United States v. Malone: Lessons for HSR Practitioners on Premerger Notification Office Informal Interpretations

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John C. Malone, CEO and Chairman of Discovery Holding Company, recently agreed to pay a $1.4 million civil penalty to settle Federal Trade Commission charges that he violated the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act),[1] in connection with acquisitions of shares in 2005 and 2008.[2] The FTC alleged that Malone failed to file the required HSR notification in 2005 after buying Discovery voting securities, and then in 2008 purchased additional Discovery shares of stock before the expiration of a waiting period required by the HSR Act.[3]

The *Malone* case is interesting because it is the first HSR Act enforcement action in which a party claimed its failure to file was based on its reliance on advice contained in an informal interpretation by the FTC's Premerger Notification Office (PNO) staff.[4] According to the FTC Complaint, Malone's counsel relied on a 2001 PNO informal interpretation of the HSR Act and rules in concluding that a particular 2005 acquisition did not require filing a report under the HSR Act. However, his counsel was apparently not aware that the particular informal interpretation relied upon had been disavowed by the PNO six months earlier in another informal interpretation also published on the FTC's Web site.[5]

Malone illustrates the key role that the PNO's informal interpretations play in the functioning of the HSR program. Like many other regulatory regimes, the pre-merger reporting system is authorized by federal statute and governed by lengthier and more detailed implementing regulations. However, the regulations, extensive as they are, sometimes do not provide clear guidance as to whether a particular transaction is reportable. The complexity of the HSR rules, their interaction with each other, and the almost infinite manner of transactions to which they might apply, can confuse even seasoned practitioners. The HSR program has come to rely heavily on PNO staff "informal interpretations" to guide parties in applying the HSR Act's requirements to specific situations.

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[1] Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390-94 (codified as amended at 15 U.S.C. § 18a).

[2] *See* Complaint for Civil Penalties for Failure to Comply with the Premerger Reporting and Waiting Requirement of the Hart-Scott-Rodino Act ¶ 1, at 1–2, United States v. Malone, No. 1:09-cv-01147-HHK (D.D.C. filed June 23, 2009) [hereinafter FTC Complaint]; United States v. Malone, No. 1:09-CV-01147-HHK, 2009 WL 2208117, at *1 (D.D.C. June 25, 2009) (Final Judgment).

[3] Press Release, Federal Trade Comm'n, FTC Obtains $1.4 Million Civil Penalty for Premerger Filing Violations (June 23, 2009), *available at* http://www.ftc.gov/opa/2009/06/malone.shtm; *see also* FTC Complaint, *supra* note 2, ¶ 1, at 1–2.

[4] The PNO is the office at the FTC that is responsible for administering the HSR premerger notification program for both the FTC and the Antitrust Division of the United States Department of Justice.

[5] FTC Complaint, *supra* note 2, ¶¶ 28–29, at 8–9.

As such, while counsel are encouraged to use these interpretations in analyzing transactions and advising clients, the *Malone* decision also cautions counsel not to rely solely on the interpretations without additional confirmation.

Malone Standards of Diligence with Respect to Reliance on Informal Interpretations

Malone provides useful insight into how a party's reliance on PNO informal interpretation advice is considered by the agencies in a subsequent enforcement action. According to the FTC's Complaint, counsel for Malone should have exercised additional diligence in confirming that the 2001 PNO interpretation upon which it relied was "still the policy" of the PNO.[6] The complaint alleged that during the time period of the transactions at issue, from August 2005 to April 2008, Malone's counsel neither checked the PNO's database of informal interpretations nor did it contact the PNO to determine whether the 2001 interpretation was still the policy of the PNO.[7] Had Malone's counsel taken either of these steps, the FTC effectively argued, his counsel would have learned that the 2001 informal interpretation had been "disavowed" in February 2005 and, based on that information, presumably would have made a filing in 2005 prior to the acquisition of the shares at issue.[8] *Malone* thus indicates that the FTC requires, at a minimum, that parties ensure that any informal interpretation upon which they intend to rely is current, either through checking the PNO's database for subsequent interpretations or otherwise confirming its continuing validity with PNO staff.

