

HSR: Back to Basics Workshop
October 23, 2008
FTC Conference Center – 9AM to 1PM

Edited Transcript
March 4, 2009

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When to File: An Overview of the Rules and Exemptions

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>>**KAREN BERG – 801: HOW TO DETERMINE IF YOU MUST FILE**

Good morning, everybody. My name is Karen Berg. I'm going to give you an overview of coverage and definitions, which is basically determining when you need to do a filing. Now, before we get started, I wanted to emphasize that this really is going to be an overview. Filing requirements are complicated and they're very fact-specific and so what we're going to be presenting this morning, at least I and Mike will be presenting, is a general guide to point you to the principal issues you need to take into consideration in deciding whether or not you need to make a filing.

Secondly, I wanted to mention they I'm going to be using a number of terms that have very specific meanings under Hart-Scott-Rodino. I'll explain what they mean as I go along, but in the interest of logical flow, I may not explain what they mean the very first time you hear them. Sit tight, though, as I will explain what I mean by the terms in good time.

One other thing I wanted to mention is that if you have any questions about anything that I say or anything that Mike says, please raise them after Mike is done with the hypotheticals -- that would be the best time to deal with any and all of them.

Coverage and definitions are found in the Clayton Act Section 7A and in 16 CFR Section 801 of the Hart-Scott-Rodino rules. I'm going to be referring to that as Section 801 as we keep going.

There are three tests for determining reportability: The first is "Engaged in Commerce", the second is "Size of Transaction" and the third is "Size of Person". Engaged in commerce is found here (cite). We'll be having cites up here for just about everything I hope. And passing the test for engaged in commerce is pretty easy. At least one party to the transaction must be engaged in commerce or an activity affecting commerce. This includes entities within the family of the filing person so if the parent company is engaged, or if one subsidiary is engaged on either side of the transaction, you pass the test. So not too tough.

The next test you need to worry about is size of transaction. This is a little meatier. I would suggest doing the size of transaction test before the size of person test because the size of transaction can determine whether you need to file at all. And if you do, whether you need to even bother with analyzing the size of person because you may not have to get to that point. Start with the size of transaction. Ask what is being acquired. Sufficiently large amounts of voting securities, assets and non-corporate interests are potentially reportable when acquired. I say "potentially" reportable because you'll see when we get to Mike's presentation, some acquisitions that seem to be reportable in fact may be exempt from reporting.

Voting securities. What do we mean by voting securities? Voting securities are securities with a current right to vote for members of the Board of Directors. Acquisitions of securities that are non-voting or that vote for some matters, but not Board of Directors, are not considered voting securities. Convertible voting securities are reportable when converted. So if your client is acquiring convertible voting securities make sure you make your Hart-Scott-Rodino filing and allow for the expiration of the waiting period to happen before the securities convert.

What else is reportable? Acquisitions of assets are potentially reportable. Assets can actually be just about anything, but not cash. Cash doesn't count as an asset. But it can be hard assets or intangible assets, in that acquisitions of exclusive licenses to intellectual property are potentially reportable. Acquisitions of non-stock corporations are also considered to be acquisitions of all of the assets of that corporation.

Finally, an acquisition of a controlling interest in a non-corporate entity is potentially reportable. If you're acquiring a controlling interest in a partnership, an LLC or several other types of non-corporate entities it is potentially reportable. We'll talk in a few minutes what a controlling interest means. Hang on to that idea.

Now, let's say that you know that you're acquiring a reportable batch of something. Now we need to figure out if you're going to have a reportable amount of it. And this requires figuring out what you will "hold" and what it's worth. We're going to start with the two related concepts of "hold" and "aggregation".

First, determine what you will hold as a result of this acquisition. Hold is a term of art and under HSR means that you value for the purposes of the size of transaction any voting securities, assets or interests you already have in the acquired person together with voting securities assets or interests you're now acquiring in the same acquired person. So to use a simple example, let's say I already own 10% of the voting securities of Company A. If I intend to acquire 5% more, I will be deemed to hold 15% of the voting securities of Company A as a result of the acquisition of this last 5%.

The related concept is aggregation. The adding together of previously acquired holdings with to-be-acquired holdings is called "aggregation". Aggregation rules I will tell you right now are extremely complicated. They vary depending on whether you're aggregating previously acquired assets, voting securities, or interests, and whether you filed for the previous acquisition or not. Aggregation also refers to the need to add together any assets or voting securities you presently may be acquiring in various subsidiaries of the same parent. So if I'm acquiring assets of subsidiary 1 and voting securities from subsidiary 2 from parent company A, I need to aggregate the values of the separate purchases to find out what I will hold as a result of this acquisition from parent A.

All right. Now that I know what I'm going to hold, I need to figure out what it's worth. That brings us to valuation, which is covered in rule 801.10. The rules explain how to value what you already hold and what you are now acquiring. Be aware there are different tests depending on whether you're valuing, for example, publicly traded or non-publicly traded voting securities, assets, or interests you already hold, or publicly traded or non-publicly traded voting securities, assets, or interests you are now acquiring. Check the rules carefully in doing this valuation and do the math. For assets, voting securities and interests being acquired now, you need to measure the value you get applying the rules against the actual purchase price or acquisition price if it can be determined. And then you use the greater of the two values. Sometimes acquisition price is not determinable because of milestone payments or earn-outs that make the ultimate consideration too hard to estimate.

Let's say that you figured out what you will hold as a result of the acquisition, what its total value is, and no exemptions apply. The statute says if your transaction value is \$50 million or less as adjusted, you will have no filing. If it's over \$50 million as adjusted but not over \$200 million as adjusted, you may or may not have a filing depending on the sizes of the persons involved in your deal. If your transaction is valued at over \$200 million as adjusted, you have to file regardless of the sizes of the persons involved in your deal.

Now, what do I mean by "as adjusted"? As adjusted reflects the fact that we adjust the filing thresholds upwards each year to reflect changes in the GNP. This is in the statute. Mike Verne pointed out the other day that this January may be the first time we have to adjust the thresholds downward. We have never seen that before but stay tuned. New thresholds are published in January every year and become effective in February. So here are the current adjusted thresholds. When we talk about a \$50 million transaction as adjusted, we're actually talking this year about \$63.1 million. 100 million this year is \$126.2 million, 200 is \$252.3 million, and so on. Check again in January to see what the new thresholds are.

Now, let's say that you have \$150 million deal. It's over the filing threshold of 63.1 million but it's less than 252.3 million. So you need to calculate your size of persons to see whether you need to file for this deal. So, who are the persons whose sizes we need to know? That's the acquiring and acquired persons and it's laid out in 801.1 and 801.2. Under the rules, an acquiring person is the ultimate parent entity or UPE of the buyer and the acquired person is the UPE of the seller. The UPE, not surprisingly, is the person that has ultimate control. They are at the very top of the food chain. What do we mean by "control"? For corporations, control means having 50% or more of the voting securities or the contractual right to designate 50% or more of the directors of the corporation. For non-corporate entities, control means having the right to 50% or more of the entities' profits, or 50% or more of its assets upon its dissolution. Once you trace the chain of control as far up as you can, you have arrived at the acquiring and acquired persons.

Now determine whether those two persons meet the minimum thresholds for size of person. And in order to do that you look to their annual net sales and their total assets. The size of person is based on the annual net sales and total assets of the UPEs as reflected in their most recent regularly prepared financial statements. Be sure that the sales and assets of any controlled entities are also included when you're figuring the size of person. According to the HSR statute, one of the parties to the transaction must have at least \$100 million in sales or total assets, as adjusted, and the other must have at least \$10 million in sales or total assets, as adjusted. Again, remember that this includes not only the sales and assets as reflected in the financials of the parent companies or UPEs but also of any entities that control. Here is a small wrinkle to keep in mind, which does trip up people every now and then. If the acquired person is not engaged in manufacturing, it must have assets of at least 10 million as adjusted. If it does not, its sales must be at least 100 million as adjusted in order to meet the size of person.

So now you know what acquisitions are potentially reportable, how to figure the size of transaction and the sizes of persons.

Section 801 of the rules also deals with what, for lack of a better term, I'm calling special filing

situations. They're situations you encounter every now and then that are just slightly oddball in the way they're treated under the rules. The first of these are tender offers and other acquisitions of voting securities not from the issuer. Self-explanatory, right? Those are found in Section 801.30 of the rules and not surprisingly, we refer to them as 801.30 transactions. These types of transactions can take various forms, including tender offers, purchases on the open market, conversions of non-voting securities to voting, exercises of options or warrants, and there are few other things, all enumerated in Section 801.30 if you want to see the complete list. What these transactions all have in common is the fact that because the acquisition of the voting securities is not being made from the issuer or from its parent, there's likely no purchase agreement and the issuer may not be aware of the planned acquisition. So for this reason, 801.30 acquisitions carry the requirement that the acquiring person notify the issuer of the planned acquisition along with certain details, including the amount of voting securities that are going to be held and the anticipated date of filing with the antitrust agencies. The acquiring person also needs to certify in the affidavit that it files with its filing that this notification has been delivered to the issuer. The acquired person then has an obligation to follow up with its own filing. The other slightly odd thing about 801.30s is that the waiting period begins when the acquiring person's filing is made and it will run out even if the acquired person never makes a filing. This prevents an unwilling target from holding up or thwarting an acquisition by inaction.

The other slightly odd situation under the rules is joint venture formations. Joint venture formations have their own slightly special rules. The formation of a joint venture is reportable if, in the case of corporate joint ventures, the contributors will hold a reportable amount of the voting securities of the new company and the contributor and JV meet the size of person test. In the case of non-corporate joint ventures, it would be reportable if a contributor takes back a controlling interest, it is of a reportable size, and the contributor and the JV meet the size of person test. The size of persons test for joint venture formations is basically the same as for other filings, that is, the contributors and the JV itself must be some combination of \$100 million and \$10 million persons, as adjusted. The slightly odd thing about joint venture formation filings is that the Newco doesn't file. The contributors who have filing obligations all file as acquiring persons and they include in their filings information about the Newco and its intended operations. The waiting period for joint ventures begins when all the acquiring persons who have filing obligations have filed. So you could, for example, have a formation of a non-corporate joint venture, a 60/40 non-corporate joint venture, and in that case there would only be one filing for it. If you remember, only the acquisition of a controlling interest in a non-corporate entity has to be reported, so for a 60/40 joint venture formation we'll only get one filing from the 60% partner. No filing from the Newco and no filing from the 40% partner. When we get that filing that's when the waiting period starts.

This brings me to the last bit of Section 801, which is rule 801.90: Transactions or devices for avoidance. This is a situation that we hope none of you will have a personal experience with (I'm sure you won't). 801.90 basically says that if you structure a deal in such a way as to make it non-reportable for no other reason than making it non-reportable, it's reportable. So in other words, if you have a legitimate business reason to structure transaction a certain way -- for example, tax avoidance is a very common legitimate business reason for structuring a transaction some kind of funky way-- and the deal as structured is non-reportable, that's fine because you had a legitimate reason for doing it. But if you gerrymander a deal in some way to get it under

thresholds or to claim exemptions just in order to avoiding Hart-Scott-Rodino reporting, the Premerger Notification Office is going to look to the substance of the transaction and you could be in violation.

Here is an example. Let's say company A holds U.S. assets of \$100 million in its subsidiary B. Prior to the acquisition of B by a third party, A creates a new foreign subsidiary C and moves \$50 million of those assets into C. The third party acquires both subsidiaries, the foreign and U.S. one, each with \$50 million worth of assets in them. Because foreign subsidiary C has less than \$63.1 million worth of U.S. assets, its acquisition is exempt under 802.51. Mike will get more into foreign exemptions but let's just say that that's exempt. What's left in subsidiary B is \$50 million, under the \$63.1 million threshold. So that part isn't reportable either. We have an acquisition of \$100 million worth of assets and we're not getting a filing for it. Because there was no legitimate reason to move the assets into this newly-created foreign subsidiary, it's a violation of 801.90 and you could be in big trouble for doing that. I hate to end on such an ominous note. But that's the end of Section 801 so that's the end of my presentation.

Next we have Mike Verne doing exemptions.

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>>MIKE VERNE – 802: EXEMPTIONS

Good morning. I'm here to talk about the part of HSR that everybody likes, because as Karen said, even if you meet all the criteria she laid out in part 801 you might be exempt under one of the exemptions in the statute or the rules.

First don't worry about taking notes because everything I say and more will be on the website. That is where the exemptions are found in both statute and the rules. Why do we need both? The obvious reason is Congress knew in 1976 they couldn't anticipate everything that needed to be exempted so they granted the authority to the agencies to promulgate new exemptions for transactions that are unlikely to violate the antitrust laws. We use that on a number of occasions, most recently in 2005 in the non-corporate rule making where we broadened a number of exemptions and added one new one for financing transactions.

There are other reasons for duplicating some of the statutory exemptions in the rules. One is to expand them, and another is to explain them. We'll talk more about that as we go through.

Here is an example of a rule that broadens the statutory exemption. Section 7A(c)(10) exempts acquisitions of voting securities when the percent you hold does not increase, for example if you have a dividend distributed pro rata to the shareholders. Rule 802.10 does the same thing but it also covers reorganizations where a corporation is converted to an LLC or partnership and you hold the same percentage in that non-corporate entity you held in the corporation.

Another example of a rule broadening a statutory exemption is rule 7A(c)(3), acquisitions of

voting securities where you already hold 50%. Rule 802.30 does the same thing but it also covers acquisitions of partnership or LLC interests where you already hold 50%, plus allows you to transfer assets from one controlled sub to another, where the statute does not.

Here's another example of a statutory exemption and a rule complementing one another. Rule 802.1 exempts specific classes of acquisitions in the ordinary course of business. For example new goods where an airline buys new plane, current supplies where a grocery store gets supplies from a distributor, and used durable goods where a person is buying equipment that it has been leasing. 7A(c)(1) broadens that by applying the ordinary course of business exemption to transactions that aren't specifically mentioned in 802.1 like a bank acquiring a portfolio of loans from another bank.

