Part IV

Federal Trade Commission

16 CFR Parts 800 and 803

Notification and Report Form for Certain Mergers and Acquisitions Under the Antitrust Improvements Act; Final Rule
FEDERAL TRADE COMMISSION

16 CFR Parts 800 and 803

Notification and Report Form for Certain Mergers and Acquisitions Under the Antitrust Improvements Act

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: This final rule revises 16 CFR part 803 Appendix, the Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions (the “Form”). The Form must be completed and submitted by persons required to report mergers or acquisitions pursuant to Section 7A of the Clayton Act as added by title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”). The revised Form will require that 1992 revenue data, identified by 1987 Bureau of the Census Standard Industrial Classification (SIC) Codes, be provided in response to certain items on the Form that previously called for 1987 data. This final rule also removes 16 CFR part 800, the Transitional Rule addressing the treatment of acquisitions consummated before, and notifications filed on or before, September 5, 1978, the effective date of the Form and the rules implementing the HSR Act (“the Rules”).

EFFECTIVE DATE: August 9, 1995.

ADDRESSES: All completed Forms, including any documents required to be submitted in response to any item on the Form, must be delivered to: Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, DC 20580, and Director of Operations, Antitrust Division, Room 3218, Department of Justice, Washington, DC 20530, as specified by 16 CFR 803.10(c).


SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

This change to the Form has been approved by the Office of Information and Regulatory Affairs, Office of Management and Budget, under the existing OMB clearance, Control No. 3084–0055.

Regulatory Flexibility Act

The Federal Trade Commission (“the Commission”) has previously certified that the Premerger Notification Rules and Report Form do not significantly affect small businesses. The revision to the Form made by this notice will not change the premerger notification rules in any way that would affect that determination. Therefore, pursuant to 5 U.S.C. 605(b), as added by the Regulatory Flexibility Act, Public Law 96–354 (September 19, 1980), the Commission certifies that these rules will not have a significant economic impact on a substantial number of small entities. Section 604 of the Administrative Procedure Act, 5 U.S.C. 604, requiring a final regulatory flexibility analysis of this revision is therefore inapplicable.

Background Information

The HSR Act requires all persons contemplating certain mergers or acquisitions to file notification with the Commission and the Assistant Attorney General of the Antitrust Division of the Department of Justice (“the Assistant Attorney General”) and to wait a designated period of time before consummating such proposed transactions. Congress empowered the Commission, with the concurrence of the Assistant Attorney General, 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)(1988)). Pursuant to that section, the Commission, with the concurrence of the Assistant Attorney General, developed the Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions. The Form is designed to provide the Commission and the Assistant Attorney General (collectively referred to as “the enforcement agencies”) with the information and documentary material necessary and appropriate for an initial evaluation of the potential anticompetitive effects of significant mergers, acquisitions and certain similar transactions. The Form is not intended to elicit all potentially relevant information relating to an acquisition. Completion of the Form by all parties required to file ordinarily will permit both enforcement agencies to determine whether the waiting period should be allowed to expire or be terminated upon request, or whether a request for additional information should be made under section 7A(e) of the Act and 16 CFR 803.2(c).

All acquiring and acquired persons required by the HSR Act to file notification must complete the Form, or a photostatic or other equivalent reproduction, in accordance with the Rules, 16 CFR 801–803, and the instructions attached to the Form.

Statement of Basis and Purpose for the Commission’s Revision of the Form and Removal of the Transitional Rule

Form Revision

To aid the enforcement agencies in determining the competitive significance of a proposed transaction, the Form requires parties to the transaction to provide information concerning their revenues for a given base year and for the most recent year for which revenue information is available. When the Form was first promulgated on July 31, 1978, 43 FR 33450, and became effective on September 5, 1978, it required data for 1972 as the base year.

The Form was revised in 1980 to require data for 1977 as the base year (45 FR 14205 (March 5, 1980)). In 1986, the Form was revised to require data for 1982 as the base year (51 FR 10368 (March 26, 1986)). Thereafter, a revision to the Form in 1990 changed the base year to 1987 (55 FR 31371 (August 2, 1990)). This notice changes the base year from 1987 to 1992 and requires revisions to the Form relating to the revenue information required by item 5 of the Form and the reference materials to be used in completing item 5, as discussed more fully below.