Malone *does not necessarily represent a departure from the way in which the HSR Act has been enforced . . .*

While first in terms of an FTC Complaint's reference to informal interpretations, *Malone* does not necessarily represent a departure from the way in which the HSR Act has been enforced over the past three decades. In particular, the FTC may continue to be willing to forgive a party's first inadvertent violation where it exercised at least some minimum level of good faith and diligence in attempting to comply with the complex requirements of the HSR Act.

Malone's repeated failures to file and observe the HSR waiting period over a period of decades clearly played a part in the FTC's decision to seek sizeable civil penalties.[9] Malone was not sanctioned until the third violation, which the FTC may have viewed as an affront to its authority, given that it occurred during the waiting period for a second corrective filing.[10] Viewed in this context, there may still be room for FTC leniency for a mistaken reliance on prior advice contained in an outdated informal interpretation if this leads a party to fail to file for a reportable transaction. The PNO has stated that it will generally allow parties who inadvertently fail to file and observe the HSR waiting period "one bite of the apple" without imposing civil penalties.[11] In fiscal year 2008, for example, the FTC noted it received forty-eight corrective filings made after the acquisitions being notified had already been consummated, but only took enforcement against one party for failure

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[6] *Id.* ¶ 31, at 9.

[7] *Id.* ¶¶ 30–31, at 9.

[8] *See id.* ¶ 29, at 9.

[9] *See id.* ¶¶ 19–44, at 7–12.

[10] *See id.* ¶ 19, at 7, ¶ 27, at 8, ¶ 34, at 10, ¶¶ 42-44, at 11–12 .

[11] Joseph G. Krauss, Asst. Dir., Premerger Notification Office, Fed. Trade Comm'n, New Developments in the Premerger Notification Program, Prepared Remarks Before the District of Columbia Bar Ass'n, Antitrust, Trade Regulation and Consumer Affairs Section, Antitrust Committee (Oct. 7, 1998), *available at* http://www.ftc.gov/os/1998/10/dcbar.htm.

to file under the Act.[12] While *Malone* lays out a standard of diligence that requires parties to ensure that any informal interpretation upon which they intend to rely is current by contemporaneous consultation with either the PNO's database or staff, failure to meet that standard may not automatically result in a civil penalty if it results in a failure to file. The PNO notes that "[i]n determining whether . . . to pursue civil penalties" for failure to file, it will consider "various factors," including the parties' explanations, and whether the "violation was the result of understandable or simple negligence."[13] The agencies will likely continue to take into account all of the facts and circumstances when determining whether to seek civil penalties from parties who make corrective filings.[14]

The HSR Act Reporting Requirements

The origins of informal interpretations may be traced to the complexities of the HSR Act reporting requirements themselves. The HSR Act was passed by Congress in 1976 to provide the FTC and the U.S. Department of Justice with the opportunity to review the potential competitive effects of certain mergers, acquisitions, and other transactions before they are completed. Prior to the Act, the agencies would often learn about anticompetitive mergers after they had been consummated, frustrating effective enforcement of Section 7 of the Clayton Act.[15]

The framers of the HSR Act sought to use objective criteria for requiring pre-closing merger filings, specifically, the parties' size of assets and revenues as shown on their financial statements, and the dollar amount of the transaction.[16] Though an antitrust law, the HSR Act does not rely on competition-based criteria for determining whether a filing is required. The parties' market shares, similarity of products and services, and geographic areas of domestic operation do not factor into reportability.

