

# MERGER NOTIFICATION AND PROCEDURES TEMPLATE

## United States of America

LAST UPDATED March 31, 2011

**IMPORTANT NOTE:** This template is intended to provide initial background on the jurisdiction's merger notification and review procedures. Reading the template is not a substitute for consulting the referenced statutes and regulations.

### 1. Merger notification and review materials (please provide title(s), popular name(s), and citation(s)/web address)

#### A. Notification provisions

Section 7A of the Clayton Act, 15 U.S.C. §18a, as amended by the Hart-Scott-Rodino Improvements Act of 1976 (the "HSR Act" or the "Act").

The Premerger Notification Rules, 16 C.F.R. Parts 801-803 (2008) (the "HSR Rules").

Other materials related to HSR Premerger Notification include:

The Statement of Basis and Purpose for the original HSR Rules ("SBP"), 43 Fed. Reg. 33450 (July 31, 1978).

For an up-to-date list of Federal Register notices related to the Statement of Basis and Purpose, see, [www.ftc.gov/bc/hsr/sbp.shtm](http://www.ftc.gov/bc/hsr/sbp.shtm).

The formal interpretations issued pursuant to the HSR Rules, compiled in 6 Trade Reg. Rep. (CCH) at ¶ 42,475.

Links to each of these authorities can be found at [www.ftc.gov/bc/hsr/hsrbook.shtm](http://www.ftc.gov/bc/hsr/hsrbook.shtm).

#### B. Notification forms or information requirements

Premerger Notification and Report Form, (the "Form"); 16 C.F.R. Part 803 app. Links to the Form, Instructions and Style Sheet are available at [www.ftc.gov/bc/hsr](http://www.ftc.gov/bc/hsr).

<p><b>C. Substantive merger review provisions</b></p>	<p>Clayton Act, Section 7, 15 U.S.C. §18, <a href="http://www.law.cornell.edu/uscode/15/18.html">http://www.law.cornell.edu/uscode/15/18.html</a></p> <p>Federal Trade Commission Act, Section 5(a); 15 U.S.C. § 45(a), <a href="http://www.law.cornell.edu/uscode/15/45.html">http://www.law.cornell.edu/uscode/15/45.html</a></p> <p>Sherman Act, Section 1, 15 U.S.C. § 1, <a href="http://www.law.cornell.edu/uscode/15/1.html">http://www.law.cornell.edu/uscode/15/1.html</a></p> <p>Additional links to substantive antitrust and merger review related statutes can be found at:  <a href="http://www.justice.gov/atr/public/divisionmanual/chapter2.pdf">www.justice.gov/atr/public/divisionmanual/chapter2.pdf</a>;  <a href="http://www.ftc.gov/bc/hsr/hsrbook.shtm">www.ftc.gov/bc/hsr/hsrbook.shtm</a>;  <a href="http://www.ftc.gov/ogc/stat2.shtm">www.ftc.gov/ogc/stat2.shtm</a>.</p>
<p><b>D. Implementing regulations</b></p>	<p>The Premerger Notification Rules, 16 C.F.R. Parts 801-803 (2008) (the "HSR Rules").</p> <p>The Statement of Basis and Purpose for the original HSR Rules ("SBP"), 43 Fed. Reg. 33450 (July 31, 1978). Links to each of these authorities can be found at <a href="http://www.ftc.gov/bc/hsr/hsrbook.shtm">www.ftc.gov/bc/hsr/hsrbook.shtm</a>.</p> <p>For an up-to-date list of Federal Register notices related to the Statement of Basis and Purpose, see <a href="http://www.ftc.gov/bc/hsr/sbp.shtm">www.ftc.gov/bc/hsr/sbp.shtm</a>.</p>
<p><b>E. Interpretive guidelines and notices</b></p>	<p>Formal Interpretations, Guides and other helpful materials regarding premerger can be found at <a href="http://www.ftc.gov/bc/hsr/index.shtm">www.ftc.gov/bc/hsr/index.shtm</a>.</p> <p>See also,  Horizontal Merger Guidelines, <a href="http://www.ftc.gov/os/2010/08/100819hmg.pdf">http://www.ftc.gov/os/2010/08/100819hmg.pdf</a>;  Antitrust Guidelines for Collaborations Among Competitors, <a href="http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf">http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf</a>;  Commentary on the Horizontal Merger Guidelines, <a href="http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf">http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf</a>.  DOJ Merger Enforcement resources, <a href="http://www.justice.gov/atr/public/merger-enforcement.html">http://www.justice.gov/atr/public/merger-enforcement.html</a></p>

