INTRODUCTION

This Premerger Notification Practice Manual contains interpretations and summaries of cases relating to the premerger notification requirements under Section 7A of the Clayton Act, 15 U.S.C. § 18a, enacted as Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act or the Act) and the Federal Trade Commission’s (FTC’s) implementing rules (Rules). The interpretations are based on guidance from the FTC staff, which is charged with administering the Act. The case summaries are of enforcement actions, most of which are filed by the United States Department of Justice (DOJ) based on a referral by the FTC.

The HSR Act and Rules

Section 7A of the Clayton Act specifies that certain acquisitions must be reported to the DOJ and the FTC in advance of their consummation. Reportability is governed in some cases by the sizes of the parties to the proposed transaction and always by the size of the contemplated transaction. Some acquisitions that satisfy the size tests, however, are not reportable because they qualify for an exemption.

Where premerger notification is filed, the parties must thereafter wait a period of time (normally about thirty calendar days) before completing the proposed acquisition. That waiting period may be extended if either of the federal antitrust enforcement agencies, the DOJ or the FTC, issues a request for additional information or documentary material (a Second Request) to either or both of the parties. The purpose of the statute is to facilitate evaluation of the antitrust implications of the proposed transaction and, where after investigation the anticompetitive consequences appear substantial, to permit either agency to challenge the legality of the transaction in federal district court and seek a preliminary injunction to block its consummation. A detailed explanation of the entire merger review process can be found in ABA SECTION OF ANTITRUST LAW, THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO U.S. AND FOREIGN MERGER REVIEW (4th ed. 2012). A discussion of many of the substantive antitrust issues that arise in merger investigations can be found in ABA SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES (3d ed. 2008).
The Rules implementing the Act initially were promulgated by the FTC in 1978 and are codified at 16 C.F.R. Parts 801 through 803. The FTC’s original Statement of Basis and Purpose, 43 Fed. Reg. 33,450 (July 31, 1978) (SBP), provides a lengthy, detailed explanation of those initial Rules and is frequently discussed in these interpretations. The Rules have been modified numerous times over the years and, each time, an SBP explaining the rule changes is published in the Federal Register. Part 801 of the Rules deals generally with the reporting requirements; Part 802 contains a number of exemptions from those requirements; and Part 803 contains procedural rules for completing and filing the notification itself. The Notification and Report Form (Form), which is used to provide information to the agencies concerning a specific transaction, is an appendix to Part 803 and can also be found on the PNO’s website.

Informal Interpretations of the HSR Act and Rules

By agreement between the two enforcement agencies, the FTC has the primary responsibility for explaining and interpreting the Rules and for responding to inquiries from the public concerning their application. Since the premerger notification program became effective in 1978, the FTC’s Premerger Notification Office (PNO) has received hundreds of thousands of letters, e-mails, and telephone inquiries. While the FTC has, with the concurrence of the DOJ, issued a small number of formal written interpretations, the vast majority of the interpretations are informal and conveyed by the PNO via telephone or e-mail.

Sources of Information for the Manual

This Manual attempts to capture, categorize, and document important FTC interpretations of the HSR Act and Rules.

The HSR practitioner has a number of published resources to use in interpreting the HSR requirements. The Rules themselves, along with the SBP, often provide sufficient guidance. Over the last few years, the PNO has placed a significant amount of additional HSR information on the FTC website. The website contains Introductory Guides, the Form and Instructions, the HSR Act, the Rules, the Formal Interpretations, FTC annual reports, frequently asked questions and other helpful tips, speeches by FTC staff regarding HSR issues, a database of informal interpretation letters, instructions related to post-consummation filings (violations), filing fee information, early termination notices, and PNO
staff contact information. The address for the FTC web page containing the HSR material is http://www.ftc.gov/enforcement/premerger-notification-program. There also are treatises that deal with HSR matters. Despite the existence of this information there are still a large number of transactions that raise HSR filing questions not specifically addressed by these materials. This Manual compiles and categorizes over 200 interpretations providing further guidance on the PNO’s current views on the application of the HSR Act to a variety of situations.

The sources of information used to prepare the interpretations contained in the Manual have changed with each edition. The first edition of the Manual, published in 1985, reflected primarily the information contained in documents obtained from the FTC through a Freedom of Information Act (FOIA) request. Most of those documents were letters received by the PNO purporting to confirm telephonic advice provided by attorneys and other members of the staff of that office. Certain internal PNO memoranda also were supplied. In addition, the original Manual contained interpretations furnished by law firms and individual lawyers, some reflecting advice received from the PNO staff, others embodying advice which attorneys had given to their clients. The original Manual relied on materials covering the period from the inception of the HSR Act program until mid-1983.