For many transactions, applying these size criteria is relatively straightforward. In some instances, though, applying these ostensibly objective thresholds is complicated. Numerous definitional rules and exemptions provided by the HSR Act and its implementing regulations add a layer of complexity. For example, the HSR Act itself lists eleven specific exemptions, and allows the FTC to further "exempt . . . classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws."[17] This delegation has resulted in an additional twenty-eight exemptions created by the FTC, as provided in Part 802 of the Rules, Regulations, Statements and Interpretations under the HSR Act.[18]

Not surprisingly, applying the HSR Act's reportability tests and dozens of exemptions to all types of business entities, forms of organization, varieties of acquisitions and business practices has proven complicated. The PNO has indicated that it annually responds to as many as "44,000

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[12] *See* Bureau of Competition, Fed. Trade Comm'n & Antitrust Div., Dep't of Justice, Hart-Scott-Rodino Annual Report—Fiscal Year 2008 at 6–7 [hereinafter HSR Annual Report 2008], *available at* http://www.ftc.gov/os/2009/07/hsrreport.pdf. Note, however, that some parties have been assessed large civil fines for an initial violation, indicating that leniency for a first violation is by no means automatic.

[13] Hart-Scott-Rodino Premerger Notification Program, Fed. Trade Comm'n, Post-Consummation Filings at 2–3, *available at* http://www.ftc.gov/bc/hsr/pcffaq.pdf.

[14] *See id.*

[15] 15 U.S.C. § 18.

[16] *See* 15 U.S.C. § 18a(a)(2). Other jurisdictions, such as Brazil, Spain, and Turkey, have chosen to rely on less objective market share thresholds as a trigger for filing obligations.

[17] 15 U.S.C. § 18a(c)(1)(ii), (d)(2)(B).

[18] *See* 16 C.F.R. §§ 802.1–802.80 (2009).

telephone calls seeking information concerning the reportability of transactions under the HSR Act and the details involved in completing and filing" premerger forms.[19]

The Authority to Issue Formal and Informal Interpretations

Anticipating the future complexity of the program, the FTC included in the initial HSR regulations a process for the FTC staff to respond to questions from the public about the coverage of the HSR Act. The process chosen was to authorize the FTC staff in the PNO to provide direct guidance to parties who request either "formal" or "informal"[20] interpretations of requirements of the HSR Act and the rules.[21] The HSR Act is not unique in this regard. For example, similar provisions are made for reporting programs overseen by other agencies, such as the Federal Elections Commission[22] and the Department of Justice Criminal Division.[23]

Two significant limits with respect to HSR Act interpretations are not explicitly included in the rule that authorizes them. Instead, they were stated in the background section of the Federal Register notice for this rule. First, a party has no right to appeal a staff interpretation. If a party is unhappy with or disagrees with a staff interpretation, whether formal or informal, there is no process to "appeal" that interpretation to the Commission.[24] In practice, however, it is not uncommon for a party who disagrees with a staff interpretation to bring the interpretation to the attention of the head of the PNO to seek reconsideration.

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[19] Bureau of Competition, Fed. Trade Comm'n & Antitrust Div., U.S. Dep't of Justice, Annual Report to Congress—Fiscal Year 1997, *available at* http://www.ftc.gov/bc/hsr/97annrpt/ann972.htm; *see also* Fed. Trade Comm'n, Annual Report to Congress for Fiscal Year 1996, at 1, *available at* http://www.ftc.gov/bc/hsr/annrpts/19annrpt1996.PDF (40,000 telephone calls); Bureau of Competition, Fed. Trade Comm'n & Antitrust Div., U.S. Dep't of Justice, Annual Report to Congress—Fiscal Year 1998, http://www.ftc.gov/bc/hsr/98annrpt/hsr98annual.htm (41,000 telephone calls). The HSR reports from Fiscal Years 1999 through 2008 (the most recent available) do not quantify telephone calls. Each of these reports does state that the PNO responded to "thousands of telephone calls seeking information concerning the reportability of transactions under the HSR Act." *See, e.g.*, HSR Annual Report 2008, *supra* note 12, at 2.

[20] When the regulation was first proposed, it provided only for a more limited "formal interpretation" process upon application to the FTC. The original proposed version of 16 C.F.R. § 803.30 provided that, in response to questions, the FTC, "with the concurrence of the Assistant Attorney General, may inform the applicant of its views as to the questions raised and publish a summary thereof in the FEDERAL REGISTER." Premerger Notification; Reporting and Waiting Period Requirements, 42 Fed. Reg. 39,040, 39,058 (proposed Aug. 1, 1977).

