

(1) Prior to the accumulation of 10,000 total hours time-in-service on the airplane strut, or within 120 days after the effective date of this AD, whichever occurs later. Or

(2) Within 12 months after the immediately preceding inspection accomplished in accordance with paragraph (a) of this AD.

Note 1: Paragraph (b) of this AD specifies an inspection zone that is expanded beyond the zone described in Revision 5 of the service bulletin to cover a 30-inch width from NAC STA 230 to NAC STA 300.

(c) For airplanes on which a frame stiffener and a skin doubler have been installed during production or in accordance with Boeing Service Bulletin 747-54-2091, Revision 1, dated October 22, 1984; Revision 2, dated March 24, 1988; Revision 3, dated July 27, 1989; Revision 4, dated December 14, 1989; or Revision 5, dated April 26, 1990: Within 120 days after the effective date of this AD, perform a visual inspection to detect cracks, heat discoloration, or wrinkles of the strut skin and internal structure in the area of the precooler exhaust vent from the edge of the doubler to NAC STA 300 on the inboard and outboard struts of Group 1 airplanes and on the outboard struts of Group 2 airplanes, in accordance with the inspection procedures described in Figure 3 of Boeing Service Bulletin 747-54-2091, Revision 5, dated April 26, 1990.

Note 2: Paragraph (c) of this AD specifies an inspection zone that is expanded beyond the zone described in Revision 5 of the service bulletin to cover a 30-inch width from the doubler edge to NAC STA 300.

(d) If no crack, heat discoloration, or wrinkle is found during the inspection required by paragraph (b) or (c) of this AD, repeat that inspection thereafter at intervals not to exceed 15 months.

(e) If any crack, heat discoloration, wrinkle, or previously stop-drilled crack is found during the inspection required by paragraph (b) or (c) of this AD, prior to further flight, repair using either the small skin doubler and frame stiffener or the large skin doubler and frame stiffener specified in Boeing Service Bulletin 747-54-2091, Revision 5, dated April 26, 1990, in accordance with that service bulletin; or in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Thereafter, repeat that inspection at intervals not to exceed 15 months.

(f) Installation of a frame stiffener and a skin doubler referred to in Boeing Service Bulletin 747-54-2091 as "terminating action" does not constitute terminating action for the inspection requirements of this AD.

(g) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle ACO. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(h) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on June 8, 1994.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

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FEDERAL TRADE COMMISSION

16 CFR Part 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes amendments to the Premerger Notification and Report Form that parties to certain mergers or acquisitions are required to file with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice before consummating such transactions. The reporting requirement and the waiting period that it triggers are intended to enable the enforcement agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation.

During the fifteen years the rules have been in effect, the Federal Trade Commission, with the concurrence of the Assistant Attorney General in charge of the Antitrust Division, has amended the premerger notification rules several times to improve the program's effectiveness and to lessen the burden of complying with the rules. The present proposed revisions to the Premerger Notification and Report Form (hereinafter "the Form") are also intended to improve the program's efficiency in insuring a prompt, thorough, initial investigation of the competitive implications of proposed acquisitions. The proposed amendments are designed to improve the premerger notification program by requiring persons to submit certain new and more up-to-date information. The proposed revisions will also reduce the burden of compliance by raising the thresholds of several items consistent with the agencies' information needs. The burden reduction proposals will decrease the amount of information that

must be provided and the search costs associated with providing that information.

DATES: Comments must be received on or before July 12, 1994.

ADDRESSES: Written comments should be submitted to both (1) the Secretary, Federal Trade Commission, room 136, Washington, DC 20580, and (2) the Assistant Attorney General, Antitrust Division, Department of Justice, room 3214, Washington, DC 20530.

FOR FURTHER INFORMATION CONTACT: Victor L. Cohen, Attorney, or John M. Sipple, Jr., Assistant Director, Premerger Notification Office, Bureau of Competition, room 303, Federal Trade Commission, Washington, DC 20580 Telephone: (202) 326-3100.

SUPPLEMENTARY INFORMATION:

Regulatory Flexibility Act

Each of these proposed changes to the Form is designed to improve the effectiveness of the premerger notification program. The Commission has determined that none of the amendments is a major rule, as that term is defined in Executive Order 12291. The amendments will not result in: An annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation or the ability of United States-based enterprises to compete with foreign-based enterprises in the domestic market. None of the proposed amendments expands the coverage of the Form in a way that would affect small business. Therefore, pursuant to Section 605(b) of the Administrative Procedure Act, 5 U.S.C. 605(b), as added by the Regulatory Flexibility Act, Public Law 96-354 (September 19, 1980), the Federal Trade Commission certifies that these proposals will not have a significant economic impact on a substantial number of small entities. Section 603 of the Administrative Procedure Act, 5 U.S.C. 603, requiring a final regulatory flexibility analysis of some rules, is therefore inapplicable.

Paperwork Reduction Act

The Hart-Scott-Rodino Premerger Notification rules and Form contain information collection requirements as defined by the Paperwork Reduction Act, 44 U.S.C. 3501-3518. These requirements were reviewed and approved by the Office of Management and Budget (OMB Control No. 3084-0005). Because the proposed

amendments would affect the information collection requirement of the premerger notification program, the proposed amendments have been submitted to OMB for review under § 3504(h) of the Paperwork Reduction Act. These provisions are described more fully in the Notice of Application to OMB under the Paperwork Reduction Act, which also is being published in the **Federal Register** today. Comments on the Commission's submission may be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for the Federal Trade Commission.

Background

Section 7A of the Clayton Act ("the Act"), 15 U.S.C. 18a, as added by Sections 201 and 202 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires parties to certain acquisitions of assets or voting securities to notify the Federal Trade Commission (hereafter referred to as "the Commission") and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereafter referred to as "the Assistant Attorney General" or "the Department") before consummating the acquisition. The parties must then wait a certain designated period before the consummation of such acquisition. The transactions to which the advance notice requirement is applicable and the length of the waiting period required are set out respectively in subsections (a) and (b) of Section 7A. This amendment to the Clayton Act does not change the standards used in determining the legality of mergers and acquisitions under the antitrust laws.

The legislative history suggests several purposes underlying the act. Congress wanted to assure that large acquisitions were subjected to meaningful scrutiny under the antitrust laws prior to consummation. To this end, Congress clearly intended to eliminate the large "midnight merger," which is negotiated in secret and announced just before, or sometimes only after, the closing takes place. Congress also provided an opportunity for the Commission or the Assistant Attorney General (which are sometimes hereafter referred to collectively as the "antitrust agencies" or the "enforcement agencies") to seek a court order enjoining the completion of those transactions that either agency deems to present significant antitrust problems. Finally, Congress sought to facilitate an effective remedy when a challenge by one of the enforcement agencies proved successful. Thus, the Act requires that

the antitrust agencies receive prior notification of significant acquisitions, provides certain tools to facilitate a prompt, thorough investigation of the competitive implications of these acquisitions, and assures the enforcement agencies an opportunity to seek a preliminary injunction before the parties to an acquisition are legally free to consummate it. The problem of unscrambling the assets after the transaction has taken place is thereby eliminated.

Subsection 7A(d)(1) of the act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, to require that the notification be in such form and contain such information and documentary material as may be necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws.

Subsection 7A(d)(2) of the act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, the authority (A) to define the terms used in the act; (B) to exempt from the act's notification and waiting period requirements additional persons or transactions which are not likely to violate the antitrust laws and (C) to prescribe such other rules as may be necessary and appropriate to carry out the purposes of section 7A.

