

## IN THE MATTER OF

## AMERICAN MEDICAL INTERNATIONAL, INC., ET AL.

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

*Docket 9158. Final Order, July 2, 1984—Modified Order, Nov. 9, 1984*

This Modified Order revises the Commission's Final Order issued on July 2, 1984, 104 F.T.C. 1, which requires a Beverly Hills operator of a chain of proprietary hospitals to divest French Hospital, located in San Luis Obispo, California, and provide the Commission, for a period of ten years, with advance notification of its intention to acquire any hospital costing \$1 million or more in the 13-state area specified in the order. As revised, the Modified Order retains the advance notification requirement of the original order, but sets forth in detail the manner in which the firm must prepare and submit the notification to the Commission, and the supplemental information that should be included.

ORDER AND OPINION OF THE COMMISSION GRANTING IN PART AND  
DENYING IN PART COMPLAINT COUNSEL'S PETITION FOR  
RECONSIDERATION

By CALVANI, *Commissioner*:

## I. Introduction

On July 2, 1984, the Commission issued its Final Order and Opinion in *American Medical International, Inc.* [hereinafter "order"] [104 F.T.C. 1]. The Commission held that respondents' acquisition of French Hospital in San Luis Obispo, California, violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 (1976), and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 (1976). The Commission rejected Complaint Counsel's request that respondents be prohibited, for a period of ten years, without prior approval of the Federal Trade Commission, from acquiring general acute care hospitals in areas where they already own or operate such a hospital. In so doing, the Commission stated:

Instead of requiring AMI to obtain prior approval from the Commission for acquiring other hospitals under the conditions set forth by Judge Barnes, we believe that many of Complaint Counsel's more legitimate objections to such acquisitions can be satisfied by requiring AMI simply to notify the Commission of its intention to make an acquisition of the variety contemplated by Judge Barnes' order. This would enable the Commission to investigate an acquisition that appears to involve significant antitrust problems, and take enforcement action against the acquisition before the acquisition has progressed beyond the "point of no return," while at the same time preserve the

procompetitive benefits attributable to AMI's presence in the acquisition market. This is not intended to replace Hart-Scott-Rodino filing requirements that may apply to any of [2] AMI's future acquisitions, but is to apply to AMI's hospital acquisitions which, for one reason or another, may be exempt from those filing requirements. We contemplate that notification by AMI of such acquisitions is to be provided when AMI's Board of Directors or Executive Committee authorizes issuance of a letter of intent or enters into a purchase agreement to make such an acquisition, whichever is earlier.

Slip op. at 60 [104 F.T.C. at 226]. Complaint Counsel has petitioned for reconsideration of certain portions of the Commission's Order in *American Medical International, Inc.* pursuant to Rule 3.55 of the Commission's Rules of Practice. Respondent American Medical International, Inc. ("AMI") replied in opposition to the Petition by memorandum dated August 6, 1984. AMI's Opposition to Petition for Reconsideration of Final Order [hereinafter "AMI Memorandum"].

After reviewing these filings, as well as the relevant briefs, decisions, orders, and transcripts in this matter, we have concluded that Complaint Counsel's Petition is an appropriate Rule 3.55 petition as to the arguments and modifications it presents concerning prior notification, but that it is inappropriate as to the arguments and modifications it presents concerning prior approval. We have determined that the Order should be modified so as to accomplish the purposes intended by the Commission's Opinion and Order of July 2, 1984. The Order as revised is designed to set forth the details of the prior notification requirement imposed under the Order so as to permit Commission staff to make a meaningful review of AMI's [3] proposed acquisition while, at the same time, guarding against imposing undue burden on AMI as a participant in the acquisition market for general acute care hospitals.

## II. Complaint Counsel's Petition for Reconsideration is Appropriate

AMI challenges Complaint Counsel's Petition for Reconsideration on two grounds. First, AMI contends that the Petition does not satisfy the requirements of Rule 3.55 of the Commission's Rules of Practice because it fails to raise any "new questions . . . upon which petitioner had no opportunity to argue before the Commission."<sup>1</sup> Second, AMI argues that the Petition should be denied because the modifications requested would harm AMI's ability to compete for new acquisitions and would "undermine the balance struck in the Commission's order between regulatory review and competitive vitality." AMI Memorandum at 2.

<sup>1</sup> Rule 3.55 of the Commission's Rules of Practice, 16 C.F.R. 3.55 provides, in pertinent part: "any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."