[21] 16 C.F.R. § 803.30 "recognizes that persons who are or may be subject to the act may frequently require information and advice concerning their obligations, and that the staff should respond to their needs for the program to function. Requests for advice may be made orally by phone or in person, or they may be made in writing. The same variety of responses is available to the staff, so that straightforward problems can be handled expeditiously, while more difficult questions are given more deliberate consideration." Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33,450, 33,516 (July 31, 1978).

[22] The implementing regulations for Title III of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, tit. III, 86 Stat. 3, 11–19 (codified as amended at 2 U.S.C. §§ 431–441(k), provide for a "formal" advisory opinion process by which interested parties may request a written opinion of the FEC as to "a question relating to the application of the Federal campaign finance law to a specific, factual situation." Federal Election Comm'n, Advisory Opinions, at 1 (Sept. 2004), *available at* http://www.fec.gov/pages/brochures/ao_brochure.pdf; *see also* 11 C.F.R. §§ 112.1–112.6 (2009). In addition, FEC staff provide "informal" advice on "questions about federal campaign finance law" by telephone. FEDERAL ELECTION COMM'N CAMPAIGN GUIDE, CORPORATIONS AND LABOR ORGANIZATIONS ii (Jan. 2007), *available at* http://www.fec.gov/pdf/colagui.pdf.

[23] The regulations implementing the Foreign Agents Registration Act of 1938, as amended (FARA), 22 U.S.C. §§ 611–621, provide that a party "may request . . . a statement of the present enforcement intentions of the [DOJ] with respect to any presently contemplated activity . . . and specifically with respect to whether the same requires registration and disclosure pursuant to [FARA], or is excluded from coverage or exempted from registration and disclosure." 28 C.F.R. § 5.2(a) (2009). For "informal" advice, "FARA Unit personnel are available to answer reasonable inquiries about what FARA requires, how to register, how to fill out the forms, and what fees are required" via telephone. U.S. Dep't of Justice, FARA Contact Information, http://www.justice.gov/criminal/fara/links/contact.html.

[24] *See* Premerger Notification, 43 Fed. Reg. at 33,516.

Second, the interpretations are not binding on either the FTC or DOJ. The Federal Register notice makes clear that "[n]either the Commission nor the Assistant Attorney General [DOJ] is bound by either the formal or the informal interpretations," but before taking a contrary position to a previously issued interpretation, they are expected to "first withdraw that opinion and give notice of that rescission to the party that originally requested the interpretation."[25]

Formal Interpretations. To date, the FTC has issued eighteen formal interpretations with the concurrence of the DOJ. Initially, as anticipated by the regulations, formal FTC opinions were issued with respect to requests from legal counsel as to the applicability of the rules to specific transactions. The first formal interpretation was issued ten days after it was requested. However, no formal interpretation as to the reportability of a specific transaction has been issued by the FTC since 1981.[26]

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Starting with Formal Interpretation No. 3 in 1978, and including all formal interpretations issued after 1981, formal interpretations have been issued by the FTC sua sponte, or in response to frequent questions received on the same issue that the FTC staff believe would benefit from formal clarification. Used in this manner, formal interpretations are an efficient way for the PNO to communicate to the private bar important information in a form that can address common situations more broadly than via a response to an individual party's question.

Formal interpretations have also been used as a way to issue HSR rules outside of the Code of Federal Regulations process. For example, several versions of a formal interpretation were issued to provide rules with respect to the treatment of non-corporate entities prior to formal rulemaking using the CFR process in 2005.[27] Of course, CFR rules are binding on the FTC and DOJ, so from a practitioner's standpoint CFR rules provide more certainty than non-binding formal interpretations.

The formal interpretation process quickly proved to be too cumbersome for parties needing timely answers to HSR filing questions.