This one is an example of a rule that explains the statutory exemption because 7A(c)(9) and 802.9 are worded the same. Acquisitions of 10% or less of the voting securities of an issuer solely for the purpose of investment. The problem is that the statute doesn't explain what that means. So although we have the exact wording in 802.9 we used the Statement of Basis and Purpose for that rule to explain exactly what that means. And it lays out certain activities that could be inconsistent with a passive investment like appointing a director or soliciting proxies.

Some of the exemptions in the statute take into account another agency doing a competitive review of the acquisition. 7A(c)(5) and (6) cover transactions specifically exempted from the antitrust laws by another statute. That eliminates activities of labor unions, and transactions reviewed by specific Federal agencies such as the Surface Transportation Board. 7A(c)(7) and (8) are transactions that require review by the Fed. So these are not reported under HSR but you may have to give us copies of what you file with the Fed.

Section 802.6 complements the statutory exemptions by taking into account the evolution of bank holding companies that can have non-banking activities like stock brokerage or insurance operations. The banking portion is exempt but the non-banking activities are reported under HSR.

Another class of exemptions are the real property exemptions, covering certain new and used facilities, office and residential property, hotels and motels, certain recreational property, certain agricultural property, certain oil and gas or coal reserves within limits, and investment rental property. Again, 7A(c)(1) complements these exemptions to cover other real estate property not listed like a REIT acquiring real property in the ordinary course of its business. 7A(c)(4) exempts transfers to or from a federal or state agency or a subdivision of one of those.

Here are some current examples. CALPERS, the California public employee retirement system, buying and selling securities on behalf of the fund. This exemption only applies to U.S. government agencies but the definition of entity that Karen talked about effectively extends it to foreign governments as well.

Another class of exemptions is debt workouts and financing transactions. 802.63 exempts, for example, a bank foreclosing on collateral for defaulted loan or entering into a lease financing transaction. 802.65 covers a pretty common investment method where you create a new LLC, a

creditor puts in money and it takes a controlling interest until it recoups its investment and then drops back below control and that would exempt those types of transactions.

802.21 addresses a flaw in the statute because it says if you hold \$50 million or more of voting securities as a result of the acquisition you have to file. That means once you're at \$50 million, every share you acquire over that would be another filing. So 802.21 uses notification thresholds that allow you to go up to the next threshold for five years after you make a filing without making another filing.

802.70 is self-explanatory. If you have a consent order with the DoJ or FTC that requires divesting assets you don't have to report it because we have already looked at it.

Another one that comes up quite a bit is the foreign exemptions. These exempt transactions where there isn't sufficient nexus with U.S. commerce, so if you have less than \$63.1 million in U.S. assets and sales that acquisition will be exempt under the foreign exemptions, 802.50 and 802.51. We'll do examples of this.

The other foreign exemption is 802.52. That's a comity exemption that says if either party is controlled by a foreign government and you're acquiring voting securities or assets of that same country, even if you do satisfy the thresholds in 802.50 or 802.51 it's not reportable under 802.52.

Last but not least is 802.4. We'll talk about that in the hypotheticals as well. This elevates substance over form so if you look at the underlying assets of a corporation or LLC or partnership and those assets will be exempt if directly acquired, then the acquisition of the voting securities or non-corporate interests is also exempt under 802.4. An example of that is a U.S. issuer that has only foreign assets with no sales into the U.S. That wouldn't be exempt under 802.51 but would be under 802.4. Another is a cash only joint venture formed as an acquisition vehicle. Because all it holds is cash it's exempt under 802.4 as well.

Now that we've bored you to death, we'll have a little fun with some hypotheticals. This will allow you to apply the concepts Karen and I talked about to some actual transactions.

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DISCUSSION OF HYPOTHETICAL SCENARIOS

We're going to talk about four things. One is a joint venture formation, the foreign exemptions, control, and aggregation. And assume that the size of person test is satisfied in all of these so we don't have to talk about that each time.

First the joint venture formation. We're going to look at how Section 802.4 applies to a joint venture formation. Remember 802.4 exempts the acquisition of voting securities or non-corporate interests if underlying assets are exempt if acquired directly. Which means if the JV has less than \$63.1 million in non-exempt assets it's not going to be reportable. This particular one we're looking at is an LLC but it would be the same for a partnership or corporation.

Here is the set up. Fund A and B are forming a 50/50 NEWCO LLC. Fund A is putting in a U.S. factory valued at \$200 million. Fund B is putting in \$200 million in cash. So there are the assets now in the NEWCO. Now we'll take a look at Section 802.4. With the acquisition by fund A they're taking back 50% valued at \$200 million so they satisfy the size of transaction threshold. Under Section 802.4 we can back out the cash because that is an exempt asset. But we've still got this \$200 million U.S. factory that normally would not be exempt. In this case it is exempt because there's a special provision in the intra-person exemption that says for your acquisition you don't have to count whatever you're putting in. Which makes sense because we wouldn't want you to have to file to acquire something you already hold.

Now, the acquisition by fund B. Again the size of transaction is \$200 million. Take out the cash once again. Can we take out the factory? No. Because that only works for A. So in B's acquisition we have non-exempt assets of \$200 million. In summary, in the acquisition by fund A the size of transaction is \$200 million; the total non-exempt assets are valued at zero. And it's not reportable. In the acquisition by fund B, there is the same size of transaction but this time there's \$200 million in non-exempt assets. It exceeds the \$63.1 million limitation so it's reportable. Note that the fact that the JV had exempt assets doesn't affect the size of transaction so it's still going to be \$200 million.

Let's take a look at the foreign exemptions now. Here is the set-up on this one. You've got fund A acquiring various things from fund B. It's acquiring voting securities of foreign issuer X, it's acquiring voting securities of U.S. issuer Y, and acquiring foreign assets from Z. Don't dwell on this too much, it's laying out the sales and assets and values for these various things and we'll get to those one by one.

Under 802.50 and 802.51 the foreign exemptions analysis goes like this: You have to add together U.S. sales of all foreign assets and foreign issuers that are being acquired. So X, the foreign issuer, has U.S. sales of \$30 million. The assets from Z that are foreign have sales into the U.S. of \$20 million, total is \$50 million. Because that doesn't exceed \$63.1 million, both of those are exempt. You don't need to add in the U.S. sales of Y because it's a U.S. issuer and the foreign exemptions don't apply to it.

But we still have a problem. We still have Y which is valued at over \$63.1 million and we can't exempt it under 802.51 because it's a U.S. issuer. How do we get around this? Section 802.4. Under that analysis we're dropping through and looking at all underlying assets that are foreign. So X, the foreign issuer, had \$30 million of sales into the US. The assets from Z that are foreign have \$20 million in sales into the US. And the foreign assets of Y, the U.S. issuer, had \$10 million of sales into the U.S. We add those all together and they total \$60 million, less than \$63.1 million, so they're all exempt. Now under 802.4 we look at the U.S. assets left over. X the foreign issuer had \$30 million worth of U.S. assets. Z had none because they're foreign assets. Y had only \$10 million in U.S. assets. So that's \$40 million total, under \$63.1 million. So the whole deal is exempt under 802.4. That make sense? Okay.

Now we're going to talk about control. And we'll do this as a quiz. I'll put up various factors that may or may not constitute control. If you jot down your answers we'll see how you do at the

end of this.

Here is the set-up. We have A corporation and B partnership. A is acquiring assets from B. Now let's look at the ownership structure of these two entities and see who is the ultimate parent and who would be filing notification. Okay. A corporation is held 100% by family trust and, as is typical of these, it has a trustee, it has a beneficiary and a settlor. Now we're going to bring up the questions of what may or may not be control.

First of all the settlor is the sole trustee. Is that control or not control? Actually it's not control.

Second the settlor can name a replacement trustee for himself should he decide to step down. Control or not control? That's not control. But it's limited to that as you'll see later on, he can only appoint a replacement if he steps down.

Third, the trustee votes the A corporation stock. Control or not control? Actually it's not control because he's voting the stock in his fiduciary role as trustee.

Fourth, the settlor is also a beneficiary of the trust. And the answer to that is that it is control because it constitutes a reversionary interest in the trust. Last, the settlor can remove and replace the successor he named to himself, and that is in fact control. So the settlor is the UPE of A corporation.

Now let's look at the other side. B partnership has three partners X, Y and Z. We'll put up factors that may or may not constitute control. Y is the general partner of B. Control or not control? Not control, because as Karen told you earlier, this is not a test covered by anything other than equity interest in the partnership.

Second, X gets 50% of the profits according to a formula, if the profits are over a certain level. Control or not control? Not control because we don't know when or if X will ever get that 50%. If it was a fixed 50% right to the profits it would constitute control. Z is B's investment advisor. Again, not control. Even though he has de facto control by guiding all the investments of B, he doesn't have an equity interest sufficient to constitute control.

Last, X gets 50% of assets if B is dissolved and that is control. As would be 50% of the profits. So settlor and X are the two people that would be filing notification as the ultimate parent entities. You get them all right? No.

Okay. If your head is not spinning yet, it will be after this. Because even seasoned HSR practitioners have trouble with the aggregation concepts. This is an actual scenario we had come up with the last couple of weeks that we had to deal with so you'll see what fun we get to have.

This is the set-up. You have Company X - and these are all corporations. Company X is held 20% by Fund A, 20% by Fund B, and 60% by the public. Fund A and Fund B hold 33% and 12 1/2% respectively of Company Y. Company Y holds 89% of Company Z and Company X's only holding is the other 11% of Company Z. So the transaction is that A acquires 20% of X from B and 20% of X from the public so it holds 60%. So let's put some values on this so we

can do the analysis.

First we're going to look at the primary acquisition, which is fund A holding 60% of company X, valued at \$90 million. Over \$63.1 million so it's reportable, right? Actually it's not because remember - Company X's only holding is the 11% interest in Company Z. And under Section 802.4 you don't have to count minority holdings of voting securities toward the non-exempt asset limitation.

Now we have to look at the secondary acquisition. Because A is acquiring control of Company X, it's deemed to be indirectly acquiring the 11% of Company Z that X holds. So we have Fund A acquiring 11% of Company Z valued at \$16 1/2 million. Not reportable, right? Wrong. Because the aggregation rules require you to aggregate all voting securities of the acquired person that you're going to hold as a result of the acquisition. In this case Company Y is the acquired person because it controls Company Z. So you have to add together the \$16 1/2 million dollars of Company Z to the 33% of Company Y, and the transaction is reportable.

Let's look at alternative scenarios here. What if A held 50% of Y instead of 33%? The primary acquisition is the same. And exempt for the same reason. The secondary acquisition now is not reportable because A holds 50% of Company Y, so is also deemed to hold the 86% of Company Z. So it's over 50% in any additional acquisition of Z voting securities is exempt under the intraperson exemption.

What if Z was an LLC instead of a corporation? The primary acquisition is exempt under 802.4 because 802.4 allows you to exclude not only minority voting security interests but also non-corporate interests that don't constitute 50% or more in determining the value of non-exempt assets under 802.4. The secondary acquisition, acquiring 11% of LLC Z, is not reportable because it's less than 50% of an LLC. As Karen pointed out that doesn't constitute control.

So there it is. You know all about aggregation, or aggravation as Jack Sidorov calls it. That's it for my part of the presentations. I'll be glad to answer questions on 801 and 802. I think we're running ahead of schedule. Yes. Could somebody get the microphone please so we can pick it up for the webcast.

>>KATHRYN E. WALSH

Give it a few minutes to warm up and if you have a question come over here and speak into the mic.

>>MIKE VERNE

Should be good now.

>>FEMALE SPEAKER

Can you talk about the assumption of liabilities in an asset acquisition?

>>MIKE VERNE

Sure. Karen, do you want to do it or do you want me to field it? Okay. Any time you're acquiring assets and you're also assuming liabilities associated with the assets, it is considered

part of the acquisition price. So you would add whatever cash consideration you're paying along with the assumption of liabilities to see whether or not you're satisfying the \$63.1 million test. An example of that might be acquiring assets that are encumbered by a loan so you're stepping into the shoes of the borrower and you would have to include that as part of the acquisition price. Anybody else? Everybody is dazed. Yes.

>>MALE SPEAKER

I have two questions. Firstly, if there's fileable transaction that's not filed or a transaction that's deliberately crafted so that it isn't filed or it isn't reportable how does the PNO find out about that? And secondly if they do find out, what can they do about it beyond unwinding the transaction?

>>MIKE VERNE

The first part is generally a complaint from a customer or a competitor or in some cases we pick it up from a news story. There are people in the litigation shops that monitor specific industries, and they would alert us to the fact that something should have been reported and wasn't. Then we'll investigate and determine whether or not it should have been. I'm going to let the other one wait until later when Mal talks because he's going to talk about corrective filings.

>>MALE SPEAKER

Why are you concerned with the ultimate parent entity of the acquired person?

>>MIKE VERNE

The acquired person?

>>MALE SPEAKER

That's correct.

>>MIKE VERNE

The principle reason for it is that if you just looked at the acquired entity, lots of times wouldn't reflect the scope of the actual acquisition because you could acquire multiple subsidiaries all under \$63.1 million and none of those would be reportable unless you looked up to the ultimate parent. It's principally there to determine whether or not you have to aggregate multiple acquisitions from the same person.

Anybody else? I'll pass it back over to Bob Jones. Thank you very much. Enjoy the rest of the presentation.

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>>ROBERT JONES

We're going to start up again. This morning's session was more of rules and how to apply the rules. What we're going to do now is go into more practical every day how you fill out the form, how you deal with clients filling out the form, and that kind of thing. First up is Janice Johnson.

>>JANICE JOHNSON – 803: THE MECHANICS OF FILING

Good morning. I'm going to provide an overview of Part 803, which contains rules for completing the form. The form is located -- I'm sorry. The form is located at the HSR website. Hopefully, some of this information will sound familiar now that Mike and Karen laid the groundwork for us.

Who actually files? The pre-acquisition entity files the form or any entity controlled by the UPE that is authorized to file. An authorized entity means any subsidiary within the UPE that is aware of transaction. Karen mentioned the definition of hold. Holdings of spouses and their minor children and holdings of each other and are aggravated. Therefore, in the case of natural person, spouse or minor children only one filing is required. In the case of a natural person, the natural person or his or her legal representative may file.