## 2. Authority or authorities responsible for merger enforcement.

<p><b>A. Name of authority. If there is more than one authority, please describe allocation of responsibilities.</b></p>	<p>The Federal Trade Commission ("FTC") and the United States Department of Justice ("DOJ") share antitrust enforcement responsibility for mergers and acquisitions. Transactions triggering a premerger notification filing are required to be notified to both agencies. The two agencies, however, have developed a clearance process between themselves to allocate responsibility for reviewing each proposed transaction. Allocation generally is made on the basis of expertise. Only one agency will issue a</p>
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	request for additional information or documentary materials. The FTC administers the premerger program; the DOJ has criminal jurisdiction. The states attorneys general also have jurisdiction over antitrust matters affecting their individual states.
<p><b>B. Address, telephone and fax (including country code), e-mail, website address and languages available.</b></p>	<p>Federal Trade Commission 600 Pennsylvania Avenue, N.W. Washington, DC. 20580 <a href="http://www.ftc.gov">www.ftc.gov</a> [English language] Tel. 202/326-3100; fax 202/326-2624</p> <p>U.S. Department of Justice Antitrust Division 950 Pennsylvania Avenue, N.W. Washington, DC 20530 <a href="http://www.justice.gov/atr">www.justice.gov/atr</a> [English language]</p>
<p><b>C. Is agency staff available for pre-notification consultation? If yes, please provide contact points for questions on merger filing requirements and/or consultations.</b></p>	<p>Yes. Parties may call or email staff at the FTC's Premerger Notification Office in the Bureau of Competition. Tel. 202/326-3100; fax 202/326-2624 A staff contact list with email addresses can be found at: <a href="http://www.ftc.gov/bc/hsr/staffphone.shtm">www.ftc.gov/bc/hsr/staffphone.shtm</a>.</p>

### 3. Covered transactions

<p><b>A. Definitions of potentially covered transactions (i.e., concentration or merger)</b></p>	<p>In general, the HSR Act and HSR Rules require that certain proposed acquisitions of voting securities, assets, or non-corporate interests that yield control ("controlling NCI") be reported to the FTC and DOJ prior to consummation. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale) (the "waiting period"), before they may complete the transaction.</p> <p>Whether a particular transaction is reportable is determined by application of the HSR Act, the HSR Rules, and formal and informal staff interpretations.</p> <p>As a general matter, the HSR Act and HSR Rules require both acquiring and acquired persons to file notification under the Program if all of the following conditions are met:</p> <p>(1) As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, controlling NCI and/or assets of the acquired person valued in excess of \$200 million (as adjusted), regardless of the sales or assets of the acquiring and acquired persons; <u>or</u></p> <p>(2) As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, controlling NCI and/or</p>
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	<p>assets of the acquired person valued in excess of \$50 million (as adjusted) but at \$200 million (as adjusted) or less; and</p> <p>(a) One person has sales or assets of at least \$100 million (as adjusted); and</p> <p>(b) The other person has sales or assets of at least \$10 million (as adjusted).</p> <p>Important note: Since 2005, the jurisdictional thresholds have been adjusted annually. The parenthetical “(as adjusted)” has been added where necessary throughout the HSR Rules to indicate where such a change in statutory threshold value occurs. These changes are published in the Federal Register and on the FTC’s Hart-Scott-Rodino web page. To reference the current thresholds, see <a href="http://www.ftc.gov/bc/hsr">http://www.ftc.gov/bc/hsr</a>.</p>
<p><b>B. If change of control is a determining factor, how is control defined?</b></p>	<p>The change of control of an entity, although often not a factor in determining whether an acquisition of voting securities or assets must be reported, is a key factor in determining whether an acquisition of an interest in an unincorporated entity must be reported. See generally HSR Rule 801.2(f)(1)(i).</p> <p>The concept of control also is relevant to determining what entities are included in the acquiring and acquired persons when calculating whether the statutory size of person test is met and what information must be submitted by filing parties; it also is relevant in determining whether the HSR Rule 802.30 exemption for intraperson transactions applies.</p> <p>Control is defined in Section 801.1(b) of the HSR Rules. For corporate entities, control is defined as either holding 50% or more of the outstanding voting securities of an issuer or, having the contractual power presently to designate 50% or more of the directors of a corporation. In the case of an unincorporated entity that has no voting securities (e.g., a LLC or a partnership), control is defined as having the right to 50% or more of the profits of the entity, or having the right in the event of dissolution to 50% or more of the assets of the entity.</p>
<p><b>C. Are partial (less than 100%) stock acquisitions/minority shareholdings covered? At what levels?</b></p>	<p>Yes. Acquisitions of minority interests in voting securities may be reportable if they result in an acquiring person holding greater than \$50 million (as adjusted) in voting securities.</p> <p>The rules identify four additional thresholds: voting securities valued at \$100 million (as adjusted) or greater but less than \$500 million (as adjusted); voting securities valued at \$500 million (as adjusted) or greater; 25 percent of the voting securities of an issuer, if the 25 percent (or any amount above 25% but less than 50%) is valued at greater than \$1 billion (as adjusted); and 50 percent of the voting securities of an issuer if valued at greater than \$50 million (as adjusted). See HSR Rule 801.1(h). (NB: These additional notification thresholds do not apply to acquisitions of assets or NCI).</p> <p>Under HSR Act Section 7A(c)(9) and HSR Rule 802.9, acquisitions resulting in holding 10% or less of an issuer’s voting securities are exempt if made solely for the purpose of</p>