The second edition of the Manual, published in 1991, also reflected materials obtained from the FTC in response to FOIA requests, along with other interpretations gathered from law firms and various other sources. Because the PNO’s positions had evolved over the years and materials collected in response to FOIA requests failed to address some important issues entirely, it was decided that the purposes of the Manual would be better served by altering the approach used in the first edition. Instead, the editors identified as many interpretative issues as possible and then summarized what they understood to be the PNO’s positions on them. The interpretations made selective reference to confirming letters and other documents obtained from the PNO and elsewhere, but did not identify all of the relevant documents that were examined. Nor did they systematically review all materials potentially available from the FTC through FOIA requests. The various drafts of the revised Manual were reviewed in detail with the PNO, whose views were sought as to all issues discussed.

In response to concerns regarding the limitations of existing written materials and intervening amendments to the HSR Act and many of the Rules, the group formed to write the third edition of the Manual continued the approach employed in the second edition. Therefore, the
third edition authors started their work by examining collected written materials, the second edition interpretations, and the new rules and revised statute to identify issues that were either missing from the second edition or needed to be revised. As before, the PNO was consulted regarding each proposed interpretation. In the course of these discussions, the PNO identified additional and related issues that were added to the Manual. The third edition not only reflected information contained in various written materials, but also included substantial input from experienced HSR practitioners in the private bar and from the PNO.

The fourth edition was an update of the third reflecting the substantial changes to the rules (most significantly, changes to the way in which non-corporate interests are treated) that were made during the intervening years. This update followed the same process as that followed in the third edition, but included a special effort to cite to relevant informal interpretations that were published on the FTC website.

The fifth edition authors followed the methodology of the third and fourth editions, starting with updating and revising the prior edition’s interpretations and drafting new interpretations to cover new rules and new interpretations by the PNO subsequent to the 2007 edition. Each interpretation was shared with the PNO for review and comment, and in many cases the PNO staff drafted and provided new interpretations as well. Working closely with the PNO staff, the editors of the fifth edition reorganized the new Manual so that interpretations are presented by general subject matter rather than just by the order of the rules. Thus, the fifth edition is organized into sections as follows: (1) HSR control tests/ultimate parent entity, (2) size of transaction threshold test, (3) size of person threshold test, (4) exemptions, (5) HSR form/process, and (6) enforcement actions. Each general section starts with an interpretation or introduction describing the topic generally. Because website addresses have changed over time, and could change again, the fifth edition, unlike earlier editions, cites to the informal interpretations by their numbers and does not provide a website address. Each interpretation can be located by its number on the PNO’s website under the informal interpretation tab.

One of the primary goals of the Manual is to provide the HSR practitioner with information about the PNO’s positions on HSR issues as faithfully as possible. Of course, as with the earlier editions of the Manual, views expressed herein are not necessarily those of the FTC itself, of any FTC Commissioner, or of the FTC’s Bureau of Competition.
Caveats

This Manual attempts to provide the current views of the PNO on the HSR analysis of the facts presented in the various interpretations. It is important, however, that the HSR practitioner using the Manual understand its limitations.

First, even though the PNO has had substantial input into this publication, the interpretations in the Manual do not bind the FTC or the PNO. As noted earlier, the PNO’s position does not bind the FTC and may be superseded at any time, either by a formal change to the HSR Act or Rules, or as a result of the PNO’s own internal decision-making. Changes in the PNO’s views on the interpretations in the Manual do not happen frequently, but they do happen.

The 1985 Manual quoted at length from an FTC letter that cautioned that letters purporting to confirm advice received from the staff may not accurately reflect the advice given, that internal staff memoranda may not state the interpretation ultimately adopted, and that, in any case, staff positions may have changed over time. Those cautions remain equally relevant today.

Similarly, the 1991 Manual quoted a letter dated March 12, 1990, from a former director of the FTC’s Bureau of Competition written to a practitioner in the context of an HSR Act compliance investigation. That letter emphasized that the Manual is not a compilation of policy formulations or interpretations issued or adopted by the FTC or its Bureau of Competition. Instead, the Manual presents broad and accessible summaries of advice given by the PNO. Thus, the letter warned, there are limitations on the usefulness of these summaries. The letter stated:

The advice reflected in the ABA Manual is, most commonly, the product of responses to questions from persons that were in the process of negotiating transactions. Because of their need for a fast turnaround, the responses of the Premerger Notification Office must be limited to the specific facts presented, are not necessarily applicable to transactions with other facts and do not comprehensively reflect the views of the Premerger Notification Office. Moreover, unlike telephone advice from the Premerger Notification Office, advice summarized in the Manual may have been superseded by the time it is read. Conflicts, or apparent conflicts, between these summaries may or may not have been fully rationalized. Also, the summaries may be misleading where the underlying written documents do not identify all relevant facts. Furthermore, in summarizing advice the ABA may have introduced
some distortions, either by characterizing the facts and advice too broadly or by inadvertent errors.

