HART-SCOTT-RODINO:
BACK TO BASICS

Presented by the
American Bar Association
Section of Antitrust Law,
Young Lawyers Division and
Center for Professional Development
The materials contained herein represent the opinions of the authors and editors and should not be construed to be the action of the American Bar Association Section of Antitrust Law, Young Lawyers Division or Center for Professional Development unless adopted pursuant to the bylaws of the Association.

Nothing contained in this book is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This book and any forms and agreements herein are intended for educational and informational purposes only.

© 2016 American Bar Association. All rights reserved.

This publication accompanies the audio program entitled “Hart-Scott-Rodino: Back to Basics” broadcast on January 14, 2016 (event code: CE1601HSR).
Hart-Scott-Rodino: Back to Basics

AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW
JANUARY 14, 2016

Agenda

- The Basics
  - Size of Person, Size of Transaction, Control

- Exemptions
  - Common Exemptions under the HSR Act

- Preparing the HSR Filing
  - How to Ensure Efficient Review by the Premerger Notification Office
The Basics

SIZE OF PERSON
SIZE OF TRANSACTION
CONTROL

The Big Picture

- HSR Casts a Broad Net
  - Filings triggered by neutral criteria (requirement to file is not driven by antitrust considerations)
  - Reaches far beyond acquisitions of control – may include minority stock investments, asset acquisitions, forming joint ventures, granting exclusive licenses, exercising options or warrants, even deals actively resisted by a target
- Can Reach Individuals as Well as Entities
- Potentially Even Hits those Who “Automatically” Receive Shares (Stock-for-Stock Deals, RSUs)
- Dollar Thresholds are Adjusted Annually
Overview of Jurisdictional Requirements

- Commerce Test
- Size of Transaction
- Size of Person

Size of Transaction

**Two Separate Size of Transaction Tests to Consider**
- First test requires that the HSR value of the transaction exceeds $50 million – as adjusted (currently set at $76.3 million)
- Second test is met when the transaction’s value exceeds $200 million – as adjusted (currently set at $305.1 million) – and if met eliminates the need to also satisfy the Size of Person Test
Size of Transaction (Continued)

- The Key Metric - What is Held “As a Result” of the Transaction
  - Not just the value of the latest acquisition if voting securities are acquired serially, and assets can also require aggregation
  - Aggregation Rules Differ Based on Type of Deal, and Order of Acquisitions
    - Value of later acquired assets added to held voting securities but not the other way around
    - For serial asset acquisitions, the rule is aggregate if other assets have been acquired - or covered by an agreement to acquire – in the prior 180 days
    - Once you control an issuer from whom you are acquiring voting securities or assets you no longer have to consider aggregation – but control has to be by virtue of holding voting securities rather than appointment power
    - Prior filing, and consummation of the transaction within a year of termination / expiration of the waiting period, resolves issue for covered acquired assets, securities up to a point (5 year rule to just shy of the next higher threshold), and non-corporate interests so long as you both obtain and maintain control (since control is all that matters for those transactions)
  - Can’t rely on cost basis, rules try to at least approximate updated values to apply to prior holdings (e.g., “fair market value” for non-publicly traded securities or non-corporate interests – “Market Price” calculation for publicly traded shares unless it can’t be run, in which case it’s back to FMV)

Size of Person

- HSR Size of Person Determination Does not End With the Entities Directly Involved in the Deal (Focus Continues Up the Chain of “Control”)
- Size of Person Test Requires one “Person” with $100 Million (as adjusted; currently $152.5 million) Size, Where the Other has $10 million (as adjusted; currently $15.3 million) Size
  - Met based on either net sales (most recent regularly prepared annual statement of income and expense) or total assets (most recent regularly prepared balance sheet)
  - If a non-manufacturer is the target, can only satisfy $10 million part of the Size of Person test based on total assets
  - Closing is the key date – be wary of “good news” turning bad based on a delayed closing and the emergence of more recent financials
Control and Other Key Concepts