	investment.
<b>D. Do the notification requirements cover joint ventures? If so, what types (e.g., production joint ventures)?</b>	Yes. Premerger reporting may be required for the formation of certain types of joint ventures. See HSR Rule 801.40 regarding corporate joint ventures. See HSR Rule 801.50 regarding unincorporated entities. The National Cooperative Research and Production Act of 1993, 15 U.S.C. §§4301-06 (NCRPA), permits parties participating in research and development joint ventures, certain production joint ventures, and standards development organizations to limit their possible antitrust damage exposure to actual – as opposed to treble – damages if they file notifications with the U.S. Attorney General and the Federal Trade Commission. Note, however, that the NCRPA does not limit antitrust review by the agencies – joint ventures may be challenged under the Clayton Act and the Sherman Act. See <a href="http://www.justice.gov/atr/public/guidelines/ncrpa.html">www.justice.gov/atr/public/guidelines/ncrpa.html</a> .

#### 4. Thresholds for notification

<b>A. What are the general thresholds for notification?</b>	<p>The general jurisdictional requirements are: (1) The acquiring or acquired person is engaged in U.S. commerce or in any activity affecting U.S. commerce; (2) the amount of voting securities, controlling NCI or assets held as a result of the acquisition is over \$50 million (as adjusted) (the size of transaction test) and (3) if a transaction is valued at \$200 million (as adjusted) or less, one person has sales or assets of \$100 million (as adjusted) or more and the other has sales or assets of \$10 million (as adjusted) or more (the size of person test).</p> <p>Note, if the size of the transaction is greater than \$200 million (as adjusted), the size of person test does not apply and, absent an exemption, the transaction is reportable. HSR Act, Section 7A(a)(2)(A).</p> <p>Note further that the HSR Act (Section 7A(c)) and HSR Rules (Part 802) exempt various classes of transactions from premerger notification requirements. See also, 4.M. below.</p>
<b>B. To which entities do the merger notification thresholds apply, i.e., which entities are included in determining relevant undertakings/firms for threshold purposes? If based on control, how is control determined?</b>	<p>The size of person and the size of transaction thresholds are dependent on two concepts. “Control” and “hold” as those terms are defined in the HSR Rules. These concepts are used in determining what entities are relevant when deciding the size of the acquiring or acquired person, or in determining what is held as a result of the acquisition. The filing person must include all entities that it controls when determining whether it meets the size of person threshold. (See 3.B. for a description of the definition of “control.”) To determine the size of transaction, the acquiring person must determine what it will hold as a result of the acquisition. “Hold” is defined as beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means. HSR Rule 801.1(c) describes the concept in more detail.</p>
<b>C. Are the thresholds</b>	Yes. Adjusted annually, beginning in 2005, for changes in the gross national product.

<p><b>subject to adjustment: (e.g. annually for inflation)? If adjusted, state on what basis and how frequently.</b></p>	<p>A link to “current thresholds” can be found at <a href="http://www.ftc.gov/bc/hsr/index.shtm">http://www.ftc.gov/bc/hsr/index.shtm</a>.</p>
<p><b>D. To what period(s) of time do the thresholds relate (e.g., most recent calendar year, fiscal year; for assets-based tests, calendar year-end, fiscal year-end, other)?</b></p>	<p>The sales or assets of a person are determined by the annual net sales and total assets stated on its last regularly prepared balance sheet and annual statement of income. See HSR Rule 801.11.</p>
<p><b>E. Describe the methodology for identifying and calculating any values necessary to determine if notification is required, including the value of the transaction, the relevant sales or turnover, and/or the relevant assets?</b></p>	<p><b>The Size of the Transaction Test:</b> The size of the transaction is determined by valuing the voting securities, controlling NCI and/or assets to be held as a result of the acquisition. This is calculated by using the acquisition price, fair market value, or market price (for publicly traded voting securities) as required under the HSR Rules. See HSR Rule 801.10, read in conjunction with HSR Rules 801.13, 801.14 and 801.15; see also, <a href="http://www.ftc.gov/bc/hsr/hsrvaluation.shtm">www.ftc.gov/bc/hsr/hsrvaluation.shtm</a> (detailed tip sheet on valuation of transactions).</p> <p><b>The Size of the Person Test:</b> For determining the size of person, HSR 801.11(c) provides “the annual net sales of a person shall be as stated on the last regularly prepared annual statement of income and expense of that person . . . and total assets of a person shall be as stated on the last regularly prepared balance sheet.”</p> <p>The size of the person includes not only the entity that is making the acquisition or whose assets, securities or NCI are being acquired, but also the ultimate parent entity (“UPE”) and any other entities the UPE controls. See HSR Rule 801.1(a).</p>
<p><b>F. Describe methodology for calculating exchange rates.</b></p>	<p>The calculation of the daily average interbank exchange rate on the day is used. See <a href="http://www.ftc.gov/bc/hsr/exchangerates.shtm">www.ftc.gov/bc/hsr/exchangerates.shtm</a>.</p>
<p><b>G. Do thresholds apply to worldwide sales/assets, to sales/assets within the jurisdiction, or both?</b></p>	<p>Statutory thresholds apply worldwide. However, exemptions under the HSR Rules for certain acquisitions of foreign assets and voting securities of foreign issuers are based on nexus to U.S. commerce. See HSR Rules 802.50 and 802.51.</p>
<p><b>H. Can a single party trigger the notification threshold (e.g., one party’s sales, assets, or market share)?</b></p>	<p>Generally, no. Where the size of the transaction is in excess of \$50 million (as adjusted) but not in excess of \$200 million (as adjusted), both parties to the transaction must meet the size of the parties test set forth in HSR Act, §7A(a)(2)(B)(ii).</p> <p>Where, however, the size of the transaction is in excess of \$200 million (as adjusted), the size of the parties test does not apply and the transaction is reportable under the HSR Act, unless an exemption applies.</p>

