



Hart-Scott-Rodino

Premerger Notification Program

INTRODUCTORY GUIDE I

WHAT IS THE PREMERGER NOTIFICATION PROGRAM?

AN OVERVIEW

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FTC PREMERGER **N**OTIFICATION **O**FFICE

<https://www.ftc.gov/enforcement/premerger-notification-program>

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AN OVERVIEW

Guide I is the first in a series of guides prepared by the Federal Trade Commission's Premerger Notification Office ("PNO"). It is intended to provide a general overview of the Premerger Notification Program (the "Program") and to help the reader in determining which types of business transactions are reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (§ 7A of the Clayton Act or "the Act"). *Guide I* describes the basic reportability requirements and how the program works. It also provides a list of alternative information sources to assist you in deciding whether or not you need to file. This Guide will introduce you to certain terminology and concepts regarding the Act and the Premerger Notification Rules (the "Rules"), 16 C.F.R. Parts 801, 802 and 803. Additional information can be obtained on the Federal Trade Commission's website at <https://www.ftc.gov/enforcement/premerger-notification-program>.

Guide II explains in greater detail certain terms used in the Act and the Rules, and shows how to determine if a transaction is reportable by analyzing a hypothetical transaction.

The Guides are not intended to address specific proposed transactions. If you are analyzing a transaction, we suggest that you consult the Act, the Rules, and the additional material referenced in Section XII of this Guide. If you have questions about the application of the Rules to a specific scenario, email the PNO at HSRHelp@ftc.gov.

I. INTRODUCTION

The Act requires that parties to certain mergers or acquisitions notify the Federal Trade Commission (“FTC” or the “Commission”) and the Department of Justice (“DOJ”) (together, the “enforcement agencies”) and observe a waiting period before closing the proposed transaction. The waiting period is usually 30 days, except in the case of a cash tender offer or a section 363(b) bankruptcy sale, when the waiting period is only 15 days. During this time, the enforcement agencies conduct a preliminary antitrust review of the proposed transaction.

The Program, which was created to implement the Act and to establish a uniform notification process, became effective September 5, 1978, after final promulgation of the Rules.¹ The review of transactions under the Program enables the FTC and the DOJ to determine which acquisitions are likely to be anticompetitive and to challenge them prior to consummation, when remedial action is most effective.

Whether a particular acquisition is subject to these requirements depends upon the value of the acquisition and the size of the parties, as measured by their sales and assets. Small acquisitions, acquisitions involving small parties, acquisitions involving passive investors, and other classes of acquisitions are excluded from the Act’s coverage.

If either agency determines during the waiting period that further inquiry is necessary, it is authorized by Section 7A(e) of the Clayton Act to request additional information or documentary materials from the parties to a reported transaction (a “second request”). A second request extends the waiting period for a specified period, usually 30 days (ten days in the case of a cash tender offer or a section 363(b) bankruptcy sale)², after all parties have complied with the second request (or, in the case of a tender offer or a bankruptcy sale, after the acquiring person complies). This additional time provides the reviewing agency with the opportunity to analyze the submitted information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may violate the antitrust laws, it may seek an injunction in federal district court to prohibit consummation of the transaction.

The Rules, which govern compliance with the Program, are technical and complex. We have prepared Guide I to describe the structure of the Program and to introduce some of the Program’s specially defined terms and concepts.

II. DETERMINING REPORTABILITY

The Act requires persons contemplating proposed business transactions that satisfy certain size criteria to report their intentions to the enforcement agencies before consummating the transaction. If the proposed transaction is reportable, then both the acquiring person and the person whose business or assets are being acquired must submit information about their businesses and about what is being acquired to the enforcement agencies, and then wait a specific period of time before consummating the proposed transaction. During the waiting period, the enforcement agencies review the antitrust implications of the proposed transaction. Whether a particular transaction is reportable is determined by application of the Act, the Rules, and formal

¹ The Premerger Notification Rules are found at 16 C.F.R. Parts 801, 802 and 803. The Rules also are identified by number, and each Rule beginning with Rule 801.1 corresponds directly with the section number in the C.F.R. (so that Rule 801.40 would be found in 16 C.F.R. § 801.40). In this Guide, the Rules are cited by Rule number.