Item 5 of the Form is designed, in part, to elicit economic data classified by Standard Industrial Classification (“SIC”) codes with respect to business activities within the U.S. in which the reporting person derived any dollar revenues in the base year and in the most recent year for which data are available. (Rule 803.2 (b) and (c), 16 CFR 803.2 (b) and (c), provide for certain limitations on item 5 and other data to be supplied by the reporting person). Such revenue data are 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) currently requires that the reporting person provide 1987 revenue data for each 4-digit industry in which that filing person was engaged. Item 5(b)(i) currently requires that the reporting person engaged in manufacturing provide 1987 revenue data for each 7-digit product code from which it derived any revenues. Item 5(b)(ii) currently requires the reporting person to identify each manufactured product that has been added or deleted since 1987. For those products added, the reporting
person must provide the total revenue attributable to the added product for the most recent year. (The reporting person may identify the product by a 7-digit product code or in the manner it ordinarily uses.) Item 5(b)(iii) currently requires that the reporting person engaged in manufacturing provided revenue data for the most recent year for each 5-digit product class from which it derived revenues. Item 5(c) currently requires that the reporting person engaged in non-manufacturing industries provide 4-digit revenue data for the most recent year. (Pursuant to Rule 803.2(b), acquired persons are required to limit their responses to item 5 to revenues derived from the assets being acquired and/or the issuer(s) whose voting securities are being acquired).

When originally promulgated, the Form required revenue data for two time periods, i.e., for 1972 and for the most recent year for which the requested information was available. The use of the 1972 base year was designed to coincide with the then most recent quinquennial economic census and the Annual Survey of Manufacturers. These Bureau of Census publications (as updated) serve as the most readily available and reliable statistical sources of industry data and universe product revenue data to which individual company product revenue data can be compared. When the original Form was promulgated, the Commission and the Assistant Attorney General stated their intention to revise Item 5 to require submission of 1977 revenue data as soon as the Bureau of the Census published the 1977 Census of Manufacturers (43 FR 33526 (July 31, 1978)). Accordingly, the Commission amended the Form in 1980, in 1986 when the 1982 Census of Manufacturers was published, and again in 1990 when the 1987 Census of Manufacturers was published.

The Bureau of the Census is currently in the process of publishing its Final Reports for the 1992 Census of Manufacturers. The projects that it will complete the publication of all Final Reports by September 1, 1995. Since most companies within the United States submit data to the Bureau of the Census for economic censuses, many potential reporting persons have gathered, compiled and assembled 1992 revenue data in accordance with the SIC code format for the 1992 Census of Manufacturers. In addition, the Bureau of the Census has completed its Numerical List of Manufactured and Mineral Products of Manufacturer Census of Manufacturers and Census of Mineral Industries (MC92–R–1) (“1992 Numerical List”). This publication contains 5-digit product class and 7-digit product codes for 1992 and is currently available from the Government Printing Office. Its present availability and the imminent availability of the 1992 product revenue universe data, contained in the Bureau of the Census Reports, to the enforcement agencies, permit the revision of item 5 to require 1992 data instead of 1987 data.

The previous change to the base year in 1990 was effective in 60 days from the date of publication of the Final Rule in the Federal Register. A transitional period during which filers could submit either 1982 or 1987 data was not provided because of significant changes in the 4-digit, 5-digit and 7-digit SIC codes. In contrast, the previous changes to the base year in 1980 and 1986 were effective immediately but provided for a 60-day transitional period during which filers were permitted to submit either the old or the new revenue data.

Because there were not been significant changes in the SIC codes from 1987 to 1992, the Commission has determined that the current changes to the Form will be effective immediately, subject to a transitional period until October 1, 1995, (as was permitted in the changeovers to the 1977 and 1982 base years). During such time, reporting persons may use as the base year either 1987 or 1992 when providing revenue and SIC code data in response to items 5(a), 5(b)(i), 5(b)(ii), 5(b)(iii) and 5(c) of the Form. Therefore, the Commission and the Assistant Attorney General will accept only 1992 revenue and SIC code data. Forms submitted on or after October 1, 1995, that do not provide 1992 base year revenue data will be treated as deficient under § 803.10(c)(2) of the Rules. (16 CFR 803.10(c)(2)).