<p><b>I. How is the nexus to the jurisdiction determined (e.g., sales or assets in the jurisdiction)? If based on an “effects doctrine,” please describe how this is applied. Is there a requirement of local presence (local assets/affiliates/subsidiaries) or are import sales into the jurisdiction sufficient to meet an “effects” test?</b></p>	<p>Generally, an acquisition of <u>assets</u> located outside the U.S. is exempt unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding \$50 million (as adjusted) during the acquired person’s most recent fiscal year. See HSR Rule 802.50 (a).</p> <p>The acquisition of <u>voting securities</u> of a foreign issuer by a U.S. person generally is exempt from the HSR Act, unless the issuer (including all entities controlled by the issuer) either holds assets located in the U.S. having an aggregate total value of over \$50 million (as adjusted), or made aggregate sales in or into the U.S. of over \$50 million (as adjusted) in the most recent fiscal year. HSR Rule 802.51(a).</p> <p>The acquisition of voting securities of a foreign issuer by a foreign person generally is exempt from the HSR Act. However, where the acquisition of foreign voting securities by a foreign person will confer <u>control</u> of the foreign issuer (and all entities controlled by the issuer), <u>and</u> the foreign issuer either holds assets located in the U.S. having an aggregate total value of over \$50 million (as adjusted), or made aggregate sales in or into the U.S. of over \$50 million (as adjusted) in the most recent fiscal year, the transaction <u>may</u> be reportable. See HSR Rules 802.51(b) and (c) for more detailed information.</p>
<p><b>J. If national sales are relevant, how are they allocated geographically (e.g., location of customer, location of seller)?</b></p>	<p>For determining sales in or into the U.S for purposes of the exemptions in HSR Rules 802.50 and 802.51, the Premerger Notification Office considers where the risk of loss and legal title passes, and may also consider other factors as well such as where services are provided, and/or location of the buyer or seller. Parties should contact the Premerger Notification Office for advice on any situations in which there is a question as to where to allocate sales.</p>
<p><b>K. If market share tests are used, are there guidelines for calculating market shares?</b></p>	<p>Not applicable.</p>
<p><b>L. Are there special threshold calculations for particular sectors (e.g., banking, airlines, media) or particular types of transactions (e.g. joint ventures, partnerships, financial investments)?</b></p>	<p>Not usually, but see response to 4.M. below. HSR Rule 801.40, covering formations of joint ventures or other corporations and HSR Rule 801.50, covering formation of unincorporated entities (and requiring reporting only where control is acquired), have a special size of person test.</p> <p>In the formation of joint ventures and unincorporated entities, all contributors are deemed acquiring persons and the joint venture or unincorporated entity is deemed the acquired person. The size of person test is satisfied if either (1) the acquiring person has annual net sales or total assets of \$100 million (as adjusted), the joint venture or new entity will have total assets of \$10 million (as adjusted) or more, and at least one other acquiring person will have annual net sales or total assets of \$10 million (as adjusted) or more, <u>or</u> (2) the acquiring person has annual net sales or total assets of \$10 million (as adjusted) or more, the joint venture or acquiring entity will have total assets of \$100 million (as adjusted)</p>

	or more, and at least one other acquiring person has annual net sales or total assets of \$10 million (as adjusted) or more.
<b>M. Are any sectors excluded from notification requirements? If so, which sectors?</b>	<p>Section 7A(c) of the HSR Act and Part 802 of the HSR Rules provides exemptions for various types of acquisitions related to certain types of assets, including real property assets and carbon-based mineral reserves.</p> <p>Note that mergers in some sectors, such as banking, get premerger competitive review by other federal agencies. Thus, sections 7A(c)(6), (c)(7) and (c)(8) of the HSR Act exempt transactions from the HSR requirements when they are subject to certain U.S. Federal regulatory agency premerger competitive review and approval. In some instances, parties must file a copy of the information and documentary material filed with such agency contemporaneously with the FTC and the DOJ.</p>
<b>N. Are there special rules regarding jurisdictional thresholds for transactions in which both the acquiring and acquired parties are foreign?</b>	Yes, see 4.I., above, discussing HSR Rules 802.50 and 802.51.
<b>O. Does the agency have the authority to review transactions that fall below the thresholds?</b>	Yes, Section 7 of the Clayton Act prohibits mergers and acquisitions which may substantially lessen competition or tend to create a monopoly.