The Commission, with the concurrence of the Assistant Attorney General, promulgated implementing rules ("the rules") and a Notification and Report Form and issued an accompanying Statement of Basis and Purpose, all of which were published in the **Federal Register** of July 31, 1978, 43 FR 33450, and became effective on September 5, 1978.

The rules are divided into three parts, which appear at 16 CFR Parts 801, 802, and 803. Part 801 defines a number of the terms used in the Act and rules, and explains which acquisitions are subject to the reporting and waiting period requirements. Part 802 contains a number of exemptions from these requirements. Part 803 explains the procedures for complying with the act. The Notification and Report Form, which is completed by persons required to file notification, is an appendix to Part 803 of the rules.

Changes of a substantive nature have been made in the premerger notification rules or Form on ten occasions since they were first promulgated. See, 44 FR 60781 (November 21, 1979); 45 FR 14205 (March 5, 1980); 46 FR 38710 (July 29, 1981); 48 FR 34427 (July 29,

1983); 50 FR 38742 (September 24, 1985); 51 FR 10368 (March 26, 1986); 52 FR 7066 (March 6, 1987) (all of these changes included revisions in the Form); 52 FR 20058 (May 29, 1987); 54 FR 21427 (May 18, 1989) and 55 FR 31371 (August 2, 1990).

The current set of proposals to change the Form is designed to improve the program's effectiveness by requiring the submission of certain additional information that will be very useful to the agencies in the performance of their initial antitrust reviews of proposed transactions. The proposals also include several modifications that are intended to reduce the burden of completing the HSR Form consistent with the agencies' antitrust enforcement needs. The Commission invites interested persons to submit comments on the appropriateness of the proposed changes to the Form and its instructions.

Proposed Changes in the Instructions and Form

a. Transactions Subject to the Bankruptcy Code

Section 363(b) of the Bankruptcy Code, 11 U.S.C. 363(b), provides for a waiting period of ten days for transactions in which a trustee in bankruptcy files notification of a proposed acquisition as an acquired person. Since 11 U.S.C. 1107 provides that a debtor-in-possession essentially has the same powers as a trustee in bankruptcy, a debtor-in-possession also may file notification as an acquired person and thereby invoke the ten-day waiting period. Due to the very limited time provided for the initial review of such transactions, it is important that the Commission and the Department quickly and easily identify transactions to which the Bankruptcy Code provisions apply. For this reason, the Commission proposes to modify the preamble found on page one of the Form to include the question:

Is this filing being made as an acquired person by a trustee in bankruptcy or a debtor-in-possession subject to Section 363(b) of the Bankruptcy Code, 11 U.S.C. 363(b)? yes / _____ / no / _____ /

b. Notification for an Acquisition That Has Taken Place

Several times each year, persons file premerger notifications for acquisitions that have been consummated prior to filing notification and observing the appropriate waiting period. Usually, such persons call the Commission's Premerger Notification Office ("PNO") promptly after discovering the violation.

Many of these violations are determined to be inadvertent, the result of simple negligence. The PNO advises persons who have consummated an acquisition in violation of the Act to file a corrective filing as soon as possible and to submit a detailed, written explanation signed by a company official explaining how the violation occurred and the steps that will be taken to ensure future compliance with the filing requirements. The letter of explanation need not accompany the corrective filing. The submission of a corrective, compliant notification will, in most instances, stop the accruing of civil penalties after the waiting period has expired.

The PNO has established procedures for processing corrective filings and conducting an informal inquiry to determine whether to refer the violation to the appropriate litigation office for investigation and a possible civil penalty action. The PNO procedures are designed to monitor persons who have violated the Act to identify repeat offenders. For this reason, it is important that filings for acquisitions that have already been consummated be easily identified and assigned to the persons who monitor and process such violations. Sometimes, persons who file corrective filings do not identify them as pertaining to an acquisition that has already been consummated. Consequently, their filings are not always assigned to the persons who have the expertise to handle these matters. To identify corrective filings easily to ensure that they are assigned to the appropriate person for review, the Commission proposes to modify the preamble found on page one of the Form to include the question:

Is this filing being made for an acquisition that has already been consummated? yes / / no / /

c. Transactions Subject to Foreign Governmental Regulation

To enforce their antitrust statutes, many foreign governments require, or provide for voluntary submission of, premerger notification comparable to that required by the Form. Their thresholds for notification overlap to varying degrees with those of section 7A. Accordingly, parties to a merger or acquisition may file notification with, and need clearance from, more than one sovereign authority. The potential for multiple notifications has grown because of the increase not only in merger enforcement organizations, but also in the number of transactions involving firms based in different countries and/or which do business in more than one country.

Bilateral and multilateral efforts have been undertaken to foster communication and cooperation between antitrust authorities in order to assist them in determining whether proposed acquisitions violate their respective antitrust laws and avoid conflict in enforcement of those laws. Bilateral agreements between the United States and Australia, Canada, the European Commission and Germany provide for, inter alia, timely notification of investigations which involve important interests of the signatories, sharing of non-confidential information, and, where possible, coordination of investigations. A 1986 Recommendation of the Organization for Economic Cooperation and Development (OECD) similarly provides for timely notification and information sharing among the OECD members. Further efforts toward cooperation and even convergence of premerger notification requirements have been recommended by the American Bar Association in the 1991 Report of its special Committee on International Antitrust.

Cooperation and potential coordination may be hindered by the inability of antitrust authorities to learn as early as possible of the fact of the submission of premerger notification to another jurisdiction. This deficiency is complicated by the lack of uniformity among the nations' premerger notification provisions as to the timing of the submission of notification. As a result, submission of notifications to different jurisdictions at different times often occurs.

To provide for timely alert of multiple notifications of a particular transaction in order to foster cooperation between the notified jurisdictions and thereby assist the Commission and the Department in determining whether such transaction would violate the antitrust laws, the Commission proposes to modify the preamble found on page one of the Form to require a listing of the name(s) of any foreign antitrust or competition authority that has been or will be notified of the proposed acquisition. The proposed language reads as follows:

If, to the knowledge or belief of the person filing notification, a foreign antitrust or competition authority has been or will be notified of the proposed acquisition, list the name and country or other jurisdiction of each such authority and the date notification was made or is anticipated to be made:

d. Calculation of the Percentage of Assets in Item 3

At present, the instructions to item 3 require both the acquiring and acquired persons to state the percentage of assets, percentage of voting securities and the aggregate total dollar amount of assets and voting securities that will be held by the acquiring person as a result of the acquisition. Determining the percentage of assets held has proven to be difficult for acquiring persons because they generally are not aware of the book value of the assets or the total book value of the acquired person's assets, which is the information needed to make the required calculation. On the other hand, acquired persons can readily ascertain the percentage of their total assets being acquired. For this reason, the Commission proposes to amend item 3(a) to require only the acquired person to determine the percentage of assets of the acquired person that will be held as a result of the acquisition.

Some filing persons have expressed uncertainty regarding the information that item 3(b) requires. Item 3(b) seeks to obtain information regarding the percentage of voting securities of the issuer or issuers whose voting securities will be held as a result of the acquisition. Thus, if voting securities of more than one issuer will be held as a result of the acquisition, percentages should be provided for each issuer. The Commission proposes to add clarifying language to the instructions in item 3(b).