The Commission has decided to provide for a transitional period during which base year revenue data may be submitted for either 1987 or 1992 and the corresponding 1987 or 1992 SIC codes can be used in responding to item 5 in order to minimize the reporting burden on filing persons. The transitional period allows for the submission of new base year revenue data by first-time filers, who may otherwise be required to compile old base year revenue data solely for the purpose of completing the Form. It also permits reporting persons who routinely file notifications with the enforcement agencies to use existing old base year revenue data to complete the Form while finishing their collection and organization of new base year revenue data. Although this approach may temporarily complicate the substantive antitrust reviews conducted by the enforcement agencies, the difficulties should not be significant because there have not been substantial changes in the SIC codes for 1992. Moreover, the enforcement agencies’ antitrust analysis clearly will benefit from the receipt of more up-to-date information.

In 1990, when the Form was amended to require submission of 1987 base year revenue data, the Commission and the Assistant Attorney General determined that reporting persons would be required to submit revenue data using the codes published by the Bureau of Census rather than codes used by Census to collect the information. This requirement is no longer necessary since the Bureau of the Census used the same codes for data collection and for publication of the 1992 Census of Manufacturers. Accordingly, reporting persons will no longer be required to convert revenue data collected using the codes published by the Bureau of Census when completing the Form.

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 APA’s notice and comment requirements the 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 revision falls within this exemption for several reasons.

First, 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 Rules and the Form, and was accompanied by a Statement of Basis and Purpose (43 FR 33450 (July 31, 1978)). Since the present amendment does not depart from or alter the substance of the prior rulemakings (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.N.Y. 1953), aff’d 217 F.2d 303 (2d Cir.), cert. denied, 348 U.S. 964 (1954).

Second, the Commission and the Assistant Attorney General gave notice of their intention to revise Item 5 in the original promulgation of the Rules and the Form in response to numerous
comments received during the two
comment periods of the original
rulemaking. Several comments then
opposed the requirement that 1972 data
based on the SIC Codes be supplied on
the grounds that the compilation of the
1972 data would be unduly
cumbersome, burdensome and
demanding. The positions were
rejected by the Commission on the basis
that revenue information "reported by
SIC-based categories currently provides
the only feasible basis for the effective
preliminary review of reported
acquisitions within the time limits
imposed by the act." (43 FR at 33527,
(July 31, 1978)).

Now, for the fourth time, the
Commission is changing the
requirements of item 5 consistent with
its earlier notices. The change will
lessen the compliance burden by
requiring more recent revenue data,
which is generally more easily
retrievable by and readily available to
reporting persons than 1987 data. The
Commission finds that a separate notice
and comment period at this time would
be unnecessary and not in the public
interest, and, therefore, it is not required
by the APA.

Section 553(d) (5 U.S.C. 553(d)(3)) 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
150 days after enactment. However,
implementation rules could not be
promulgated prior to the effective date.
Therefore, on January 27, 1977, the
Commission, with the concurrence of
the Assistant Attorney General,
proposed the Transitional Rule (42 FR 6365 (February 2,
1977)). The Transitional Rule, 16 CFR
part 800, created an exemption for all
transactions consummated prior to the
effective date of the Rules and specified
the manner in which the Rules would
be implemented during the first 30 days
following the effective date. The Rules
have now been in effect since
September 5, 1978, and there are no
longer any transactions that are subject
to the Transitional Rule. Thus, the
deletion of the Transitional Rule is
appropriate at this time.

The Commission believes that the
notice and comment period ordinarily
required by the APA, 5 U.S.C. 553(b), is
also unnecessary for the removal of the
Transitional Rule, which falls within
the exemption provided by Section
553(b)(B) of the APA. Because the
Transitional Rule governs no current or
future transactions, no members of the
public will be affected by the deletion
of the rule. Therefore, to make the
removal of the Transitional Rule subject
to the notice and comment requirements
of the APA would be "impractical,
unnecessary, or contrary to the public
interest." (5 U.S.C. 553(b)(B)(1988)).

The Commission, with the
concurrence of the Assistant Attorney
General, hereby removes 16 CFR part
800.

List of Subjects in 16 CFR Parts 800 and
803
Antitrust.

Final Rule
Accordingly, under the authority at 15
U.S.C. 45(a) and 46(g) the Federal Trade
Commission amends title 16 chapter I of
the Code of Federal Regulations as
follows:

PART 800—TRANSITIONAL RULE
1. Part 800 is removed.