## 5. Notification requirements and timing of notification

<b>A. Is notification mandatory pre-merger?</b>	Yes, if statutory notification threshold requirements are met and no exemption applies. See 4.A., above.
<b>B. Is notification mandatory post-merger?</b>	<p>No, unless the parties failed to file in a timely manner. Procedures for submitting post-merger or “corrective” filings can be found at <a href="http://www.ftc.gov/bc/hsr/postconsumfilings.shtm">http://www.ftc.gov/bc/hsr/postconsumfilings.shtm</a>. Civil penalties may be sought for failure to observe the notification requirements. 15 U.S.C. § 18a(g)(1).</p>
<b>C. Can parties make a voluntary merger filing even if filing is not mandatory? If so, when?</b>	No, but parties can voluntarily alert the FTC or the DOJ about a planned transaction any time.
<b>D. What is the earliest that a transaction can be</b>	In consensual transactions, the parties can notify the FTC and the DOJ based on a signed letter of intent. The rules require parties to attest in an affidavit to a good faith intention to complete the

<b>notified (e.g., is a definitive agreement required; if so, when is an agreement considered definitive?)?</b>	acquisition. See HSR Rule 803.5.
<b>E. Must notification be made within a specified period following a triggering event? If so, describe the triggering event (e.g., definitive agreement) and the deadline following the event. Do the deadline and triggering event depend on the structure of the transaction? Are there special rules for public takeover bids?</b>	<p>No, however parties cannot close on a transaction until the waiting period requirements have been observed.</p> <p>The parties have one year from the expiration or grant of early termination of the waiting period in which to complete the acquisition or to meet the notification threshold previously filed upon. If they have not done so after one year, the parties must file a new notification and observe the waiting period before completing the acquisition. See HSR Rule 803.7(a).</p>
<b>F. Can parties request an extension for the notification deadline? If yes, please describe the procedure and whether there is a maximum length of time for the extension.</b>	No.

## 6. Simplified procedures

<b>Describe any special procedures for notifying transactions that do not raise competition concerns (e.g., short form, simplified procedures, advanced ruling certificates, discretion to waive certain responses, etc.).</b>	Not applicable.
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## 7. Documents to be submitted

<b>A. Describe the types of</b>	In addition to the affidavit required by HSR Rule 803.5, and a copy of the agreement between the parties, Item 4 of the Form
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<p><b>documents that parties must submit with the notification (e.g., agreement, annual reports, market studies, transaction documents).</b></p>	<p>requires parties to attach certain documents. The most substantive of Item 4 requirements is Item 4(c), which requires attachment of all studies, surveys and analyses which were prepared by or for any officer or director, or by individuals exercising similar functions, for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets. Parties may also voluntarily submit additional information under 803.1(b).</p>
<p><b>B. Are there any document legalization requirements (e.g., notarization or apostille)?</b></p>	<p>Yes. An affidavit required by Rule 803.5 and a certification of the Form are required. The affidavit and certification must be signed using a notary <u>or</u> the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury, providing “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).” See 28 U.S.C. § 1746.</p>
<p><b>C. Are there special rules for exemptions from information requirements (e.g. information submitted or document legalization) for transactions in which the acquiring and acquired parties are foreign?</b></p>	<p>In the Notification Form, foreign filers must provide a U.S. contact for purposes of receiving a request for additional information and documentary material issued pursuant to HSR Act 7A(e) and HSR Rule 803.20(b)(2)(iii). In lieu of a notary’s jurat when certifying the form, persons may sign the form using the following statement “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).” See 28 U.S.C. § 1746.</p>

## 8. Translation

<p><b>A. In what language(s) can the notification forms be submitted?</b></p>	<p>English.</p>
<p><b>B. Describe any requirements to submit translations of documents with the initial notification, or later in response to requests for information, including the categories or types of documents for which translation is required, requirements for certification of the translation, language(s) accepted, and whether summaries or excerpts are allowed in lieu of complete translations.</b></p>	<p>If at the time of filing an English language outline, summary, extract or verbatim translation exists, it must be supplied along with the foreign language information or materials. HSR Rule 803.8(a). Translations are required at the second request stage. HSR Rule 803.8(b).</p>