Informal Interpretations. Given the limitations of the formal interpretation process, informal staff interpretations have developed as the principal method used by the PNO to advise the public both with regard to questions relating to HSR Act reportability and completing the notification form. Because informal interpretations are by their nature oral rather than written, much of the guidance for the reportability of complex or specialized transactions has developed from telephone calls between frequent HSR practitioners and PNO staff. Thus developed a large body of unwritten "lore" that formed the basis of much of the information needed to comply with the HSR Act.

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[25] *Id.* at 33,517.

[26] Formal Interpretation Nos. 1, 2, 4, 8, and 12 were requested by private parties.

[27] *See* Premerger Notification: Reporting and Waiting Period Requirements, 64 Fed. Reg. 5,808 (Feb. 5, 1999) (adopting Formal Interpretation No. 15), *amended by* Premerger Notification: Reporting and Waiting Period Requirements, 64 Fed. Reg. 34,804 (June 29, 1999), *and amended by* Premerger Notification: Reporting and Waiting Period Requirements, 66 Fed. Reg. 16,241 (Mar. 23, 2001), *and repealed by* Premerger Notification; Reporting and Waiting Period Requirements, 70 Fed. Reg. 11,256 (Mar. 8, 2005) (Issuance of Formal Interpretation No. 18 repealing Formal Interpretation No. 15). Formal Interpretation No. 18 repealed Formal Interpretation No. 15, which itself had been twice amended. *See* Premerger Notification; Reporting and Waiting Period Requirements, 70 Fed. Reg. 11,256 (Mar. 8, 2005) (Issuance of Formal Interpretation No. 18 repealing Formal Interpretation No. 15).

To make the process more useful, a practice has developed between private counsel and PNO staff to allow for the creation of a written record of these "oral" interpretations.[28] Typically, counsel will call a PNO staff member and describe a hypothetical set of parties and a hypothetical transaction. Because of confidentiality concerns, counsel often will withhold the identity of their client and refer to parties using descriptive names such as "Company A" or "Target T."[29] After presenting the hypothetical transaction, counsel ask staff how to apply a particular rule or perhaps potentially conflicting rules. The PNO staff member then provides a view as to how the rule would apply in the given situation, based on staff's knowledge and experience with similar questions. If counsel presents a novel question that has not previously arisen or which may have implications for other situations, staff may request time to consult with other PNO staff members or management in order to provide a view.

Once staff has orally conveyed the informal interpretation, counsel will then draft a letter to the PNO staff member describing the fact pattern, presenting the question at issue, and summarizing the oral interpretation received from the staff. Often, the letter will conclude with language requesting that staff contact the author as soon as possible if staff does not agree that counsel has accurately and adequately summarized the interpretation received. The general practice is for counsel to keep these letters in their files in case of later questions from the agencies, particularly if the informal interpretation led to the conclusion that a HSR notice was not required for a particular transaction.

Traditionally, the PNO has not responded to these confirmation letters in writing, presumably to ensure that the advice remained "informal" (oral) rather than "formal" (written).[30] In a nod to evolving technological capability, staff at the PNO have embraced email as a method for providing interpretations and answering questions. This has helped simplify the more cumbersome process of telephone calls followed by confirmatory letters. Staff will often respond directly to a question posed via email, and these email responses are often more helpful in that they allow staff to choose the wording of their response to requests for interpretation advice, as opposed to leaving the phrasing solely to the questioner.

It is somewhat unclear whether staff email responses to requests for interpretations and notations included with disclosed private party confirmation letters constitute "formal" interpretations because they are made in a written form, or whether they are still considered "informal" because they have evolved out of the oral telephone call context. FTC staff (as opposed to the Commission itself) are authorized by 16 C.F.R. § 803.30 to issue formal (i.e., written) interpretations. Staff formal interpretations are not required to be published in the Federal Register, but are required to

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[28] The PNO's Web page notes that:

> If you call and receive advice from the PNO, you may confirm the staff member's advice by sending a letter to the PNO. You should address the letter to the staff member and include the date you called, reiterate the facts presented, and state the conclusion reached. Note that letters received are subject to the Freedom of Information Act. Letters received can be reviewed in redacted form (confidential information such as names, etc. are removed) on the PNO's informal interpretation database located at http://www.ftc.gov/bc/hsr/informal/index.shtm.

