

16 CFR Part 803

Antitrust Improvement; Notification and Report Form for Certain Mergers and Acquisitions; Amendment to Appendix

AGENCY: Federal Trade Commission.
ACTION: Promulgation of Final Rule Amendment.

SUMMARY: This amendment to the Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions required under the Commission's premerger notification rules will change the requirement that 1972 revenue data be provided with respect to certain questions on the Form relating to product lines. The change will require that reporting persons provide the Federal Trade Commission and the Antitrust Division of the Department of Justice with 1977 revenue data in those instances where the Form presently requires 1972 data.

EFFECTIVE DATE: March 5, 1980.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to file notification with the Commission and the Antitrust Division of the Department of Justice and to wait designated periods of time prior to consummation of such proposed transactions. Congress empowered the Commission, with the concurrence of the Assistant Attorney General in charge of the Antitrust Division, to require "that the notification . . . be in such form and contain such documentary material and information . . . as is necessary and appropriate" to enable the agencies "to determine whether such acquisitions may, if consummated, violate the antitrust laws." 15 U.S.C. 18a(d)(1).

Pursuant to that section, the Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions was devised as the means through which persons are required to supply both agencies with specified information and documentary material relevant to the reportable merger or acquisition.

Item 5 of the Form is designed to elicit economic data classified by Standard Industrial Classification ("SIC") codes with respect to all those lines of commerce in which the reporting person

derives any dollar revenues. Such revenue data is required by industry (4-digit SIC code), by product class (5-digit SIC-based code), and by product (7-digit SIC-based code). More specifically, item 5(a) requires that the reporting person provide 1972 revenue data for each 4-digit industry in which that filing person was engaged. Item 5(b)(i) requires that the reporting person engaged in manufacturing provide 1972 aggregate revenues for each 7-digit product from which the reporting person derives any revenues. Item 5(b)(ii) requires the reporting person to identify each manufactured product that has been added or deleted since 1972. For those products added, the reporting person must provide the total revenue attributable to the added product for the most recent year. Item 5(b)(iii) requires that the reporting person engaged in manufacturing provide aggregate revenues for the most recent year derived from each 5-digit product class. Item 5(c) requires that the reporting person engaged in non-manufacturing industries provide 4-digit revenue data for the most recent year.

The premerger notification rules were promulgated to require revenue data for these two time periods (i.e., 1972 and "most recent year") to coincide with the publication schedules of the quinquennial economic censuses and the *Annual Survey of Manufactures*, publications which serve as the most readily available and reliable statistical sources of industry components and market universes to which individual company product and revenue data can be compared. Nevertheless, it was the stated intention of the Commission and the Antitrust Division of the Department of Justice to amend item 5 to require the submission of 1977 revenue data where the Form originally called for 1972 data as soon as the Bureau of the Census published the 1977 *Census of Manufactures*. 43 FR 33526 (July 31, 1978).

The Bureau of the Census has completed its publication of the preliminary economic reports which constitute the bulk of the 1977 economic censuses for the industry series. These preliminary reports will be superseded by final paperbound reports which, in turn, will be bound into the various volumes of the 1977 *Census of Manufactures* by the end of 1980. Since most companies within the United States submit data to the Bureau of the Census for the economic censuses, reporting persons presumably have gathered, compiled and assembled 1977 revenue data in accordance with the SIC code format for the 1977 *Census of*

Manufactures. Because of this, and the fact that the 1977 aggregate data is now available to the Commission and the Antitrust Division of the Department of Justice in preliminary form, item 5 is herewith being amended to require 1977 data instead of 1972 data.

The Commission believes that the notice and comment period ordinarily required by the Administrative Procedure Act ("the APA"), 5 U.S.C. 553(b), is unnecessary here. Section 553(b)(B) exempts from the notice and comment requirements of the APA promulgation of a rule where the agency for good cause finds that the standard procedure would be "impracticable, unnecessary, or contrary to the public interest." Promulgation of the proposed amendment falls within this exemption for several reasons.