## 9. Review periods

<p><b>A. Describe any applicable review periods following notification.</b></p>	<p>Filing persons must wait 30 days (15 days in the case of a cash tender offer or bankruptcy filing made pursuant to Section 363(b) of the U.S. Bankruptcy Code) generally measured from the date a complete filing is received by all parties required to file. Should a second request be issued, the waiting period is extended an additional 30 days measured from the date the parties substantially comply with the second request (10 days in the case of a cash tender offer or bankruptcy). HSR Rule 803.10; see 9.B., below, for explanation of somewhat different rules for tender offers.</p>
<p><b>B. Are there different rules for public tenders (e.g. open market stock purchases or hostile bids)?</b></p>	<p>Cash tender offers are subject to a shortened waiting period (see above). In all tender offers, or acquisitions from third parties (persons other than the issuer or ultimate parent entity of the issuer), the waiting period begins to run from the date the acquiring person files a complete Form. HSR Rule 803.10. The acquired person must file within 15 days (10 days in the instance of a cash tender offer or bankruptcy filing). HSR Rule 801.30. For all tender offers and bankruptcy transactions, a second request issued to the acquiring person (but not the acquired person) extends the waiting period. 15 U.S.C. § 18a(e)(2).</p>
<p><b>C. What are the procedures for an extension of the review periods, if any (e.g., suspended by requests for additional information, suspended at the authority's discretion or with the parties' consent)? Is there a statutory maximum for extensions?</b></p>	<p>See answers to 9.A. and 9.B., above, regarding second requests.</p>
<p><b>D. What are the procedures for accelerated review of non-problematic transactions, if any?</b></p>	<p>Filing parties can request early termination of the waiting period by checking the appropriate item on the Form. Only one filing person need request early termination. Early termination can be granted at any time after filing. The majority of early terminations occur within 2 weeks from the date of filing.</p>

## 10. Waiting periods / suspension obligations

<p><b>A. Describe any waiting periods/suspension obligations following notification, including whether closing is</b></p>	<p>The waiting period is described in 9.A., above. The acquiring person cannot acquire voting securities, controlling NCI or assets prior to the expiration of the waiting period if as a result of the acquisition it would "hold" a reportable amount. "Hold" is defined in terms of "beneficial ownership". HSR Rule 801.1(c). The FTC and DOJ have sued for civil penalties when parties have</p>
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<p><b>suspended or whether the implementation of the transaction is suspended or whether the parties are prevented from adopting specific measures (e.g., measures that make the transaction irreversible, or measures that change the market structure), during any initial review period and/or further review period.</b></p>	<p>transferred operational control of the seller's business to the buyer prior to expiration of the waiting period on the grounds that this transferred beneficial ownership. See, e.g., <u>United States v. Input/Output, Inc.</u>, No. 99-0912 (D.D.C. filed Apr. 12, 1999, available at <a href="http://www.ftc.gov/os/1999/04/inputoutput.pdf">www.ftc.gov/os/1999/04/inputoutput.pdf</a>; <u>United States v. Titan Wheel Int'l, Inc.</u>, No. 96-01040, 1996 WL 351143 (D.D.C. May 10, 1996).</p>
<p><b>B. Can parties request a derogation from waiting periods/suspension obligations? If so, under what circumstances?</b></p>	<p>Filing parties can request early termination of the waiting period by checking the appropriate item on the Form. Only one filing person need request early termination. Early termination can be granted at any time after filing. The majority of early terminations occur within 2 weeks from the date of filing.</p>
<p><b>C. Are the applicable waiting periods/suspension obligations limited to aspects of the transaction that occur within the jurisdiction (e.g., acquisition or merger of local undertakings/business units)? If not, to what extent do they apply to the parties' ability to proceed with the transaction outside the jurisdiction? Describe any procedures available to permit consummation outside the jurisdiction prior to the expiration of the local waiting period and/or clearance (e.g. request for a derogation from the suspension obligations, commitment to hold separate the local business operations, escrow agents.)</b></p>	<p>No. The waiting period applies to the transaction as described in the notification and report form. However, if the foreign portion of a transaction is exempt from the HSR filing requirements, the parties may sometimes proceed to acquire the exempt assets or voting securities depending on the structure of the transaction. In such circumstances, the parties should seek advice from FTC Premerger Staff. See 2.C., above, providing contact information.</p>
<p><b>D. Are parties allowed to close the transaction if no decision is issued within the statutory period?</b></p>	<p>If the agencies do not file an action to stop the acquisition, parties can close after expiration of the waiting period.</p>