² See [11 U.S.C. 363\(b\)](#), 16 CFR 803.10(b).

interpretations, and is also informed by informal staff interpretations.

As a general matter, the Act and the Rules require both acquiring and acquired persons to file notifications under the Program if all of the following conditions are met:

1. As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, non-corporate interests (“NCI”), and/or assets of the acquired person valued in excess of \$200 million (as adjusted)³, regardless of the sales or assets of the acquiring and acquired persons⁴; or
2. As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of \$50 million (as adjusted) but at \$200 million (as adjusted) or less; and
3. One person has sales or assets of at least \$100 million (as adjusted); and
4. The other person has sales or assets of at least \$10 million (as adjusted).

A. Size of Transaction Test

The first step in analyzing reportability is to determine what voting securities, NCI, assets, or combination thereof are being transferred in the proposed transaction. Then you must determine the value of the voting securities, NCI, and/or assets as well as the percentage of voting securities and NCI that will be “held as a result of the acquisition.” Calculating what will be held as a result of the acquisition (referred to as the “size of the transaction”) requires the application of several rules, including Rules 801.10, 801.12, 801.13, 801.14 and 801.15. Generally, the securities and/or NCI held as a result of the transaction include those that will be acquired in the proposed transaction, as well as any voting securities and/or NCI of the acquired person, or entities within the acquired person, that the acquiring person already holds. Assets held as a result of the acquisition include those that will be acquired in the proposed transaction as well as certain assets of the acquired person that the acquiring person has purchased within the time limits outlined in Rule 801.13.⁵

If the value of the voting securities, NCI, assets or combination thereof exceeds \$200 million (as adjusted) and no exemption applies, the parties must submit a premerger notification filing and observe the waiting period before closing the transaction.

If the value of the voting securities, NCI, assets or combination thereof exceeds \$50 million (as adjusted) but is \$200 million (as adjusted) or less, the parties must look to the size of person test.

³ The 2000 amendments to the Act require the Commission to revise certain thresholds annually based on the change in the level of gross national product. A parenthetical “(as adjusted)” has been added where necessary throughout the Rules (and in this guide) to indicate where such a change in statutory threshold value occurs. The term “as adjusted” is defined in subsection 801.1 (n) of the Rules and refers to a table of the adjusted values published in the Federal Register notice titled “Revised Jurisdictional Thresholds for Section 7A of the Clayton Act.” The notice contains a table showing adjusted values for the rules and is published in January of each year.

⁴ See § 7A(a)(2) of the Act.

⁵ The Rules on when to aggregate the value of previously acquired voting securities and assets with the value of the proposed acquisition are discussed in greater detail in Guide II.

B. Acquiring and Acquired Persons/Acquired Entity

The first step in determining the size of person is to identify the “acquiring person” and “acquired person.” “Person” is defined in Rules 801.1(a)(1) and is the “ultimate parent entity” or “UPE” of the buyer or seller, i.e. the entity that ultimately controls the buyer or seller.⁶ The “acquired entity” is the specific entity whose assets, NCI, or voting securities are being acquired. The acquired entity may also be its own UPE or it may be an entity within the acquired person.

Thus, in an asset acquisition, the acquiring person is the UPE of the buyer, and the acquired person is the UPE of the seller. The acquired entity is the entity whose assets are being acquired. In a voting securities acquisition, the acquiring person is the UPE of the buyer, the acquired person is the UPE of the entity whose securities are being bought, and the acquired entity is the issuer of the securities being purchased. In an acquisition of NCI, the acquiring person is the UPE of the buyer, the acquired person is the UPE of the entity whose NCI are being bought, and the acquired entity is the entity whose NCI are being acquired. Often the acquired person and acquired entity are the same.