Accordingly, the Commission proposes to modify the instructions to item 3 to read as follows:

Assets and voting securities held as a result of the acquisition (item 3(a) to be completed by the acquired person only; items 3(b) and 3(c) to be completed by both the acquiring and acquired persons). State:

Item 3(a)—the percentage of assets of the acquired person (see § 801.12(d));

Item 3(b)—the percentage(s) of voting securities of each issuer (see § 801.12(a));

Item 3(c)—the aggregate total dollar amount of assets and voting securities of the acquired person to be held by each acquiring person as a result of the acquisition (see §§ 801.13 and 801.14).

e. Elimination of Document Identification in Item 4(a)

At present, the instructions to item 4(a) of the Form permit filing persons to merely identify documents filed with the Securities and Exchange Commission (SEC) in lieu of their actual submission as attachments to the Form when copies of the documents are not

"readily available." Fortunately, filing persons rarely use this proviso and generally submit the required SEC documents with their Forms. If filing persons failed to submit these documents, it would hinder the ability of the Commission and the Department to complete their antitrust reviews within the limited time periods provided by the act.

Accordingly, the Commission proposes to delete the following instruction presently included as the last sentence in item 4(a):

Alternatively, if the person filing notification does not have copies of responsive documents readily available, identification of such documents and citation to date and place of filing will constitute compliance.

f. Submission of 4(c) Documents Prepared by or for Partners

Item 4(c) of the Form requires reporting persons to submit all studies, surveys, analyses and reports that were prepared by or for any officer or director (or individuals exercising similar functions in the case of an unincorporated entity) for the purpose of evaluating or analyzing the proposed acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or product or geographic market expansion. Item 4(c) also encompasses officers or directors of any entity included within the reporting person. See 43 FR 33450, 33525 (July 31, 1978).

Item 4(c) documents often provide valuable insights into possible product and geographic markets as well as the competitive purposes and projected competitive consequences of the proposed transaction. As such, item 4(c) documents are often essential to Commission and Department attorneys in making preliminary determinations of product and geographic markets and their initial evaluations of the potential competitive effects of a proposed acquisition. In addition, item 4(c) documents also have been very useful to the agencies in preparing requests for additional information and documentary material.

At present, the instructions to item 4(c) require the submission of documents "which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) * * *." Item 4(c) applies to all entities included within the reporting person and, thus, to partnerships. However, it has been argued that partnerships do not have item 4(c) documents because they contain no individuals exercising functions similar to officers or directors

(partnership interests generally "do not entitle the owner of that interest to vote for a corporate "director" or "an individual exercising similar functions"). See 16 CFR 801.1(b), example 2, and 52 FR 20058, 20062 (May 29, 1987). The Commission believes that documents prepared by or for partners of a partnership and persons responsible for managing the affairs of a partnership are likely to contain the same types of market information found in documents prepared "by or for officers or directors" of a corporation. For this reason, the Commission proposes to amend item 4(c) to require the submission of documents prepared by or for partners of a partnership. However, the Commission is concerned about the burden that such a requirement may impose on limited partners in a limited partnership. There are often numerous limited partners in a limited partnership, and it is the Commission's understanding that limited partners are principally passive investors because, generally, they must refrain from participation in the conduct of the partnership in order to limit their liability. Uniform Limited Partnership Act (U.L.A.), section 1. Indeed, the Commission has observed that often the limited partners are pension funds, insurance companies and similar types of investors.

In contrast, general partners in a limited partnership and partners in a general partnership are normally the decisionmakers who participate in the day-to-day management of a partnership. Uniform Limited Partnership Act (U.L.A.), section 6. Consequently, they are likely to create, or have created for them, documents that meet the criteria of item 4(c). On the other hand, limited partners in a limited partnership are likely to have in their possession primarily item 4(c) documents which are also within the control of the general partners. The Commission believes that any benefit that may be derived from requiring a search for and submission of item 4(c) documents by limited partners is outweighed by the additional burden that such a requirement would impose.

Accordingly, the Commission proposes to amend item 4(c) to require the submission of documents prepared by or for general partners of a limited partnership and partners of a general partnership. These changes are contained in the proposed item 4(c) language that follows section g.

g. Submission of Documents Relating to Businesses or Products of Parties to the Transaction

The Commission and the Department have received certain types of documents in response to requests for additional information that the Commission believes would be very useful to the agencies in conducting their initial assessment of the possible competitive effects of a proposed transaction. These documents describe or analyze the businesses of, the products manufactured by or the services provided by the parties to the transaction or relate to the possible integration of operations.

In this regard, the Commission's experience with filings has demonstrated that it is sometimes difficult to identify the specific products produced by the filing persons using the information presently required by the Form. The SIC codes do not always provide the specificity needed to determine the products or services of the filing persons. As a result, the agency cleared to review the transaction may spend much of the waiting period trying to determine if the filing persons manufacture products that actually compete. The agency is then left with less time to reach conclusions about other antitrust issues, such as entry, that are necessary to determine whether the acquisition raises serious antitrust concerns. Documents that discuss or analyze the businesses, products or services of the parties to the transaction, if submitted when the filings are made, may, in some cases, obviate the need for the issuance of a request for additional information and documentary materials. Such request would otherwise be needed to resolve the competitive issues that the agency lacked the time to resolve during the initial waiting period.

To provide the agencies with additional documentary material to analyze the competitive effects of a proposed acquisition, to assist the agencies in resolving all competitive issues during the initial waiting period and, in some cases, to eliminate the need to issue a request for additional information and documentary materials, the Commission proposes to modify item 4(c) to require the submission of documents that discuss, describe or analyze (1) the businesses of, the products manufactured or the services provided by the acquiring person and the business enterprise being acquired (as represented by the assets or issuer whose voting securities are being acquired) or (2) the possible integration of the operations of the acquiring person and the business enterprise being

acquired. Documents covered by the change are limited to documents that are considered to be within the traditional criteria of item 4(c) noted above and are prepared by or for any officers or directors (or, in the case of unincorporated entities, individuals exercising similar functions or general partners of a limited partnership and partners of a general partnership) for the purpose of discussing, evaluating or analyzing the proposed acquisition.

Although the amendment expands the categories of documents that filing persons are required to submit, the Commission believes that the documents may help to clarify information that the parties report in item 7(a) concerning the SIC product code overlaps. For transactions that pose no antitrust concerns, these documents are likely to enhance the ability of the agencies to expedite their review and grant early termination of the waiting period when requested.

Accordingly, the Commission proposes to amend item 4(c) of the Form to read as follows:

Item 4(c)—All studies, surveys, analyses, or reports or documents which were prepared by or for any officer(s) or director(s) including officers or directors of any entity within the filing person (or, in the case of unincorporated entities, individuals exercising similar functions or, in the case of a limited partnership, any general partner(s) of such partnership and, in the case of a general partnership, the partners of such partnership) for the purpose of discussing, evaluating or analyzing the acquisition with respect to (i) market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets; (ii) the businesses of, products manufactured by or services provided by the acquiring person and the business enterprise being acquired (as represented by the assets or issuer whose voting securities are being acquired); or (iii) the integration of the operations of the acquiring person and the business enterprise to be acquired.

h. Submission of Solicitation Documents

Pursuant to the requirements of item 4(c), filing persons often submit a variety of documents, including offering memoranda, analyses by investment bankers and similar documents prepared by consultants and investment firms for the purpose of soliciting expressions of interest from prospective purchasers. These documents often provide detailed information on the operations and the market position of the acquired person.