The public was afforded the opportunity to comment on the original rules and Form in two notice and comment periods provided pursuant to the rulemaking requirements of the APA. The rulemaking culminated in the promulgation and publication of the premerger rules and Form, and was accompanied by a Statement of Basis and Purpose. 43 FR 33450 (July 31, 1978). Since the amendment does not depart from or alter the substance of the prior rulemaking (i.e., it does not change the type or amount of information required by the Form), further opportunity for comment is unnecessary. *See generally, Texaco, Inc. v. Federal Energy Administration*, 531 F.2d 1071 (Emer. Ct. App.), cert. denied, 426 U.S. 941 (1976); *Durkin v. Edward S. Wagner Co.*, 115 F. Supp. 118 (D.C.N.Y. 1953), aff'd, 217 F.2d 303 (2d Cir.), cert. denied, 348 U.S. 964 (1954).

Additionally, the agencies gave notice of their intention to revise item 5 in the original promulgation of the rules, as previously stated, in response to numerous comments received during the two comment periods of the rulemaking that opposed the requirement that 1972 data be supplied on the grounds that the compilation of 1972 data would be unduly cumbersome, burdensome and expensive. The Commission is now changing the requirements of item 5 consistent with its earlier notice, to lessen the compliance burden by requiring more recent revenue data that is generally more easily retrievable and readily available to reporting persons than 1972 data. The Commission therefore finds that a separate notice and comment period at this time would be unnecessary and not in the public interest.

Section 553(d) of the APA requires that 30 days' notice be provided to the public before a rule becomes effective,

but provides an exception from this requirement where good cause is found. 5 U.S.C. 553(d)(3). Rather than to delay the effective date of the new requirements by 30 days, the Commission has determined in the public interest to accommodate all reporting persons by instituting a 60-day transitional period during which reporting persons may submit either 1972 or 1977 revenue data in response to items 5(a), 5(b)(i) and 5(b)(ii). Thereafter, the Commission and the Antitrust Division of the Department of Justice will accept only 1977 revenue data. Forms which do not provide 1977 data after the 60 day period will be treated as deficient under § 803.10(c)(2) of the premerger notification rules, 16 CFR 803.10(c)(2).

The Commission, with the concurrence of the Assistant Attorney General, hereby amends the Appendix to 16 CFR Part 803 as follows:

Appendix [Amended]

Instructions on page 361 of the CFR, third paragraph, line 5: Add "and its 1977 supplement" after "*Manual*"; line 8: Change "1972" to "1977"; line 9: Change "MC72-1.2" to "MC77-R-1"; Delete "(New 1972 SIC basis)"; Change "1972" to "1977"; line 14: Change "Appendix A" to "Appendix B"

Item 5(a) on page 368 of the CFR, line 2: Change "1972" to "1977"; line 9: Change "1972" to "1977"; line 10: Change "1972" to "1977", Column heading: Change "1972" to "1977"

Item 5(b)(i) on page 369 of the CFR, line 2: Change "1972" to "1977"; line 7: Change "1972" to "1977"; line 8: Change "1972" to "1977", Column heading: Change "1972" to "1977"

Item 5(b)(ii) on page 369 of the CFR, line 2: Change "1972" to "1977"; line 5: Change "1972" to "1977"; line 6: Change "since 1972" to "since 1977"; Change "acquired since 1972" to "acquired since 1977"; line 7: Change "1972" to "1977"; line 8: Change "1972" to "1977"; line 10: Change "1972" to "1977"

The affected pages of the Appendix as revised are being printed for convenience of the reader.

Issued February 25, 1980, by direction of the Commission.

Carol M. Thomas,
Secretary.

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INSTRUCTIONS

Each answer should identify the item to which it is addressed. Attach separate additional sheets as necessary in answering each item; each additional sheet should identify the item to which it is addressed. Voluntary submissions pursuant to § 803.1(b) should be so identified. If unable to answer any item fully, give such information as is available and explain why the answer is incomplete, as provided by § 803.3. If books and records which provide accurate answers are not available, enter best estimates and indicate the sources or bases of such estimates. Estimated data should be followed by the notation, "est." All financial information should be rounded to the nearest thousand dollars.

All references to "year" refer to calendar year. If the data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period which most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recent calendar or fiscal year for which the requested information is available.