In many voting securities acquisitions, the acquiring person proposes to buy voting securities from minority shareholders of the acquired entity, rather than from the entity itself (tender offers are an example of this type of transaction). These transactions are subject to Rule 801.30, which imposes a reporting obligation on the acquiring person and on the acquired person, despite the fact that the acquired person may have no knowledge of the proposed purchase of its outstanding securities.⁷ For this reason, the Rules also require that a person proposing to acquire voting securities directly from shareholders rather than from the issuer itself serve notice on the issuer of the shares to ensure the acquired person knows about its reporting obligation.⁸

C. Size of Person Test

Once you have determined who the acquiring and acquired persons are, you must determine whether the size of each person meets the Act’s minimum size criteria. This “size of person” test generally measures a company based on the person’s latest regularly prepared annual statement of income and expenses and its latest regularly prepared balance sheet.⁹ The size of a person includes not only the entity that is making the acquisition or whose assets or securities are being acquired but also the UPE and any other entities the UPE controls.¹⁰

If the value of the voting securities, NCI, assets or combination thereof exceeds \$50 million (as adjusted) but is \$200 million (as adjusted) or less, the size of person test is met, and no exemption applies, the parties must submit a premerger notification filing and observe the waiting period before closing the transaction.

⁶ See “control” under 801.1(b).

⁷ See Rule 801.1; Rule 801.30.

⁸ See Rule 803.5.

⁹ See Rule 801.11.

¹⁰ See Rule 801.1(a)(1).

D. Notification Thresholds

The notification thresholds apply only to the buyer in acquisitions of voting securities. An acquisition that will result in a buyer holding more than \$50 million (as adjusted) worth of the voting securities of an issuer crosses the first of five staggered “notification thresholds.”¹¹ The Rules identify four additional thresholds: voting securities valued at \$100 million (as adjusted) or greater but less than \$500 million (as adjusted); voting securities valued at \$500 million (as adjusted) or greater; 25 percent of the voting securities of an issuer, if the 25 percent (or any amount above 25% but less than 50%) is valued at greater than \$1 billion (as adjusted); and 50 percent of the voting securities of an issuer if valued at greater than \$50 million (as adjusted). If a buyer is acquiring all of the voting securities of an issuer, it should choose the highest notification threshold, which is the 50 percent threshold, regardless of the corresponding dollar value.

The thresholds provide a basis for exemptions that relieve the parties of the burden of making multiple filings for successive acquisitions of voting securities of the same issuer. As such, when notification is filed, the acquiring person is allowed one year from the expiration of the waiting period to cross the threshold stated in the filing.¹² If the person reaches the stated threshold (or any lower threshold) within that year, it may continue acquiring voting shares up to the next threshold for five years from the end of the waiting period.¹³ If the person does not reach the stated threshold within a year from the expiration of the waiting period, the notification expires, and a new filing must be submitted prior to any new reportable acquisition. For example, if you file to acquire \$100 million (as adjusted) of the voting securities of Company B and cross that threshold within one year, you would be able to continue to acquire voting securities of Company B for a total of five years without having to file again so long as your total holding of Company B’s voting securities did not exceed either \$500 million (as adjusted) or 50 percent, i.e., additional notification thresholds. Once an acquiring person holds 50 percent or more of the voting securities of an issuer, all subsequent acquisitions of securities of that issuer are exempt.¹⁴

E. Exempt Transactions

In some instances, a notification is not required even if the size of person and the size of transaction tests have been satisfied. The Act and the Rules set forth a number of exemptions, describing particular transactions or classes of transactions that need not be reported despite meeting the threshold criteria.¹⁵ For example, certain acquisitions of assets in the ordinary course of a person’s business are exempted, including new goods and current supplies (e.g., an airline purchases new jets from a manufacturer, or a supermarket purchases its inventory from a wholesale distributor.)¹⁶ In addition, the acquisition of foreign assets are exempt where the sales in or into the U.S. attributable to those assets were \$50 million (as adjusted) or less.¹⁷ Once it has been determined that a particular transaction is reportable, each party must submit its notification to the FTC and the DOJ. In addition, each acquiring person must pay a filing fee to the FTC for each transaction that it reports (with a few exceptions, see IV below).

¹¹ See Rule 801.1(h).

¹² See Rule 803.7.

¹³ See Rule 802.21.

¹⁴ See § 7A(c)(3) of the Act, 15 U.S.C. § 18a(c)(3).