Affidavits may vary depending on the type of transaction. In 801.30 transactions, where there's an agreement between the acquiring person and the acquired person both parties must attest to certain things: that the contract, agreement in principle, or letter of intent has been executed, and that the filing party has a good faith intention to complete the transaction. And this is just a note. In the case of a bankruptcy, the premerger office will accept filings prior to the existence of an agreement where party attests to a good faith intention to proceed with the transaction upon approval by the bankruptcy court and supply a copy of the court's order concerning the sale.

In non-801.30 transactions -- those transactions Karen mentioned that were special deals; for example, open market purchases, conversions, and the exercise of options. The acquiring person must attest to certain information in the affidavit.

The acquired person must attest that Target has received notice in writing. The Notice is very important. By the time that we receive the filing in the FTC and DoJ the Notice has to be received by the acquired person. The Notice has to have very specific information; for example, it has to indicate that the acquiring person has filed with the FTC, it has been mentioned that the acquiring person intends to acquire stock of the acquiring company; and there are 9 or 10 different specific pieces of information listed in 803 of the rules that has to be in the Notice. If not, then the transaction could be delayed, meaning the waiting period is not going to commence until all that information is in the filing.

The acquiring person must attest that it has a good faith intention to make the acquisition. In the case of a cash tender offer, the intention to make the offer has to have been made public. For example, you can use a press release, a letter to shareholders or SEC documents. And in 801.30 transactions, because there's no agreement usually with the two parties, no affidavit is required.

Incomplete response. What do you do when you fill out the form and there's an item you get to that you can't provide a complete response to? You can provide a statement of reason of non-compliance. By doing that you simply state the reason why the information is not there and why it was not available, and the efforts you made to locate the information. If the reason is based on a claim of privilege, just state that claim -- which is usually the attorney-client privilege or

attorney work product doctrine. If there is no statement of reasons for non-compliance the filing is deemed deficient. The form has to be recertified otherwise the waiting period is delayed.

Who certifies the form? In the case of a partnership any general partner; in a corporation, officer or Director; an entity that lacks officers, partners, (such as a trust or LLC), any person with similar functions of a general partner, officer or director. In the case of natural person, the natural person or his or her legal representative may certify the form. In the case of the estate of a deceased natural person, a legal representative of the state may certify.

Waiting periods. In non-801.30 transactions -- when there is a deal between two parties, the waiting period commences when both parties submit a compliant filing. There's a 30-day waiting period except in the case of a bankruptcy -- where there's a 15-day waiting period. In 801.30 transactions, the waiting period commences when the acquiring person submits a compliant form. There's a 30-day waiting period except in the case of a cash tender offer, which has a 15-day waiting period. Once 801.30 transactions are in the office and after review, we send a letter to the acquiring company whose stock is being acquired informing the company they have to file. And there's a time limit for them to file. If the waiting period is 30 days then that -- the issuer has 15 days to file. If the waiting period is 15 days, the issuer has 10 days to file.

There are two ways that a waiting period can end. The waiting period can expire or the transaction can be granted early termination. If the waiting period expires, it will expire at 11:59 Eastern Time on the 30th day or in the case of a cash tender offer or bankruptcy transaction, the 15th day. If the waiting period expires on the Saturday or Sunday or legal holiday, the waiting period will expire the next business day.

Grants of early termination allow parties to consummate the transactions before the waiting period expires. Early transaction is considered if you request termination; it's a matter of filling out the filing form. This is just a few pieces of general information about waiting periods. The waiting period commences when both the FTC and DoJ received compliant filings.

The date of receipt of a filing is when a filing is received by both agencies by close of business, which is 5:00 p.m. Day one is the next day after receipt of a filing. Most people think day one is the actual date of receipt but it's actually the next -- actually the following day. That's when you start counting your days. If the filing is deemed deficient the waiting period will not start until the filing is corrected and the form recertified. The parties have one year from the expiration of the waiting period to consummate the transaction.

And this is just some general information on grants of early termination. Only one party has to request ET for ET to be considered. That's again by checking the appropriate box on the front of the form. Early termination is only granted when FTC and DoJ have completed their review. Once the FTC Premerger staff notifies the contact person listed on the filing form that ET has been granted. Grants of ET are published on the HSR website the next business day and subsequently published in the Federal register. Finally, after the waiting period has expired the parties may consummate the transaction.

A little tidbit of information that you didn't know I'm sure. Our next panel session will be

Kathryn Walsh, Dani Jachino and Ellen Jakovic.

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>>ELLEN M. JAKOVIC, DANI JACHINO AND KATHRYN E. WALSH – PANEL DISCUSSION

>>ELLEN M. JAKOVIC

Can everyone hear me? Great. Thank you. As you can tell from the slide presentation, we're going to discuss the mechanics of putting together the HSR form. To begin, I'd like to give you some background on Dani's and my experience. We're so pleased to have been invited by the Premerger Staff to participate in this program. One thing I would like to say is, as a practitioner for many years in this area, the Premerger Staff are some of the brightest, best, most helpful staff in the government. They are terrific. There are few places in the government that I can point to and say these people go out of their way to ensure you get what you need done right and the Premerger Staff will do that. As Janice pointed out in her fun fact, you can call and get advice from the Staff. As Marian mentioned, just make sure you have your background facts, you know what the general law is, and you wait until the transaction is as nearly final as possible so that the advice you're getting will closely match what your real life situation is.

Dani and I practice at Kirkland & Ellis. Dani has been there many years. She has over 20 years of experience as head of our mergers and acquisitions clearance team. I joined Kirkland within the past year from White & Case as partner in charge of the HSR practice. So we're very pleased to be here today. We're going hit the high points of things you want to watch out for when preparing an HSR form. You'll hear from all of us today that the goal is to put together a straightforward, clear filing to expedite the review of the transaction and to avoid calls from the Staff where they don't see something they are looking for, they don't understand why you've put this information here, or it looks like some information is missing. Kate has some process items that she wants to discuss to kick off the presentation.

>>KATHRYN E. WALSH

Good morning, everyone. My name is Kate Walsh and I'm attorney in the Premerger Notification Office. I have been with the FTC 18 months and I came from private practice so I hope I have a unique perspective on preparing filings. Let me just say a couple of words about the way the PNO is set up and the way filings come in and are handled, and then Dani and Ellen will get into specifics. The PNO has a front office where your filings are stamped and checked in. They are processed by a fabulous team of folks in our front office, Theresa Kingsberry, Sandra Peay and Renee Hallman. The filings are assigned a transaction number: the first four digits are going to reflect the fiscal year and the second four are chronological. After the transaction number is assigned, the filing is distributed in alphabetical order—whoever is next in the alphabet gets the next filing. Once the filings come to us, we look through them for

compliance and we go from there. What we're going to walk you through is making sure you have a filing that's as close to compliant as possible so you won't get a call from us. There are 7 of us at the premerger office who review filings—folks who have been there a number of years. We've all seen quite a range of issues and I'm going to be chiming in on some things that Ellen and Dani say to provide a little bit of context based on our experiences.

>>ELLEN M. JAKOVIC

This slide lists the various items of the form and a brief summary of each item. We'll touch on each of the items today, but there are a couple that we're going to focus on and that we'll spend more time on. They are the items that typically take more time to prepare, more time to gather information from the client, and also typically result in the most problems that the PNO sees in filings. So we're going to try to spend our time helping you work through these issues and make sure we get those items of the form correct. In particular those will be Item 4 including Item 4(c), Item 5 which is dollar revenues, and item 7 which deals with overlap in NAICS codes with the other parties. Dani will kick off with gathering the information.

>>DANI JACHINO

Good morning. I'll be discussing gathering the necessary information. This is important because you need information for the HSR from your client. You're told you need to prepare an HSR for ABC Company. So you talk to the corporate attorney. Let's assume this is ABC Company and you have never done an HSR for them before. You learn as you do them for awhile that some you will have in the can and you only need to update it. But if you have never done one before, we'll discuss where you have to start. You have to ask the corporate attorney for information about the transaction. You definitely want a copy of the letter of intent if there is one. You want to know if you plan to file on the LOI or if you're waiting for the signed agreement. You want a copy of the draft agreement. Ask the corporate team to put you on the circulation list so you keep getting the newer drafts. You want to know the time line. When do they think they're going to sign the agreement, which generally tells you when you're going to file. What they tend to do sometimes is put into the agreement a clause that says you're going to file HSR in five business days; sometimes three business days; sometimes two business days. You don't really want only two business days unless you have been working on this HSR for a couple of weeks. If you're lucky they'll call and ask you if you can get a filing together in three days. You have to be honest and tell them yes or no. You'll know the client. If you have a manufacturing company with many NAICS codes, tell them to get you as much time as they can. It's something they negotiate between the parties and lot of times if you're the acquiring person, the acquired person wants the HSR filed because they think this shows the buyer is serious about the transaction. You are the one that will be pushing the client. You need to make your corporate team understand that a client is going to be doing a lot of this work. Another push back you get from the corporate attorney is not to ask the client for anything because right now they're working on the schedules for the agreement. You have to tell them that you can't do this HSR without working with the client. You need the information from the client. You want to know the date you're going to file the HSR, and request ten business days. They'll probably give you less and you'll have to work with it.

You also want the anticipated closing date because then you'll know if they don't have a date for filing, when you need to file in order to get them to that closing date, and always allow 30 days.

You can ask for early termination. At Kirkland we have a lot of private equity clients. They almost always expect early termination. They'll call and ask how many days you will need to get the HSR through the FTC. We know we can get early termination generally in about ten days to two weeks. Some of them think it's 15 days. You can get early termination in 15 days, right? Wrong. There's no set time. I have actually had early termination 12 hours before the HSR waiting period expired. The other thing you need to ask the corporate team is about the filing fee. In almost all deals recently, they split the fee between the parties. By statute the acquiring person is to pay but the parties are free to negotiate anything. In some deals, usually investments in companies by private equity groups, they will actually negotiate to have the acquired person pay. They're giving them a huge amount of money so they think the seller can pay this little filing fee. You need to know who is paying because it goes on the form and it goes in your letters.

The other thing you need, if this is a new client, is an individual at the client to work with you on the HSR. You prefer a CFO or a Controller. Sometimes they'll give you the General Counsel and the General Counsel is not going to be very helpful with revenue information so he'll get other people involved. You also want the contact for the other side—the HSR attorney on the other side doing the deal. When you contact your CFO or Controller and you start talking to him, he'll tell you they don't keep information by NAICS codes. They don't know what their NAICS codes are. Well, you just have to work with him and calm him down and tell him that you will help him as much as you can and make the process as easy for him as possible. And that's when we at Kirkland are very lucky. We have a team of people that work on HSRs and they're really good. I have been doing this for years. You literally get documents and try to figure out NAICS codes for the client. A little later, I'll get into how you can figure the codes out. That's what you need the CFO for. He may or may not be able to help you gather 4(c) documents. That we'll also be talking about later. He may get you someone else involved with 4(c) documents, perhaps the General Counsel. The CFO will also identify the other individuals that will help you gather other information for the HSR because he's basically going to help you with financials and financial information. You need to coordinate with the HSR contact for the other side. I must admit we know a lot of those people. If our corporate team tells me firm name, I usually know who I'm going to work with. You need to coordinate your description, you want your description that we'll get to later to be pretty much the same. We'll discuss that later. You need to compare your NAICS codes once you both have them because that's going to tell you if there's an overlap. You also need to discuss shared 4(c) documents. Those are the important things at the beginning. Now, I'll turn it over to Ellen.

>>ELLEN M. JAKOVIC

Thank you, Dani. I want to echo what Dani has said. You have to walk your client through some of these materials and what is needed and make sure that you have the point persons that are necessary for the types of information that you're going to need for the form. I want to say a few things about doing a filing for a foreign person. Often, foreign companies are not familiar with the Hart-Scott-Rodino process and they don't understand it. Those of you that have prepared merger notifications in foreign jurisdictions know that our HSR form is very different from the filings required in other countries around the world: When your client is a foreign company, you really have to take extra time to make sure that the client is educated on how different the U.S. notification is, and how much more detailed information we're going to need

for the filing. Oftentimes they won't understand why so you have to be calm and work with them: Yes, this is very important. No, this is not optional. Yes, I understand you don't think it has anything to do with the deal but we need to provide this information. So a lot of it is hand-holding, making sure the client knows why it's needed, and that it's very important that this information be submitted in a timely fashion. As Dani said, oftentimes we don't get a lot of up-front notice when a deal is happening. Most of the time we know before it's signed but sometimes we're sent an agreement three days after it's signed and it has a ten day HSR filing deadline in it. So sometimes we're playing catch-up, but the more information you can provide the client and the more hand-holding you can do, the better.

Moving on to the form. Item 1 of the form asks for basic information regarding the filing person. This is the ultimate parent that's going to be filing on either the acquired or the acquiring side. It's not necessarily the subsidiary or the entity that's directly involved in the acquisition but if you take your control rules and follow them up to the person who has ultimate control, that's the entity that needs to go in Item 1. I will caution you that the determination of who is your UPE is not always straightforward. The HSR control concepts can be very different from how your client looks at control from a business perspective. So you have to be precise and not ask your client who controls this entity? You have to go through what the control tests are for HSR. For example, we talked a little bit in the prior presentation about a partnership. If you ask a client who controls that partnership they'll tell you the GP. Very often the GP is entitled to much, much less than 50% of the profits or the assets on dissolution of that partnership. So for Hart-Scott purposes the GP does not control. So you really have to walk your client through these concepts and make sure that you're getting the right entity on top.

I would like to give one example where getting the entity right actually resulted in not having a filing where we originally thought one was required. We were representing the acquiring party. The acquired party was a foreign corporation. Its wholly owned subsidiary incorporated in the same foreign state was the entity being acquired. We had coordinated with the other side's HSR counsel and determined we met the jurisdictional requirements and that no exemption would apply. The other counsel assured us that their client was a publicly held company, and that no one owned 50% or more of the outstanding voting stock. So we started to prepare the filing. In due course, we on the acquiring side reviewed the Annual Report and other materials of the acquired person and that included information on the entity that was going to be acquired. When we looked at the pie chart of shareholders in that Annual Report, sure enough, it showed there was no one entity who had anywhere near 50%. When we looked more closely at some of these entities we said wow, these are funky names—maybe ministry or government entities. So we called the other side said, do you know anything about these entities? They did not, so we did some research, and it turned out that five of those entities whose combined interests added up to more than 50% of the outstanding voting stock were all foreign governmental entities, so at the end of the day the ultimate parent was controlled by a foreign government. The entity whose stock was going to be acquired was an issuer that was organized in that foreign country so we were able to exempt the entire acquisition under 802.52. So again, this is perhaps an unusual example where knowing who your ultimate parent is can be very important, even as to whether you have to do a filing or not.