• What is “Control”? That Depends on the Entity Type . . .
  o For corporate entities, control consists of either
    » Holding 50% or more of the outstanding voting securities of the issuer; or
    » Having the present contractual right to appoint half or more of its Board.
  o For non-corporate entities (LLCs or partnerships), control consists of having either
    » The right to 50% or more of that entity’s profits; or
    » The right to 50% or more of that entity's assets upon dissolution.
  o For trusts, control is achieved if any of the following are true:
    » The trust is revocable;
    » The settlor has a revisionary interest; or
    » The settlor has the right to remove and replace the trustees.
  o For non-profits, control is based on the contractual ability to appoint half or more of the board.

Control and Other Key Concepts (Continued)

• How Does One Hold? Direct or Indirect Beneficial Ownership
  o An individual’s holdings are deemed to include those of one’s spouse and minor children.
  o Important to keep this greater reach in terms of individual holdings in mind, since it can stack up (e.g., a spouse who can revoke a trust controls that trust, and what he/she holds as a result is imputed to the other spouse)

• What’s an Ultimate Parent Entity? An Entity That is Not Controlled by Any Other Entity
  o A natural person can be a UPE
  o An “entity” does “not include any foreign state, foreign government, or agency thereof (other than a entity engaged in commerce), nor the United States, any of the states thereof, or any political subdivision or agency of either (other than a corporation or non-corporate entity engaged in commerce).”
Exclusive Licenses

• **Exclusive Licenses Count as “Assets”**
  - Only “exclusive” licenses constitute assets whose acquisition may potentially trigger filing obligations – non-exclusive grants don’t regardless of their value
  - To be exclusive they must be exclusive even as to the grantor
  - Once deemed exclusive such grants do qualify as assets and must be valued – the scope and duration of a license influence its value but not its status as an asset
  - The territorial scope of license does not affect the determination of whether it is an asset, but license grants to ex-U.S. rights fall within an HSR exemption (so they fall away entirely from the valuation calculation)

Exclusive Licenses (Continued)

• **What is Sufficiently Exclusive to be “Exclusive” in the HSR Sense?**
  - Since 2013 new and specific guidance applies in the “pharma” space
    - If the license grant is for intellectual property which would generate revenues in a pharmaceutical code (NAICS code 3254) the test is now whether “all commercially significant rights have been transferred”
    - Again, note that scope and duration only go to the value of an asset even in a narrow scope and duration
    - The retention by the licensor of so-called co-rights (co-promotion, co-development) does not factor into the analysis, and the retention of certain other rights (most especially manufacturing rights if production is restricted to just supplying the licensee)
  - If not in this pharma space (e.g., industrial chemicals, etc.) old interpretations which have been disallowed for pharma may continue in force – key in all industries is what is truly / meaningfully exclusive (even as to the grantor)

• **Traps for the Unwary . . .**
  - Licenses which merely shift back to the licensor upon a scheduled expiration are not deemed to be an acquisition by them, but otherwise even if they are just getting back what they licensed it must be valued
  - If a grant claims to give current exclusive rights, even to an unidentified product, it must be valued – if it’s the grant of an option it is to be analyzed upon option exercise
Hypothetical #1

- Arrow Venture Capital Fund acquires, in 2013, voting securities of Zforce for $50 million in a Series A financing in which it acquired these shares at $2 per share.
- It now is looking to exercise a warrant, enabling it to acquire $5 million more worth of the Series A shares (since the warrant, acquired for a nominal amount, is set to expire and the Series A shares are now deemed by Alpha to be worth at least $4 per share).
- Any potential issues?