¹⁵ See § 7A(c) of the Act, 15 U.S.C. § 18a(c), and Part 802 of the Rules, 16 C.F.R. Part 802.

¹⁶ See Rules 802.1(b) and 802.1(c).

¹⁷ See Rules 802.50 and 802.51.

III. THE FORM

The Notification and Report Form (“the Form”) solicits information that the enforcement agencies use to help evaluate the antitrust implications of the proposed transaction. Copies of the Form, Instructions, and Style Sheet are available from the PNO website at <https://www.ftc.gov/enforcement/premerger-notification-program>.

A. Information Reported

In general, a filing party is required to identify the persons involved and the structure of the transaction. The reporting person also must provide certain documents such as balance sheets and other financial data, as well as references to certain documents that have been filed with the Securities and Exchange Commission. In addition, the parties are required to submit certain planning and evaluation documents that pertain to the proposed transaction.

The Form also requires the parties to disclose whether the acquiring person and acquired entity currently derive revenue from businesses that fall within any of the same industry and product codes of the North American Industry Classification System (“NAICS”) and, for manufacturing industries, the North American Product Classification System (“NAPCS”),¹⁸ and, if so, in which geographic areas they operate. Identification of overlapping codes may indicate whether the parties engage in similar lines of business or if their products are differentiated. Acquiring persons must also describe certain previous acquisitions within the last five years of companies or assets engaged in businesses in any of the overlapping codes identified. Please note that an acquiring person must complete the Form for all of its operations; while an acquired person, on the other hand, must limit its response in Items 5 through 7 to the business or businesses being sold and does not need to answer Item 8.¹⁹ In addition, the acquired person does not need to respond to Item 6 in an asset-only transaction.

B. Contact Person

The parties are required to identify two individuals (listed in Item 1(g) of the Form) who are representatives of the reporting person and familiar with the content of the Form. These contact persons are, in most cases, either counsel for the party or an officer of the company. The listed contact persons must be available during the waiting period.

C. Certification and Affidavits

Rule 803.5 describes the affidavit that must accompany certain Forms. In 801.30 transactions where the acquiring person is purchasing voting securities from non-controlling shareholders, only the acquiring person must submit an affidavit. The acquiring person must state in the affidavit that it has a good faith intention of completing the proposed transaction and that it has served notice on the acquired person as to its potential reporting obligations.²⁰ In all other transactions, each of the

¹⁸ Information concerning NAICS and NAPCS codes is available at www.census.gov. In reporting information by 6 digit NAICS code, refer to the North American Industry Classification System - United States, 2017 published by the Executive Office of the President, Office of Management and Budget. In reporting information by 10-digit NAPCS code, refer to the concordance tables between 2012 product codes and 2017 NAPCS-based product codes published by the Bureau of the Census.

¹⁹ See 803.2(b).

²⁰ See Rule 803.5(a)(i)(I) through (vi) for the full requirements of such notice. In tender offers, the acquiring person also must affirm that the intention to make the tender offer has been publicly announced. See Rule 803.5(a)(2).

acquired and acquiring persons must submit an affidavit with their Forms, attesting to the fact that a contract, an agreement in principle, or a letter of intent has been executed and that each person has a good faith intention of completing the proposed transaction. The affidavit is intended to assure that the transaction is sufficiently ripe for notification and that the enforcement agencies will not be presented with hypothetical transactions for review.²¹

Rule 803.6 requires that the Form be certified and specifies who must make the certification. One of the primary purposes of the certification is to preserve the evidentiary value of the filing. It also is intended to place responsibility on an officer or a similarly situated individual within the filing person to ensure that the information reported is true, correct, and complete. Both the certification and the affidavit must be notarized, or may be signed under penalty of perjury.²²

D. Voluntary Information

The Rules provide that reporting persons may submit information that is not required by the Form.²³ If the reporting persons voluntarily provide information or documentary material that is helpful to the competitive analysis of the proposed transaction, this may expedite the enforcement agencies' review of a proposed transaction. However, voluntary submissions do not guarantee a speedy review. Voluntary submissions are included in the confidentiality coverage of the Act and the Rules.