One more thing about early termination. It is important for early termination that you talk to

your client about whether they want to request it or not in a particular transaction. As we've heard in prior presentations, when early termination is granted that fact is made public. It's published on the FTC website, it's also published in the Federal Register. Normally the fact that an HSR filing has been made and the information included in the filing are confidential. When you file for a transaction and if the waiting period expires on its own terms, nothing is made public about that. But when you file for early termination and you get it, the transaction number will be published, as well as the date of early termination and the entities involved. There are various reasons why your client might not want that information to become public. If the voting securities or assets are privately held, the client may not want this public for various reasons. If it's a publicly traded company, the client may not want it public until the board of directors votes on it and it's totally approved so it's very important to make sure that you coordinate whether you want to request early termination or not. And if one party requests it, only one, that means that the agencies are going to consider it. So if your client doesn't want it you need to talk to counsel for the other side and make sure that they're not checking the box for early termination.

>>KATHRYN E. WALSH

Just to emphasize this point, sometimes one side has checked the early termination box and the other side hasn't. You're cued up for early termination if one side checked the box. If it's very important to keep this transaction confidential, you absolutely need to make sure that you're consistent as to whether or not you're checking the early termination box. I think this comes up most frequently in 801.30 transactions. We get the filing in from the A side, let's just say the box isn't checked so there's no early termination cued up. Then we get the filing for the B side and they have checked early termination. That's tricky. And I know it's a difficult situation because it's an 801.30 transaction, you're not talking as frequently to counsel on the other side as you would be in a signed up transaction. But, if you can—get the lawyer on the A side to get that question answered so you can be consistent on the early termination issue.

I also just want to say a couple of things about Item 1. Item 1 is on pages 1 and 2 of the form and contains important information for the PNO, including the UPE for the filing party. Later, in Item 2, we get the other side's UPE and it's important to be correct about the name of each side's UPE; if you don't list exactly the same names you'll get a call from us. Back to Item 1—in item 1(f) it's very useful for us to know the entity doing the deal even if it's an unformed Newco, so please make an effort to answer Item 1(f) with whatever information you have. In addition, in item 1(g) we get your contact information and it's crucial we have someone we can reach listed in that item of the form. I can't tell you how many times we have tried to reach out to the person listed only to be told they're on vacation, or otherwise unavailable. That leaves us in a real bind if we need to get something corrected on the form and that could impact your waiting period. So think Item 1(g) through, and give us an alternate—we have had people give two or three alternates, especially around the holidays. So be sure you go through Item 1 and Item 2, the next topic, very carefully and review these items for consistency with the other side.

>>ELLEN M. JAKOVIC

If early termination is granted, the call will come to your contact person. That's good news you want to get right away and pass on to your client, so that's another reason why it's important to have as your contact person somebody who is going to be accessible and, if not in the office to receive the call, at least checking voice mails frequently so they can get that information to the

client.

Now we're going to move on to Item 2. As you can see, the acquiring person is Cookies and Crackers Galore, LLC acquiring a subsidiary of Big Diversified Company. We can't take total credit for the case scenario. Nancy Ovuka, who was with the PNO for many years, used the scenario in a presentation several years ago. We tweaked it here and there, but Nancy gets the credit for the scenario we're using today. Item 2 lists basic transaction information that you need to fill out. We'll focus on a particular area of Item 2: Item 2(c). Item 2(c) is completed by the acquiring person in a voting securities transaction only. So, if you're an acquired person you don't need to answer 2(c). If you're not acquiring voting securities and you're an acquiring person, you still don't need to answer 2(c). The other important thing to remember about 2(c) is that you need to check the box for the highest notification threshold applicable to your transaction. The notification thresholds are explained more fully in Section 801.1(h). For more detail on how to figure out your threshold, refer to 801.1(f). Fifty percent is the highest notification threshold. So if you're acquiring 50% or more of the outstanding voting securities of an entity, regardless of the value—we're assuming it's reportable—fifty percent is what you check. That's the only box that you'll check in that case.

>>KATHRYN E. WALSH

And please just check one box, the highest box applicable to your transaction. If it's fifty percent, that's all you need to check. You do not need to check something corresponding to the dollar value. That is a very, very common mistake that we see. Again, the highest threshold that applies to your transaction, check the box for that threshold only.

>>ELLEN M. JAKOVIC

Now we'll move on to 3(a). Dani will discuss that.

>>DANI JACHINO

Now we're on to the description of the transaction. You have your letter of intent and you have your draft agreement or your signed agreement. You literally need to look through the document—if I had an agreement I could show you there are key parts where you find what you want to use in your 3(a). You want it to be very brief. You want to just hit the high points of the deal. You don't need to go through “pursuant to an agreement dated as of October 23rd by and between...” and then list ten different parties. The FTC can look at the agreement and see that. They don't need to see that in this little tiny summary. You'll see in the next slide pretty much what we want to say. Another important thing is that we want to identify in item 3(a) anything that's unusual. If you have a stock for stock transaction and the other party, the acquired person, is getting stock in the acquiring person and someone is getting \$63.1 million of stock, you want to say if there is a person who is going to be filing, or that a filing isn't required because they'll rely on the investment-only exemption or something to that effect. Indicate that if another filing is required, it will be coming under separate cover. There are other things, such as if there's a secondary acquisition, as Mike talked about earlier today, where it's an investment of the acquired person and the acquiring person will be getting that stock and it's valued at \$63.1 million, so filing would be required or not because it's investment only. You should say that in item 3(a). Also mention any other types of related transactions. Sometimes there just could be another filing required because of the type of deal it is. Sometimes you have two ultimate parent

entities.

So here is a little sample, again, initially produced by Nancy that will go with Cookies and Crackers Galore. And you can see here at the top, you have the person and the entity of both the acquiring and acquired side. It just shows the FTC exactly who the parties are. We will generally define them so that we can use the definition in the description. Then you can see here at the very end there's a little footnote and it says that CCG's acquisition of BD's wholly owned French subsidiary is exempt. That type of thing is good too. We're not talking about that at all. That would have added \$64 million to the purchase price but it's exempt, so you're not filing for it. But, the FTC would probably see it in the agreement and ask you about it. The way I look at 3(a) is, and what I always tell everyone that works with us, try to answer a question so you don't get a call from the PNO. If it's a simple little thing, I'll just stick it in the description. Another thing that sometimes happens, we call the PNO and we get some advice from someone telling us we can handle the filing a certain way. But we've talked to Mike and Kate gets the filing to review and she doesn't know we have talked to Mike and she calls us. If we just set forth in 3(a)—pursuant to advice from Mike Verne on such and such a day or something, then Kate knows. And if she has a question about it she can ask Mike. Now onto Ellen.

>>KATHRYN E. WALSH

Let me chime in on item 3(a) here. This is your one opportunity to tell us what's going on. We don't need every single little detail about every share that's being acquired. We need an overview of what's happening. We need the players. And Dani and Ellen lay it out in this way. It's also okay if you lay it out across the page so the acquiring person is followed below by the acquiring entity and on the other column the acquired person would be at the top with the acquired entity below. That layout is also fine. We need to know when the letter of intent or agreement was signed. We need to know the basics of what's going on: voting securities, assets, non-corporate interests, the value of the transaction. If the consideration is stock, as Dani said, we'll want to know if there's going to be a filing on the backside of the transaction where shareholders of the target are in turn going to be filing for what they get in the acquiring company's stock. It's very useful for us to have a closing date. And any other wrinkle that we would have a question about looking through the agreement or the 4(c) materials answer here for us. As Dani said, the best way to approach it is what question can I anticipate knowing the materials that are part of my filing and I'm going to answer it here. I like in particular this footnote telling us about another part of the acquisition that's exempt. You need to make sure that we are clear on all of those pieces. You will avoid a phone call that way and that's always a good thing.

One other quick item to mention in item 3—Item 3(d). I think everyone is fairly used to fact that that's where you attach your agreement—whatever you're filing on, whether letter of intent or a signed up agreement. We also require copies of non-competition agreements to be submitted under that part of the form. Sometimes non-competes are in the actual agreement and if we have got the agreement, that's fine. Sometimes they're in exhibits afterwards, after the main part of the agreement. If that's the case you need to get us a copy of that exhibit. That's the one instance in which we would require exhibits or schedules to be submitted along with the main part of the agreement.

>>ELLEN M. JAKOVIC

Now we'll move on to items 4(a) and items 4(b). They're basically the financials—the documents filed with the SEC for public companies and Annual Reports, annual audit reports and regularly prepared balance sheets for public and private companies actually. You can send hard copies to the government. What we did when we used to do that, you'll see in a minute why we don't any more. Actually, I don't know how you feel about it, Kate. I would actually prefer sending you the copies, the hard copies, because you could look at them.

>>KATHRYN E. WALSH

I think everyone has a different take on that. I don't mind looking at them electronically but I know some do like the paper so it depends on who you get.

>>DANI JACHINO

The people that work with me who pull these documents like to put in the links, so they put the links in. At any rate, if you do download the documents and if you do it from the free Edgar database, or the company website which probably links to the free Edgar database, make sure that when you're downloading you get the whole document. Sometimes it doesn't change the page as it prints it out so you'll have something cut off like the actual total assets or net sales. The FTC is going to use this to see the size of person and is not going to see the size of person. And they're going to be calling you and telling you. And possibly even bouncing you on that one, I think. So you want to make sure that you have the whole document if you're using a hard copy. For private companies, again, like I said we do a lot of private equity, so we're always filing private financials. Although my staff likes to use the Edgar database for public companies, they're submitting hard copies a lot. You need to ask the client for them. You would think that a private equity firm would have an Annual Report and a regularly prepared balance sheet in the file for companies they control. They don't always. It's so hard sometimes to get these you are pulling your hair out. And you'll see later when you're pulling your hair out, you just try to get what you can. Some of our private equity clients have 30 companies in a fund and you need 30 separate financials. You just work with them. If you're just dealing with a corporation it's going to be easier because they will have the financials. There are times that you won't get a current annual report—some of these companies, now in particular in this economy, are in trouble and they aren't preparing their Annual Report on time. So you're going to have to use an old one and these financials are not supposed to be more than 15 months old. So then you try to get a regularly prepared balance sheet. You literally sometimes can only do the best you can do from the company.

Now, we were saying about this link, you can incorporate by reference by putting a link in to the SEC documents and to the Annual Report on a company's website. But it has to be a live link, they have to be able to get to it, they have to be able to get to it free. I guess the other thing I was going to say when you're downloading financials, if you go to LivEdgar, it prints out correctly because it changes the page to fit the actual paper. And that one works out, but then of course the client is paying for you to download the financials. You can also incorporate by reference, as we do with private equity, to a prior filing. In that case, you need to put the prior transaction number. You don't need to put an actual exhibit number in the filing when you incorporate by reference. What you have to do though, if you're doing this a couple of months after the most recent filing, is get new balance sheets—the most recent balance sheets. Then you

are putting in the exhibit number and note on this example how we have the exhibit number. I'm sure Kate will talk about this later on in the Style Sheet but that is how they would like the numbers done. We used to number differently, then we changed to make the PNO happy.

>>KATHRYN E. WALSH

It's good to make the PNO happy. I want to say a word about item 4(b), as this comes up more often than you would think. When you have a transaction where the size of person is relevant—in other words we're looking through the filing to make sure the size of person test is met on both sides—if we don't have financials that show that your party meets the size of person, and you have filed on the assumption that they do, we need you in item 4(b) to make a statement stipulating to the fact the size of person test is met. That is as simple as saying party A stipulates that it is a blank million dollar person. Don't leave us guessing on that—you will get a call. What happens occasionally is the size of person test isn't met and we have to go through the process of refunding the money in that particular instance because the filing wasn't supposed to have been made. But, often what happens is we get a filing on the idea that size of person is met but none of the financials we have actually reflects that. So please just anticipate the question that's going to come up, look at your balance sheets, see whether the numbers are clear and, if not, stipulate to the appropriate size of person in a transaction where size of person is relevant.

>>ELLEN M. JAKOVIC

As Kate and Dani have demonstrated here, these two items require a lot of detail, a lot of attention. Specifically under 4(a), if you have a public company, you may have a lot of 8-Ks you're going to be putting into the filing. Again, either way you look at it, if you print them out, you have to be careful you have them all, all page numbers are there, they're all complete. If you incorporate by reference to a website via a link, you need to make sure that your link is live, that it's free, and that the PNO can access it. This is one of the items that seems straight forward, but you need to take some time and make sure that you do it right and you have everything together for it.

Now we'll move on to Item 4(c). We could spend a whole day talking about Item 4(c). I'm sure you don't want to sit here that long, although it's very interesting. We're just going to just hit the high points in terms of preparing the form and making sure you gather all the information you'll need for 4(c). I'm sure most of you know that 4(c) is the item that requests copies of documents prepared by or for an officer or director analyzing the transaction with respect to certain sensitive issues: markets, market shares, competitors, competition, and the ability for expansion into product or geographic markets. The first thing I want to talk about may help you in terms of limiting where you have to look for these documents and who you need to search. Not all officers of a company fit the definition of an officer or director for purposes of Item 4(c). We're particularly looking at officers or directors that are specified in the company bylaws or in the articles of incorporation or are appointed by the Board or persons exercising similar functions in non-corporate entities. A partnership will not have officers or directors, so you will need to work with your client contact to figure out what individuals would exercise similar functions and would fall under the 4(c) officer and director group. Another important thing to keep in mind, 4(c) will apply not only to your ultimate parent, your officers or directors at the ultimate parent level, but down through the chain, through your controlled entities. Many times in a transaction you have a particular subsidiary or controlled entity that's really working the deal, but obviously

you make your filing based on your ultimate parent. So you may need to be searching folks at the ultimate parent level as well as at the level of whatever controlled entity may have been involved in the transaction. So this is where it's very important to be talking to your contact person at the client. Generally the general counsel will get involved at this level and help you determine whose files need to be searched. Your CFO or other financial people will focus on other items of the form. But their files likely will need to be searched as well.

