

801.10(c)(1)

**Verne, B. Michael**

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**From:** [REDACTED]  
**Sent:** Thursday, February 21, 2013 3:34 PM  
**To:** Verne, B. Michael; Walsh, Kathryn  
**Subject:** RE: SOT - Stock Question

Mike,

Sorry for the confused sentence structure in my last email. Please ignore. (I hit send by accident and before I looked at my note). Let me try again.

Suppose that the stock price increases in #3, so that the lowest closing price in the 45 days prior to the acquisition is \$150 per share. If we measured the market price based on the 45 days prior to the acquisition, the market price of the shares already held would be \$150M. In other words, the current holdings would already exceed the \$100 million (as adjusted) threshold and – it would seem – X could lock in the 5-year grace period at that point by acquiring a single share. I think that this is an allowable reading of 801.13(a)(2) and 801.10(c)(1). Am I correct?

[REDACTED]

**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**).

**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]

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For more information about [REDACTED]

Acquisitions made after the one year period that was filed for should be calculated using the 45 days prior to the acquisition(s) during the five year period. The locked in market price is only for the one year prior to expiration of the notification.

BM  
2/4/12