E. Confidentiality

Neither the information submitted nor the fact that a notification has been filed is made public by the agencies except as part of a legal or administrative action to which one of the agencies is a party or in other narrowly defined circumstances permitted by the Act.²⁴ However, in response to inquiries from interested parties who wish to approach the agencies with their views about a transaction, the agencies may confirm which agency is handling the investigation of a publicly announced merger.²⁵ Additionally, the fact that a transaction is under investigation may become apparent if the parties announce it to the public or disclose it in other regulatory filings, or if the agencies interview third parties during their investigation.

F. Filing Procedures

Premerger notification filings are submitted electronically through a secure file transfer system that automatically directs the submissions to both the FTC and the DOJ premerger offices. The parties should follow the PNO Guidance for Filing Parties, available at <https://www.ftc.gov/enforcement/premerger-notification-program/covid-19-guidance-filing-parties>.

²¹ See Statement of Basis and Purpose to Rule 803.5, 43 Fed. Reg. 33510-33511 (1978).

²² 28 U.S.C. § 1746 allows use of the following statement in lieu of a notary's jurat: "I declare (or certify, verify or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date) [and] (Signature)." The italicized text is necessary only if signed outside the territorial United States.

²³ See Rule 803.1(b).

²⁴ See Section 7A(h) of the Act.

²⁵ A publicly announced merger is one in which a party to the merger has disclosed the existence of the transaction in a press release or in a public filing with a governmental body.

IV. THE FILING FEE

In connection with the submission of a premerger notification filing, Congress also mandated the collection of a fee from each acquiring person. The amount of the filing fee is based on the total value of the voting securities, NCI, or assets held as a result of the acquisition and is adjusted annually.²⁶ Information about the current fee tiers and fee amounts is available at <https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information>. The site also provides instructions about paying the fee by electronic wire transfer (check payments are discouraged, but if a check is the only option to submit a fee, it should be a bank cashier's check or certified check), as required under Rule 803.9. For transactions in which more than one person is deemed to be the acquiring person, each acquiring person must pay the appropriate fee (except in consolidations and in transactions in which there are two acquiring persons that would have exactly the same responses to Item 5 of the Form).²⁷ In addition, an acquiring person will have to pay multiple filing fees if a series of acquisitions are separately reported.²⁸ The parties may split the filing fee however they decide, but must inform the PNO of their arrangement.

V. THE WAITING PERIOD

After filing, the filing parties must observe a statutory waiting period during which they may not consummate the transaction. The waiting period is 15 days for cash tender offers and section 363(b) bankruptcies, and 30 days for all other types of reportable transactions.²⁹ The waiting period may be extended by issuance of a request for additional information and documentary material.³⁰ Also, a waiting period that would end on a Saturday, Sunday or legal public holiday will expire on the next regular business day.

A. Beginning of the Waiting Period

In most cases, the waiting period begins after both the acquiring and acquired persons file completed Forms with both agencies. However, for certain transactions subject to 801.30, the waiting period begins after the acquiring person files a complete Form. In a reportable joint venture formation, the waiting period begins after all acquiring persons required to file submit complete Forms.³¹ Failure to pay the filing fee or the submission of an incorrect or incomplete filing may delay the start of the waiting period.³²

B. Early Termination of the Waiting Period

Any filing person may request that the waiting period be terminated before the statutory period expires. Such a request for "early termination" will be granted only if (1) at least one of the persons

²⁶ The filing fee tiers are adjusted annually for changes in the GNP during the previous year. The fees are also adjusted annually based on the percentage increase, if any, in the Consumer Price Index, as determined by the Department of Labor, for the year then ended over the level so established for the year ending September 30, 2022. See Public Law 101-162 (15 U.S.C. 18a note), § 605.

²⁷ For example, if two separate UPEs jointly control an acquisition vehicle and own no other entities, their Item 5 27 responses would be identical.

²⁸ See Rule 803.9(a) - (c).

²⁹ See Rule 803.10; 11 U.S.C. § 363(b)(2), as amended (1994).

³⁰ See Section VIII(C), *infra*.

³¹ The joint venture entity does not file. See Rule 802.41.