Hypothetical #2

- Dr. Andreas, the founder and a minority shareholder of CloudKing, has been outvoted and his company is being sold to StarReach in stock-for-stock merger.
- Dr. Andreas will be receiving 10 million shares, valued at $11 per share, of StarReach Common Stock for the 25% voting share stake he holds in CloudKing.
- Making the best of a bad situation, he is now looking forward to receiving the consideration as soon as possible and is considering a hefty bonus payment for agreeing to continue to serve as an officer at CloudKing for the next year.
- The HSR waiting period for StarReach’s acquisition of CloudKing is set to expire in two weeks – is there anything Dr. Andreas should be thinking about?
Overview of Exemptions

- If an exemption applies, no HSR filing is required, even if the transaction satisfies the jurisdictional tests

- Rationale for exemptions:
  - Unlikely to raise substantive antitrust issues
  - Subject to other regulations that trigger separate antitrust review (although copies of submissions may be required to be filed contemporaneously with FTC and DOJ)

- Exemptions found in HSR Act (15 U.S.C. § 18a(c)(1)-(12)) and HSR Rules (16 C.F.R. Part 802)
  - Some exemptions in statute also are reflected in rules
Ordinary Course Exemptions

- **7A(c)(1): Acquisitions of Goods or Realty Transferred in the Ordinary Course of Business**
  - Exempts acquisitions by a REIT of real property and assets incidental to the real property or of voting securities or assets of another REIT
    - Applies regardless of who the seller is or whether the real property falls within any of the real property exemptions
    - Applies to an entity that intends to qualify as a REIT
  - Exempts financial instruments (portfolios of loans, leases, certain kinds of contracts and servicing rights) but no longer interpreted to exempt portfolios of commodities trading contracts
    - Acquired person cannot be exiting the business (construed broadly)
    - Exception: sale of credit card business is not exempt even if seller continues to engage in other lending

- **802.1: Ordinary Course of Business - Goods**
  - Exempts certain acquisitions of new goods (802.1(b)), current supplies (802.1(c)), or used durable goods (802.1(d)) unless acquired as part of an acquisition of all or substantially all of the assets of an “operating unit”

Real Property Exemptions

- **802.2: Certain Acquisitions of Real Property Assets**
  - Exempts certain acquisitions of:
    - New facilities (never used, constructed or held for resale)
    - Used facilities
    - Unproductive real property (aggregate revenue from contiguous parcels)
    - Office and residential property (except if purchasing business)
    - Hotels and motels (not casinos or ski resorts)
    - Recreational land (golf course, swimming or tennis club, not ski resorts)
    - Agricultural property (not timberland)
    - Retail rental space; warehouses (except if purchasing business)
  - Interesting applications:
    - Turnkey facilities - new facilities, not unproductive real property
    - Assisted living facilities (not nursing homes) - residential property
    - RV park – residential property; hotels/motels
    - Per recent PNO guidance, warehouse exemption not available for oil/gas storage facilities
## Real Property Exemptions

- **802.3: Acquisitions of Carbon-Based Mineral Reserves**
  - Oil/gas reserves valued at $500 million or less
  - Coal reserves valued at $200 million or less
  - These thresholds are not adjusted
  - Includes associated exploration and production assets (e.g., wells, compressors, pumps)
  - Unproductive real property exemption may apply to non-producing reserves

- **802.5: Acquisitions of Investment Rental Property**
  - Exempts acquisitions of property currently rented or held for rent and that will be rented to third parties
  - Per recent PNO guidance, generally does not apply to pipelines, billboards or telecom towers

## Voting Securities / Investment-Only Exemptions

- **7A(c)(9)/802.9: Acquisition of Voting Securities Solely for the Purpose of Investment**
  - Exempts acquisitions made solely for investment purposes, if results in holding 10% or less
  - “Solely for the purpose of investment” defined in 801.1(i)(1):
    - Holder has “no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer”
    - Constrained very narrowly – “considering” any action inconsistent with investment-only intent is problematic
  - Merely voting the stock is not inconsistent with investment-only intent
  - Conduct inconsistent with “solely for the purpose of investment” per the SBP:
    - Nominating a candidate for the board of directors
    - Proposing corporate action requiring shareholder approval
    - Soliciting proxies
    - Serving as an officer or director of the issuer
    - Being a competitor of the issuer (rebuttable presumption)
    - Doing any of the above with regard to an entity controlled by the issuer
Voting Securities / Investment-Only Exemptions

