

## Summary of the PNO Brown Bag Series - Summer 2018

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October 12, 2018

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This summer, the Premerger Notification Office (PNO) held three brown bag meetings with experienced HSR practitioners. The meetings were an opportunity for the HSR bar to meet staff, share comments regarding the HSR process, and address any concerns or “big picture” policies. The PNO did not set an agenda for these meetings and did not answer any HSR hypotheticals or take questions related to specific transactions. Over 50 attorneys from various law firms attended one of the three 60-90 minute sessions held in May, June, and July at the FTC’s Constitution Center.<sup>1</sup>

After introducing the PNO staff and attendees, each session resulted in a lively discussion on numerous topics. Among the key takeaways from these meetings is that the PNO staff continues to have a very collegial, cooperative relationship with the HSR bar.

The PNO addressed a few topics:

- The ministerial rule and Form Instruction changes that would take effect on August 15, 2018. The PNO outlined some of the changes and directed the attendees to the PNO website for additional information.
- The PNO’s plan to establish a cloud-based filing platform. Staff explained that the platform is still in the planning stages and that paper and DVD filing will remain in effect for the near future. The PNO will reach out to the outside bar for suggestions on methodology, interface, and encryption when the time comes – practitioners were excited about this initiative, and many volunteered to be beta-testers when the PNO reaches the appropriate stage of development.
- The PNO provided tips for wiring filing fees for foreign parties. When fees come from foreign banks, they can often be delayed. Staff suggested that foreign parties wire money from a US subsidiary, if possible. In addition, the PNO made it clear that just because a wire has been sent, that does not mean it has been received. The PNO stressed that it is the filings parties’ obligation to verify that the wire has arrived at Treasury.

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<sup>1</sup> The PNO limited each session to one attorney per law firm.

## Some of the questions and issues raised by the HSR practitioners:

These do not represent all the questions and issues discussed, but provide an overview of some of the more important or frequent discussions held during the sessions.

### **Informal Interpretations**

A lot of time was spent discussing informal interpretations. The private bar appreciates the guidance, but practitioners are sometimes confused when an informal interpretation position changes.

- *Would the PNO consider creating a “no longer the PNO position” tag or informal interpretations web page?*
  - The PNO informed the attendees that such a page is in development. Staff is determining the most efficient way to classify informal interpretations that are no longer fully, or in part, the position of staff.
- *Could there be a grace period following any changes to a specific informal interpretation?*
  - Staff told attendees that if an informal interpretation change is significant, the PNO always sets a date for it to take effect, or grandfathers in new filings for a short time period. The PNO emphasized that any time the PNO changes its position, if there are any questions about how it might affect pending filings, practitioners should contact the PNO.
- *How does the PNO make the determination when to publish an email as an informal interpretation?*
  - The PNO outlined some criteria, including:
    - the value the informal interpretation would have for rest of the bar;
    - how fact-specific was the underlying situation; and
    - if the informal interpretation addressed a de novo topic.
- *Are there other ways to search for informal interpretations other than ftc.gov?*
  - Several attendees criticized the FTC website for returning incomplete search results for informal interpretations. The PNO told them staff is aware of the problem and agreed that the current search engine needs improving.
  - One attendee suggested a workaround using Google.

#### **4(c) board decks**

The PNO fielded numerous questions about board decks, including how to deal with the relevant 4(c)/4(d) material contained in often very large presentations given to a company's board of directors.

- The PNO emphasized that in the case of a very large board deck with only a few pages of 4(c)/4(d) content, the PNO's current position is that the entire deck is responsive.
- There's been a recent trend that separate presentations are often sequentially numbered – thus creating confusion for PNO staff because the presentation's pages do not begin at page 1. The PNO advised that if these are truly separate documents, the best course of action is to provide an endnote explaining the odd numbering.
- Staff reiterated its availability to help sort out questions relating to board decks.

#### **Miscellaneous Issues**

- *Will the PNO consider using Docu-sign in lieu of actual signatures?*
  - Staff explained that a digital signature policy must be implemented FTC-wide before the PNO can accept Docu-sign signatures.
- *When will the new NAICS codes take effect?*
  - The PNO told the attendees to keep using the current codes until Census completes its update.
- *What can the PNO reveal about the status of a specific, pending HSR filing?*
  - The PNO reiterated that staff cannot tell the parties the status of review at either agency - only whether clearance has been granted.
- *Would the PNO consider fixing the 802.21 discrepancy for voting securities and non-corporate interests? 802.21 does not apply to non-corporate interests, so if a filer loses and regains control of a LLC between years 2 and 5, it would require another HSR filing.*
  - Staff told attendees that this is something the PNO would examine.
- *What happens when there is an inadvertent early termination (ET)?*

- First, staff assured attendees that this rarely occurs, and explained the procedural reasons premature ETs sometimes happen. Staff explained that when it does happen, the PNO takes immediate action upon discovery of the problem. The PNO said that there's a standard next day policy; if the ET was granted more than a day ago, the PNO does not rescind it. Anything less than that, staff deals with on a case-by-case basis.
- *How many filings are on DVD compared to paper?*
  - Approximately 25% of HSR filings are on DVD. Staff emphasized that the DVD option is a temporary placeholder for e-filing, and encouraged DVD use to help speed up PNO review and increase the accuracy of data entry.
  - To help the PNO's process, staff asked that both party names appear on the DVD label.
- *When replacing or adding a new document for a filing submitted on DVD, can the parties just send the replacement or additional documents on a DVD?*
  - Staff reminded attendees that on any revised DVD, the entire production must be resubmitted.

## **Blog Posts**

The attendees asked the PNO to consider drafting new blog posts on a variety of topics. Staff told attendees to email ideas for new or updated blog posts.

- Some topics suggested included:
  - Procedures for filing fee payments (especially from a foreign bank).
  - 802.9/Investment-only exemption.
  - Gun-jumping: explain what it is and ways to avoid it.
  - How to analyze the debt of the target and when can the debt be excluded from the size of the transaction test.
  - Fair market value versus acquisition price: when to use each valuation method.
  - How to calculate the value of voting securities.
  - An update to the 4(c)/4(d) tipsheet or a new blog.