³² See Rules 803.3 and 803.10(a).

specifies it on the Form; (2) all persons have submitted compliant Forms; and (3) both antitrust agencies have completed their review and determined not to take any enforcement action during the waiting period.³³

The PNO is responsible for informing the parties that early termination has been granted. The Act requires that the FTC publish a notice in the Federal Register of each early termination granted. Moreover, grants of early termination also appear on the FTC's website at <https://www.ftc.gov/legal-library/browse/early-termination-notice>

It is important to note that early termination of the waiting period is entirely within the discretion of the enforcement agencies. For example, as of February 2021, the agencies have suspended grants of early termination, as explained in a press release at <https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination>.

VI. REVIEW OF THE FILING

Once parties submit their premerger notification filings, the enforcement agencies begin their review. The FTC is responsible for the administration of the Program. As a result, the PNO determines whether a filing complies with the Act and the Rules.

The premerger notification filing is assigned to a member of the PNO staff to assess whether the transaction was subject to the reporting requirements and whether the Form was completed accurately. If the filing appears to be deficient, the staff member will notify the contact person as quickly as possible so that errors can be corrected. It is important to address any errors as soon as possible because the waiting period will not commence until the Form is completed accurately, all required information and documentary material are supplied, and payment of the filing fee is received.³⁴

When the PNO determines that the premerger notification filings comply with all filing requirements, letters are sent as required by the Act and the Rules, identifying the beginning and ending of the waiting period, as well as the transaction number assigned to the filing. The conclusion that the parties have complied with the Act and the Rules may be modified later, however, if circumstances warrant.

VII. ANTITRUST REVIEW OF THE TRANSACTION

Initially, both enforcement agencies undertake a preliminary substantive review of the proposed transaction. The agencies analyze the premerger notification filings to determine whether the acquiring and acquired firms are competitors, or are related in any way such that a combination of the two firms might adversely affect competition. Staff members rely not only on the information included within the filing but also on publicly available information. The individuals analyzing the

³³ See Formal Interpretation 13 issued August 20, 1982.

³⁴ For transactions in which a person buys voting securities from someone other than the issuer (third party and 34 open market transactions), the waiting period begins after the acquiring person submits a complete and accurate Form. An incorrect or incomplete Form from the acquired person will not stop the running of the waiting period. However, the acquired person still is obligated to correct any deficiencies in its filing.

Form often have experience either with the markets or the companies involved in the particular transaction. As a result, they may have industry expertise to aid in evaluating the likelihood that a merger may be harmful.

If, after preliminary review, either or both agencies decide that a particular transaction warrants closer examination, the agencies decide between themselves which one will be responsible for the investigation. Only one of the enforcement agencies will conduct an investigation of a proposed transaction. Other than members of the PNO, no one at either agency will initiate contact with any of the persons or any third parties until it has been decided which enforcement agency will be responsible for investigating the proposed transaction.³⁵ The clearance decision is made pursuant to an agreement that divides the antitrust work between the two agencies. This clearance procedure is designed to avoid duplication of effort and eliminate any confusion that could result if both agencies contacted individual persons at different times about the same matter.

Of course, any interested person, including either of the parties, is free to present information to either or both agencies at any time. However, if the clearance decision has not yet been resolved, the person must make a presentation, or provide written information or documents, to both agencies. If you are representing a party that wishes to make a presentation, or provide written information or documents, you may notify the PNO ; and the PNO will inform reviewing staff attorneys at both agencies that a party would like to make a presentation, or provide written information or documents.

VIII. SECOND REQUESTS

Once the investigating agency has clearance to proceed, it may ask any or all persons to the transaction to submit additional information or documentary material to the requesting agency. The request for additional information is commonly referred to as a “second request.”³⁶ As discussed above, although both agencies review each Form submitted to them, only one agency will issue second requests to the parties in a particular transaction.

A. Information Requested

Generally, a second request will solicit information on particular products or services in an attempt to assist the investigative team in examining a variety of legal and economic questions. A typical second request will include interrogatory-type questions as well as requests for the production of documents. A model second request has been produced jointly by the FTC and DOJ for internal use by their attorneys and is available at https://www.ftc.gov/system/files/ftc_gov/pdf/Final-Rev-Model-Second-Request-01-26-2024 . However, since every transaction is unique, the model second request should be regarded only as an example.