In support of its contention that the Petition fails to satisfy the criteria of Rule 3.55, AMI cites to portions of the briefs that it submitted to Administrative Law Judge Barnes and to the Commission in this matter, and to the transcript of the oral argument before the Commission. There, AMI claims that it raised the issue of prior notification and that Complaint Counsel had an opportunity to present its views on this issue. [4]

In briefs submitted by AMI (both to Administrative Law Judge Barnes and to the Commission), the prior approval remedy was the focus on the "fencing-in" discussion. In AMI's trial brief to Judge Barnes, AMI made only passing reference to a prior notification remedy; the overwhelming part of the "fencing-in" discussion addressed the unfairness of a prior approval requirement. Although AMI had cited to a consent decree involving a hospital merger that had employed a prior notification remedy, *United States v. Hospital Affiliates International, Inc.*, 1982-1 Trade Cas. (CCH) ¶64,696 (E.D. La. 1982), AMI included no discussion in its trial brief of the relative benefits, disadvantages, or problems associated with using this remedy or the mechanics of its use. See Trial Brief of Respondent American Medical International, Inc. at 99 & 100.

Similarly, the prior approval remedy was the focus of the "fencing-in" discussion in the two briefs submitted to the Commission by AMI. In its brief on appeal, AMI criticized the prior approval remedy as unfair, unwarranted, and anticompetitive. The only reference in AMI's brief to an alternative to a prior approval "fencing-in" appeared in a footnote that contained citations to two Justice Department merger cases in which prior notification remedies were employed. See *United States v. Stroh Brewery Co.*, 1982-83 Trade Cas. (CCH) ¶65,037 (D.D.C. 1982); *United States v. Hospital Affiliates International, Inc.*, 1982-1 Trade Cas. (CCH) ¶64,696 (E.D. La. 1982). Although AMI cited these two consent decrees, it failed to include any discussion of the advantages, [5] disadvantages, or justifications for use of this remedy. Respondent's Brief on Appeal From Initial Decision at 70 n.87. AMI's Reply Brief again stressed the unfairness of a prior approval remedy and suggested that a prior notification remedy would be much more "reasonable" in the circumstances of this case. AMI's Reply Brief contained no discussion of the mechanics of a prior notification requirement.

Although Complaint Counsel made reference to prior notification as a "fencing-in" remedy in its briefs in this matter, it did not do so in any meaningful way. Complaint Counsel referred in a footnote to premerger notification as a "fencing-in" remedy. See Complaint Counsel's Answering Brief at 65 n.92. In this reference, Complaint Counsel simply points out that a process involving premerger notifica-

tion was available to the Commission as an alternative to a prior approval "fencing-in" provision. Complaint Counsel's brief contains no further discussion of this point, or of the prior notification remedy generally. There was no discussion of, or reference to, prior notification "fencing-in" in Complaint Counsel's brief to Administrative Law Judge Barnes.

Thus, it appears that Complaint Counsel in its briefs argued for prior approval "fencing-in." Administrative Law Judge Barnes ordered this remedy in the initial order in this case. See Initial Decision at 183-89. AMI argued that "fencing-in" was unnecessary and that, even if the acquisition were found to be violative of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, prior approval "fencing-in" was not [6] warranted. Both parties focused their discussions on the justification, or lack thereof, for a prior approval remedy, and it appears that the issue of how to devise a prior notification remedy that could be employed effectively by the Commission to monitor future AMI acquisitions simply was never discussed.

As AMI correctly notes, Chairman Miller, in oral argument, did raise the issue of whether a prior notification remedy would adequately "fence-in" respondents, assuming the finding of an unlawful acquisition. Complaint Counsel responded to Chairman Miller's question by pointing out three deficiencies with a prior notification "fencing-in" requirement: (1) the Commission would not have credible information with which to assess a proposed acquisition; (2) the Commission might not have the time it needed to assess the competitive impact of the proposed acquisition; and (3) the Commission would not have any indication as to how quickly the proposed acquisition could be consummated. See Transcript of Oral Argument at 53. However, although Complaint Counsel's arguments at oral argument in this matter are similar to the arguments raised in Complaint Counsel's Petition, it does not appear that Complaint Counsel had a meaningful opportunity to argue them before the Commission at that time. Chairman Miller merely posed the possibility of a prior notification requirement, and Complaint Counsel responded in general terms without proposing any specific suggestions to deal with these potential problems. Complaint Counsel's discussion of the problems associated with a prior notification remedy at oral argument occupies only three-quarters of a page in a sixty-eight page [7] transcript. It is not reasonable to conclude that Complaint Counsel had an opportunity to discuss the practical problems associated with this remedy or the mechanics for putting it into use.

After reviewing AMI's briefs and the oral argument transcript, as well as the briefs submitted by Complaint Counsel in this matter, we

conclude that there was no opportunity for Complaint Counsel to address the prior notification issue in a meaningful way earlier in this case. This is due principally to the fact that the *operation* of a prior notification requirement was not at issue earlier in the case, an issue quite different from the *propriety* of imposing a prior approval requirement for future AMI acquisitions. Although Complaint Counsel's Petition for Reconsideration raises some of the issues that were articulated during the oral argument, the Petition discusses, analyzes, and develops these items so that AMI and the Commission can focus for the first time on the difficulties and the practical problems associated with the use of a prior notification remedy. It presents information and specific suggestions that could not have been presented earlier in the case because prior notification "fencing-in" was not at issue until the Commission opted to make it one by rejecting the prior approval provision. When the Commission chose to impose a prior notification requirement on AMI in the order, the practical problems associated with this requirement suddenly became significant for consideration by Complaint Counsel and AMI. Since neither Complaint Counsel nor AMI was in a position to [8] discuss this hypothetical remedy with any degree of precision prior to the Commission's Decision and Order, Complaint Counsel's Petition for Reconsideration is the only means available to Complaint Counsel to present to the Commission suggestions as to how to make the prior notification remedy effective. Thus, we find that those portions of Complaint Counsel's Petition that seek to modify the prior notification provision contained in Section III of the Commission's Final Order present appropriate areas for reconsideration under Rule 3.55 of the Commission's Rules of Practice, which we examine below.