- Additional conduct enumerated in U.S. v. Third Point:
  - Contacting third parties about being a candidate for CEO or the board
  - Communicating with the issuer about candidates for CEO or the board
  - Assembling a list of possible candidates for CEO or the board
  - Internally discussing the possible launch of a proxy battle

- Plan to acquire 50% or more of issuer is inconsistent with investment-only intent
- Filing a 13D instead of a 13G may evidence active and not passive intent
- If intent changes, need to file before acquiring any more shares
- Key factor is acquiring person’s intention; non-passive intent, even without conduct, can make the exemption unavailable

Voting Securities / Investment-Only Exemptions

- 802.64: Acquisitions of Voting Securities by Institutional Investors
  - Exempts acquisitions made solely for investment purposes, if results in holding 15% or less
  - Acquisition must be made directly by an “institutional investor” (defined in 802.64(a)) in ordinary course of business
  - Be mindful of exceptions to exemption – U.S. v. Leucadia
Voting Securities / Additional Exemptions

- **802.10: Stock Dividends, Splits, and Reorganizations**
  - Exempts stock splits or pro rata stock dividends (per 7A(c)(10))
  - Exempts acquisitions of non-corporate interests or voting securities as a result of the conversion of a corporation to a non-corporate entity, or vice versa provided
    - No new assets are contributed to the entity (other than cash) and
    - Either (i) there is no increase in percentage holdings in the new entity, or
    - (ii) the acquiring person controlled the original entity

- **802.21: Acquisitions of Voting Securities Not Meeting/Exceeding Next Notification Threshold**
  - Provides 5 year period from expiration or termination of waiting period for earlier acquisition to acquire additional voting securities
  - Subsequent acquisition cannot increase holdings above notification threshold greater than that met or exceeded in earlier acquisition
  - Must actually have crossed a notification threshold at some point within one year – by acquisition or appreciation in value after acquisition

- **802.31: Acquisition of Convertible Voting Securities**
  - Voting securities that do not presently entitle holder to vote for directors
  - Subsequent conversion into voting securities that have present right to vote for directors may be subject to the HSR Act

- **802.35: Acquisitions by Employee Trusts**
  - Exempts acquisitions of company stock by an employee stock ownership plan provided the employee trust is controlled by the person that employs/employed the beneficiaries

- **802.60: Acquisitions of Voting Securities by Securities Underwriters**
  - Exempt if in the ordinary course of business and in the process of underwriting
Foreign Exemptions

- **802.50: Acquisitions of Foreign Assets**
  - Exempts acquisitions of assets located outside the U.S. with aggregate sales in or into the U.S. of $50 million (as adjusted) or less during most recent fiscal year
  - Special test in 802.50(b) when both acquiring and acquired persons are foreign

- **802.51: Acquisitions of Voting Securities of Foreign Issuers**
  - Exempts acquisitions of foreign issuers with aggregate sales in or into the U.S. of $50 million (as adjusted) or less and assets located in the U.S. with a FMV of $50 million (as adjusted) or less
  - Foreign-to-foreign acquisition that does not confer control is always exempt
  - Must aggregate assets/sales of multiple foreign issuers being acquired from same acquired person
  - Special test in 802.51(c) when both acquiring and acquired persons are foreign

- **802.52: Acquisitions by or from Foreign Governmental Entities**
  - Exempts acquisitions if either the acquiring or acquired person is controlled by a foreign government and the acquisition is of assets, voting securities, or non-corporate interests located in that foreign state

Exemptions for Transactions Subject to Other Regulatory Approvals

- **7A(c)(6)-(8)/802.6: Federal Agency Approval**
  - Exempts acquisitions requiring federal agency approval, including certain bank transactions, if copies of the materials provided to the applicable federal agency are also provided to the FTC and DOJ
  - Where some portion of the transaction does not require advance review may be subject to the HSR reporting requirements as if it were a separate acquisition