In view of these limitations, persons examining prior advice from the Premerger Notification Office or the ABA Manual must be wary of relying heavily on one or two interpretations; they need to look at the totality of relevant materials in the ABA Manual and, more particularly, at §7A of the Clayton Act, the premerger notification rules, their examples and the statements of basis and purpose for the rules. If, after examining these materials, a person has questions about its obligations under §7A of the Clayton Act, the person would do well to seek specific advice from the Premerger Notification Office.

Thus, the reader must remember that what is published in this Manual today may no longer be the PNO’s position on the issue at a later time. Practitioners usually can keep abreast of changes and proposed changes in the HSR Act and Rules by reviewing the FTC’s website. Attorneys also are encouraged to contact the PNO directly by telephone, letter, or e-mail for specific advice on particular facts. This contact can ensure that a particular interpretation still reflects the position of the PNO. The PNO staff is readily accessible and very responsive to questions from the bar.

Just as the interpretations in the Manual are not formal positions of the FTC, neither are they formal positions of the ABA, the Section of Antitrust Law, or the private bar. As noted above, the primary goal of this Manual is to provide what is believed to be the current position of the PNO on the application of the HSR Act and the Rules to various situations. In a few instances the authors and editors of this edition have provided their comments about an interpretation. But no comment, or lack of comment, should be interpreted as general acceptance or rejection by the authors or editors (much less the Section of Antitrust Law) of the analysis contained in an interpretation. There was no attempt to reach a consensus among the bar as a whole (or even among the authors) on each interpretation.

Finally, it is not inconceivable that a party could take a defensible HSR position that differs from a PNO position. Reasonable, experienced HSR practitioners can (and do) disagree among themselves and with the PNO about the “correct” application of HSR regulations to a given transaction. The PNO’s interpretations of the HSR Act and the Rules are not always without controversy. Of course, taking a position contrary to the PNO’s views runs the risk that the agency will institute an investigation and initiate an enforcement action for failure to file the Form and observe the HSR waiting period.
Format of Summaries and Citation Procedures

The Manual contains summaries, which are arranged into six groups: HSR control tests/ultimate parent entity, size of transaction threshold test, size of person threshold test, exemptions, HSR form/process, and enforcement actions. Each of these chapters begins with introductory remarks about the issue, and each interpretation begins with a citation to the relevant section or subsection of the Act, the Rules, or the Form. A brief statement of the issue and a description of the facts (if applicable) are followed by an analysis and discussion. In some instances an “Editor’s Note” has been included to provide additional perspective. The authors also have cited to relevant PNO informal interpretations.

Correlation of Interpretations in Prior and Present Manuals

This edition of the Manual is intended to supersede the earlier versions. Thus, interpretations contained in the 1985, 1991, 2003, and 2007 Manuals have been incorporated into the present publication to the extent that they remain the present views of the PNO staff. Some of these earlier interpretations have been reprinted without change, although most have been revised. Some prior interpretations have been superseded and therefore do not appear in this edition at all.

HSR Dollar Thresholds

A 2000 amendment to the HSR Act provided that all of the HSR dollar thresholds would be increased based on the change in gross national product beginning in 2005 and annually thereafter. The increases are generally published in the Federal Register by the FTC in January or February of each year and are effective thirty days after publication. Instead of using the thresholds as of the date of publication, the Manual refers to the 2000 thresholds (such as $50 million) and notes that they are subject to adjustment. A chart reflecting all of the dollar thresholds (in millions) as of February 24, 2014, is set forth below.¹

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**Section 7A note: Assessment and Collection of Filing Fees**

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A list of commonly used terms in this Manual is contained on the following page.

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2 Pub. L. 106-553, Sec. 630(b) amended Sec. 18a note.
COMMONLY USED TERMS AND ABBREVIATIONS

Bureau................................. FTC Bureau of Competition
DOJ................................. United States Department of Justice
FDIC................................. Federal Deposit Insurance Corporation
FOIA................................. Freedom of Information Act
FTC................................. Federal Trade Commission
Form................................. Notification and Report Form
GAAP......................... Generally-accepted accounting principles
HSR Act or Act..................... Hart-Scott-Rodino Antitrust Improvements Act of 1976
IPO................................. Initial public offering
LMAs................................. Local marketing agreements
LLC................................. Limited liability company
MLP................................. Master limited partnership
NAICS Codes......................... North American Industry Classification System Codes
PNO................................. The Premerger Notification Office of the FTC
REIT................................. Real Estate Investment Trust
Rules................................. 16 C.F.R. Parts 801 through 803
SBP................................. Statement of Basis and Purpose
Second Request..................... A request for additional information or documentary material issued by the DOJ or FTC pursuant to §7A(e)(1)(A)
Staff................................. Staff of the FTC Premerger Notification Office
UPE................................. Ultimate Parent Entity