AMI claims that the fact that the petitioning party had an "opportunity to argue" bars a motion for reconsideration under Rule 3.55, citing *Holiday Magic, Inc.*, 85 F.T.C. 19, 20 (1975), *Ash Grove Cement Co.*, 86 F.T.C. 606, 607 (1975), and *National Association of Women's and Children's Apparel Salesmen, Inc.*, 78 F.T.C. 1584, 1585-86 (1970), in support of this proposition. However, we find that these decisions are inapposite to the case at bar. In *Holiday Magic, Inc.*, the Commission apparently had "fully considered in reaching its final decision the arguments raised by counsel in the motion to reconsider." 85 F.T.C. at 20. Here, we gave no such consideration to these matters.<sup>2</sup> In *Ash Grove Cement Co.*, the Commission found that respondent "had [9] an opportunity, which it exercised, to argue before the Commission" the very issues that it addressed in its petition for reconsideration.

<sup>2</sup> AMI's "opportunity to argue" contention in *Holiday Magic* presumably refers to the portion of respondent's motion for reconsideration relating to substitution of counsel in that case. The facts are totally different in this case, and we cannot seriously entertain AMI's reliance on this facet of that case for the proposition that it asserts in the case at bar.

tion. 86 F.T.C. at 607. Similarly, in *National Association of Women's and Children's Apparel Salesmen, Inc.*, the Commission found that "respondents have had opportunities and have made use of such opportunities" to argue the same points raised in their petition for reconsideration. 78 F.T.C. at 1587. There, the matters were discussed extensively in briefs and oral argument. Here, not only was the opportunity never exercised but, in fact, it never existed since the operation of the prior notification requirement was not put in issue before the Commission issued its Final Order on July 2, 1984. None of the three dozen or so reported decisions examining Rule 3.55 that we have uncovered through independent legal research suggests a contrary conclusion.

However, a portion of Complaint Counsel's Petition for Reconsideration reasserts an argument already presented to, and rejected by, the Commission. These modifications would require AMI to obtain Commission approval for a ten year period for any hospital it seeks to acquire in San Luis Obispo County, California. Both parties briefed the prior approval remedy fully before Administrative Law Judge Barnes and the Commission, and it appears that Complaint Counsel's request for reconsideration of this remedy for any geographic market, including San Luis Obispo County, does not present "a new question . . . upon which petitioner had no opportunity to argue before the Commission." Accordingly, we find that the specific modifications presented [10] with regard to Section IV of the Order (and the arguments marshalled in support of these modifications at pages 11 and 12 of Complaint Counsel's Petition) are not appropriate areas for reconsideration under Rule 3.55, and thus this portion of Complaint Counsel's Petition will be denied.

### III. The Mechanics of Prior Notification

The Commission's Order requires AMI to notify the Commission when it seeks to acquire a hospital in any of thirteen states, if the acquisition would cost in excess of \$1 million and the acquisition would provide AMI with a 20% or more share of the acute care hospital beds in a specifically designated area. Under the Order, AMI is directed to notify the Commission of its intent to acquire a covered hospital either when it issues a letter of intent or enters into a purchase agreement, whichever is earlier,

Complaint Counsel's Petition for Reconsideration focuses on the "fencing-in" provision that the Order imposes. Complaint Counsel requests reconsideration and modification of this provisions and prefers specific language to accomplish the suggested modifications.

Complaint Counsel seeks to modify the prior notification requirement in five specific ways, discussed below.

First, Complaint Counsel requests that the Order provide a specific notification period so that AMI will be required to give the Commission notice of any covered acquisition at least thirty days prior to completion of the acquisition (or fifteen days in [11] the case of a cash tender offer). Petition at 9. Complaint Counsel argues that without a specified notification period in the Order, AMI would be permitted wide discretion in notifying the Commission of covered acquisitions, and that the Commission could be left without sufficient time to obtain the evidence necessary to seek an injunction to block an illegal acquisition. *Id.* at 3. Complaint Counsel contends that a thirty day notification period would provide the Commission with sufficient time with which to assess the acquisition, obtain evidence, and move to enjoin the acquisition if necessary. *See id.* at 3 & 5-6.