Hart-Scott-Rodino Premerger Notification Program, Fed. Trade Comm'n, Informal Interpretations of the HSR Act and Rules, http://www.ftc.gov/bc/hsr/hsrbook.shtm.

[29] Because these letters are subject to public disclosure under the Freedom of Information Act (FOIA), it is advised that counsel avoid identifying parties by name and refrain from submitting underlying deal documents to the PNO to prevent disclosure. The PNO informal interpretation database contains examples of partially redacted deal documents. *See, e.g.*, Lease and Transfer Agreement, http://www.ftc.gov/bc/hsr/informal/opinions/9903021.pdf, and Stock Purchase Agreement, http://www.ftc.gov/bc/hsr/informal/opinions/9112014.pdf.

[30] The Federal Register notice for 16 C.F.R. § 803.30 parenthetically defines "formal" as "written" and "informal" as "oral." Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33,450, 33,516 (July 31, 1978).

"be rendered with the concurrence of the Assistant Attorney General or his or her designee."[31] Because it would seem unduly cumbersome for the PNO to obtain specific concurrence from the DOJ for each of the hundreds of email interpretations it provides annually, for efficiency sake PNO staff email responses are best viewed as "informal" interpretations. Accordingly, the FTC refers to the PNO's answers to emails as "informal advice."[32]

Publication of Informal Interpretation Confirmation Letters. Because the PNO's informal interpretations are primarily oral and generally not reduced to writing by PNO staff but (if at all) only by the parties who receive them, initially informal interpretations received by one party were not accessible to other parties evaluating similar HSR issues. This raised concern in some quarters because these interpretations "were an important body of learning not generally available to the legal and business communities."[33] Consequently, secondary sources, such as treatises and practice guides[34] prepared by the private bar, soon appeared in order to collect and summarize a growing body of informal interpretations as understood by practitioners. These early guides relied heavily upon hundreds of confirmatory letters shared among the private bar. The FTC initially resisted making public the letters it received confirming informal interpretations. These letters were eventually released pursuant to a FOIA request made by the editors of the *Premerger Notification Practice Manual*.[35]

The release of these informal interpretation confirmation letters revealed several areas of concern, primarily because they were authored by the parties seeking the interpretations, and not by the PNO staff. Thus, a later party that seeks to use the informal advice that these letters purport to summarize must rely on the original author's clarity, word choice, and understanding of the staff member's response. In addition, these letters may omit or change certain facts that were important in formulating the staff's interpretation. The FTC noted these types of concerns in a letter that accompanied the FTC's response to the original FOIA request.[36] The FTC further noted that some of the letters were wrong in that "authors of some of the letters misconstrued the legal advice given by the [PNO] staff."[37]

The PNO Informal Interpretation Database. While letters confirming the PNO staff informal interpretations have long been cited in secondary sources, the letters themselves remained largely inaccessible in their entirety until the 1990s, when the Internet made their publication practical. In 1998, a private law firm made approximately 1,100 confirmation letters available to the public

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[31] 16 C.F.R. § 803.30(c), (e) (2009).

[32] Hart-Scott-Rodino Premerger Notification Program, Fed. Trade Comm'n, HSR Informal Interpretations, http://www.ftc.gov/bc/hsr/informal/index.shtm [hereinafter HSR Informal Interpretations].

[33] ABA Section of Antitrust Law, Premerger Notification Practice Manual v (1st ed. 1985) [hereinafter Practice Manual (1st ed.)].

[34] The treatise *Acquisitions Under the Hart-Scott-Rodino Antitrust Improvement Act* was first published in 1979, and has grown to three volumes in its third edition. *See generally* Steven M. Axinn et al., Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act (3d ed. 2008). In 1985, the American Bar Association published the first edition of the *Premerger Notification Practice Manual*. This book is now in its fourth edition. *See generally* ABA Section Of Antitrust Law, Premerger Notification Practice Manual (4th ed. 2007) [hereinafter Practice Manual (4th ed.)].