On occasion, counsel for a filing person has contended that investment bankers' books or other types of offering documents prepared by third parties as general selling documents are not covered by item 4(c) because they were not prepared for the specific acquisition for which a filing is being made. This position appears to be based, in part, on the statement in the Statement of Basis and Purpose ("SBP") that the "reporting person must submit only those documents prepared in connection with the reported acquisition." 43 FR 33450, 33525 (July 31, 1978). The Commission did not intend, nor does it interpret, this language to mean that only documents prepared after the acquiror has been identified qualify as item 4(c) documents. Rather, it is the Commission's view that such documents were "prepared in connection with the reported acquisition" even though at the time of preparation the specific acquiror had not been identified. Similarly, if an acquiror is considering a number of acquisition candidates and prepares documents which analyze various aspects of competition prior to making its decision regarding which candidate(s) to pursue, those documents pertaining to the candidate(s) selected are item 4(c) documents.

Counsel for filing persons also have contended that investment bankers' books are not item 4(c) documents because it is not clear that such documents are prepared "by or for any officer(s) or director(s)." The Commission believes that such documents meet this requirement because they are usually prepared at the direction of an officer or director of the acquired person. Moreover, in the Commission's view such documents of the acquiring person qualify as 4(c) documents because they are prepared for the officers or directors—the decision-makers who will determine whether to pursue an acquisition. The fact that investment bankers' books usually are prepared by outside consultants also has no bearing on whether such documents are covered by item 4(c). As the Commission made clear in the SBP when the premerger notification rules were promulgated, item 4(c) documents include "documents prepared by any person, including consultants, for officers and directors." See 43 FR 33450, 33525 (July 31, 1978). The Commission proposes to amend item 4(c) by adding new item 4(c)(ii) which will make clear that the submission of investment bankers' books and similar documents prepared in connection with the sale of the

acquired person or any portion of the acquired person is required. However, this new section is not limited to documents "prepared by or for any officer(s) or director(s)" of the acquiring or the acquired person. Documents of this type have provided valuable information to the agencies in connection with their antitrust reviews and the agencies should not be precluded from receiving these documents simply because they were not prepared expressly for officers or directors.

Accordingly, the Commission proposes to add a new subsection to item 4 to be identified as item 4(c)(ii) and to renumber item 4(c) to item 4(c)(i). Proposed item 4(c)(ii) will read as follows:

Item 4(c)(ii)—All investment bankers' books, offering memoranda, and similar documents which have been prepared by any person for the purpose of soliciting expressions of interest from prospective purchasers of the assets or entity to be acquired.

i. Submission of an Index for Item 4(c) Documents

At present, persons filing documents required by item 4 of the Form may provide an optional index for the documents submitted. An index to item 4 documents has proven to be valuable to both the Premerger Notification Office staff as well as to litigation staff in expediting their reviews of proposed acquisitions, especially when numerous documents are submitted.

In order to facilitate the review process, the Commission proposes to require the submission of an index of documents submitted in response to items 4(c)(i) and 4(c)(ii). Such indices will better enable the Commission and the Department to keep track of item 4(c) documents. They also will enable the agencies to determine whether filing parties have inadvertently omitted any documents identified as item 4(c) documents.

Accordingly, the Commission proposes to add the following language to the general instructions to item 4, amended to require the submission of an index identifying all item 4(c)(i) and 4(c)(ii) documents:

Persons filing notification must provide an index of documents being submitted pursuant to Items 4(c)(i) and 4(c)(ii). With respect to each document, provide the name of the document, the date of preparation, and the name and title of the document's authors and recipients.

j. Acquisition of the Assets of an Insurance Carrier

Item 5 of the Form requires insurance carriers, i.e., persons deriving revenues in 2-digit SIC major group 63, to supply revenue information only for industries not within SIC major group 63 and instructs such persons to complete the Insurance Appendix to the Form when voting securities of an insurance carrier are to be acquired. If the proposed acquisition is not of voting securities but of assets that generate insurance revenues within 2-digit SIC major group 63, the current instructions do not require the filing person to complete either item 5 or the Insurance Appendix. To correct this omission, the Commission proposes to modify item 5 and the Insurance Appendix to require insurance carriers to complete the Insurance Appendix if the acquisition is of assets that generate insurance revenues.

Accordingly, the Commission proposes to revise item 5 and the Insurance Appendix instructions to the Form to read as follows:

Item 5—Insurance Carriers (2-digit SIC major group 63) should supply the information requested only with respect to industries not within SIC major group 63. If voting securities of an insurance carrier or assets that generate insurance revenues in 2-digit SIC major group 63 are being acquired, the filing person should complete the Insurance Appendix to this Form.

Appendix To Notification and Report Form: Insurance

Insurance carriers (2-digit SIC major group 63) are required to complete this Appendix if voting securities of an insurance carrier or assets that generate insurance revenues in 2-digit SIC major group 63 are being acquired directly or indirectly

k. Products Added

Item 5(b)(ii) of the Form requires the filing person to identify (by 7-digit SIC code or in the manner ordinarily used by such person) each product within 2-digit SIC major groups 20–39 (manufactured products) which it has added or deleted subsequent to 1987 (the current base year), indicating the year of addition or deletion and stating the total dollar revenues it derived in the most recent year for each product added. Products added by reason of mergers or acquisitions of entities are not included and are reported in items 5(a) and 5(b)(i).

Some filing persons have asserted that item 5(b)(ii) does not require the inclusion of products added, either through new product innovation or through the purchase of assets including

production facilities, after the most recent year for which the filing person reports revenues in item 5(b)(iii). For example, such persons assert that if the revenues reported in item 5(b)(iii) are for calendar year 1992, then they need not report in item 5(b)(ii) any new product developed in 1993 which generated revenues under an SIC code not previously used by the filing person. This interpretation of the current language of item 5(b)(ii) would permit filing persons to omit potentially important information that is not called for elsewhere on the Form. It might allow an SIC code overlap to go unreported, as well as information about the filing person's ability to manufacture the new product.

The Commission believes that the language of item 5(b)(ii) does not permit this limited reading. However, the Commission proposes to amend item 5(b)(ii) to make explicit that all manufactured products added or deleted after the base year must be reported. The amendment will alert filing persons that they must provide the "most current information available" about their production activities to enable the agencies to better assess the competitive effects of a proposed transaction. See 43 FR 33450, 33529 (July 31, 1978).

The Commission also proposes to modify item 5(b)(ii) to clarify the procedure for reporting revenues derived during the base year by entities acquired by filing persons after the base year. The current instructions to item 5 require that a filing person report in response to items 5(a)–(c) any revenues derived during the base year by an entity that the filing person later acquires by merger or acquisition. However, the instructions to item 5(b)(ii) require only the reporting of products added by merger or acquisition in item 5(b)(i), which calls for revenues by 7-digit SIC manufacturing product codes, and not item 5(a), which asks for base year revenues by 4-digit SIC manufacturing and non-manufacturing industry codes. The amendment adds language to item 5(b)(ii) to indicate that base year revenues for these added products should be included in response to both items 5(a) and 5(b)(i).

Since the present language in item 5 applies only to the acquisition of an "entity", it does not cover asset acquisitions. However, the Commission's staff has adopted the position that if an asset is acquired after the base year and is accompanied by books and records sufficient to provide responses to items 5 (a) through (c), then such responses must be provided. If such books and records do not

accompany the purchased asset, then, if the asset engages in manufacturing, it must be included in the response to item 5(b)(ii) as a product added by the reporting person. The Commission is in agreement with the staff's treatment of asset acquisitions and has modified item 5 to reflect this position.

