

From: [Gillis, Diana L.](#)
To: [REDACTED]
Cc: [Walsh, Kathryn E.](#); [Whitehead, Nora](#); [Carson, Timothy](#); [Storm, Evan](#)
Subject: RE: Advice sought regarding 1-year/5-year rules
Date: Monday, December 12, 2016 11:43:00 AM

[REDACTED]

#132 is correct. We will update 1201007 accordingly. H only needs to acquire 1 share to satisfy 803.7 and take advantage of 802.21.

-Diana

From: [REDACTED]
Sent: Monday, December 12, 2016 10:36 AM
To: Walsh, Kathryn E.; Whitehead, Nora
Subject: Advice sought regarding 1-year/5-year rules

Dear Kate and Nora,

I write to seek clarification of an apparent inconsistency between the January 2012 advice provided by Mike Verne in Informal Interpretation 1201007 and the 2015 advice contained in the ABA's *Premerger Notification Practice Manual* (5th ed. 2015) in ABA Interpretation 132. Here is a link to the earlier PNO interpretation. <https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1201007> A .pdf copy of the ABA interpretation is attached.

Please assume the following facts: H is a hedge fund that is its own UPE. In January 2016, H held shares of Target Corporation ("T") valued at \$74 million, which it had acquired as a passive investor (and its accumulated holdings of T shares was valued below the minimum HSR threshold in any event). Anticipating that it would acquire additional shares during the following year, and shedding its passive intention for an active one, H made an HSR filing to acquire T shares valued at \$100 million (as adjusted). The HSR waiting period was terminated on February 1, 2016. At the time of the filing in January 2015, the minimum HSR threshold was \$76.3 million. As things turned out, H has not made any additional acquisitions. Moreover, during the course of the eleven months since H made its HSR filing, the value of T shares that it held had appreciated to a high of \$77 million. The value of those shares currently (the same number held on the day of filing) is approximately \$64 million.

Analysis: HSR Rule § 803.7 provides that notification "with respect to an acquisition" shall expire 1 year following the expiration of the waiting period and that a new filing would be required if "the acquiring person's holdings do not, with such time period, meet or exceed the notification threshold with respect to which the notification was filed, the requirements of the act must thereafter be observed with respect to any notification threshold not met or exceeded." For acquisitions satisfying the 1-year requirement of § 803.7, HSR Rule § 802.21 provides that the acquiring person may acquire up to the next reporting threshold above whichever threshold was crossed during the initial 1-year period.

Advice sought: H's question is whether, in order to take advantage of the 5-year rule, H may rely on the appreciation of its shares to a value exceeding the threshold that was in force in January 2016 or whether H must have made an acquisition that crossed a threshold. This is where the ambiguity of the interpretations comes into play. Interpretation 1201007 states explicitly that for purposes of the 5-year exemption, "meeting or exceeding [a] threshold has to be by means of an acquisition, not an increase in value of previously acquired shares." In seemingly direct contrast, the later ABA interpretation states that so long as the acquiring person "made an acquisition during the 1-year period, and at some point during that period, the value of the stock exceeded the \$50 million (as adjusted) threshold, the [acquiring person] has crossed the threshold and may acquire up to \$100 million (as adjusted) during the 5-year period under Section 802.21."

Assuming I am correct that these two interpretations are inconsistent with each other, can you please clarify the PNO's current position on its interpretation of 803.7 and 802.21? Further assuming that the PNO's current position is the position stated in the ABA interpretation, can you further confirm that H would merely have to acquire a single additional share of T's stock in order to come within the rule. That is, an acquisition of a single share would provide H with a current holding of approximately \$64 million but, sometime during the year following expiration of the waiting period, the value of the shares held by H crossed the \$76.3 million threshold. Accordingly, after acquiring an additional share, H should be able to acquire up to \$100 million (as adjusted) during the next five years.

If on the other hand, the current position of the PNO is consistent with the earlier PNO interpretation, then please confirm that H would have to make an acquisition of shares prior to the anniversary of its filing such that its holdings of T shares would be valued

in excess of \$76.3 million in order for the 5-year exemption to apply.

Thank you in advance for your advice.

[REDACTED]