- **802.53: Foreign Banking Transactions**
  - Exempts certain foreign banking transactions that require Fed approval if the information provided to the Fed is also provided to the FTC and DOJ at least 30 days prior to closing
### Miscellaneous HSR Exemptions

- **7A(c)(3)/802.30: Intraperson Transactions**
  - Exempts acquisitions in which the acquiring person and at least one of the acquired persons are the same by holding 50% or more of voting securities or having the right to 50% or more of profits or assets on dissolution
  - Does not include control by virtue of the right to appoint directors
  - Special application to joint venture formations (802.30(c))

- **802.63: Acquisitions by Creditors and Insurers**
  - Exempts creditor’s acquisition of collateral or receivables, acquisitions in foreclosure or default, in connection with the establishment of a lease financing, or as part of a bona fide debt work-out
  - Exempts insurer’s acquisition pursuant to an insurance contract
  - Credit/insurance transactions must have been entered into in the ordinary course
  - “Vulture Fund” exception applies where debt/creditor claims are acquired after impending bankruptcy is publicly announced
  - Does not cover creditor’s/insurer’s subsequent disposition

### 802.4: One Exemption to Rule Them All

- **The “Look-Through Exemption”**
  - Exempts acquisitions of entities holding assets the direct acquisition of which is exempt
  - Incorporates other exemptions

- **How to Apply 802.4:**
  - Pretend the acquisition is of all of the target’s assets instead of its voting securities or non-corporate interests
  - Divide the underlying assets of the target into two buckets
    - Exempt – *e.g.*, cash, assets exempt per 802.50, etc.
    - Non-Exempt
  - Exclude any would-be exempt assets, and then ask whether the remaining non-exempt assets have a FMV above or below $50 million (as adjusted)?
    - Above $50 million (as adjusted) → entire transaction is reportable for 100% of the acquisition price/FMV
    - Below $50 million (as adjusted) → entire transaction is exempt
Hypothetical #1

- Fund A, Fund B and Fund C intend to form Newco LLC.
- Fund A will contribute a U.S. factory with a FMV of $300 million in exchange for 60% of Newco LLC interests.
- Fund B will contribute $100 million in cash in exchange for 20% of Newco LLC interests.
- Fund C will contribute 100% of Opco, a wholly-owned foreign issuer with no assets located in the U.S. and sales into the U.S. of $30 million, in exchange for 20% of Newco LLC interests.

Is the transaction reportable?

Hypothetical #2

- Fund A files HSR to cross the $100 million (as adjusted) threshold for voting securities of Pubco. At the time of the filing, the $50 million and $100 million thresholds are $76.3 million and $152.5 million, respectively.
- Within one year of expiration of the waiting period, Fund A makes an acquisition of $78 million of Pubco voting stock. At the time of the acquisition, the $50 million filing threshold had been adjusted upwards to $79 million.
- In year three, Fund A intends to acquire additional voting stock of Pubco such that Fund A will hold $90 million of Pubco voting stock – in excess of the current $50 million threshold, as adjusted, but less than the current $100 million threshold, as adjusted.

Does 802.21 apply?

- In year four, the $100 million threshold has been adjusted to $180 million. Fund A intends to acquire additional voting stock in Pubco to increase its holdings to $200 million.

Does 802.21 apply?
Hypothetical #3

- UPE A intends to acquire 100% of the voting securities of Issuer B, an oil & gas exploration company, for approximately $1 billion. Issuer B has two subsidiaries, Sub B-1 and Sub B-2.
- Sub B-1 holds producing oil & gas reserves and associated exploration and production assets valued at $300 million, as well as adjacent non-producing oil & gas reserves valued at $600 million.
- Sub B-2 holds a non-controlling interest in Issuer C. Issuer C holds producing oil & gas reserves valued at $400 million.