PART 803—TRANSMITTAL RULES
2. The authority citation for part 803
continues to read as follows:
Authority: Section 7A(d), Clayton Act, 15
U.S.C. 18a(d) as added by section 201, Hart-
Scott-Rodino Antitrust Improvements Act of

3. The Appendix is amended by
revising pages I and IV of the
Instructions to the Antitrust
Improvements Act Notification and
Report Form for Certain Mergers and
Acquisitions, and pages 6 and 7 of the
Antitrust Improvements Act
Notification and Report Form for
Certain Mergers and Acquisitions to
read as follows:

Appendix [Amended]
ANTITRUST IMPROVEMENTS ACT
NOTIFICATION AND REPORT FORM
for Certain Mergers and Acquisitions

INSTRUCTIONS

GENERAL
The Answer Sheets (pp. 1-16) constitute the Notification and Report Form ("the Form") required to be submitted pursuant to § 803.1(a) of the premerger notification rules ("the rules"). Filling persons need not, however, record their responses on the Form.

These Instructions specify the information which must be provided in response to the items on the Answer Sheets. Only the completed Answer Sheets, together with all documentary attachments are to be filed with the Federal Trade Commission and the Department of Justice.

Persons providing responses on attachment pages rather than on answer sheets must submit a complete set of attachment pages with each copy of the Form.

The term "documentary attachments" refers to materials supplied in response to Item 2(d), Item 4 and to submissions pursuant to §§ 803.1(b) and 803.11 of the rules.


Definitions-The definitions and other provisions governing this Form are set forth in the rules, 15 CFR Parts 801-803. The governing statute, the rules, and the Statement of Basis and Purpose for the rules are set forth at 43 FR 33450 (July 31, 1978), 44 FR 60781 (November 22, 1979) and 48 FR 34427 (July 29, 1983).

Affidavit-Attach the affidavit required by § 803.5 to page 1 of the Form. Affidavits are not required if the person filing notification is an acquired person in a transaction covered by § 801.30. (See § 803.5(a).)

Responses-Each answer should identify the item to which it is addressed. Use the reverse side of the corresponding answer sheet or attach separate additional sheets as necessary in answering each item. Each additional sheet should identify at the top of the page the item to which it is addressed. Voluntary submissions pursuant to § 803.1(b) should also be so identified.

Enter the name of the person filing notification appearing in Item 1(a) on page 1 of the Form and the date on which the Form is completed at the top of each page of the Form, at the top of any sheets attached to complete the response to any item, and at the top of the first or cover page of each documentary attachment.

If unable to answer any item fully, give such information as is available and provide a statement of reasons for non-compliance as required by § 803.3. If exact answers to any item cannot be given, enter best estimates and indicate the sources or bases of such estimates. Estimated data should be followed by the notation, "est." All information should be rounded to the nearest thousand dollars.

Year-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.

SIC Data-This Notification and Report Form requests information regarding dollar revenues and lines of commerce at three levels with respect to operations conducted within the United States. (See § 803.2(c)(1).) All persons must submit certain data at the 4-digit (SIC code) industry level. To the extent that dollar revenues are derived from manufactured 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).

The term "dollar revenues" is defined in § 803.2(d).

References- In reporting information by "4-digit (SIC code) industry" refer to the 1987 edition of the Standard Industrial Classification Manual published by the Executive Office of the President, Office of Management and Budget.

In reporting information by "5-digit product class" and "7-digit product" refer to the following reference publication published by the U.S. Bureau of the Census:

Numerical List of Manufactured and Mineral Products, 1992 Census of Manufactures and Census of Mineral Industries (MC92-R-1). Make sure that the Numerical List you use has MC92-R-1 printed on the cover.

Furthermore, when the Numerical List cites footnote 3, which refers to Appendices A and C for detail collected in a specified Current Industrial Report, you must provide revenue information using the 7-digit product codes listed in Appendix A.

Privacy Act Statement - Section 18(a) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of this information is to determine whether the merger or acquisition reported in the Notification and Report Form may violate the antitrust laws. Furnishing the information on this Form is voluntary.

Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to $10,000 per day.

FTC Form C 4 (rev. 07/95)
the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document.

Persons filing notification may provide an optional index of documents called for by item 4 on page 5 of the Answer Sheets.

NOTE: If the person filing notification withholds any documents called for by item 4(c) based on a claim of privilege, the person must provide a statement of reasons for such noncompliance as specified in the staff formal interpretation dated September 13, 1979, and § 803.3(d).