Accordingly, the Commission proposes to modify the general instructions to item 5 and item 5(b)(ii) to read as follows:

Persons filing notification should include the total dollar revenues for 1987 derived by all entities, or generated by assets (for which books and records necessary to supply such revenues are available) even if such entities or assets have become included within the person since 1987. For example, if the person filing notification acquired assets in 1989, along with the books and records necessary to supply 1987 revenues generated by the assets, it must include those revenues in Item 5(a) and, if a manufactured product, in item 5(b)(i).

Item 5(b)(ii)—Products added or deleted. Within 2-digit SIC major groups 20–39 (manufacturing industries), identify each product of the person filing notification added or deleted subsequent to 1987, including products added after the most recent year for which period revenues are reported in the response to item 5(b)(iii). Indicate the year of addition or deletion and, for products added, state the total dollar revenues derived in the most recent year, and, for products added after the most recent year, for the time period, if any, the product has derived revenues. Also include products added by the acquisition of assets engaged in manufacturing (2-digit SIC major groups 20–39) for which books and records sufficient to provide revenues for the base year were not also acquired. Products added should be identified by the appropriate 7-digit SIC product code unless the person is unsure of the proper code, in which case the person can identify the product in the manner it ordinarily uses.

Do not include products added since 1987 by reason of the acquisition of an entity in operation in 1987 or of assets accompanied by the books and records sufficient to provide 1987 revenues for such assets. Dollar revenues derived from such products should be included in response to Items 5(a) and, if a manufactured product, 5(b)(i). However, if an entity acquired after 1987 by the person filing notification (and now included within the person) itself has added or deleted any manufactured products since 1987, these products should be listed in Item 5(b)(ii).

Products deleted by reason of dispositions of assets or voting securities since 1987 should also be listed in Item 5(b)(ii).

l. Foreign Manufactured Products

Section 803.2(c)(1) of the rules, 16 CFR 803.2(c)(1), instructs filing persons to provide information in response to items 5, 7, 8 and 9 and the Insurance Appendix "with respect to operations conducted within the United States." Areas included in the United States are defined in § 801.1(k), 16 CFR 801.1(k). Filing persons are not required to submit SIC code information on a detailed manufacturing basis for products they manufacture outside the United States even if they sell the products in the United States. For example, if a filing person manufactured a product in 1987 in Canada, imported it into the United States and sold that product at the wholesale or retail level, the filing person would report revenues derived from those sales in item 5(a) using a wholesale or retail 4-digit SIC code. The filing person would not be required to identify in either item 5(a) or item 5(b)(i) the product it manufactured in Canada using the descriptive 4-digit SIC code or the 7-digit SIC product code for manufactured products that would have been required if the product had been manufactured in the United States. Similarly, if the filing person derived revenues in the most recent year from sales of the product in the United States, the person would report those revenues in item 5(c) using the appropriate 4-digit wholesale or retail code. The filing person would not report those revenues in item 5(b)(iii) using the appropriate 5-digit SIC product class code for manufactured products as it would have if the product had been manufactured in the United States.

The 4-digit SIC wholesale and retail codes reported in items 5(a) and 5(c) do not identify the SIC manufacturing codes applicable to the products manufactured abroad that are sold by the manufacturer in the United States. Consequently, the agencies have found it very difficult, using the information presently required by the Form, to determine whether a filing person that manufactures products outside the United States but sells them in the United States may be involved in manufacturing activities similar to those of another party to the transaction.

The Commission believes that 7-digit SIC product code information concerning products manufactured outside the United States that are sold in or into the United States at the wholesale or retail level would be very

helpful to the agencies in performing their initial antitrust review. This information has become more important over the last decade as foreign imports and their effect on the nation's economy have increased. For this reason, the Commission proposes to modify the Form to require filing persons to identify the 7-digit SIC product code (manufacturing industries) for each product they manufacture outside the United States and sell in the United States at wholesale or retail. Since this provision requires persons to identify codes and not report revenues, it should only impose a minimal additional burden on filing persons. The proposed revision would require filing persons to identify the 7-digit SIC product codes for such foreign manufactured products only for the most recent year.

Accordingly, the Commission proposes to add a new item 5(c)(ii) to the Form and to change the designation of present item 5(c) to 5(c)(i). New proposed item 5(c)(ii) reads as follows:

Item 5(c)(ii)—Identification of 7-digit SIC product codes for certain foreign manufactured products. Provide the 7-digit SIC product code for each product manufactured outside the United States by the person filing notification for which the person reported revenues in item 5(c)(i). The 7-digit SIC product codes to be provided are those that the person would use to identify the products if the person had manufactured the product(s) in the United States. Revenues for such 7-digit codes need not be provided.

m. Increases in Reporting Thresholds in Items 6(b) and 6(c)

At present, item 6(b) of the Form requires the reporting person to identify shareholders holding five percent or more of the voting stock of any entity included within the reporting person (including the ultimate parent entity) having total assets of \$10 million or more. For each shareholder, the reporting person must list the issuer, the class, the number and the percentage of each class of voting securities held. Item 6(c) requires the reporting person to list its minority voting stock holdings of five percent or more in any issuer having total assets of \$10 million or more.

Item 6 is designed to obtain information to "alert the enforcement agencies to situations in which the potential antitrust impact of the reported transaction does not result solely or directly from the acquisition, but may arise from direct or indirect shareholder relationships between the parties to the transaction." See 43 FR 33450, 33531 (July 31, 1978). For example, items 6(b) and 6(c) may reveal

situations in which "a person known to be a competitor or customer or supplier of one of the parties is also a significant shareholder of the other party, or when the acquiring party holds stock in a competitor or customer or supplier of the acquired company or vice versa." Id.

The Commission has reviewed its use of the information submitted in response to items 6(b) and (c) and has determined to propose an increase in the thresholds from five percent to ten percent. Subsection (c)(9) of the Act exempts most acquisitions of ten percent or less of an issuer's voting securities, so long as the acquisition is made solely for the purpose of investment. Although the Commission and the Department of Justice have issued requests for additional information to reporting persons who proposed to acquire less than ten percent of an issuer's voting securities, it does not appear that disclosures of stock holdings of less than ten percent by filing persons in response to items 6(b) and 6(c) of the Form have raised competitive concerns sufficient to result in the issuance of any second requests.

Increasing the reporting thresholds to ten percent is also likely to reduce significantly the compliance burden of certain filing persons, such as nonpublic and foreign firms. Generally, nonpublic and foreign firms are not required to report their holdings regularly as publicly-held companies in the United States are required to do. Consequently, such firms appear to have difficulty gathering the information needed to respond accurately to items 6(b) and 6(c) at the five percent thresholds.

Accordingly, the Commission proposes to revise items 6(b) and 6(c) of the Form to read as follows:

Item 6(b)—Shareholders of person filing notification. For each entity (including the ultimate parent entity) included within the person filing notification the voting securities of which are held (See § 801.1(c)) by one or more other persons, list the issuer and class of voting securities, the name and headquarters mailing address of each other person which holds ten percent or more of the outstanding voting securities of the class, and the number and percentage of each class of voting securities held by that person. Holders need not be listed for issuers with total assets of less than \$10 million.