Is the transaction reportable?

Preparing the HSR Filing

How to Ensure Efficient Review by the Premerger Notification Office
Ensure Efficient Review of Your Filing

- Prepare a complete and correct filing
- Be familiar with the available resources for completing the form:
  - PNO Website: https://www.ftc.gov/enforcement/premerger-notification-program
  - Consult the tip sheets: https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources
- If you have questions, or need an informal interpretation, email PNO Staff
  - https://www.ftc.gov/enforcement/premerger-notification-program/contact-information

Other Resources

- Statute and Rules:
- Statement of Basis and Purpose
- Form and Instructions
  - http://www.ftc.gov/enforcement/premerger-notification-program/form-instructions
- Informal Interpretations
  - https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations
- PNO Blog
  - http://www.ftc.gov/news-events/blogs/terms/368
- ABA Resources:
  - Premerger Notification Practice Manual (5th Ed.)
  - Hart-Scott-Rodino Practice Page
    - http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/ata311500_hsr.authcheckdad.pdf
  - The Threshold (The Newsletter of the Mergers & Acquisitions Committee)
    - HSR Filings: Package and Polish, Spring 2008
    - A Discussion with the FTC’s Premerger Notification Office, Fall/Winter 2015
Completing the Form: Items 3(a) and (b)

- Include what is required by the instructions (e.g., brief description of transaction, conditions to closing, timing, consideration)
- Provide the “press release version” of the transaction
  - Keep it short – ideally a paragraph or two
  - Explain what equity or assets are being transferred (e.g., a brief description of the business the acquired assets or entity comprise)
  - Explain the transaction without the “legalese” or “corporate-speak” and avoid numerous references to the agreement
- Anticipate the questions PNO may have
  - Explain whether and why certain exemptions may or may not apply
  - Note when you have discussed the transaction previously with PNO Staff
  - Explain if the filing relates to another filing being made
- With the agreement, include non-compete agreements (whether signed or in draft)

Completing the Form: Item 4(c) Documents

- Criteria for Responsiveness:
  - Prepared by or for, or reviewed by, an officer or director;
  - To evaluate or analyze the notified transaction; and
  - Discuss competition, competitors, markets, market shares, or potential for sales growth or expansion into new product or geographic markets.
- Typical Item 4(c) material:
  - Board presentations, management presentations, internal memoranda
  - Some responses to diligence requests
  - Emails (internal and external), handwritten notes
- PNO Tip Sheet:
  - [http://www.ftc.gov/sites/default/files/attachments/hsr-resources/4ctipsheet.pdf](http://www.ftc.gov/sites/default/files/attachments/hsr-resources/4ctipsheet.pdf)
Completing the Form: Item 4(d)(i) Documents

- **Criteria for Responsiveness:**
  - Confidential Information Memorandum (or materials meant to serve the purpose of a CIM)
  - Any CIM prepared during the year prior to filing relating specifically to the assets or entity being acquired must be produced
    - Documents older than one year may still be responsive to Item 4(c)
  - Lender presentations do not qualify
  - Seller must always produce any qualifying CIM even if it was not provided to the buyer; however, if there were multiple versions of a CIM for different bidders, seller only needs to provide the version that went to the winning bidder

Completing the Form: Item 4(d)(ii) Documents

- **Criteria for Responsiveness:**
  - Prepared by third party advisors (either engaged or seeking engagement);
  - For any officer or director involved in the transaction;
  - To analyze or evaluate competition, competitors, markets, market shares or potential for sales growth or expansion into new product or geographic markets specifically relating to the assets or entity being acquired.

- **Typical Item 4(d)(ii) materials:**
  - Bankers books/pitch books prepared during the planning stages of a transaction
  - Not necessary to conduct a separate search of third party advisor files
Completing the Form: Item 4(d)(iii) Documents

- **Criteria for Responsiveness:**
  - Prepared or reviewed by or for any officer or director involved in the transaction;
  - To analyze or evaluate the notified acquisition; and
  - Discuss synergies and/or efficiencies.