* * * * * *

ITEMS 5 through 9 and the Appendix

NOTE: For Items 5 through 9 and the Appendix limited or separate responses may be required of the person filing notification. (See § 803.2(b) and (c).)

ITEM 5(a) - 5(c): These Items request information regarding dollar revenues and lines of commerce at three levels with respect to operations conducted within the United States. (See § 803.2(c)(1)). 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).

NOTE: See the "References" listed in the General Instructions to the Form. Refer to the 1987 edition of the Standard Industrial Classification Manual for the 4-digit (SIC code) industry codes. Refer to the Numerical List of Manufactured and Mineral Products, 1992 Census of Manufactures and Census of Mineral Industries (MC82-R-1) for the 5-digit product class and 7-digit product codes. Report revenues for the 5-digit and 7-digit codes using the codes in the columns labeled "Product code."

Insurance carriers (2-digit SIC major group 63) should supply the information requested only with respect to industries not within 2-digit major group 63. Credit agencies other than banks; security and commodity brokers, dealers, exchanges, and services; holding and other investment offices, and real estate companies (2-digit SIC major groups 61, 62, 67 and 65) should identify or explain the revenues reported (e.g., dollar sales, receipts).

Persons filing notification should include the total dollar revenues for 1992 derived by all entities included within the person filing notification at the time this Notification and Report Form is prepared (even if such entities have become included within the person since 1992). For example, if the person filing notification acquired an entity in 1994, it must include that entity's 1992 revenues in Items 5(a) and 5(b)(i).

Item 5(a)-Dollar revenues by industry. Provide aggregate 4-digit (SIC code) industry data for 1992.

Item 5(b)(i)-Dollar revenues by manufactured product. Provide the following information on the aggregate operations for the person filing notification for 1992 for each 7-digit product of the person in 2-digit SIC major groups 20-39 (manufacturing industries)

NOTE: When the Numerical List refers to footnote 3, which cites Appendices A and C for detail collected in a specified Current Industrial Report, you must provide revenue information using 7-digit product codes listed in Appendix A.

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 1992, indicate the year of addition or deletion, and state total dollar revenues in the most recent year for each product that has been added. Products may be identified either by 7-digit product code or in the manner ordinarily used by the person filing notification.

Do not include products added since 1992 by reason of mergers or acquisition occurring since 1992. Dollar revenues derived from such products should be included in response to Item 5(b)(i). However, if an entity acquired since 1992 by the person filing notification (and now included within the person) itself has added any products since 1992, these products and the dollar revenues derived therefrom should be listed here. Products deleted by reason of dispositions of assets or voting securities since 1992 should also be listed here.

Item 5(b)(iii)-Dollar revenues by manufactured product class. Provide the following information about the aggregate operations of the person filing notification for the most recent year for each 5-digit product class of the person within SIC major groups 20-39 (manufacturing industries). If such data have not been compiled for the most recent year, estimates of dollar revenues by 5-digit product class may be provided if a statement describing the method of estimation is furnished.

Item 5(c)-Dollar revenues by non-manufacturing industry. Provide the following information concerning the aggregate operations of the person filing notification for the most recent year for each 4-digit (SIC code) industry in SIC major groups other than 20-39 in which the person engaged. If such data have not been compiled for the most recent year, estimates of dollar revenues by 4-digit industry may be provided if a statement describing the method of estimation is furnished. Industries for which the dollar revenues totaled less than one million dollars in the most recent year may be omitted.

NOTE: This million dollar minimum is applicable only to Item 5(c).
ITEM 5 (See the "References" listed in the General Instructions to the Form. Refer to the 1987 edition of the Standard Industrial Classification Manual for the 4-digit (SIC Code) industry codes. Refer to the Numerical List of Manufactured and Mineral Products, 1992 Census of Manufactures and Census of Mineral Industries (MCB2-R-1) for the 5-digit product class and 7-digit product codes. Report revenues for the 5-digit and 7-digit codes using the codes in the columns labeled "Product code.")

5(a) DOLLAR REVENUES BY INDUSTRY

<table>
<thead>
<tr>
<th>4-DIGIT INDUSTRY CODE</th>
<th>DESCRIPTION</th>
<th>1992 TOTAL DOLLAR REVENUES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Product code published</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
By direction of the Commission.

Donald S. Clark,
Secretary.

[FR Doc. 95–19546 Filed 8–8–95; 8:45 am]

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