<p><b>E. Describe any provisions or procedures available to the enforcement authority, the parties and/or third parties to extend the waiting period/suspension obligation.</b></p>	<p>Aside from the second request procedure, there is no provision in the statute for extension of the waiting period. However, in limited circumstances, several practices effectively extend the time for premerger review. During the initial phase of the waiting period, parties have been permitted to withdraw their filing and re-certify the filing within two business days in order to start another 30-day waiting period without having to pay another filing fee. With second requests, the waiting period is suspended until substantial compliance is certified by the parties. Parties can delay certification of their submission until they are ready to proceed. By letter agreement, the parties can agree not to close the transaction or certify substantial compliance until notice is given, or a specified time period passes.</p>
<p><b>F. Describe any procedures for obtaining early termination of the applicable waiting period/suspension obligation, and the criteria and timetable for deciding whether to grant early termination.</b></p>	<p>Filing parties can request early termination of the waiting period by checking the appropriate item on the Form. Only one filing person need request early termination. Early termination can be granted at any time after filing. The majority of early terminations occur within 2 weeks from date of filing.</p>
<p><b>G. Describe any provisions or procedures allowing the parties to close at their own risk before waiting periods expire or clearance is granted (e.g., allowing the transaction to close if no "irreversible measures" are taken).</b></p>	<p>No.</p>

## 11. Responsibility for notification / representation

<p><b>A. Who is responsible for notifying – the acquiring person(s), acquired person(s), or both? Does each party have to make its own filing?</b></p>	<p>In most transactions, both acquiring and acquired persons must file separately. HSR Rule 803.1. In joint venture formations, only the acquiring person(s) must file.</p>
<p><b>B. Do different rules apply to public tenders (e.g. open market stock purchases or hostile bids)?</b></p>	<p>In public tenders (hostile or non-hostile), as well as in acquisitions of voting securities from third parties, the waiting period begins to run from the time a complete filing is received from the acquiring person. See HSR Rules 801.30 and 803.10. The acquired person must file within specified time periods. See 9.B., above.</p>

<p><b>C. Are there any rules as to who can represent the notifying parties (e.g., must a lawyer representing the parties be a member of a local bar)?</b></p>	<p>No</p>
<p><b>D. How does the validity of the representation need to be attested (e.g., power of attorney)? Are there special rules for foreign representatives or firms? Must a power of attorney be notarized, legalized or apostilled?</b></p>	<p>The Form requires that a person be designated as a contact regarding the Form. The contents of the Form are then certified to be true and correct by a company representative. HSR Rule 803.6 specifies who may certify: Partnership – a general partner; a corporation – any officer or director; if person does not have officers or directors – by any individual having similar functions; a natural person – the natural person or his or her legal representative; an estate of a deceased natural person – by any duly authorized legal representative of such estate. Foreign filing persons must provide a name and title, firm name, address, telephone number, fax number, and e-mail address of an individual located in the U.S. for the limited purpose of receiving notice of the issuance of a second request.</p>

## 12. Filing fees

<p><b>A. Are any filing fees assessed for notification? If so, in what amount and how is the amount determined (e.g., flat fee, fees for services, tiered fees based on complexity, tiered fees based on size of transaction)?</b></p>	<p>Yes. The fees for notification are tiered fees based on the size of transaction. Current fees and thresholds can be found at <a href="http://www.ftc.gov/bc/hsr/filing2.htm">http://www.ftc.gov/bc/hsr/filing2.htm</a>; see also, HSR Rule 803.9.</p>
<p><b>B. Who is responsible for payment?</b></p>	<p>HSR Rule 803.9(a) requires that each acquiring person shall pay the filing fee required by the HSR Act. In practice, any party may pay the fee on behalf of the acquiring person.</p>
<p><b>C. When is payment required?</b></p>	<p>At the time of filing notification.</p>
<p><b>D. What are the procedures for making payments (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)?</b></p>	<p>Payment by bank cashier's check, certified check, or electronic wire transfer is accepted. Electronic wire transfer is the preferred method of payment. See HSR Rule 803.9; <a href="http://www.ftc.gov/bc/hsr/filing2.htm">http://www.ftc.gov/bc/hsr/filing2.htm</a>.</p>

## 13. Confidentiality

<p><b>A. To what extent, if any, does your agency make public the fact that a pre-merger notification filing was made or the contents of the notification?</b></p>	<p>Generally, neither the fact that a filing has been made, nor the contents of a filing is public information except as may be relevant to any administrative or judicial action or proceeding involving the FTC or the DOJ. If requested, disclosure can be made to U.S. Congress. See 7A(h) of the HSR Act. However, grants of early termination of the waiting period are published pursuant to 7A(b)(2) of the HSR Act. The fact of early termination is available in the Federal Register, on the FTC web page, and is available by phone at 202/326-3100.</p>
<p><b>B. Do notifying parties have access to the authority's file? If so, under what circumstances can the right of access be exercised?</b></p>	<p>No.</p>
<p><b>C. Can third parties or other government agencies obtain access to notification materials? If so, under what circumstances?</b></p>	<p>Disclosure to other governmental agencies (e.g., state attorneys general, foreign antitrust authorities) can only be made if parties expressly waive confidentiality and specifically request that they be allowed access to the materials.</p>
<p><b>D. Are procedures available to request confidential treatment of the fact of notification and/or notification materials? If so, please describe.</b></p>	<p>Not necessary; see above.</p>
<p><b>E. Is the agency or government a party to any agreements that permit the exchange of information with foreign competition authorities? If so, with which foreign authorities? Are the agreements publicly available?</b></p>	<p>The United States Government is party to nine bilateral cooperation agreements that contemplate the exchange of non-confidential information between the competition authorities within the limits allowed by domestic law: Germany (1976), Australia (1982), Canada (1995), the European Communities (1991), Israel (1999), Japan (1999), Brazil (1999), Mexico (2000), and Russia (2009). Absent the parties' consent, the HSR Act does not permit the U.S. agencies to share information provided by the parties pursuant to the HSR Act with foreign enforcement authorities under these agreements. The United States has also entered a Mutual Antitrust Enforcement Assistance Agreement with Australia (1999) that permits the sharing of otherwise non-disclosable information, excluding information obtained pursuant to the HSR Act, under certain circumstances. These agreements are contained in publicly-available documents that may be obtained at:  <a href="http://www.usdoj.gov/atr/public/international/int_arrangements.htm">http://www.usdoj.gov/atr/public/international/int_arrangements.htm</a>.</p>