- **Financial models without stated assumptions (or without an explanation as to why certain assumptions were applied) do not need to be produced**

- **Documents that discuss but do not quantify possible synergies are not responsive**

- **PNO Tip Sheet:**
  - [https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-guidance-item-4d](https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-guidance-item-4d)

Completing the Form: Item 4 Documents

- **Item 4 Attachment Information**
  - List title of document, date, names and titles of authors (if prepared by filing party, or name of third party)
  - Include a privilege log for both withheld and redacted documents, which must contain:
    - The claim of privilege
    - The identity of each document
    - Its author
    - Addressee
    - Date
    - Subject matter
    - All recipients of the original and of any copies
    - Its present location, and who has control of it (name of the law firm is sufficient)

Completing the Form: Item 5

- Report Revenues derived in the most recent year from U.S. operations
  - Revenues from manufacturing operations:
    - Report at the 10-digit classification level using the most recent *Numerical List of Manufactured and Mineral Products* manual
    - Includes products manufactured in the U.S., but sold anywhere in the world
    - [http://www.census.gov/manufacturing/numerical_list/](http://www.census.gov/manufacturing/numerical_list/)
  - Revenues from non-manufacturing (i.e., service and wholesaling) operations:
    - Report at the 6-digit classification level using the most recent *North American Industry Classification System* manual
    - [http://www.census.gov/cgi-bin/sssd/naics/naicsrch?chart=2012](http://www.census.gov/cgi-bin/sssd/naics/naicsrch?chart=2012)

- Also report revenues derived from products *manufactured* outside the U.S., but sold in the U.S.
  - Sales to a U.S. subsidiary:
    - Report the sale at the transfer price if it is reasonably obtainable (otherwise report the wholesale/retail price)
  - Sales to a U.S. third party or direct purchaser:
    - Report the sale at the wholesale/retail price
  - Foreign subsidiary to foreign customer sales are generally not reported
    - Unless the foreign to foreign sale results in products being sold in the U.S. through a controlled entity or to a U.S. customer
    - Do not “double count” manufacturing revenues by also using a wholesaling code for products sold by an establishment other than the plant
Completing the Form: Item 5

- See [https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/reporting-revenues-item-5](https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/reporting-revenues-item-5)
- Always express revenues in millions of dollars rounded to the nearest one-tenth of a million dollars
- All manufacturing codes should be provided at the 10-digit level (although Item 7 requires overlapping manufacturing NAICS codes at the 6-digit level)
- List NAICS codes in ascending order

Completing the Form: Item 6

- Item 6(a): List subsidiaries (entities in which the Acquiring Person or Acquired Entity has a 50% or greater interest)
- Item 6(b):
  - Shareholders of Acquiring Person, Acquiring Entity, or Acquired Entity with at least 5% but less than 50% of the equity interests
  - For Limited Partnerships, only list name of General Partner regardless of percentage held
- Item 6(c): Minority holdings (i.e., at least 5%, but less than 50%) of the Acquiring Person, the Acquiring Person’s Associates, or the Acquired Entity in entities that are believed to derive revenues in the same NAICS code(s) as the other filing party
- See [https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-6- hsrr-form](https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-6- hsrr-form)
Associates

- **Associate**
  - Entities under common investment or operational management with the person filing notification
  - “Control” as defined in the HSR Rules is not the only factor to consider
- **Applies to PE funds, Master Limited Partnerships, and corporations with investment arms**
- **Responsive information only required from Acquiring Persons**
- **Examples of Associates:**
  - The general partner of a partnership
  - The managing member of an LLC
  - Individual Persons
    - Generally do not qualify as an associate
    - Unless the individual has contractual authority to manage the entity’s investments separate from the authority provided in the entity’s governing documents
- **PNO Interactive Decision Tree:**
  - [http://www.ftc.gov/sites/default/files/attachments/hsr-resources/decision-tree.pdf](http://www.ftc.gov/sites/default/files/attachments/hsr-resources/decision-tree.pdf)
- **See also “Associates” Under the New HSR Rules, March 22, 2013**
  - [http://www.americanbar.org/content/dam/aba/publications/antitrust_law/20130322_at1322_materials.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/antitrust_law/20130322_at1322_materials.authcheckdam.pdf)