Item 6(c)—Holdings of person filing notification. If the person filing notification holds voting securities of any issuer not included within the person filing notification, list the issuer and class, the number and percentage of each class of voting securities held, and

(optional) the entity within the person filing notification which holds the securities. Holdings of less than ten percent of the outstanding voting securities of any issuer, and holdings of issuers with total assets of less than \$10 million, may be omitted.

n. Reporting of 5-Digit SIC Code Overlaps

At present, item 7 of the Form requires the filing person who has knowledge or belief that it and any other party to the acquisition derived revenues in the most recent year from any of the same 4-digit SIC industry codes to list the overlapping SIC codes and to provide its description. If the transaction involves the formation of a joint venture or other corporation, the filing person must indicate the common 4-digit SIC codes in which it derives revenues and in which the joint venture will derive revenues as well as the common codes it has with other parties to the transaction. The Commission proposes to amend item 7 in two ways.

First, the Commission proposes to require filing persons to identify and provide geographic market information for overlapping 5-digit SIC product class codes as well as 4-digit SIC codes for manufacturing operations (SIC major groups 20-39). The Commission has found that many of the 4-digit SIC codes within SIC major groups 20-39 are too broad for proper product line determinations. Because many products are often included within a particular 4-digit SIC code, it is difficult to determine based on 4-digit information whether the parties to the transaction produce competing products. However, 5-digit SIC codes delineate specific product classes that are less inclusive than the 4-digit SIC codes that classify products by manufacturing industry. Modifying item 7 to include overlapping 5-digit SIC codes will provide more detailed geographic market information about a more narrowly defined class of products that the filing persons produce in common. For example, the 4-digit SIC code, 2834 - Pharmaceutical Preparations, is sub-categorized into nine different 5-digit SIC codes. Thus, for the most part, while the information received in response to item 7 has been very useful, the Commission believes that information regarding geographic markets at the 5-digit SIC code overlap level will improve the agencies' initial antitrust review.

Second, the Commission proposes to amend item 7 to require filing persons to include SIC code overlaps and geographic market information for products added and facilities that began operations after the period for which

revenue information was provided in response to items 5(b)(iii) and 5(c). At present, Item 7 requires a filing person to identify overlaps from operations in which it derived revenues "in the most recent year." If a filing person interprets this language narrowly to mean only overlaps for operations in which it reported revenues in items 5(b)(iii) and 5(c) for the most recent year (for which it has compiled twelve months of revenue information), overlaps which exist due to products or facilities added after that period would not be identified. The Commission is aware of at least one instance in which a filing person failed to report geographic market information for a retail establishment it opened and from which it derived revenues after the year for which it reported revenues in item 5(c). The failure to disclose such locations in responding to item 7 compromises the agencies' ability to make a complete assessment of the potential competitive effects of a proposed acquisition. For this reason, the Commission proposes to amend item 7 to clarify that filing persons are required to report product overlap and geographic market information current to the date of filing.

In addition, consistent with the proposal described above, the Commission proposes to amend current item 7(c)(iv), which will be renumbered item 7(c)(v). This item requires filing persons to provide the street addresses, arranged by state, county and city or town, of establishments in certain industries, e.g., retail trade, for which the competitive effects in local geographic markets may be of concern. The Commission proposes to amend renumbered item 7(c)(v) to make clear that the listing of establishments must include establishments acquired or constructed since the end of the most recent year for which period revenues are reported in item 5(b)(iii).

The Commission therefore proposes to amend item 7 to require: (1) The disclosure of SIC code overlaps and geographic market information at the 5-digit product class level as well as the 4-digit industry level in SIC major groups 20-39; (2) the listing of SIC code overlaps and geographic markets resulting from products added or businesses entered into since the end of the most recent year for which revenues are reported in item 5(b)(iii) or item 5(c)(i); and (3) in newly numbered item 7(c)(v), the listing of establishments acquired or constructed since the end of the most recent year for which period revenue information was provided in response to items 5(b)(iii) and 5(c). The proposed amendments read as follows:

Item 7—If, to the knowledge or belief of the person filing notification, the person filing notification derived dollar revenues in the most recent year (and/or in the period from the end of the most recent year to the date of filing of this Notification and Report Form) from any 4-digit SIC code or, within SIC major groups 20-39 (manufacturing industries), from any 4-digit industry or 5-digit product class code in which any other person who is a party to the acquisition also derived dollar revenues in the most recent year or since the end of the most recent year (or in which a joint venture or other corporation will derive dollar revenues), then for each 4-digit (SIC code) industry and each 5-digit (SIC code) product class:

Item 7(a)—List the 4-digit (industry) and 5-digit (product class) SIC codes and the description for the industries and product classes;

Item 7(b)—List the name of each person who is a party to the acquisition who derived dollar revenues in the 4-digit industry and 5-digit product class code;

Item 7(c)(i)—For each 4-digit industry and 5-digit product class code within SIC major groups 20-39 (manufacturing industries) listed in Item 7(a) above, list the states (or, if desired, portions thereof) in which, to the knowledge or belief of the person filing notification, the products in that 4-digit industry and 5-digit product class produced by the person filing notification are sold without a significant change in their form, whether they are sold by the person filing notification or by others to whom such products have been sold or resold;

Item 7(c)(v)—For each 4-digit industry within SIC major groups 52-61, 70, 75, 78, and 80 (retail trade, banking, and certain services) listed in Item 7(a) above, provide the street address, arranged by state, county and city or town, of each establishment from which dollar revenues were derived in the most recent year or since the end of the most recent year, including establishments acquired or constructed by the filing person since the end of the most recent year.

o. Submission of Geographic Market Information for Health Care Facilities

At present, item 7 does not always provide the enforcement agencies with the geographic market information needed to assess the potential anticompetitive effects of acquisitions involving health care facilities. The problem results from the use of different 4-digit SIC codes to report the revenues derived from owned versus managed health care facilities. Persons who

their revenues in item 5 under one of six different 4-digit SIC codes in industry groups 805 and 806. In contrast, persons who manage health care facilities but do not own the facility report revenues derived from their management services under 4-digit SIC code 8741—

Management Services. Consequently, since filing persons use different 4-digit SIC codes to report revenues derived from owned and managed health care facilities, they are not required to identify these operations as overlaps in item 7(a). Thus, if one party to an acquisition derived revenue from the ownership and operation of a general medical hospital (4-digit SIC code 8062) in the most recent year and the other party derived revenue from the management of a general medical hospital (4-digit SIC code 8741) in the same metropolitan area, the parties would not be required to identify these operations as an overlap in item 7 or to provide geographic market information.

The Commission believes that information concerning the operation of both owned and managed health care facilities is essential to the agencies' ability to perform an initial antitrust review of health care acquisitions. As the Commission found in *Hospital Corporation of America*, 106 F.T.C. 361 (1985), *aff'd*, *Hospital Corporation of America v. Federal Trade Commission*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987), management contracts greatly enhance the ability of a firm to coordinate behavior between its owned hospitals and the hospitals it manages, thereby increasing the likelihood of anticompetitive consequences. For this reason, the Commission held that including the management contracts to be acquired from Hospital Affiliates within Hospital Corporation of America's market shares presented a more accurate picture of HCA's post-acquisition market power.

The importance of receiving information concerning management contracts in the health care area is further supported by the fact that approximately eight percent of the nation's community hospitals are operated under management contracts, often by hospital companies that both manage hospitals for others as well as operate hospitals which they own. See American Hospital Ass'n, *Guide to the Health Care Field* (1992) and *Hospital Statistics* (1992–1993 ed.). However, geographic information for managed health care facilities is not readily available on a current basis from these or any other published sources. Thus, it is important that the enforcement agencies receive with the HSR filing

overlap and geographic market information concerning health care facilities that are owned, as well as those that are managed, by the filing parties.