Second, Complaint Counsel recommends that the Order require written prior notification of a covered acquisition. *Id.* at 3 & 9. Complaint Counsel suggests that since AMI's notification may trigger significant action by the Commission (such as obtaining evidence sufficient to support an injunction), the notice triggering such efforts by the Commission should be written notice, not oral. *See id.* at 5.

Third, Complaint Counsel requests that language requiring the submission of specific information be provided in the Order so that the Commission will have the opportunity to make an informed decision as to whether the proposed acquisition is lawful. *Id.* at 6. Complaint Counsel points to the difficulties in obtaining information from companies under investigation, particularly if compulsory process and enforcement procedures are required. *Id.* at 4-5. Complaint Counsel, therefore, recommends that the Order provide the Commission with an efficient, orderly, [12] and equitable way of obtaining specific information needed to assess the competitive impact of a covered acquisition. *See id.* at 9-11.

Fourth, Complaint counsel requests that the Order provide Commission staff with a reliable way of obtaining additional information in a timely fashion in the event that the initial information provided is not sufficient to fully assess the impact of the covered acquisition. *Id.* at 8. Complaint Counsel suggests that in some acquisitions, additional time and information may be required to assess the competitive impact. *Id.* at 10. Complaint Counsel argues, therefore, that the Order should provide a way for obtaining more information and additional time in which to assess that information without forcing the Commission to rely on purely voluntary production.

Fifth, Complaint Counsel requests that a prior approval "fencing-in" provision be added to the Commission's Order to cover AMI hospi-

tal acquisitions in San Luis Obispo County. *Id.*, at 11–12. However, since we have determined that this issue is not appropriate for a Rule 3.55 Petition, this issue will not be addressed herein.

AMI's memorandum in opposition to Complaint Counsel's Petition argues that a modified prior notification provision similar to the one contained in Complaint Counsel's Petition would harm AMI competitively. AMI Memorandum at 6. AMI contends that the Order, as originally crafted, struck a balance between the Commission's desire to monitor certain acquisitions by AMI that are not subject to Hart-Scott-Rodino reporting requirements [13] and the need to "preserve the procompetitive benefits attributable to AMI's presence in the acquisition market." *Id.*, citing slip op. at 60 [104 F.T.C. at 226 (1984)]. Under the proposed modification, AMI contends that in every case it would be required to wait for thirty days plus any extensions allowable under Hart-Scott-Rodino, *id.* at 1 & 7 and, since the proposed Order would apply only where Hart-Scott-Rodino was not otherwise applicable, AMI's competitors in the hospital acquisition market would not have to condition their bids on compliance with these regulatory strictures. *See id.* AMI argues that "the proposed order would eliminate AMI's procompetitive presence in circumstances such as the sale of county-owned hospitals to which HSR does not apply," *id.* at 9, and "eliminate AMI's procompetitive presence in covered transactions [and] deprive the public of the benefits that the order was intended to preserve." *Id.* at 12.

AMI does not make a convincing showing that a reasonable notice requirement would harm it competitively or place it at a competitive disadvantage vis-a-vis its competitors in the hospital acquisition market. By arguing that "the proposed modification would uniquely handicap AMI and therefore effectively remove it from the market for acquisitions covered by the order," *id.* at 5, it is apparent that AMI misconstrues the concerns that the Commission expressed when it rejected the prior approval requirement. Under the prior approval requirement ordered by Administrative Law Judge Barnes, AMI would be at a competitive disadvantage due principally to an additional regulatory hurdle that it must jump in order to consummate the [14] acquisition of a hospital. This additional hurdle, which for all intents and purposes (subject to further appellate review) constitutes a veto over AMI acquisitions, would likely make a prospective seller of a hospital reluctant to deal with AMI. In practical terms, this would reduce AMI's leverage in negotiating an acquisition and might necessitate AMI paying a premium in price for a potential acquisition over what "unfettered" acquirers, AMI's competitors, would be willing to pay. In the highly competitive market for hospital acquisitions, this would likely eliminate AMI as a viable competitor.

However, the situation with regard to prior notification is quite different from that of prior approval. AMI does not set forth any evidence demonstrating that a notification provision requiring submission of detailed market information would in any way burden an acquisition program. Such an advance notification requirement would not impose any undue burden on AMI because it does not inject any uncertainty into the acquisition process; instead, all it does is afford the Commission a meaningful opportunity to review the competitive impact of the acquisition.

AMI's arguments confuse prior approval and prior notification. Prior approval would preclude AMI from making a definitive purchase commitment; prior notification does not, as even AMI admits. AMI suggests that Complaint Counsel's proposed modifications would make an AMI bid "a conditional offer," *id.* at 7, a "conditioned transaction[ ]," *id.* at 8. But, at the same time, AMI admits that prior notification requirements, such as [15] those imposed under Hart-Scott-Rodino, do not make such a transaction "conditional." According to AMI witness Weisman:

[Sellers of hospitals] do not want conditional transactions. They don't view Hart-Scott-Rodino generally as a condition anymore than they view, for example, a preparation of a definitive agreement as a condition.