The other thing that's important to remember is that it's not just documents that are found in the files of your officers or directors that might be responsive to 4(c), but also documents in the files of any agents that worked with your client on the transaction. These include investment bankers or consultants. They may have prepared documents that fall within the item 4(c) definition. Generally when you do your search at the client you should bring these documents up, but they won't always be in the client's files. Investment bankers sometimes will prepare memoranda and documents for officers and boards of directors and then they collect them and the only copies that exist are at the investment banker's offices. So it's very important that you work with a client and you ask them were there consultants, did you have an investment banker involved? A good practice is to contact the agent directly to a contact at that agent and ask them to perform their own 4(c) search. An example of when this search was not performed, which turned out to be very unfortunate for the client, was a matter several years ago where a transaction was filed, the initial waiting period had expired, and a second request was issued. In the course of the second request, the investigating agency asked for documents directly from the files of the investment banker for one of the companies that was party to the transaction. Files were produced, among which was a document, clearly prepared for the board of directors of one of the parties, that did not show up in the initial 4(c) search of the client, and was not filed with the HSR filing. The agencies took the position that it was a 4(c) document, and that it should have been included with the initial filing. The filing was, as we call it, "bounced." The party who should have produced the document had to go back, update their filing, and recertify. The waiting period started all over again with the initial 30 day period. As a result, the agency had an opportunity to issue another second request, now with the benefit of having all the information that it had gathered up to that point in the first second request process. So it can be a very costly mistake indeed if an important 4(c) document has not been produced. So it really makes sense to cross your Ts and dot your Is on this. A postscript: that transaction was challenged, went to court, and an injunction was issued, and the deal died after that. I'm sure the result was not directly related to this 4(c) document, but again, it was a very, very important piece of that entire transaction. So it is important to focus on this item.

A couple of other things to mention about 4(c). A party's obligation to produce 4(c) documents runs up to the point of filing. That would include any documents that meet the 4(c) definition that may have been prepared after the execution of the LOI or the agreement. It doesn't mean that once the agreement is signed we're not analyzing any more documents for 4(c). That's not the way Hart-Scott looks at it. You need to look at all documents created up to the point when you file HSR, and test them against the 4(c) criteria to see if they meet the test and if they should be produced. A note about foreign language documents. As you may know, in the second request process, if a foreign language document is responsive, you have to submit a translation of that document. If you have a 4(c) document in a foreign language, however, there's no up front obligation to translate it. If you submit the document in the foreign language, you have

complied with 4(c). However, as we have discussed today, one of our goals here is to expedite your filing and the review of your filing by the Premerger Staff. One thing that is very helpful when you have a foreign language document is to submit a translation of that document with your filing. This is something that you'll need to discuss with your client. Sometimes clients are not going to pay to have the document translated. If you explain to them the benefits, it's a small cost along the way to getting your deal cleared quickly. The Staff may also ask for a translation. That's happened to me when the client decided, no let's see if they're interested. If expediency is important, submit a translation along with the foreign language document. If a partial translation or full translation exists, you need to provide that with your Hart-Scott submission. But you have no obligation affirmatively to go out and have it translated. But it's something certainly to consider in the interest of expediting your filing.

Now, a couple of points on process with these documents before we look at a sample 4(c) response to a filing. As Dani talked about with Items 4(a) and (b), it is important to make sure that the documents that you submit in response to 4(c) are legible and complete. If your copies are not good, if they're cut off, if for some reason there is a chart, a graphic in say a management presentation where it's very important to have the color to figure out what this chart means, you may get a call from the Staff asking that you provide the full page or a color copy. So again, in the interest of avoiding that call, check your copies, make sure you have all the pages, make sure nothing is illegible or cut off. If you have color copies or if you have color originals, I would strongly urge you to consider supplying color copies with your filing. It's a little extra expense for the client but compared to the deal transaction costs it's probably minimal. Also one other point that I think comes up very often in some documents is that clients, investment bankers and attorneys like to give code names to transactions and code names to each party involved in the transaction. Often a 4(c) document may have nothing but code names in it and never identify the parties. It's very difficult for Staff going through your documents sometimes to figure out who's "Blue" and who is "Black?" So if somewhere in your filing you can identify to whom those code names refer, again, you'll avoid a call from the Staff. Sometimes it's appropriate to do in your 3(a) description of the transaction, sometimes in your 4(c) response. I don't think the Staff has a preference as long as it's in there so they can figure out who is who.

>>KATHRYN E. WALSH

I think we tend to see it more often in the 4(c) list, but it is very helpful.

>>ELLEN M. JAKOVIC

One final point before we look at a sample. Generally, if even part of a document is responsive to Item 4(c), then the full document needs to be submitted. There are two exceptions. One is in the case of a claim of privilege. If part of the document references attorney-client privileged advice, that portion of the document may be redacted and a redacted version may be produced. If the entire memorandum reflects attorney-client advice, then the entire document can be withheld. Also portions of board minutes unrelated to the transaction for which the filing is being made can be redacted as well. But other than these exceptions, if any part of a document is responsive to 4(c), the entire document should be produced. We have here a sample of a 4(c) response. Here you see listed typical 4(c) documents, a confidential information memorandum and a management presentation. We have listed the date and authors, using the exhibit configuration that PNO has said they like to see. In the bottom section, we list a document

withheld on the basis of privilege. So here we've basically given the information that Janice spoke about earlier when she talked about the 803.3 statement of non-compliance. If you're not complying fully you have to state the reasons for it. Subsection (d) of 803.3 lists what you need to say if you're asserting a claim of privilege. You have to show what the claim is and the basis. Here we say we're withholding on the basis of attorney-client and work product privilege because it contains advice of counsel. 803.3(d) also requires you to say where the original of the document is located and whose control it's under. So here we say it's located at the offices of Law Firm LLP, list the address and that it's under the control of Sue Partner and what her relationship is to the filing person. Then we've given the information on the document itself which we have to provide: What type of document it is, who the author is, who the addressee is and any additional recipients. We have disclosed an additional recipient, Jane Doe, the CFO, who also received a copy. Sometimes people don't look at the elements of what has to be set forth in a privilege claim. The PNO likes to see all of these elements set forth, so make sure you go to 803.3(d), familiarize yourselves with these elements and include them every time you assert a claim of privilege for a 4(c) document.

>>KATHRYN E. WALSH

That's also true for a redaction—we expect the full lay-out of these elements as listed in 803.3(d) even for a redaction.

So, if Ellen's example from before doesn't illustrate the need to be careful on 4(c), I don't know what does. It was a very good example. I know everyone is hoping that I'll provide some nugget of wisdom on 4(c). I'm not here to do that. It's a topic for another day. It could take an entire session such as this and I still don't know if we would get anywhere at the end of it. I want to reiterate that a good 4(c) list will obviate the need for a call from us. That's particularly true as Ellen said in your claim of privilege. We want to know the basis for your claim. Attorney-client privilege—based on what, advice of counsel? Tell us the general reason. It doesn't have to get into superfine detail but we want the basis for your claim, and we want the other elements that are listed in 803.3(d), so familiarize yourselves with those and then you'll submit a clean list for us and avoid the need for a phone call.

>>ELLEN M. JAKOVIC

There's a lot more we could say but Dani will take over.

>>DANI JACHINO

We talked about it before, revenues by NAICS codes, clients don't keep their revenues this way. Generally they're going to fight you on it. We don't do it, we don't want to do it. As Ellen said, particularly foreign companies. Particularly Japanese companies, oh my gosh. You have to remember that actually a good portion of their products is not manufactured in the U.S. and they may fit into a wholesale code. But, oh, when they manufacture here, you just have no idea. Days, days working with these people. Item 5 requires 2002 and current year revenues by NAICS codes for operations conducted in the US. That includes the territories, possessions and D.C. It also includes, I think I'm correct on this, right across the border in Mexico? Mike is saying yes. The acquiring person must provide revenues by NAICS codes for all controlled companies. The acquired person provides it only for the stock, assets or non-corporate interests that are being acquired. And this I know is a huge item that is done incorrectly in the HSRs.

What you want to do is think about what the FTC wants to compare. This is the part where they're comparing if the two companies do the same thing, if there's an overlap. We'll find out later that this item will generate Item 7. And you need to have it correct, you want to have this correct. Think about the fact that the acquiring person has tons of businesses but they're only buying one small business from another big company. That's what could create the overlap. It's not everything that the acquired person does. That's what you want to show the government. If you think that way, that should help you remember that you only need to put the NAICS codes for the acquired assets or the subsidiary that's being acquired into the acquired person's item 5. You also need to leave out NAICS codes when something is exempt, like that little French subsidiary. There's a possibility that some of their products were sent into the U.S., which could be reported in a wholesale code if they were U.S. operation or if they were sold through a U.S. entity. But that part of the deal was exempt so you don't put anything in for that company.

How do you find these codes? In these two wonderful little books. The top one, the North American Industry Classification System, keeps getting bigger and heavier and one of these days they will find me on the floor in my office because I will have reached for it and knocked myself in the head. But that book contains all of the 6-digit codes for every kind of business. The Numerical List of Manufactured and Mineral Products contains 10-digit codes for manufactured products. There are a couple of odd ball things in the front that are not manufactured. That's your bible for manufactured products. You can get the books on the census website. Our library now orders them, the newer ones whenever they are updated. We're in 2008 so we're past the 2007 census. 2002, the base year will probably change in maybe 2010 or so. It takes about three years for them to publish the last census reports and change the base year, which is another big mess for preparing HSRs. When you tell clients that the base year is changing, oh, my gosh. They are not happy. When the base year doesn't change, you just keep updating your 2002 revenues with acquisitions and sales. When you are talking to your client and trying to help them figure out what their NAICS codes are, you can suggest that they look at their 2002 census report. However, do not think that's gospel because very early in my 20 something years of doing this, a partner at the firm at the time and I sat in his office for two days with this little consultant from the client going through census reports and having this man tell us oh, no, that was wrong. He said they wrote that in or they tried to fit that into an old code and that's not really what they do now. What happens is census sends out forms for what the company did in the last census. The business may have changed and the company may have added products. They may not be doing that exact product so the codes on the census report are not the ones they should be reporting in. At least the codes are a good start because it gets you into a category of NAICS codes. Looking at a prior HSR is really helpful. Even if it's a very old one. At least it gets you an idea of what they did. Sometimes if you get one you can find the current year on the old form was 2002 and then you can generate your 2002 revenues from the old HSR. Here you work with the CFO or the Controller, or whoever they assign you to on their staff. These people aren't going to be happy with you, I'll tell you that. They're usually accountants and they don't have a sense of humor. So it can be trying, particularly if they're in manufacturing because you need the 10-digit codes.

Now as I said, census reports are not necessarily something you can completely rely on. You need to check these NAICS codes yourself. Like I told you, the group that works with us, as soon as we find out the client we're going to work with, gets on the company website. If you

have an information memorandum, you look through there and try to figure out what the company's products are. There is one trick that you need to think about carefully—everything written, including the website and information memorandum, may say that the company manufactures but they actually may not manufacture themselves. They may use a contract manufacturer in China or somewhere else offshore, in which case you will report in a wholesale code. It's really important if they don't manufacture not to report in manufacturing. If you report in manufacturing it may create an overlap and manufacturing can create more problems than wholesaling. So that is something you need to be careful of. I have had that happen many times. I had a client company that manufactured shampoo buy a company that only developed and marketed a premium shampoo, they didn't manufacture shampoo, but their website made you think they did. When the client bought that company there was no overlap because the target only reported in a wholesale NAICS code. There are all sorts of creative things that you have to think about. And as you work with clients and the more you work with them, the more you understand their business. Like we said, you also use the website to see what their products are. Sometimes this is where you can discover that they actually don't manufacture themselves.

For manufacturing companies as I have been talking about, you need the 2002 and current year revenues by 10-digit codes. You need to report that way. The 10-digit contains like the first six digits (the 6-digit code) and the first seven digits are the 7-digit codes. So the smart thing to do is just ask for all manufacturing products for 2002 and the current year by 10-digit code. You can add up to the 6-digits for 2002 and add up to the 7-digits for the current year. You can also catch a substantive overlap in a product by comparing the 10-digit NAICS codes of the two companies. We suggest you do that. If you have a client that is a little savvy with HSR, you may not get it that way. We recently had one that literally filled out all the items. We had to work with it and discovered that they weren't correct. Then we had to go back to them and work with them to get the correct information. Believe it or not, it was that shampoo company. I like to say that you are doing HSR as a snapshot of the companies when you're putting the filing together and when you file. So if they acquired something in 2004, you need to report 2002 revenues as though they owned it in 2002. That is also sometimes a difficult thing for them to do. They may estimate, and you may have to footnote it. The same thing occurs with the current year. If they actually sold an entity and you have the 2002 revenues in there, you need to take them out because that business is no longer part of their company. It can create an overlap that doesn't exist because they are no longer in that business. If you remember your NAICS codes are going to create an overlap, it's going to cause you to try to be very correct with them. A very important thing is to list them in ascending order and double space them. When our client acquires a company we'll try to get the other side's HSR. I have seen them with this tiny little font that you practically need a magnifying glass to look at and single spaced. You definitely want them double spaced so the FTC can read them easily.

>>KATHRYN E. WALSH
Don't irritate the PNO.

>>DANI JACHINO
If there's something else really unusual in the NAICS codes and revenues, make certain you footnote it. Now Ellen will pull out her hair.