This Notification and Report Form requests information regarding dollar revenues and lines of commerce at three levels. All persons must submit certain data at the 4-digit (SIC code) industry level. To the extent that dollar revenues are derived from manufacturing operations (SIC major groups 20-39), data must also be submitted at the 5-digit product class and 7-digit product levels (SIC-based codes). In reporting by "4-digit (SIC code) industry" you should refer to the 1972 edition of the Standard Industrial Classification Manual and its 1977 supplement published by the Executive Office of the President, Office of Management and Budget. In reporting information by "5-digit (SIC-based code) product class," and by "7-digit (SIC-based code) product," you should refer to one or both of the following reference publications published by the U.S. Bureau of the Census: (a) Numerical List of Manufactured Products, 1977 Census of Manufactures (MC77-R-1); (b) Volume II, "Industry Statistics," 1977 Census of Manufactures. In reporting information by "5-digit (SIC-based code) product class" you may also refer to the code appearing in the "Product Class Reference List" shown in the Instruction Manual for the Annual Survey of Manufactures. In reporting information by "7-digit (SIC-based code) product" you may also refer to the applicable "Product Reference Lists" appearing in the Instruction Manual of the various Current Industrial Reports surveys (monthly, quarterly, or annual) conducted by the U.S. Bureau of the Census. For product codes ending in 00, submit information by product as listed in Appendix B to the Numerical List of Manufactured Products cited above.

In responding to items 5, 7, 8 and 9 and the Insurance Appendix --

- supply information only with respect to operations conducted within the United States, including its commonwealths, territories, possessions and the District of Columbia. See §§ 801.1(k), 803.2(c)(1);
- information need not be supplied with respect to assets or voting securities currently being acquired, the acquisition of which is exempt under the statute or rules. See § 803.2(c)(2).

In responding to items 5-9 and the Insurance Appendix, limited or separate responses may be required of a person filing notification. See § 803.2(b).

Name _____

Date _____

NOTE: LIMITED OR SEPARATE RESPONSES TO ITEMS 5-9 AND THE APPENDIX MAY BE REQUIRED OF THE PERSON FILING NOTIFICATION SEE § 803.2(b), (c).

5(a)

Dollar revenues by industry. Provide the following information on the aggregate operations of the person filing notification for 1977 for each 4-digit (SIC code) industry in which the person engaged Insurance carriers (2-digit SIC major group 63) should supply the information requested only with respect to industries not within 2-digit SIC major group 63. Credit agencies other than banks; security and commodity brokers, dealers, exchanges, and services; and holding and other investment offices (2-digit SIC major groups 61, 62, and 67) and real estate companies (2-digit SIC major group 65) should identify or explain the dollar revenues reported (e.g. dollar sales, receipts, etc.). Provide aggregate 4-digit (SIC code) industry data for the entire operations of the person. All persons filing notification should include the total dollar revenues for 1977 derived by all entities which are included within the person filing notification at the time this Notification and Report Form is prepared (not as of 1977).

4-DIGIT (SIC CODE) INDUSTRY

1977 TOTAL DOLLAR REVENUES

INDUSTRY CODE

DESCRIPTION

Notification and Report Form (Part 803 -- Appendix) Continued

Name _____ Date _____

5(b)(1) Dollar revenues by manufactured product. Provide the following information on the aggregate operations of the person filing notification for 1977 for each 7-digit (SIC-based code) product of the person within 2-digit SIC major groups 20-39 (manufacturing industries). Do not provide 7-digit data for product codes ending in 00. These are summary codes. Revenues derived in such categories should be provided by product as listed in Appendix A to the Numerical List of Manufactured Products. See Instructions to Notification and Report Form. All persons filing notification should include the total dollar revenues for 1977 derived by all entities which are included within the person filing notification at the time this Notification and Report Form is prepared (not as of 1977).

<u>7-DIGIT (SIC-BASED CODE) PRODUCT</u>		<u>1977 TOTAL DOLLAR REVENUES</u>
<u>PRODUCT CODE</u>	<u>DESCRIPTION</u>	

5(b)(11) Within 2-digit SIC major groups 20-39 (manufacturing industries), identify each product of the person filing notification added or deleted subsequent to 1977, indicate the year of deletion or addition, and give total dollar revenues for the most recent year for each product that has been added. Products may be identified either by 7-digit SIC-based code or in the manner ordinarily used by the person filing notification. Do not include products added since 1977 by reason of mergers or acquisitions occurring since 1977. However, if an entity acquired since 1977 by the person filing notification (and now included within that person) itself added any products since 1977, those products and the dollar revenues derived therefrom should be listed here. Dollar revenues derived in 1977 by entities acquired since that time should be included in response to item 5(b)(1). Products deleted by reason of dispositions of assets or voting securities since 1977 should be included in response to this item, 5(b)(11).

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