*Id.*, quoting Hearing Transcript page at 1727 (Weisman) [hereinafter "Tr."]. Similarly, AMI witness Reilly stated:

Each of these transactions are, from the seller's perspective, time critical. And as it would be for you as an owner of a substantial piece of real estate, *once you have decided to sell it, you want to get it committed and know it is locked in.* It may take some time for escrow to close, but you want to know you have a deal.

*Id.*, quoting Tr. 1848 (Reilly) (emphasis added). AMI's arguments that prior notification will make its acquisition bid conditional are disingenuous. Under prior notification, the Commission cannot stop a proposed acquisition except by successfully bringing suit, either in federal court or through an administrative complaint. Thus, the notification requirement does not in any way impose a prior approval constraint over the acquisition, as AMI seems to imply. Except for the compliance costs (principally, administrative and legal costs associated with preparation of the notification itself), such a requirement does not diminish AMI's leverage in negotiating an acquisition nor would it necessitate AMI paying a premium price for the acquisition in order to out-bid competitors in the acquisition market. If anything, it injects increased certainty into the acquisition because it subjects the acquisition to an early (albeit, non-binding) antitrust review and, as a

practical [16] matter, lessens the likelihood that the Commission might seek divestiture of the acquisition at some later date on anti-trust grounds.

On the other hand, in adopting the advance notification provision contained in the original Order, we never intended to deny staff the time and resources needed "to investigate an acquisition that appears to involve significant antitrust problems, and take enforcement action against the acquisition before the acquisition has progressed beyond the 'point of no return.'" See Petition at 2, quoting slip op, at 60 [104 F.T.C. at 226 (1984)]. A simple statement by respondents of their intent to enter into an acquisition, without more, does not provide Commission staff with a meaningful opportunity to evaluate the competitive effects of the acquisition. Imposing a reasonable prior notification procedure does not simply "make the [Commission] staff's job easier," as AMI contends, Petition at 6 (emphasis added)—rather, it makes it possible for staff to do the job that we anticipated would be done under the Order—assess the competitive effects of the acquisition. Because of the demands of time, it would be highly unlikely that, through normal channels of investigation, staff would be able to learn of the acquisition, assess its competitive impact, and prepare the legal papers needed to pursue a preliminary injunction in the event that the acquisition posed competitive concerns. AMI's offer in its memorandum to "be responsive to reasonable requests for information," AMI Memorandum at 11, does not by any means constitute a legally enforceable obligation that guarantees an [17] opportunity for meaningful review of a covered acquisition.

However, we are not convinced that there is a need to impose a waiting period on AMI in its covered acquisitions. Although AMI may have wide discretion in the *timing of its making a purchase commitment* to a prospective seller, AMI does not have discretion over the *timing of notification of the commitment* to the Commission. The final order requires AMI to notify the Commission once AMI becomes legally bound to make the purchase, which may be as early as issuance of a letter of intent and is certainly no later than entering into the purchase agreement itself. Market incentives encourage AMI to make this commitment as soon as possible so as to take the assets off the market. Consummation of the acquisition, especially consolidation of the acquired entity's operations with those of AMI, often will be delayed well past the purchase date because of externalities beyond AMI's control, such as state certificate-of-need requirements. As a practical matter, the Commission staff will have enough time, even more than the statutory waiting periods prescribed under Hart-Scott-Rodino, to review the notification filing by AMI and assess the likely competitive effects of the acquisition. Imposing an inflexible waiting

period on AMI would subject covered acquisitions to a time constraint that would accomplish little other than disabling AMI vis-a-vis its competitors. We conclude that the Commission staff will have adequate resources, under the present framework, to assess the competitive impact of covered acquisitions and prevent consummation of anticompetitive acquisitions, and that imposition [18] of a waiting period is not necessary.

Complaint Counsel is correct in asserting that “[t]he Commission’s expressed intent is similar to the purposes of HSR to provide the government with a meaningful opportunity to challenge unlawful transactions *before* consummation, thus avoiding the problem of constructing post-acquisition relief and preventing injury to the public that would otherwise occur before divestiture.” Petition 2 (emphasis in original). A detailed prior notification and reporting requirement would satisfy this concern. Such a requirement is well within the wide discretion accorded the Commission to remedy unlawful practices. *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946). Since the Commission has found prior approval to be appropriate in certain instances, it is fair to conclude that a detailed prior notification requirement (a less drastic remedy than prior approval “fencing-in”) is a legally valid remedy that the Commission could order in this case.