>>ELLEN M. JAKOVIC

I want to keep my hair but the little man is going to pull his out in the picture. As you gather from Dani's presentation, Item 5 is the most frustrating and time consuming item of the form. As Dani mentioned, your NAICS codes often will not be a perfect fit with what a company does and you have to work with a company and understand exactly what they do and fit them in to the NAICS codes that best describe their business. Companies generally will not keep this information by NAICS code. If they prepare filings on a regular basis they will at least have the prior filing to refer to, but this is not something they're going to be able to go into the CFO's office and pull out. So, when you're figuring out the timeline for your filing and when you have to have certain things done in order to get the filing done by the date specified in the agreement, put aside a good chunk of time for Item 5. In the example we'll go through shortly, we have a limited number of NAICS codes. I have had over the course of my experience a client who had 40 pages of product level codes—and at that point we weren't into 10-digit product codes. It took a tremendous amount of time to check that and make sure we were accurate, to make sure all of the product codes corresponded with the numbers for that appropriate 6-digit industry. It was a lot of time and effort. So be sure to put aside a good healthy chunk of time to make sure this item is correct. And the reason you want to make sure this item is correct, because any mistakes here, anything unclear here is very likely to result in a bounce. Go ahead Kate.

>>KATHRYN E. WALSH

Item 5 is where we see the most mistakes. This is such a crucial part of the form, mistakes in this item are more than likely to get you bounced. So, I'll make another plea to be careful on this part of the form. It is so helpful for us if codes are listed in ascending order double spaced. I can't tell you how hard it is to muddle through tiny little numbers so really, do us that favor. It lets us get through your filing more quickly and lets us get comfortable with the numbers more quickly. I think the example that Ellen and Dani will run us through is going to illustrate crucial points of listing Item 5 information and what needs to be there in various parts of Item 5. All of Item 5 interrelates and Dani and Ellen will walk you through how it works.

>>DANI JACHINO

We haven't gone into the substance of the question of whether the client manufactures in the U.S. and where that revenue should be reported. That could be another session. But they are very good references on the premerger website.

>>ELLEN M. JAKOVIC

Yes, there are guides to help you walk you through those types of questions. Let's go to our sample Item 5 pages. This is the HSR filing, the Item 5 portion of the filing, for Cookies and Crackers Galore. And as you'll see here, they are listing in three industry codes, three 6-digit industry codes. Only one of those codes is a manufacturing code. You can tell by the preface. So in item 5(b)(i), that's where we have our 2002, our base year, revenues and for every manufacturing industry code we need to break out those 2002 revenues by 10-digit product code. That's exactly what we've done here. The overall code is "cookie and cracker manufacturing." And then we've broken out in 5(b)(i) at the 10-digit level the various 10-digit codes in which Cookies and Crackers Galore manufactures products. The key, and what you should be doing every time you file, is making sure that when you add up all these numbers here for the 10-digit codes in any 6-digit industry that the total number here, the 200.7 million, when you reference

back to 5(a) which is your dollar revenues by industry, that the total here matches. If it doesn't match, then something is wrong.

>>KATHRYN E. WALSH

And you will get a call.

>>ELLEN M. JAKOVIC

Hopefully it's just that maybe you added wrong, but sometimes a code is wrong or the client didn't give you the proper revenues for a code. But it's not something you can ignore. If it's not that far off, don't think that it doesn't make a difference. It does make a difference and you need to go back and check with the client to make sure you have the correct revenues here. The other two codes are non-manufacturing codes. Those do not have a corresponding 10-digit product codes, so those won't appear as a break-out in 5(b)(i). It's only your manufacturing industry codes where you'll have the 10-digit break-out.

Now that we know that portion of the form is correct, we're going to go on to the next part of Item 5. This section handles any products added or deleted by the company's own internal expansion and provides the current year revenues, in this case 2007, for the product codes. As Dani mentioned, when you have a company that has sold a subsidiary and no longer manufactures those products because they sold that subsidiary, that type of deletion of product doesn't appear in the add/delete section. You're looking at a snapshot of your business. If you sold a business and the business is no longer included in your company, you back out whatever revenues were in 2002 and you don't have it now, so you have no current revenues to report. So that gets lifted out of your filing completely. A common mistake is saying we don't produce those products any more so we put them in 5(b)(ii) as an add/delete. You don't have that business any more. It comes out totally. Where you have an add here is in this case where Cookies and Crackers Galore didn't buy a business. If it bought a business that manufactured this product they would have to include it in base year revenue and this code would appear in 5(b)(i). They didn't. They added a product line. They decided through internal expansion that they were going to begin to make this product. So what we need to do is add the 10-digit product code here, "biscuit mixes made from purchased flour," list it as an add, include the year of the change and list the current year revenues related to that product. Then, what we need to do in Item 5(b)(3), we have to list Cookies and Crackers Galore's current year revenues, which is 2007 revenues, by 7-digit product class. So here now, we have added a different 7-digit code from the two manufacturing codes we used before. So here we have to add the 7-digit code that relates to biscuit mixes and list the revenues as well. Then 5(c) is the current revenues for the non-manufacturing industries which are consistent with what we reported in 5(a). Do you want to add anything, Kate?

>>KATHRYN E. WALSH

I think that's a very good illustration of the process you need to go through to make sure that you are getting things to add up and how to represent properly things that have been added or deleted.

>>DANI JACHINO

Moving on with the form. We're getting near the end. Item 6 has three parts. 6(a), 6(b) and

6(c). Item 6(a) for the acquiring person contains a list of all of the worldwide entities with addresses. Not completely sure why we need the worldwide entities but we do, so we put them in. Some of the sources for this data are the company database. If it's a public company I don't mean the subsidiary list in the 10-K because that does not include all the subsidiaries. I'm not sure what they have to disclose in an SEC filing but it does not include everything the HSR requires. So make sure you talk to the company. It's usually the secretary's office that will help you gather this, or it could be a corporate legal assistant in the company. It may take time to update this. Another thing I don't understand is why companies don't have a list that they can just print out but they don't seem to have it and, if they do, they don't seem to keep it up to date. They look at the existing list and say—I know this is wrong, that's gone. We liquidated that company. So don't think they'll be able to print out a list quickly and give it to you. Like I said, there's no complete source of information that you can get yourself. You have to rely on the company for this information. For the acquired person, if it's a stock transaction or non-corporate interest transaction, you only list the entities being sold. In an asset deal, the wonderful thing is item 6 does not have to be completed. That's just a nice thing, everyone thinks it's great when they don't have to do that.

>>ELLEN M. JAKOVIC

Dani is right. Very often, companies don't have this list handy. It depends. Some companies are very good, very organized. They go right to the legal secretary's or corporate secretary's office and can print it out. You have to gauge how good your client is with this information and, if you know they're going to need some time to update it, you just need to figure that into your timeline of filing. And very often the problems with updates come with the foreign entities.

>>DANI JACHINO

It's almost always the foreign entities that screw you up. We had a client a number of years ago that would update this huge chart, legal-size pages about that thick, and send it to me to keep because they were unable to keep Item 6 updated. That was fun quarterly--sitting there spending all this time working on Item 6. Now, item 6(b) lists the shareholders of the acquired person of the ultimate parent entity and any subsidiaries, any of those many companies listed that are not wholly owned. You must show all 5% to 49.99% shareholders. Again, there's probably not going to be readily available information. For the ultimate parent itself you can look at the 10-K or the proxy statement, depending on how old it is. If it was filed last February or so, it's not going to be very accurate. Public shareholders change a lot so you may need again to ask the company about the shareholders. They may send you to the 13G filings and I really don't like when they do that. I find 13Gs a little difficult to figure out. With private companies and the not wholly owned entities, there's no source other than asking the company for their shareholders of 5 to 49.99%. And again, the foreign information is just extremely difficult to obtain.

I told Ellen the other day a couple of things that happened before she was with Kirkland. In the case of one HSR, the prior in-house lawyer that did the HSR said he had his HSR in perfect shape. So the new lawyer in charge gave the data to me to use in an HSR, and I should have mentioned with NAICS codes, when you get an HSR from another law firm, we always check the NAICS codes to make sure they're correct. The same with Item 6. So I start checking through it and I have one foreign company that had a dash as the shareholder, literally a dash. Not a name, not an address, nothing. Just a dash. And the dash had a percentage of stock. So

we checked into that one. Another time I had a company trying to get information for me and we were filing quickly. We were actually trying to get it out that day before we could do it all electronically, internally at Kirkland not with the government. But we were trying to get it done so we could send the form out the next day and the client calls—he he was already the kind of in-house attorney that was really nervous and excitable. I can't get the shareholder, I can't get it. There's a coup in this country and we can't get the information. I said it was fine. We'll just leave it. I understand from some people that some countries don't allow certain information out about shareholders. So you just may never get it and you can just do the best you can do.

Item 6(c) lists the companies that are not controlled—not 50% or more held. However, currently 6(c) applies only to corporations that have voting securities. We have some PE clients that the only way we can stay on top of what they don't control is to list their LLCs in item 6(c). We just list them because it is just easier for us to work with them that way even though you're only required to list issuers of voting securities currently. The secretary's office in a corporation should have this information. Again, the foreign stuff is difficult. You may get the name of the issuer, you may get the percentage held, and you may never get the class or number of shares held. Again you just do the best you can do. Item 6 is important because your client is certifying the HSR. I don't think it makes or breaks the HSR like the NAICS codes do, but, again, it's something your client is certifying and you want to have it as correct as you can possibly get it.

>>ELLEN M. JAKOVIC

Now we'll move to Item 7 and NAICS code overlaps. This is the item where you need to list the 6-digit industry codes in which you overlap with the other party. Here obviously the best way to do that is to have been coordinating with the other party all the way through on your filings. The easy part of the process is to exchange with them your 6-digit codes, figure out where your overlap is, and report that. You need to report overlaps between the acquiring person filing notification and any acquired person. The process is relatively straightforward. The only time it gets difficult is when you have an 801.30 transaction. Maybe it's a tender offer, and you have been not been talking to or cooperating with the target, so you can't ask their HSR counsel what codes they will report in. In this case, you do the best you can to figure it out. Look at the target's website, look at the public filings they have made to figure out what they do and where they overlap with your client. You know in what codes your client is reporting. Your client's CFO or Controller maybe helpful in figuring out in what codes the target may report—or any deal folks, because they obviously have been focusing on this acquisition. Your client has decided that this is an acquisition they want to make. They clearly know about the company, and what business it's in, so they can help you figure out what your overlaps will be. There are times when the parties show an overlap at the 6-digit level but, especially in manufactured products, when you look down to the 10-digit level there's really no overlap. For example, in this case we know that Cookies and Crackers Galore manufactures cookies and saltine crackers. They don't manufacture graham crackers. If that were the only product in the 6-digit industry in which the acquired entity produces a product then it might be important to note on your form that there may be an overlap at the 6-digit level but if you go down to the 10-digit level there's no overlap here.

>>KATHRYN E. WALSH

That's helpful to us so I would encourage you make that statement in the form to streamline our review.

>>DANI JACHINO

It really helps. I did it quite a few years ago actually and we got early termination. The former partner said to me he was really glad I thought of doing that because there was an overlap and the client wanted early termination and we got it.

>>ELLEN M. JAKOVIC

You have determined that you have an overlap at the 6-digit level. Then what? We move on to item 7(c) of the form. This is the part of the form that requires geographic information about where your client does business or where your products are sold in those overlap codes. Again, the most reliable source for this information is going to be your client and your client contact will be someone in the sales and marketing department. Maybe someone in the CFO's office can help figure out for you what are the different states or what are the establishments that should be listed in 7(c). It's also instructive to check the company website and the confidential information memorandum, if you're on the acquired side. But those really are just a check. This is information you need to get from the client. Item 7(c) contains various subsections where you have to list certain information depending on what your 6-digit industry overlap is. For all subsections except 7(c)(iv), you can respond with the word "national" if your client conducts business in all 50 states. You don't have to list out all 50 of them. For 7(c)(iv), it is a little different. The industries in that subsection are retail trade and other industries. Here the agencies require a different listing. You can't just list states, rather, you have to list the address of each establishment from which revenue was derived in that overlap code. The information must be arranged by state, county, city and/or town. Again, this is information that you won't be able to derive on your own. You will need to work with your client. The client probably will not give the information to you in the form that PNO wants it, but if they give it to you in an excel spreadsheet it's easy to rearrange into the appropriate form. I would encourage you to get the information electronically from your client. This is another item of the form to which you really need to pay particular attention because PNO really cares that they get this information in the correct format.

>>KATHRYN E. WALSH

I can't tell you how many times we get an overlap in a code that requires listing in this fashion and folks don't do it. If that happens, you will get a call and you will have to get us the information in the correct manner. So whenever you have an overlap just do a quick 30-second double check to make sure you don't fall into 7(c)(iv). If you don't, listing states is fine, but otherwise you have to provide it to us in this detailed manner and Ellen is just about to show us an overview of that

>>ELLEN M. JAKOVIC

Our example is relatively straightforward but if you have an overlap, generally you have a multi-page listing. So it's a condensed view, but it shows why this item is important. If you give the PNO all those stores without the proper organization, it's really difficult for them to make sense of it. Here is a sample 7(c) for our transaction. Our first overlap code is "cookie and cracker manufacturing." That's in subsection 7(c)(i). That's a code for which we can provide the

response “national” if your client's products are distributed into all 50 states. That's exactly what we have done here. We also have another overlap in the industry code for “snack and non-alcoholic beverage bars.” That code happens to fall in 7(c)(iv). We have to go to the client and get that store list and we have to organize it the way that PNO requires, which is what we have done here. You can see that we have arranged the address by state, county, and city, alphabetically within those categories. So we start with Alabama, then Georgia, Indiana, Kentucky. I want to highlight Georgia because it helps illustrate how to organize these responses. When we list by county, we start with the first in alphabetical order. Bibb County comes before Fulton County, so Bibb gets listed first. Then we have two cities in Fulton County. How do we decide which is listed first? Then we shift to the city. When you look at Atlanta and Sandy Springs, “A” comes before “S,” so Atlanta comes before Sandy Springs. If the client doesn't give the information to you in this form, and likely they won't, it will take you a little time to put it in the proper form but it's something you just need to do. Now we'll go to Item 8.