[35] *See* Practice Manual (1st ed.), *supra* note 33, at x–xii; Practice Manual (4th ed.), *supra* note 34, at xv. The letters first released in 1983 under FOIA were redacted as to the identity of the parties requesting the advice, as well as any staff notations. Many of these notations have since been disclosed, and indicate information such as staff's agreement or disagreement with the letter, information conveyed orally by staff to the author, and the results of staff consultations with other PNO staff or management. It is the present practice of the PNO to make redacted copies of these letters public without the need for a FOIA request.

[36] *See* Practice Manual (1st ed.), *supra* note 33, at x–xi.

[37] *Id.* at x.

on its Web site via a searchable database.[38] In 2003, the PNO created and indexed an Internet searchable database of informal interpretation letters on its own Web site. This database, which is still operational today, contains approximately 3,300 entries[39] and is added to monthly. It is this PNO database to which the FTC referred in its *Malone* complaint.[40]

The PNO notes on the search page to the informal interpretation database set out a disclaimer noting four important limits to the material it contains.[41] To paraphrase, these are:

(1) The database does not contain all PNO letters and emails related to informal staff interpretations.[42]

(2) The letters and emails contained in the database may not be accurate and complete.

(3) The letters and emails may not accurately state the advice given to the writer by the PNO staff.

(4) The letters and emails may not represent the current views of the PNO staff.

Despite these limits, the PNO database is by all accounts a very useful resource for HSR practitioners. Nonetheless, its limits must be understood. Significantly, the database is not actively monitored for consistency, changes in the statute or regulations, or evolving PNO views.[43] Thus one can find letters that relate to regulations that have since been repealed or modified and letters referring to positions taken by the PNO that have subsequently been disavowed.[44] Indeed, the superseded letter upon which Malone's counsel relied continues to be included in the database. There is no system in place for flagging such outdated letters similar to the Shepard's system of cautions for overruled or questionable court decisions.[45]

Practical Consequences of the *Malone* Enforcement Action

The agencies have a thirty-plus year record of not seeking civil penalties from a party who relied on a staff interpretation that the party requested itself in order to assess the reportability of a specific transaction it planned to undertake. *Malone*, which alleges that the respondent inappropriately claimed to rely on a disavowed informal interpretation given to a different party, in the con-

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[38] *See* Press Release, Morgan, Lewis & Bockius LLP, First Hart-Scott-Rodino Searchable Database: HSRScan™—Eases Compliance with Federal Pre-merger Requirements (Sept. 10, 1998), *available at* http://www.morganlewis.com/pubs/87146AF0-AC11-4755-B584A89FEF048A79_Publication.pdf.

[39] *See generally* HSR Informal Interpretations, *supra* note 32. The total number of entries is based on the number of entries listed on the PNO index of informal interpretations as of February 2010, http://www.ftc.gov/bc/hsr/informal/opinions/. Individual confirmation letters and emails from private parties are available on the FTC's Web site in the format http://www.ftc.gov/opinions/YRMONUM.FMT, where YR = the last two digits of the year (e.g., "97" for 1997), MO = the two digit month (e.g., "01" for January), NUM = the sequential number of the letter (e.g., 001, 002, 003, etc.), and FMT = the format (either "htm" for the hypertext version (this is the version that is text-searchable) or "pdf" for the Adobe Acrobat version of the redacted original document image). Thus, the URL "http://www.ftc.gov/opinions/9801002.htm" indicates that this link is to the second letter from January 1998 posted in hypertext format.

[40] FTC Complaint, *supra* note 2, ¶ 30, at 9.

[41] *See* HSR Informal Interpretations, *supra* note 32 (Disclaimer).

[42] Presumably some editorial decisions are therefore made as to what is included.

[43] Because there appears to be some sort of editorial decision made as to which letters are included in the database, the more recent letters may be more reliable in the sense that mistaken, ambiguous, or confusing letters may not be posted to the database.