Accordingly, we will modify the Final Order in this matter by requiring written notification of AMI’s intent to make a covered acquisition.<sup>3</sup> This notification is to be provided when AMI’s Board of Directors or Executive Committee, or any entity [19] that is authorized to act on AMI’s behalf in such acquisitions,<sup>4</sup> authorizes issuance of a letter of intent or enters into a purchase agreement to make such an acquisition, whichever is earlier. The Modified Order provides for filing information comparable to Hart-Scott-Rodino reporting requirements by AMI in order to permit staff a meaningful opportunity to assess the competitive effects of the proposed acquisition.<sup>5</sup> We will also require that the notification be supplemented with additional information, either in AMI’s possession or reasonably available to

<sup>3</sup> As we did in the Final Opinion and Order, we again caution respondents that this Modified Order does not replace Hart-Scott-Rodino filing and waiting period requirements that may apply to any of AMI’s future acquisitions. Where both Hart-Scott-Rodino and this Order apply to a particular acquisition, the Hart-Scott-Rodino reporting and waiting period requirements would supercede operation of this Order. However, where AMI’s acquisition is otherwise exempt from Hart-Scott-Rodino, the terms of this Order will govern AMI’s filing obligations.

<sup>4</sup> We do this *sua sponte* so as to prevent technical inapplicability of the Order if AMI were to assign acquisition responsibilities to a different AMI committee or entity.

<sup>5</sup> Complaint Counsel has also requested a mechanism for obtaining more information and additional time in which to assess that information without forcing the Commission to rely upon purely voluntary compliance. We deny Complaint Counsel’s request for additional time for the same reasons that we have denied the request for a waiting period for the acquisition. However, we can envision some circumstances under which additional information may be necessary to fully assess the competitive effects of an acquisition. Therefore, we will require AMI to comply with reasonable requests by staff for additional information within fifteen days of service of such requests.

AMI, relating to the hospital to be acquired, the AMI hospital in the area, and identification and assessment of the area hospital market.<sup>6</sup> We require this supplemental information because, absent such, it would be difficult to determine the [20] existence and extent of market overlaps resulting from the acquisition.

*It is hereby ordered,* That, for the foregoing reasons, Complaint Counsel's Petition for Reconsideration is granted in part and denied in part. An appropriate order is appended.

#### MODIFIED ORDER

#### I

Complaint Counsel has filed a Petition for Reconsideration of the Commission's Order in this matter issued on July 2, 1984 [104 F.T.C. 1]. Respondents have replied in opposition thereto. The Commission has determined upon review of the matter that its Order of July 2, 1984 should be modified, for the reasons set forth in the accompanying opinion. Therefore,

It is ordered, That for purposes of this Order the following definitions shall apply:

A. *Acquire any hospital* means to directly or indirectly acquire all or any part of the stock or assets of any hospital, or enter into any arrangement by which AMI obtains ownership, management, or control of any hospital, including the right to lease or manage any hospital. [2]

B. *AMI* means American Medical International, Inc., a corporation organized under the laws of Delaware with its principal executive offices at 414 North Camden Drive, Beverly Hills, California, and its directors, officers, agents, and employees, and its subsidiaries, divisions, affiliates, successors, and assigns.

C. *AMISUB (French Hospital)* means the wholly-owned subsidiary corporation of AMI that was established for the purpose of acquiring and operating French Hospital located in San Luis Obispo, California.

D. *County* also means a county equivalent such as a parish in Louisiana.

E. *General acute care hospital*, herein referred to as *hospital(s)*, means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and

<sup>6</sup> This information should include, where available, patient flow data, annual management and strategic plans, hospital utilization and revenue data, and documents relating to market share, formulation of hospital prices, competitive interaction among area hospitals, planned efficiencies, relations with third-party payers, and physician admitting patterns.

professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

F. *Operate a hospital* also means to own, manage or lease a general acute care hospital.

G. *MSA* and *PMSA* mean, respectively, a Metropolitan Statistical Area and a Primary Metropolitan Statistical Area, as defined as of July 1, 1983 by the Office of Management and Budget, Office of Information and Regulatory Affairs.

## II

*It is ordered,* That within twelve (12) months from the date this Order becomes final, AMI shall divest, absolutely and in good faith, all stock, assets, properties, licenses, leases, and other rights and privileges, tangible and intangible, that AMI acquired from Central Coast Hospital Company, French Hospital Corporation and French Medical Clinic, Inc., together with any [3] subsequent improvements. The purpose of the divestiture is to reestablish French Hospital as a viable competitor in San Luis Obispo County. The divestiture shall be subject to the prior approval of the Federal Trade Commission.

Pending divestiture, AMI shall take all measures necessary to maintain French Hospital in its present condition and to prevent any deterioration, except for normal wear and tear, of any of the assets to be divested so as not to impair French Hospital's present operating abilities or market value.