>>DANI JACHINO

We sound like we're client bashing here but we're not. We're talking about a form that we need to fill out in a certain way to make sure the FTC and DOJ understand it. Generally, the client doesn't keep the information in the form we need it. And Item 8, prior acquisitions, is no different. When you have an overlap the acquiring person needs to list prior acquisitions in the NAICS codes in which you have an overlap. Sometimes the client can tell you what they've acquired. Actually, my shampoo company was good about that. They were good with their prior acquisitions. Some people have no idea. With private equity firms you very often end up with an overlap in a NAICS code between two totally unrelated companies. It could be a computer software publishing company. The client is not even thinking of that other company they acquired so it's up to you to remember what you might have filed for. There are ways you can check—footnotes in financials will often list acquisitions within the last year. If you have prior HSRs you can check to see if they reported in a particular NAICS code. Or you can ask your contact at the company. If you get a good person who's been there awhile and knows what they have been acquiring they can help you. You are reporting prior acquisitions only for direct acquisitions by the ultimate parent of U.S. issuers or U.S. assets that meet the certain criteria listed in the instructions. You do not report acquisitions made by an entity currently included within the filing person if that entity was included within a different person when that entity was acquired. You just report direct acquisitions. With some clients' HSRs who are acquisitive we have quite a list of prior acquisitions. That's it, unless Kate has something to add.

>>KATHRYN E. WALSH

I want to add a couple of points. Thank you both very much. Ellen and Dani have done a great job laying out the basics, the highlights of key parts of the form. What I want to do is just touch a little bit on process. And I want to call attention to a couple of things in your folders—I am specifically referring to the checklist and style sheet. Both of these resources are available on our website and I'm going to be walking you through the website in a bit and I'll show you where to find them. As the checklist lays out, you'll see a lot of points that I have mentioned here today. I also want to be sure to mention a couple of additional points about how to actually put the filings together.

Now that you have had a crash course on how to fill out the form, please make sure to use single-

sided HSRs and single-sided copies. There's a big push to do double sided copies to save paper, but it's harder to get through attachments and look at substantive 4(c) documents if we have to keep flipping the document around, so please just give us single-sided materials. In addition, we like each document to be separately stapled. If a staple won't work because the document is too big, a clip will be fine. That does not mean clip a whole stack of documents together. It means each individual document should stand on its own with a separate staple or clip. In trying to explain this, people have taken our statements in that regard and started giving us huge clipped piles of documents. That doesn't do us much good. Make sure they're separately held together so we can get through them more easily. Once you have assembled those materials you need to label them. The style sheet lays out the proper form for labeling your materials. You need to put the name of the filing person, the date and then an attachment number. The attachment number should correlate to part of the form to which that particular attachment responds. For your included 4(c) attachments, they should be labeled 4(c)-1, 4(c)-2—pretty logical but helps us keep them straight. Once you have done that, put your filing in a redweld or other redweld-type folder. Don't bind the materials, don't put them in any kind of pleadings folder, don't punch holes in them, don't do anything like that. Just put the documents that are separately stapled and clipped inside a redweld—we don't want to disassemble anything in order to look at the materials you have given us. Finally, if you do file on faxed signature pages be sure to get those originals to us within two days. If you're going to have a problem doing that with a foreign entity, give us a heads-up.

I want to call attention to one other item in your folder, and I'll review this on the website later. This is our contact information. And I'll note here that we do request you look at our website, look at the materials available on the website to try and answer your fact situation before you call. If you do get to the point where you have to call, please do have your transaction as fully evolved as possible. What is very hard is when people call us with a set of facts that isn't fully developed and then we get another call as the facts change and another call as the facts change. You can't help that in some situations but try to make sure your scenario is as fully developed as possible. You'll find our addresses, the FTC and the DOJ premerger unit, where you send filings. There's a special notice regarding deliveries to the FTC. If you use a delivery company like FedEx or UPS, you can run into delivery issues. They go to a central receiving spot and the waiting period doesn't actually begin until they come to our office within the FTC. And sometimes there can be a delay. So if you're looking to get your filing in and date stamped, the safest way to do it is to have a messenger walk it over.

I have been talking about resources and again, I'm going to be walking you through our website which is just been totally revamped. The website is a great resource for HSR materials. Another good resource I'll ask Ellen to hold up is called the Premerger Notification Practice Manual. It's an American Bar Association Section of Antitrust Law publication from 2007. We help go through it to make sure it's as accurate as possible and basically what it contains are key letters and emails received from the bar over the years containing key questions that will help you understand particular provisions of the rules and also the form. So it's not a complete source by any means but it is a great starting point. That together with our website provides most folks with a good starting point for their fact situations.

The last thing I want to say is in regards to confidentiality. The materials that you submit under

HSR, the form and the attachments are confidential. I know when I was practicing on the other side, that assurance is the only way you can get your clients comfortable with submitting the types of materials such as key internal business documents to the government. By confidential, I mean these documents are not subject to FOIA. I think an Act of Congress can dislodge them from the agencies but you won't have these materials publicly available once they are submitted to us. That provides folks with a great deal of comfort in terms of submitting these materials. So on that note, thank you both very much. We're going to move on to more useful things to know. Let me introduce Sheila Clark-Coleman who will talk about filing fees.

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>>SHEILA CLARK-COLEMAN – PAYING THE FILING FEE

Good afternoon. It is afternoon now, am I correct? At this point everyone should know that they have to file and that a filing is warranted under HSR. Just a little history. It was not until 1989 that Congress determined that a fee should be paid for all mergers and acquisition subject to the Hart-Scott-Rodino Act and regulations promulgated there under. The statute further stated no notification shall be considered filed until payment of the fee. In other words the waiting period required under the Act won't begin until payment of the filing fee. You have heard a lot today about thresholds. Under the current thresholds if the size of transaction is valued at greater than \$63.1 million but less than \$126.2 million, the filing fee is \$45,000. If the size of transaction is valued at \$126.2 million or greater but less than \$630.8 million, the filing fee is \$125,000. If the transaction is valued at \$630.8 million or greater the filing fee is \$280,000. We jokingly said we'll see if that will change. I think the size of transaction might change in the opposite direction but I don't know if the fees will go down as well.

Payment of the fee. The acquired person is responsible for the payment of the fee at the time of filing. However, as Dani mentioned now day clients will split the fee. If the fee is split among the acquiring and acquired person then you should notify us or tell us on your report and notification form or any transmitting correspondence. By transmitting correspondence now day e - mail is preferable instead of a regular letter. Fees are made payable to the Federal Trade Commission by electronic wire transfer or EWT, that is the preferable method. Or if necessary, by bankers cashier check or certified check. The fee must be paid in U.S. currency. The amount of payment must be net any service transfer or wiring fees charged by the bank or financial institution. In most instances, this happens with foreign wires when they deduct a transferring fee from the wire. If that happens, you will be notified by the premerger Staff, mostly me of the shortage. We will accept electronic wire transfer or a check for the shortage. We will accept a regular check if the shortage is under \$100. Fees are deposited into the United States treasury account.

To insure filing fees paid by EWT are attributed to the appropriate payer filing notification the payor must provide the following information to the bank initiating EWT. It is very important the ABA number and the ALC number is correct. And the SWIFT code. There are two SWIFT

codes most banks will accept. And if you run into a problem with one then try the other. If the ABA or ALC number is transposed it will delay the wire being put into the FTC's account. The best anecdote I have is that someone transposed the number, the fee went to IRS, the client owed IRS and the IRS kept the money. So make sure the numbers are correct. If the name used to transmit the EWT differs from the payor's name, the alternative payer's name should be disclosed on the correspondence accompanying the filing. We have had instances where John Doe paid as the owner of, the Cookie Company. We need to know.

This is the most important thing, if your client sends you a EWT receipt; this is how you decode it. It will save you a lot of grief and it will make a lot easier to actually tell us the confirmation number which is required on the form if you have it before you file. Basically what this is showing you is that Citi Bank actually wired the money from John Doe's account to Banc of America and it was a million dollars. What you're looking for up here is the receiver type and that is actually Citi Bank's ABA number. Here is also Bank of America -- I'm sorry, I did it in reverse, receiver is Bank of America and sender is Citi Bank, there's the ABA number and the amount. The most important thing on that form is when you receive it from your client is the IMAD and the OMAD. That is the Fed Reference number; the number we're looking for is the confirmation number. To decipher that, you'll notice 2008, '08, '04 is actually saying that on August 4, 2008 the money was sent to that account. And the rest of the alpha numeric number is the confirmation number. Key is the first eight digits because it's telling me when it was received into the account.

Next, the banker's check or certified checks are accepted as payment of filing fee. If any other form, any other check, company check, I don't know how many people now a days have a personal check to send, is actually sent to us, it will be returned via FedEx and you'll be told to give us a certified check or banker's check or EWT. Hopefully this will help you and one of the biggest hold ups with a filing or your waiting period is that the fee was not paid. So hopefully this will help expedite that.

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>>MALCOM CATT – CORRECTIVE FILINGS

My name is Malcolm Catt and I'm an attorney in the premerger office. I'm also the post consummation filing guy. I speak somewhat funny, as my friend Karen often tells me. So you're not all sitting there wondering where I'm from, I'm from New Zealand originally.

But let's get on to post consummation filings. To begin with, what is a post consummation filing? It basically comes up in the following situation. Two parties consummate a transaction and someone later on realizes they didn't make the required HSR filing. After initial panic they try to correct the omission by making a post consummation filing. Also known as a corrective filing or violation.

I know you're wondering who would do such a thing.

One common group is founders and high ranking executives in large companies, particularly when they go to exercise their options. I think it was discussed earlier that sometimes people don't have an understanding of aggregation and they can't conceive by exercising a few thousand dollars worth of options that they're going to have HSR problems but, of course, if they're already holding a couple of hundred million dollars of shares they are required to make a filing. So keep an eye out for those people.

A second group is passive investors. I think Mike discussed this earlier -- you can acquire up to 10% of the voting securities of an issuer without making a filing as long as you remain passive. The problem here is when people cease to remain passive or go over the 10%. So those aren't the only two groups to watch out for but they are two I commonly see come across my desk.

So you've found a violation. What do you do next?

First thing, you should do is check out the new HSR website. Kate will talk about that later on. It's full of lots of good information and one of the great things about the update is that there's now a tab to post consummation filings you can click on, right from the first page -- information that used to be deep down far away in the back parts that people could never find. So you should get on that -- all the information I'm talking about today is on that, plus lots of other good stuff.

We have a room full of people waiting for your call. Actually, it's just me. But when you get to the website you see my number. You can give me a call. If you find one of these things, flag it to me immediately.

Once you have done that you can start preparing and submitting the form. It's the same form, basically, you would prepare and do in a normal filing. One thing you need to do is make sure you check the corrective filing box there, that way people in our front office know to send it to me so I can have a look at it.

So in preparing the filing you look back in time. What I mean by that, pretend you're back there preparing the filing when it should have been actually prepared. So for instance, the thresholds that apply will be the thresholds that were in place at the time the transaction occurred, not the ones that are currently in place. So just because you're below the current threshold doesn't let you off the hook. So that's -- if you had a 20 million transaction consummated in 1990 you have to file even though it's below the current threshold because at the time 15 million was threshold. You should prepare the filing at the time you should have made it. For instance the item 4A and 4B documents and item 5 revenues should reflect the period of time just prior to when the filing should have been made, not the time you're actually making the corrective filing.

But don't forget the present. I guess with all golden rules there are exceptions. One, you need to give us the 4C documents all the way up to the date you actually make the filing. Also the filing fees threshold and filing fees are those in place at time of the actual filing, so don't think you'll get away with giving us less money than you hoped.

Next, you should prepare an explanatory letter. This is one big difference between a post consummation filing and a regular filing. The letter doesn't have to come in when the filing comes in. It's useful if it does but if you're rushing to get the filing in you can follow up a little bit later, as soon as possible, with that letter. In the letter you're going to explain various things.

One, you're going to tell us why the violation occurred; you're going to tell us how it was discovered; you're going to tell us whether you've previously made HSR filings; whether you have previously failed to file a reportable transaction; and whether you have realized any benefit or advantage that would not have been realized that made a timely filing. And two, the steps that the party is going to take to ensure their future compliance with the Act. I can't tell you how often people don't give me all these things on the list. And not only does it annoy me but it's also going to annoy your client because I'm going to call you and ask you to fill in the gaps. You're going to have to go back to your client and get the further information and provide it to me. So please make sure -- you'll see it on the website all these things are listed -- if you're in the position you have to prepare an explanatory letter for your client, you get everything in there. Who signs the letter? You may be preparing it, but it has to be signed by the filing person if it's an individual or a company official if the filing person is an entity. You cannot sign it so don't even try, we need to get the signature of somebody involved in the company.

What can you expect after you filed? We're going to process it just like any other filing and the same waiting periods will apply. The only difference here is that early termination is never granted with these kind of filings so you don't need to bother checking the early termination box on the form, it's going to be ignored if you do.

Secondly, the FTC or Department of Justice is going to investigate further and during the investigation they'll determine where to take action and look at various factors which include: whether the violation was the result of understandable or simple negligence; whether the filing was made promptly after the violation was discovered; whether the parties realized any benefit they would not otherwise have realized; and whether the parties have implemented adequate measures to prevent future violations. I should also add, we will also look to see if this is the first time you have got into trouble. These are all factors -- by no means all the factors -- that we'll take into account but some of them.

If you're lucky you get a "Don't do it again letter". Which basically says although we believe you violated the Act we're not going to take action at this stage but we'll be keeping an eye on you and if you do it again you may not be so lucky. Those do go out quite frequently but don't feel -- even if it's your first time -- that you're necessarily going to get one of those letters. Worst case scenario, one of the agencies sues your client and your client maybe liable for up to \$11,000 fine for each day that the party has been in violation [the fine has increased to up to \$16,000 per day]. \$11,000 might not seem a lot but, as you can imagine, it quickly mounts up. If your violation occurred months or --God forbid -- years ago, you can be facing a lot of money. So you should be very careful.

In summary, for each completed acquisition that comes to your attention, you should look at it and see whether there's been an HSR filing. Where there hasn't you should ask yourself "Why not?". And if there's not a good reason for it and if you think there may be a problem you should call me [Janice Johnson now processes post consummation filings. Her number is (202) 326

3101] immediately. Thank you for your time. Next up is Bob Jones.

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>>ROBERT JONES – E-FILING

Good afternoon. We have two more speakers and then we'll close up. Right now it looks like we're running pretty much on time.

I want to talk to you about the electronic filing option. The government mandated early 2000, 2001 that agencies that could do so would have to do some sort of an electronic filing option for the people who have to file various documents with them. Most people are familiar with filing your taxes electronically. So we were trying to make it as much fun as filing your taxes when we did this.