Completing the Form: Item 7

- **Item 7(a):** List the 6-digit manufacturing and non-manufacturing codes in which there is an overlap between the Acquiring Person and Acquired Person or the Acquiring Person’s Associate and the Acquired Person
- **Item 7(b)(i):** List the Person with whom the filing party overlaps
  - You do not need to list the “entity that overlaps” except in the context of a private equity fund
- **Item 7(c):** List the appropriate geographic information for each overlapping NAICS code
  - Consult the instructions
  - Remember that 7(c)(iv) requires the address of each establishment from which the filing party derived revenues in the overlapping NAICS code – *arranged by state, county, and city*
- **Item 7(d):**
  - Acquiring Person must provide geographic information on behalf of Associate(s)
  - Acquired Person does not need to respond
Completing the Form: Item 8

- Only Acquiring Person required to respond
- List prior acquisitions of entities or assets that derived revenues in the overlapping NAICS code(s) reported in Item 7
- Limited to acquisitions in the past 5 years of either
  - 50% or more of the equity (regardless of dollar value) with annual net sales of $10 million or more in the year prior to acquisition, or
  - Assets valued at the then-current HSR thresholds
- Include exempt acquisitions
- Include acquisitions of foreign entities or assets that derived had sales in the U.S. (*i.e.*, sales that would have been reported in Item 5)

Completing the Form: Affidavits

- Executed by an officer/director of the acquiring person or an entity within the acquiring person
  - If the acquiring person is an LP or LLC, executed by a partner or member of the GP or Managing Member
  - Notarized or attested pursuant to 28 U.S.C. § 1746
    - I declare under penalty of perjury [under the laws of the United States of America] that the foregoing is true and correct.
  - State that an agreement in principle has been executed and the *good faith* intention of the Person (*i.e.*, Ultimate Parent Entity, and not just the Acquiring Entity) filing notification to consummate the notified transaction
  - Filings may be made with copies of the signed affidavit and HSR certification, but the originals must be provided within two business days
- **801.30**
  - Only the acquiring person files an affidavit
  - The acquiring person must state it provided the requisite notice under 803.5 to the acquired person
    - The notice letter required under 803.5 may be transmitted by email
  - In the case of a tender offer, must also state that the intention to make the tender offer has been publicly announced
Other Packaging and Polishing Tips

- **“None” vs. “N/A”**
  - “None” means the item relates to the transaction, but the filing person has nothing to report, *e.g.*, no overlaps in Item 7 = “None”
  - “N/A” means the item is not relevant to the transaction, *e.g.*, the parties are not reporting any overlaps in Item 7, therefore Item 8 is “N/A” for the Acquiring Person

- **Attachments**
  - Labeling Attachments
    - Attachment number should refer to the Item to which it responds, *e.g.*, Attachment 3(b), Attachment 4(c)(1), etc. (and not the number generated by the dynamic pdf form)
    - Labels on attachment should include the name of the filing person, the attachment number, and the date of the Form
  - Attachments vs. Items of the Forms
    - When a response to an item is included as an attached response, it is technically part of the form – and not a separate attachment
    - Make sure to include the appropriate number of copies (as you would with the form), and not only one copy (as you would with documentary attachments)

- **Do Not Use Paper Clips**
- **Consult the form tip sheet**
  - [https://www.ftc.gov/system/files/attachments/form-instructions/hsr_form_tip_sheet_1.0.5.pdf](https://www.ftc.gov/system/files/attachments/form-instructions/hsr_form_tip_sheet_1.0.5.pdf)

Questions