## III

*It is further ordered,* That for a period of ten (10) years from the date this Order becomes final, AMI shall not, without providing advance notification to the Federal Trade Commission, directly, or indirectly acquire any hospital located in the states of Oregon, California, Texas, Oklahoma, Missouri, Arkansas, Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, or North Carolina, if:

A. The hospital to be acquired is within an MSA or a PSMA in which AMI already operates a hospital and in which AMI, immediately after the acquisition, would operate hospitals that combined have a twenty (20) percent or more share of the licensed general acute care hospital beds within that MSA or PMSA; or

B. The hospital to be acquired is not within an MSA or a PMSA but is within a county in which AMI already operates a hospital and in

which AMI, immediately after the acquisition, would operate hospitals that combined have a twenty (20) percent or more share of the licensed hospital beds within that county; or

C. The hospital to be acquired is (1) not within an MSA or a PMSA or a county in which AMI [4] already operates a hospital, but is within thirty (30) miles of a hospital which AMI already operates in another MSA or PMSA or county, and (2) the hospital to be acquired and any hospital(s) that AMI operates combined have a twenty (20) percent or more share of the licensed hospital beds in the area within thirty (30) miles of the midpoint between the hospital to be acquired and any hospital operated by AMI.

*Provided, however,* That no acquisition shall be subject to this Section III: (1) if the consideration to be paid for the purchase of the hospital, including assumption by AMI of liabilities of its present owners, does not exceed one million dollars (\$1,000,000); or (2) if notification of the acquisition is required to be made, and in fact is made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a. Such advance notification shall be provided when AMI's Board of Directors or Executive Committee, or any entity that is authorized to act on AMI's behalf in such acquisitions, authorizes issuance of a letter of intent or enters into a purchase agreement to make such an acquisition, whichever is earlier.

#### IV

The notification required by Section III shall be the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended, and shall be prepared and transmitted in accordance with the requirements of that part. The notification required by Section III of this Order shall apply to AMI and shall not apply to any party that AMI seeks to acquire. However, AMI shall provide at the same time of the filing of the Notification and Report Form supplemental information, either in AMI's possession or reasonably available to AMI, relating to the hospital to be [5] acquired, the AMI hospital in that geographic area, and identification and assessment of the area hospital market. Such supplemental information should include, where available, patient flow data, annual management and strategic plans, hospital utilization and revenue data, and documents relating to market share, formulation of hospital prices, competitive interaction among area hospitals, implementation of certificate of need standards in the area, planned efficiencies, relations with third-party payers, and physician admitting patterns.

AMI shall comply with reasonable requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

Any acquisition subject to Section III of this Order, involving an arrangement to lease, manage, or control a hospital, shall be fully described in the notification regardless of whether the acquisition involves the acquisition of any stock or assets of a hospital.

## V

*It is further ordered,* That AMI shall, within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until it has fully complied with the provisions of Section II of this Order, submit a report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with these provisions.

Such compliance reports shall include a summary of all contacts and negotiations with potential purchasers of the stock [6] and assets to be divested under this Order, the identity and address of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

AMI also shall submit such further written reports as the staff of the Federal Trade Commission may from time to time request in writing to assure compliance with this Order.

## VI

*It is further ordered,* That AMI shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed corporate change, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance with the obligations arising out of this Order.

Commissioner Bailey voted in the negative.

Modifying Order

104 F.T.C.

IN THE MATTER OF  
BATUS INC.

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

*Docket C-3099. Consent Order, Dec. 6, 1982—Modifying Order, Nov. 13, 1984*

This Order reopens the proceeding and modifies the divestiture order issued against a department store operator, 100 F.T.C. 553 (1982), which required the company to divest department stores sufficient to reduce its floor space by 200,000 square feet and its sales volume by \$20 million, as measured by 1981 sales. To date, the operator has received Commission approval for divestitures totalling 492,000 square feet and \$17.9 million in 1981 sales, and has petitioned for modification of the Order stating that any further divestiture would "account for substantially more than \$20 million in 1981 sales." Following an examination of the record and the company's plan of divestiture, the Commission concluded that the company had made a good faith compliance effort and that divestiture of a much larger store to satisfy the remaining \$2.1 million sales volume requirement was not in the public interest. Therefore, Paragraph II of the original Order has been modified by substituting for the phrase in the first sentence reading "in an amount not less than \$20 million as measured by fiscal 1981 sales" the phrase "in an amount not less than \$17.9 million as measured by fiscal 1981 sales."

ORDER REOPENING PROCEEDING AND MODIFYING ORDER

By petition filed July 17, 1984, respondent BATUS Incorporated ("Batus") requests, pursuant, to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), that Paragraph II of the Commission's Order issued in this matter on December 6, 1982 [100 F.T.C. 553], be modified so that Batus will not be required to make further divestitures to reach the \$20 million sales volume standard set out in Paragraph II of the Order. Pursuant to Section 2.51 of the Commission's Rules of Practice and Procedure, the petition was placed on the public record for thirty days. No comments were received.

The order required Batus to divest department stores in the Milwaukee, Wisconsin SMSA sufficient to reduce its floor space by 200,000 square feet and its sales volume by \$20 million, as measured by 1981 sales. To date Batus has received Commission approval for divestitures totalling 492,000 square feet and \$17.9 million in 1981 sales.