Accordingly, the Commission proposes to amend item 7 to require reporting persons to identify managed and owned health care operations as overlaps and to provide appropriate geographic market information. To accomplish this, the Commission proposes to add a special instruction to item 7 that will treat reporting persons that operated a health care facility under a management contract in the most recent year as having derived revenues from that facility in that facility's 4-digit SIC code. For example, if the acquiring person in a reported transaction owned and operated a general medical hospital in the most recent year and reported revenues under 4-digit SIC code 8062 and the acquired person managed a general medical hospital under a management contract in the most recent year, the parties would be required to identify in item 7(a) an overlap in 4-digit SIC code 8062. In addition, each person would be required to provide, in response to renumbered item 7(c)(v), the street address, arranged by state, county and city or town, for each general medical hospital it owned or managed. This special instruction will apply only to establishments listed within SIC industry group 805, Nursing and Personal Care Facilities, and SIC industry group 806, Hospitals. Accordingly, the Commission proposes to add the following language to the instructions to item 7.

For purposes of Item 7, a person that operates, under a management contract an establishment included within SIC industry group 805, Nursing and Personal Care Facilities, or within industry group 806, Hospitals, shall be deemed to derive revenues from that establishment in the establishment's 4-digit SIC code, whether or not the person is entitled to share in the establishment's revenue, or is otherwise compensated for its management services. An establishment is deemed to be operated under a management contract by a person if that person has been delegated by another person, or governmental unit, the contractual authority and responsibility to administer or supervise the operations of all, or substantially all, of the establishment; whether or not the operator is subject to the supervision of that or any other person or unit.

p. Submission of County Geographic Market Information

Item 7(c)(ii) of the Form requires filing persons to identify the states in which they derive revenues for overlapping 4-digit SIC codes within major groups 01–17 (agriculture, forestry, fishing, mining, construction and transportation industries) and 40–49 (communications, electric, gas and sanitary services). Based on the agencies' review of past transactions in these industries, the Commission has determined that the agencies need more detailed geographic market information for the communications industry (major group 48), which includes cable television services. Many franchises and licenses in the communications industry are issued on a local (county or city) basis rather than on a state-wide basis. Comparison of county services will provide information as to whether competition exists or is likely to exist in this industry. Submission of county information will help the agencies in determining the possible competitive effects of a proposed transaction within the limited time provided by the act.

Accordingly, the Commission proposes that county as well as state information be provided by filing persons whenever a 4-digit SIC code within 2-digit major group 48 has been identified as an SIC code overlap in response to item 7(a) of the Form. To accomplish this, the Commission proposes that item 7(c)(ii) be changed to exclude SIC major group 48 and that (1) a new item 7(c)(iii) be added to the Form to require the filing person to identify the counties and states in which it derived revenues for 4-digit SIC codes in major group 48; and (2) present items 7(c)(iii), 7(c)(iv), 7(c)(v) and 7(c)(vi) be renumbered, respectively, 7(c)(iv), 7(c)(v), 7(c)(vi) and 7(c)(vii). The proposed modification of item 7(c)(ii) and the proposed new item 7(c)(iii) read as follows:

Item 7(c)(ii)—For each 4-digit industry within SIC major groups 01–17, 40–47 and 49 (agriculture, forestry and fishing, mining, construction, transportation, electric, gas and sanitary services) listed in Item 7(a) above, list the states (or, if desired, portions thereof) in which the person filing notification conducts such operations;

Item 7(c)(iii)—For each 4-digit industry within SIC major group 48 (communications) listed in Item 7(a) above, list the states and the counties within such states in which the person filing notification conducts such operations or, if the person filing notification conducts operations in all

counties within a state, the identity of such states.

q. Increase in Reporting Threshold for Vendor-Vendee Relationships

At present, item 8 of the Form requires filing persons that are also vendees to provide certain information if the acquiring and the acquired persons maintained a vendor-vendee relationship during the most recent year with respect to any manufactured product that the vendee either resells, consumes in, or incorporates into, the manufacture of a product. If the proposed acquisition involves the formation of a joint venture or other corporation, item 8 requires each person forming the entity to identify any manufactured product it purchased from any other such person which will be supplied to the joint venture or other corporation. If the aggregate annual sales of the manufactured product do not exceed \$1 million, the filing person need not list the product in item 8. The intended purpose of item 8 is to "identify certain instances in which a reported acquisition may result in vertical foreclosure or an increase in vertical integration in an industry." See 43 FR 33450, 33533 (July 31, 1978).

The Commission is aware that the \$1 million threshold can make complying with item 8 burdensome. Responding can be particularly difficult for a large firm without a centralized accounting system that tracks the sales and purchases of each of its many divisions and subsidiaries. Consequently, such a firm may need to undertake a significant records check to determine whether it had sales or purchases of over \$1 million of product from the other person to the transaction in order to supply the data called for by item 8.

The Commission proposes to increase the threshold in item 8 to require the reporting of vendor-vendee relationships when aggregate annual sales or purchases of a manufactured product during the most recent year exceed \$5 million. In 1978, the Commission declined to raise the threshold to \$5 or \$10 million because it was concerned that a reporting floor higher than \$1 million would exclude some highly significant vertical relationships. See 43 FR 33450, 33534 (July 31, 1978). However, the Commission's experience in reviewing filings and investigating proposed transactions in recent years has indicated that acquisitions in which either party makes product purchases from the other party under \$5 million rarely, if ever, present risks of vertical foreclosure or increased vertical integration in a given industry. In

addition, this threshold should simplify filing persons' reporting obligations because even large firms with numerous operations are likely to be able easily to identify customers that purchase this volume of product. Vendees that must supply the data required by item 8 also will likely know if they acquired products exceeding \$5 million from a single source of supply.

Accordingly, the Commission proposes to modify item 8 of the Form to read:

Manufactured products are those within 2-digit SIC major groups 20-39. Any product purchased from the vendor in the aggregate annual amount not exceeding \$5 million, or the manufacture, consumption or use of which is not attributable to the assets to be acquired, or to the issuer whose voting securities are to be acquired (including entities controlled by the issuer), may be omitted.

r. Reporting of Prior Acquisitions

At present, item 9 requires the acquiring person to list certain prior acquisitions when both the acquiring person and the acquired issuer or the acquired assets had attributable to them revenues of \$1 million or more in the most recent year in the same 4-digit SIC code. The acquiring person is required to list only prior acquisitions made within the previous five years of more than 50 percent of the voting securities or assets of entities which had annual net sales or total assets greater than \$10 million in the year prior to the acquisition.

The purpose of item 9 is "to assist the agencies in identifying any prior acquisitions by the acquiring person . . . that may suggest a pattern of acquisitions in a particular industry by that person." 43 FR 33450, 33534 (July 31, 1978). Item 9 has been useful to the agencies in monitoring competition within industries. Responses to this item have provided information relating to acquisitions for which a premerger filing was not made as well as information regarding possible violations of the Act for failure to file notification.