<p><b>F. Can the agency exchange documents or information with other reviewing agencies? If so, does it need the consent from the parties who have submitted confidential information to exchange such information?</b></p>	<p>See response to C, above.</p>
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## 14. Transparency

<p><b>A. Does the agency publish an annual report? Please provide the web address if available.</b></p>	<p>For FY 2010, <a href="http://www.ftc.gov/os/2011/02/1101hsrreport.pdf">http://www.ftc.gov/os/2011/02/1101hsrreport.pdf</a></p>
<p><b>B. Does the agency publish press releases related to merger policy or investigations?</b></p>	<p>The DOJ and FTC file a press release whenever a transaction is challenged in court and in some instances when a transaction is restructured or abandoned after the parties are aware of the investigating agency's competition concerns. On appropriate occasions, the agencies may issue a public statement describing the reasons for closing an antitrust investigation. The notice describing the Issuance of Public Statements Upon Closing of Investigations may be found at <a href="http://www.justice.gov/atr/public/guidelines/201888.htm">http://www.justice.gov/atr/public/guidelines/201888.htm</a> and <a href="http://www.ftc.gov/os/closings/commclosing.shtm">http://www.ftc.gov/os/closings/commclosing.shtm</a></p>
<p><b>C. Does the agency publish decisions on why it cleared / blocked a transaction?</b></p>	<p>See response to 14.B., above.</p>

## 15. Sanctions/penalties

<p><b>A. What are the sanctions/penalties for failure to file a notification and/or failure to observe any mandatory waiting periods/suspension obligations?</b></p>	<p>Parties may be assessed a civil penalty of \$16,000 per day of violation for failure to observe the requirements of the HSR Act. See 7A(g) of the HSR Act.</p>
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<b>B. Which party/ies are potentially liable?</b>	Any acquiring or acquired person, or any officer, director, or partner of the acquiring or acquired person.
<b>C. Can the agency impose/order these sanctions/penalties directly, or is it required to bring judicial action against the infringing party? If the latter, please describe the procedure and indicate how long this procedure can take.</b>	The agency cannot impose penalties directly. "Such penalty may be recovered in a civil action brought by the United States." To date, all such civil penalty cases have settled without trial, and most have settled simultaneously with filing of the complaint. See, e.g., <u>United States v. ESL Partners, L.P. and ZAM Holdings, L.P.</u> , No. 1:08-CV-02175 (D.D.C. filed December 15, 2008) (consent decree); <u>United States v. John C. Malone</u> , No. 1:09-CV-01147 (D.D.C. filed June 23, 2009) (consent decree).

## 16. Judicial review

<b>Describe the provisions and timetable for judicial review or other rights of appeal/review of agency decisions on merger notification and review.</b>	From the time parties (the acquiring party in the case of a tender offer or bankruptcy sale) substantially comply with a second request, the agencies have 30 days (15 days in the case of a cash tender offer or U.S. Bankruptcy proceeding) to file a motion for a temporary restraining order (often stipulated) and preliminary injunction in federal district court.
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## 17. Additional filings

<b>Are any additional filings/clearances required for some types of transactions, e.g., sectoral regulators, securities regulator?</b>	Filings/clearances may be required with some sectoral regulators, such as in banking and communications.
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## 18. Closing deadlines

<b>When a transaction is cleared or approved, is there a time period within which the parties must close for it to remain</b>	Notification remains valid for one year from the expiration or grant of early termination of the waiting period. HSR Rule 803.7(a).
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**19. Post merger review of transactions**

<b>Can the agency reopen an investigation of a transaction that it previously cleared or allowed to proceed with conditions? If so, are there any limitations, including a time limit on this authority?</b>	The HSR Act (15 U.S.C. 18a(i)(1)) provides that any action taken by the agencies, or failure to take action, shall not bar any future action by the agencies with the respect to the acquisition.
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