B. Narrowing the Request

Parties that receive a second request and believe that it is broader than necessary to obtain the information that the enforcement agency needs, may discuss the possibility of narrowing the

³⁵ Staff at either agency may initiate contact with a person prior to the resolution of which agency will handle the matter by first notifying the other agency and offering the other agency the opportunity to participate.

³⁶ See Rule 803.20(a)(1) for the identities of persons and individuals that are subject to such request.

request with the staff attorneys reviewing the proposed transaction. Often, the investigative team drafts a second request based only on information contained in the initial filing and other available material reviewed in the first 30 days after filing. At this point, the investigative team may not have access to specific information about the structure of the company or its products and services. By meeting with staff, representatives of the company have an opportunity to narrow the issues and to limit the required search for documents and other information. If second request modification issues cannot be resolved through discussion with staff, the agencies have a formal internal appeals process that centralizes in one decision maker for each agency the review of issues relating to the scope of and compliance with second requests.³⁷

The enforcement agency issuing the second request may have determined that certain data sought in the request can resolve one or more issues critical to the investigation. In such a situation, the agency's staff may suggest use of the informal "quick look" procedure. Under the quick look, the staff will request the parties to first submit documents and other information, which specifically address critical issues (e.g., market participants or ease of entry). If the submitted information resolves the staff's concerns in these areas, the waiting period will be terminated on a sua sponte basis and the parties will not have to respond to the full second request. Of course, if the submitted information does not resolve the staff's concerns on determinative issues, then the parties will need to respond to the full second request.

C. Extension of the Waiting Period

The issuance of a second request extends the statutory waiting period until 30 days (or in the case of a cash tender offer or section 363(b) bankruptcy filings, 10 days) after both parties are deemed to have complied with the second request (or in the case of a tender offer and bankruptcy, until after the acquiring person has complied).³⁸ During this time, the staff attorneys investigating the matter may also be interviewing relevant parties and using other forms of compulsory process to obtain information.

The second request must be issued by the enforcement agency before the waiting period expires. If the waiting period expires and the agencies have not issued a second request to the parties of the transaction, then the parties are free to consummate the transaction. The fact that the agencies did not issue second requests does not preclude them from initiating an enforcement action at a later time.³⁹ All of the agencies' other investigative tools are available to them in investigations.⁴⁰

³⁷ See 66 Fed. Reg. 8721-8722, February 1, 2001.

³⁸ See § 7A(e) of the Act.

³⁹ See § 7(A)(i)(1) of the Act.

⁴⁰ See § 7(A)(i)(1) of the Act.

IX. AGENCY ACTION

After analyzing all of the information available to them, the investigative staff will make a recommendation to either the Commission or the Assistant Attorney General (depending on which agency has clearance).

A. No Further Action

If the staff finds no evidence that competition will be reduced substantially in any market, it will recommend no further action. Assuming the agency concurs in that recommendation, the parties are then free to consummate their transaction upon expiration of the waiting period. As with a decision not to issue a second request, a decision not to seek injunctive relief at that time does not preclude the enforcement agencies from initiating a post-merger enforcement action at a later date.

B. Seeking Injunctive Relief

If the investigative staff believes that the transaction is likely to be anticompetitive, it may recommend that the agency initiate injunction proceedings in U.S. district court to halt the acquisition. If the Commission or the Assistant Attorney General concurs in the staff's recommendation, then the agency will file suit in the appropriate district court. If it is a Commission case, the FTC is required to file an administrative complaint within twenty days (or a lesser time if the court so directs) of the granting of its motion for a temporary restraining order or for a preliminary injunction.⁴¹ The administrative complaint initiates the FTC's administrative proceeding that will decide the legality of the transaction. If it is a DOJ case, the legality of the transaction is litigated in district court.

C. Settlements

During an investigation, the investigative staff may, if appropriate, discuss terms of settlement with the parties. The proposed settlement must then be presented to the Commission, accepted by a majority vote, and placed on the public record for a notice and comment period before it can be made final. Similarly, a proposed settlement negotiated by DOJ staff must be approved by the Assistant Attorney General and also placed on the public record for a notice and comment period before it will be entered by a district court pursuant to the provisions of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h).