[44] *See, e.g.*, Premerger Notification Office, Federal Trade Comm'n, Informal Staff Opinion 0102008 (Mar. 8, 2001), http://www.ftc.gov/opinions/0102008.htm (interpreting superseded version of 16 C.F.R. § 802.21).

[45] Although at least one letter has been later annotated to indicate that it was "[n]o longer the position of the PNO," Premerger Notification Office, Federal Trade Comm'n, Informal Staff Opinion 9911006 (comment Nov. 6, 2006), http://www.ftc.gov/opinions/9911006.htm (interpreting Section 7A(c)(8) of the Clayton Act). Additional examples of this kind of notation have not been identified.

text of a different transaction,[46] does not call into question a party's ability to rely on an informal interpretation that it receives directly from the PNO staff regarding the party's own transaction, assuming it makes accurate disclosure to the PNO.

It is perhaps ironic that an agency that initially resisted making its informal interpretations public until forced to do so under the FOIA now considers them to be required reading. The *Malone* case indicates that the PNO will hold parties to a minimum level of diligence in making sure that whatever decision is made with respect to filing under the HSR Act, it is based on the current rules, of which the views of the PNO, as expressed in informal interpretations are an integral component. The *Malone* case may lead parties facing reportability decisions that rely on prior informal interpretations of the PNO to contact the PNO more frequently to verify that the particular views expressed in those informal interpretations remain current.

Malone . . . *does not call into question a party's ability to rely on an informal interpretation that it receives directly from the PNO staff regarding the party's own transaction . . . .*

The practical consequences are that parties reviewing informal interpretations on the PNO database should:

- View with caution any advice that is dated. As a general rule, the more recent the interpretation, the more likely it represents the PNO's current view.
- Not always assume, however, that the most recent interpretation is correct. If you find material inconsistencies in two or more interpretations, seek PNO clarification.
- Be cautious about relying solely or too heavily on one or two interpretations. It is best to find additional support for the position in the *ABA Practice Manual*, FTC speeches, articles by PNO staff, and HSR treatises.
- Place less reliance on an interpretation the further removed it seems from the language of the regulations. An application of the rules to unusual fact patterns may also raise questions as to the interpretation's broader applicability.
- Keep in mind that some PNO staff may be better than others at communicating advice, so some letters may be entitled to greater weight based on the staffer consulted. A notation that senior staff or the head of the PNO concurred in a view suggests greater reliability.
- Look carefully at the staff comments on each of the hypertext and pdf versions because an interpretation with lengthy staff comments may be more helpful than one that just says "agreed." Some staff comments provide detailed analysis and thus are very informative.[47]
- Be sure to check the database frequently. Just because you confirmed that the PNO took a certain position on an issue for a deal you worked on last year, do not necessarily assume it is still the current PNO view. Experienced HSR counsel who have become familiar with certain PNO positions may be more at risk of missing such a change than inexperienced counsel looking at an issue for the first time.

Conclusion

For the majority of transactions, the HSR Act and its regulations provide clear guidance as to whether a transaction is or is not reportable. However, for those transactions that require a more complex HSR reportability analysis, recourse to informal interpretations may be necessary in order to apply the HSR Act to a particular transaction. Parties may either rely on informal interpretations given to other parties and recorded in the PNO database or seek an interpretation themselves from the PNO directly.

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[46] *See* FTC Complaint, *supra* note 2, ¶¶ 28–33, at 8–10.

[47] Indeed, one informal interpretation includes thirteen pages of staff notes: http://www.ftc.gov/bc/hsr/informal/opinions/8304010.pdf.

It is important for HSR practitioners not to draw an overbroad conclusion from *Malone* regarding the risk of relying on the advice contained in PNO staff informal interpretations. The specific circumstances in *Malone*, including the existence of past multiple HSR violations and a high-profile party with experienced counsel, likely compounded the issue of whether counsel properly relied on the informal interpretation when deciding not to file an HSR notification. As such, an apparent mistake concerning one complicated aspect of the HSR rules was only one aspect of the enforcement action. However, the *Malone* case does confirm that when relying on informal interpretations, parties should take reasonable measures to ensure that the advice they contain is current. ●