Right now we have an e-filing form that is available through the website, you can get it. There are a bunch of benefits you can get from it. One is that it makes filling out the form easier. It makes sure you put in correct numbers. If you put in things that are the wrong format it won't accept it, it can give you help. There are various tools that it uses to make it easier.

I think this is one of the biggest ones: you can submit a filing any time day or night. The way it is now with paper you have to be in by 5:00 p.m. If your messenger comes into the building and they let him through security at 5:10, it gets stamped for the next day. You don't get any credit for being there that day. With e-filing you can be at your home on your computer in your pajamas and submit an HSR filing. And to me, for some reason, that sounds very attractive.

You can create custom templates for various clients. So if you have clients that are frequent filers, you just open their template and fill it out, it would save the NAICS code information, you can have prior acquisitions in there and you wouldn't have to necessarily fill them out, although obviously you would have to update them.

As I said, it does check for errors. It doesn't say "no, you phrased that badly" or "no, that's not the UPE, this guy is the UPE" but it does check things like have you included all the information that you need to include, have you included it in the proper format? Is all the information there?

It definitely speeds up our processing of the filing because basically all the information that comes in the e-form is fed right into our premerger system and it reduces a lot of data entry we have to do at the beginning. When a filing comes in we have to enter the contact information, we have to enter the parties, we have to enter the structure of the deal and all this stuff. It just goes right into our system if you use the e-filing form. It can help speed up the processing.

Finally, even if you don't want to file electronically, it still produces a very nice clean copy of the form that you can print out and have your messengers deliver or FedEx or however you

usually do it. We like to encourage people to use it because believe it or not there are a lot of law firms that use their own custom made forms and occasionally we get ones that are just a little difficult to figure out what's where. So this is a good standard hard copy of the form that we like to see.

The E filing form is on HSR.gov website, right there. Basically all you have to do are three things. Download the viewer which is where the arrow is pointing, save it to your hard drive, it's a little bit of software it needs to interpret the form and affidavit. And you get the form and affidavit and basically you just save them. You open them and save them to your hard drive like you would a Word document.

Then there's the slight rub. You have to get a filing certificate. The idea behind the filing certificate is the E-form isn't going to have someone who physically signs the form. So when we devised this, we thought, well, we need some electronic equivalent of that signature. At this point, this is where we stand with e-filing, is that you have to apply for an ECA certificate. This isn't a really difficult thing. You have to fill out a form, it goes to Verisign and they'll check it's a legitimate company, the person represents the company, stuff like that. I think there's a small fee of \$150. But what they then get is an electronic signature that they can use to sign the form and submit it to us.

This is just a quick shot of part of it. You'll see that some of the fields are green. Those are required fields. You have to fill those out. If they're not filled out the form will tell you, "hey, you didn't put the name of the company in there." That kind of thing. It has filing fees, all that kind of stuff. As I said, mandatory fields.

It adapts to the filing status so if you click certain buttons, it will highlight certain other things that you have to complete with that type of a deal. Again, it validates formats. So it forces a particular date format throughout that's easy for us to read and won't cause any problems. For finite answer sets, things like the amount paid there's only three -- well, there are three standard filing fees you might pay but you also might split it so you can either type in the filing fee or you can click down and it will show you the fees and you pick it. So there are various features like that incorporated.

Another nice feature is that it has help available. You can click the help button and then whenever you go over a particular field, a box will pop out and give you the instructions for that particular item. So, it's fairly helpful.

As I said, after you filled it out and -- I should mention the way documents are handled it has a -- you attach them at the end. There's an attachment list. You can give an attachment number. Then for every item within the form you do, you say look at attachment 1, look at attachment 2. We prefer PDFs because they're standardized but it does take a few other types of formats. You can have all of your 4C documents, your entire form in this electronic package. No copying, send it to the FTC, and it will take care of the complete filing that way. Like I said if you completed all mandatory, it will check for that, then comes the ECA certificate signing.

When you send it to us, it goes over -- when you sign it, it encrypts it. It's very well encrypted so

it can't be intercepted. When we get it, it goes behind the firewall and only when it's behind our firewall is it decrypted and then it's sent to DOJ. So it goes to both agencies at the same time, safely and securely.

Alternatively, as we always like to say, if you don't want to take the risk, don't want to do anything else, you don't even need the ECA certificate. If you just want to use it to fill out the form and print out a copy. Like I said, that is available. Go to HSR.gov for more information.

Now Kate is going to finish up with an overview of our website.

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>>KATHRYN E. WALSH – USING THE NEW HSR WEBSITE

Okay. Hi, again, everyone. Once again Kate Walsh from the PNO. I hope everyone is still awake. This is your last session so thanks for hanging in there. I want to walk through our newly revamped website with all of you. It will show you where all the materials we have referenced today are available. It's a great resource. And now that we've redesigned it, I hope it's more streamlined and user-friendly. Our goal in updating the website was to preserve all the pages from our old web page or replace them with something better. So if you can't find something you've used in the past, we have made every effort to make sure everything is preserved or replaced with something better. But if you can't find something that you use, that should be there, please let us know. This is still very much a work in progress. It's only been live since yesterday—yesterday at about 4:00.

You'll see here on the home page a general overview of our program. In the text you can access two things directly. In the first, this is our landing page for the introductory guides that we have. There are three of them. The third relates to second requests, I'll talk about that in a bit but the first two are useful resources. If you haven't had a chance to check these out I would encourage you to do so. They have been both been recently updated, revised as of September 2008. They have a lovely new cover on them that is the same as a lot of the materials in your folder. These have been reworked somewhat and it's worth taking another look even if you are familiar with them already. Guide I is an overview of the Premerger Notification program, containing very useful background information about how things work. Guide II is an overview of the rules that includes a hypothetical transaction. It's very useful to read through that hypo, it really illustrates a lot of points as you work through it. So let me click back to the home page. Here also there's a direct link—and you can get to this information in lots of way but one is right from that paragraph on the home page—to our contact information. I want to just highlight this top number here. This is the number you should call for your general questions including transaction number and general filing status. The people who answer the phone as I have mentioned before, Renee, Sandra and Theresa, can answer those basic questions for you and that's in fact a large part of what they do. So I encourage you to use that general number for those types of general questions. You'll see that this material is also available in a PDF which

prints off cleanly—the idea was you could print that out and have it next to your phone so it's nice and clean for those of you who work with us frequently.

Under special highlights here we have got three areas. The first is this What's New click through. Here is a list of updates to the web page. It's a great way to come on and find out recent changes that have been made. For instance, you could find the revised thresholds when they're put up. It's a quick reference for recent changes to the web page. We do have some cleaning up to do here. We haven't quite gotten to that yet. But we will. You'll also see current headlines including this very workshop we're all so excited to be part of. And below we have a sort of news archive. And headlines will eventually be pushed down to this area and you'll also find some older materials we felt were important to keep on the web page but are not exactly current news.

So hopefully as I have been navigating you have noticed this template that is a part of most pages that you click through to. And the idea in doing this template was to provide you with navigation tools no matter where you are on the website. So what I thought I would do is just walk you through the basics of our new left navigation menu and these two buttons at the bottom of the page which are new. There is an exception to the template being present. It's when it's owned by another part of the FTC's website and you'll see that in a couple of instances as I pull things up. If it's owned by another part of the website we won't have the template and that's just the way it goes. First and foremost, we have got a link here to the statute and the rules—here is the statute, here are the rules, the statement of basis and purpose and our formal interpretations. Now, the statement of basis and purpose, assuming here that folks really are new to the practice, the statement of basis and purpose is a great source of background material. It provides the basis of all of the rules that we have promulgated. If you have questions about a particular rule or an exemption, looking back at this history can be helpful in terms of finding out what the original intent of that particular rule was and that can often help you interpret how to apply it. Now, you can see there's also a link to our guides here which clicks you through to the same landing page we discussed before. And we've also elevated the statement basis and purpose or the SBP up to this level as well so if that's what you're coming to the site for you can get there with one click. I will say that this page is directly transferred over from the old site, and also transferred directly over from the old site is this HSR rulemaking page. Now, we are taking a look at these two pages – having them juxtaposed like this has sort of forced us to think about what differentiates the two pages. For now, both are good resources for rulemaking, both rulemaking and the history and justification for the rules.

Our next topic on our left navigation menu is the form and instructions where you can access the form in Adobe and Word. We also have the link to our handy HSR.gov for e-filing. That takes you to a different site so it doesn't have the template. We have brought e-filing to the top so if that's what you're at the site for you can get there directly. We have also put the style sheet here for easy access. This is something I was talking about during our panel, and it also is available in the PDF as you have in your folders for clean printing. All right. The next topic on the left navigation menu is our informal interpretations page. I hope all of you had occasion to visit this page already. This is an incredibly useful part of our site. What this page accesses is our database of letters and emails, redacted of course, that have been sent in asking for advice on particular transactions. The Premerger Notification Practice Manual contains some of those

types of materials but this is a much broader source of information. Now, the trouble with it is that it's very hard to search. So with that admission, we are getting a better search engine function, it is coming. I can't promise exactly when. I thought it would be in place by now but it is imminent and it will from my understanding provide ability to search by date which would be useful because then, for instance, if you're looking for something regarding a non-corporate entity and you know you have to look after the 2005 changes for anything relevant, you could limit your search to that particular date range. But just to provide you with an example of how useful this is, I'm going to enter Mike's favorite exemption, 802.4. And you will come up with all kinds of documents. You can hone your search by adding other Sections of the rules, 802.4 how it intersects with 802.50. This is what you see when you pull it up: you'll see the Section of the rules that are applicable, the Staff member who answered the question, the date of the question, and the answer and then if you want to click through to the original file you can do that. So that would be an original image of what we received. Then here of course is the redacted content, an email, and it lays out that Mike had a conversation with someone and here are the facts, just writing to memorialize this, make sure we have got it correct. Looking through these can be helpful to your fact scenarios, especially if it's something like 802.4 which there's a lot of material on, or foreign exemptions—there's a lot of material on those. Again, it's sort of as good as your search is, that's why we're making an effort to get a better search engine in place. But I do encourage you to come to this part of the site, get familiar with it—it's a great resource to investigate before you get to the point you feel like you need to call Staff.

Next we have a link to early termination. You'll see they're listed by year and month. This is not from this page currently searchable. We're looking into whether that is something we can set up but as of right now from this page the best way to negotiate it is clicking through each one which is kind of time consuming. Next is current threshold information, updated every year. You'll scroll down and see the original threshold, \$50 million, and then the current threshold that's in place, currently \$63.1 million. There are additional updates to the numbers as well. So that's an important place to visit to know what the current thresholds are. Clicking through to the filing fee, this is what Sheila reviewed with you. You have got your fee thresholds, information laid out about account numbers. She has even put her email right here for you—big mistake on her part. Next we have what Malcolm covered, procedures for post consummation filings. All the information he covered is there. It's at the top of the page so you don't have to dig for it. We have a click-through to the Medicare prescription drug and improvement Act. This basically applies in limited circumstances: if you're looking at an agreement between a brand name and a generic manufacturer of drugs, in certain circumstances you have to file copies of those agreements with us. This is here because people do come to the site to find out this information. Another reason people come to the site is for HSR Annual Reports. You can see this is maintained by another part of the FTC website. The most recent one we have here is 2006. I understand that 2007 is imminent so that will be posted here as soon as it's available. For those of you who don't know, the HSR Annual Report is a great source of information about the number of HSR filings made, stats on enforcement actions—it's a very useful source of information in terms of what we're doing on a yearly basis. Again on your left navigation menu you have access to our contact information there wherever you are on the site.

Finally I would like to walk you through these two new buttons that we have created as part of the new website. We wanted to create a spot for people who don't have a lot of experience, a

starting point with some basic materials, and then we also wanted to create a spot on the website where you can come and know that you are looking at all the resources that we have available to help you with filings. One of the biggest criticisms of our old website is there was information spread all over the place, and now the idea is to have it all in one centralized location under these buttons. Let me start with first time filer. For a lot of you in this room it would be a great place to start. Again, you have got links to your introductory guides. We have got a link to frequently asked questions. In terms of introductory materials, this is a very nice document that's new: Steps for Determining Whether an HSR Filing is Required. It lays out what you heard today on commerce test, size of transaction test and size of person test, points you to the guides to where you can get and analyze the questions and is also available on the PDF for printing out. We have a couple more links you'll find helpful and another new document we've referenced, the Checklist. This is another way to make sure that you're answering everything you need to answer and are providing us with a filing in the form we want to receive it. All these materials are also on the resources page so don't feel like you have to look for one on one page and not on the other. The idea behind the resources button is everything we have to help you is now available in one spot. It's divided into categories and it is our intention to put helpful information on this page and we may have to create new categories at some point. This is what they are for now. We have Basics: the guides, frequently asked questions, the steps document I just showed you. In Filling out the Form there is an overview of item 5 and what you should do with manufacturing versus wholesaling, foreign questions that come up quite a bit. This is a really nice overview and a great place to start if you have a question on item 5. There's also an overview of NAICS, where to go, what it's about, the style sheet and the checklist document. Under Valuation, one of the toughest concepts is to figure out what you need to look at, that is what you have already got and what you have now to come up with your valuation—Karen and Mike touched on that. This is a very brief overview of what you need to do. Assets, voting securities, that are non-publicly traded or publicly traded and non-corporate interests are treated the same way non-publicly traded voting securities are. If that's not enough for you we have a more detailed version of this. We also have a nice tip sheet on 802.4, this is available in PDF. It lays out how you do the test. It's a very useful walk-through as to how you need to apply the various elements of that exemption. Finally, we have an overview of second requests. There's a model second request which is Guide III. We also have one that relates to retail elements and a press release that goes along with that. There is guidance here—if you want to submit documents during the initial waiting period to help with review of your transaction, this is the overview you would need to review. One initiative of the former Chairman was merger review process and here is that document.

So we hope the new website is more streamlined and user-friendly. We welcome your comments and thoughts as you walk through it, get comfortable with it. You have our contact information in many different places. Feel free to reach out and let us know what you think. Thank you very much and Bob will make some closing remarks.

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