As stated above, item 9 currently requires information regarding prior acquisitions involving common 4-digit SIC codes in which both the acquiring person and the issuer or assets to be acquired derived revenues of \$1 million or more in the most recent year. In 1987, the Commission decided not to adopt a suggestion to raise the \$1 million threshold to \$10 million "because the agencies sometimes find overlaps of less than \$10 million in a given 4-digit SIC code to be of significance." 52 FR 7078

(March 6, 1987) The Commission explained that this is particularly true when the parties compete in small local markets and when the acquiror has a large market share. *Id.* However, based on the Commission's experience in reviewing acquisitions since 1987, the Commission has observed that acquisitions in which either party currently derives revenues of less than \$5 million in the same 4-digit SIC industry code seldom present competitive concerns. Thus, information about the acquiring person's prior acquisitions involving such industries is of limited value, either in analyzing the transaction for which the acquiring person is currently filing notification, or for monitoring competition in the given industry. For this reason, the Commission proposes to raise the \$1 million threshold presently found in item 9 to \$5 million.

The Commission also proposes to clarify the language in item 9 which provides that "only acquisitions of more than 50 percent of the voting securities or assets of entities" need be listed. With respect to asset acquisitions, this language has been read to mean that only acquisitions of more than 50 percent of the assets of an entity need be listed. While the more than 50 percent threshold is justified for voting securities acquisitions, it appears to have no basis from an antitrust perspective as applied to assets. In many cases, filing parties often have recognized this incongruity and have included in their response to item 9 acquisitions of assets that did not constitute more than 50 percent of the acquired entity's assets; strict application of the more than 50 percent requirement to assets would permit nearly all prior acquisitions from large, multi-divisional corporations to go unreported in item 9. Accordingly, the Commission proposes to modify the instructions to item 9 to make clear that asset acquisitions are not subject to the 50 percent test.

In addition, the Commission proposes to modify the language of the "more than 50 percent" test as applied to the acquisition of voting securities to a "50 percent or more" test consistent with the Commission's definition of control of an issuer. See 16 CFR 801.1(b).

Accordingly, the Commission proposes that the instructions to item 9 be revised, in part, as follows:

Item 9—Previous acquisitions (to be completed by acquiring persons). Determine each 4-digit (SIC code) industry listed in Item 7(a) above, in which the person filing notification derived dollar revenues of \$5 million or more in the most recent year and in

which either (1) the issuer to be acquired derived revenue of \$5 million or more in the most recent year (or in the case of the formation of a joint venture or other corporation, where the joint venture or other corporation can be expected to derive revenues of \$5 million or more), or (2) revenues of \$5 million or more in the most recent year are attributable to the assets to be acquired.

For each such 4-digit industry, list all acquisitions made by the person filing notification in the five years prior to the date of filing. List only acquisitions of (1) 50 percent or more of the voting securities of an issuer which had assets or annual net sales of \$10 million or more in the year prior to the acquisition or (2) acquisitions of assets valued at \$10 million or more at the time of their acquisition.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 94-14316 Filed 6-13-94; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1301

Registration of Manufacturers and Importers of Controlled Substances

AGENCY: Drug Enforcement Administration (DEA).

ACTION: Supplemental notice of proposed rulemaking (SNPRM).

SUMMARY: On October 7, 1993, DEA published a notice a proposed rulemaking (NPRM) in the *Federal Register* (58 FR 52246) to amend its regulations to eliminate the mandatory administrative hearing requirement for objections to the registration of certain bulk manufacturers and importers of controlled substances. This SNPRM revises the NPRM by proposing to eliminate the hearing provision relating to bulk manufacturers altogether and leave unaltered the hearing provision relating to registration of importers.

DATES: Written comments and objections to this SNPRM must be received on or before August 15, 1994.

ADDRESSES: Comments and objections should be submitted in quintuplicate to the Administrator, Drug Enforcement Administration, Washington, DC 20537, Attention: DEA Federal Register Representative/CCR.

FOR FURTHER INFORMATION CONTACT: Julie C. Gallagher, Associate Chief Counsel, Diversion and Regulatory

Section, Office of Chief Counsel, Drug Enforcement Administration, Washington, DC 20537, telephone (202) 307-8010.

SUPPLEMENTARY INFORMATION: On October 7, 1993, DEA published a NPRM in the *Federal Register* (58 FR 52246). The DEA proposed to amend two sections of its regulations, specifically 21 CFR 1301.43(a) and 1311.42(a), in which the Administrator is required to hold an administrative hearing on an application for registration to manufacture or import a bulk Schedule I or II controlled substance when requested to do so by any current bulk manufacturer of the substance(s) or by any other applicant for a similar registration. Because the proposals in this SNPRM differ in some respects from the NPRM, DEA encourages interested persons to file comments in response to this SNPRM even if they have already commented on the NPRM. Comments previously received under the NPRM will be considered under the SNPRM to the extent they are relevant to the changes in the SNPRM.

Section 1311.42(a)

In the NPRM, DEA proposed to remove the provision which enabled a person registered as a bulk manufacturer of a controlled substance or applicant thereof to request a hearing on the application of an importer of that controlled substance. As several commentators argued, the proposed amendment to 21 CFR 1311.42, cannot be reconciled with the hearing provisions of 21 U.S.C. 958(i). The relevant portion of 21 U.S.C. 958(i) states: "prior to issuing a registration under this section . . . the Attorney General shall give manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing." In keeping with the above requirement, 21 CFR 1311.42, allows current bulk manufacturer registrants to request an administrative hearing regarding their objections to the registration of certain importers of Schedule I and II controlled substances. With an existing statute in effect, DEA is not empowered to adopt regulations that contravene the express language of that statute. Therefore, based on the hearing provisions under 21 U.S.C. 958(i), 21 CFR 1311.42, Application for importation of Schedule I and II controlled substances, shall remain unchanged.

Section 1301.43(a)

Unlike the registration of importers, the Controlled Substances Act (21

U.S.C. 801, et seq.) does not require that current registrants be allowed to request a hearing on an application for registration as a bulk manufacturer of a controlled substance. The NPRM proposed to modify § 1301.43(a) and provide for a hearing only when "the Administrator determines that a hearing is necessary to receive factual evidence and/or expert testimony with respect to issues raised by the application or objections thereto." The SNPRM goes one step further and eliminates this hearing provision entirely. However, the Administrator would still be required to hold hearings when requested by the applicant pursuant to an order to show cause, § 1301.44, and current registrants and applicants would still be permitted to submit comments or objections concerning an application for registration. In addition, current registrants and applicants would be granted an opportunity to participate in any hearings conducted pursuant to § 1301.44.

DEA recognizes that the antecedent for this hearing provision derives from statutory acknowledgement that limiting the number of registrants may increase the capability to control diversion. The regulations clearly state, however, that the Administrator is not required to limit the number of manufacturers even if the current registrants can provide an adequate supply, as long as DEA can maintain effective controls against diversion. 21 CFR 1301.43(b). In addition, as stated in the NPRM, the Administrator has never denied an application solely on the basis of increased danger of diversion or adverse impact upon domestic competition.

DEA also agrees that current registrants and applicants should be allowed to object to an additional registration by filing comments on grounds that it would adversely affect diversion or competition in a highly regulated industry. But DEA finds that registrants and applicants have abused the mandatory hearing requirement in the past and it remains a future source of abuse where these individuals deter or delay new registrations and retaliate by opposing annual renewals.

Most important, the proposed change as provided herein does not violate statutory intent but instead comports with sound principles of substantive and procedural due process. First, eliminating the hearing requirement except when requested by the applicant after issuance of an order to show cause, supports the statutory and regulatory mandate that an applicant for registration as a bulk manufacturer shall have the burden of proof at "any hearing" that the requirements of