X. FAILURE TO FILE

A. Civil Penalties

If you consummate a reportable transaction without filing the required prior notification or without waiting until the expiration of the statutory waiting period, you may be subject to civil penalties. The Act provides that "any person, or any officer, director or partner thereof" shall be liable for a penalty of up to \$51,744 a day for each day the person is in violation of the Act. The enforcement agencies may also obtain other relief to remedy violations of the Act, such as an order requiring the

⁴¹ FTC Act Section 13(b).

person to divest assets or voting securities acquired in violation of the Act.⁴²

B. Reporting Omissions

If you have completed a transaction in violation of the Act, it is important to bring the matter to the attention of the PNO and to file a notification as soon as possible in order to terminate the violation. The parties should include a letter with the notification from an officer or director of the company explaining why the notification was not filed in a timely manner, how and when the failure was discovered, and what steps have been taken to prevent a violation of the Act in the future. The letter should be addressed to the Deputy Director, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave., NW, Washington DC 20580.

For more information about post-consummation filings see the PNO guidance <https://www.ftc.gov/enforcement/premerger-notification-program/post-consummation-filings-hsr-violations>.

C. Deliberate Avoidance

The Rules specifically provide that structuring a transaction to avoid the Act does not alter notification obligations if the substance of the transaction is reportable.⁴³ For example, the agencies will seek penalties where the parties split a transaction into separate parts that are each valued below the current filing threshold in order to avoid reporting the transaction, but the fair market value of everything being acquired is actually above the notification threshold.⁴⁴

XI. GUIDES IN THIS SERIES

Guide I: What is the Premerger Notification Program? An Overview is the first guide prepared by the PNO.

Guide II: *To File Or Not To File -- When You Must File a Premerger Notification Report Form*, which explains certain basic requirements of the program and takes you through a step-by-step analysis for determining whether a particular transaction must be reported.

XII. OTHER MATERIALS

To make effective use of these guides, you must be aware of their limitations. They are intended to provide only a very general introduction to the Act and Rules and should be used only as a starting point. Because it would be impossible, within the scope of these guides, to explain all of the details and nuances of the premerger requirements, you must not rely on them as a substitute for reading the Act and the Rules themselves. To determine premerger notification requirements, you should consult the following materials, all of which are available at <https://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-formal-interpretations> :

⁴² See § 7A(g) of the Act, as amended by the Debt Collection Improvements Act of 1996, Pub. L. No. 104134 (Apr. 26, 1996); 61 Fed. Reg. 54548 (Oct. 21, 1996); 61 Fed. Reg. 55840 (Oct. 29, 1996); and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, [Public Law 114-74](#), § 701; 89 Fed. Reg. 1810 Jan. 15, 2024).

⁴³ See Rule 801.90.

⁴⁴ See, e.g., *United States v. Sara Lee Corp.*, 1996-1 Trade Cas. (CCH) ¶ 71,301 (D.D.C. 1996).

1. Section 7A of the Clayton Act, 15 U.S.C. § 18a, as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390, and amended by Pub. L. No. 106-553, 114 Stat. 2762 and Pub. L. No. 101-162 § 605.
2. The Premerger Notification Rules, 16 C.F.R. Parts 801 – 803. (2023).
3. The Statement of Basis and Purpose for the Rules, 43 Fed. Reg. 33450 (July 31, 1978)
4. The formal interpretations issued pursuant to the Rules, available at <https://www.ftc.gov/legal-library/browse/hsr-formal-interpretations>

It is advisable to check the PNO web site for more recent Rules changes that have not yet been incorporated into the Code of Federal Regulations or these guides as well as other HSR resources. <https://www.ftc.gov/enforcement/premerger-notification-program>.

Finally, if you have questions about the program or a particular transaction not answered by the PNO's website, the staff of the PNO is available to assist you. The PNO answers thousands of inquiries each year and provides informal advice concerning the potential reportability of a transaction and completion of the Form. For questions about how the Rules may apply to a specific scenario, email the PNO at HSRHelp@ftc.gov.