shares in the 12 months following expiration of the HSR waiting period. So at the "market price" calculated off the 803.5(a) notice, X will exceed the \$100 million, as adjusted, threshold. X files at that higher threshold.

3. X, in fact, acquires the 1,500,000 shares in the 12 months following the expiration of the HSR waiting period. However, the "market price" of the stock dropped to \$35 per share, as measured by the lowest closing price in the 45 days prior to the acquisition.

It seems to me that, under 801.10(c)(1), to calculate the "market price" for the stock held and acquired in (3), we can use either the lowest closing bid price in the 45 days prior to the acquisition, or the lowest closing bid price in the 45 days prior to the 803.5(a) notice. Do I have this right? This is important to determine whether the \$100 million was exceeded in the 12 months following the termination of the waiting period, so the 5 year grace period is locked in.

It would certainly seem unfair if the person were denied the benefit of the 5 year period by a facts beyond his control. (Both the stock price and the timing of the purchases, which are subject to restriction by the SEC).

Thanks,

[REDACTED]

[REDACTED]

Please consider the environment before printing this email.

This email message and any attachments are being sent by [REDACTED] are confidential, and may be privileged. If you are not the intended recipient, please notify us immediately—by replying to this message or by sending an email to [REDACTED]—and destroy all copies of this message and any attachments. Thank you.

For more information about [REDACTED]

In a transaction where you filed using the market price determined by the 45 days prior to the notice, the market price at any point beyond the end of the waiting period is irrelevant. You have already locked it in with the filing.

BW
2/21/13