The Commission has reviewed Batus' plan of compliance with the divestiture requirements of the Order, including its selection of stores, and the efforts undertaken to fulfill its obligations and believes Batus has made a good faith effort to accomplish full compliance with the Order. The record also demonstrates that sale of an additional store having a 1981 sales volume in the range of \$2.1 million to a

viable competitor is unlikely. Given Batus' good faith compliance effort and the degree of divestiture already obtained, we believe that it is not in the public interest to require a divestiture of a much larger store to satisfy the remaining \$2.1 million sales volume requirement. Therefore, we find that modification of certain language in Paragraph II of the order is in the public interest.

Accordingly, *it is ordered*, that the proceeding be, and it hereby is, reopened for the purpose of modifying the Order entered therein;

*It is further ordered*, That Paragraph II is amended by substituting in lieu of the phrase at the end of the first sentence which reads:

in an amount not less than \$20 million as measured by fiscal 1981 sales.

the phrase,

"in an amount not less than \$17.9 million as measured by fiscal 1981 sales."

## IN THE MATTER OF

## TEAC CORPORATION OF AMERICA

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION ACT

*Docket C-2752. Consent Order, Oct. 24, 1975—Modifying Order, Nov. 16, 1984*

This Order grants the request of a Montebello, California supplier of high fidelity audio components to reopen the proceedings and delete Paragraph I(11) from the Commission's October 24, 1975 Consent Order, 86 F.T.C. 981, *modified*, November 25, 1983, 102 F.T.C. 1814, so as to permit the firm to prevent transshipment of its products to dealers who did not meet non-discriminatory standards of promotion, service and display. After considering company's arguments and other relevant information, the Commission concluded that the public interest warranted reopening and modifying the Order as requested. The transshipment provision had served its remedial purpose. There was no indication that the firm had engaged in resale price maintenance or breached the transshipment provision. Nor was there anything in the record to suggest a need to retain the provision as a fencing-in mechanism, or as a means of preventing anticompetitive effects from nonprice vertical restraints. Accordingly, the Commission ordered that the matter be reopened and Paragraph I(11) of the Order deleted.

## ORDER REOPENING AND MODIFYING ORDER ISSUED ON OCTOBER 24, 1975

On June 6, 1984, respondent TEAC Corporation of America ("TEAC") filed its "Request to Reopen Proceedings and to Modify Consent Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.5 of the Commission's Rules of Practice. The Request asked the Commission to reopen the proceeding in Docket No. C-2752 and modify the order issued by the Commission in this case on October 24, 1975—as modified by an order issued November 25, 1983—to remove a provision that restricts TEAC's ability to limit transshipment of its products. TEAC's Request was placed on the public record for thirty days and no comments were received.

After reviewing TEAC's request and other available information, the Commission has concluded that the public interest warrants reopening and modifying the order in the manner requested by TEAC. The transshipment provision of the order [2] (Paragraph I(11)) was adopted principally as a "fencing in" restraint ancillary to the order's ban on resale price maintenance ("RPM"). TEAC has shown that it does not fix the prices at which its authorized dealers resell TEAC products, that TEAC product prices vary from dealer to dealer, and that the transshipment provision therefore has encouraged the emer-

gence of intrabrand price competition in TEAC products. Consequently, Paragraph I(11) need not be retained for that purpose.

To the extent that Paragraph I(11) was also intended to remedy alleged anticompetitive effects of vertical practices other than RPM, the Supreme Court decision in *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)—issued after the original order in this matter—makes further analysis necessary. As the Court explained, non-price vertical restraints may either enhance or impede economic efficiency and consumer welfare, depending upon whether the fundamental purpose or effect of the restraints is on balance to enhance or exploit market power or instead to promote a more efficient form of distribution. It follows that devices that facilitate the imposition of non-price vertical restraints—such as transshipment restrictions—similarly may be beneficial in some situations and harmful in others. These practices are not inherently suspect or so plainly anticompetitive that they can be condemned without more extensive analysis under the rule of reason. The Commission has relied upon *Sylvania* to conclude that [3] it will only prohibit non-price vertical restraints that have “a probable adverse effect on *interbrand* competition” at either the manufacturer or the dealer level.<sup>1</sup>

The foregoing cases establish the need to evaluate the likely consequences of non-price vertical restraints in the recording equipment industry under the rule of reason in considering TEAC's petition. Vertically imposed transshipment restrictions such as those at issue here are most likely to be used in conjunction with a program of other non-price vertical restraints that effectively limits the entities with whom the manufacturer will deal. TEAC apparently seeks authority to use transshipment restrictions to facilitate a distribution program involving only carefully selected dealers. If TEAC's petition is granted, TEAC could use transshipment restrictions to facilitate the imposition and enforcement of other non-price vertical restraints.

## I.

When market power either does not exist or cannot be sustained, anticipated efficiency gains are the only rational basis for a manufacturer to impose a vertical restraint. Only procompetitive practices will survive the market test when the [4] creation or enhancement of market power is unlikely; the market does not reward inefficient distribution practices. Thus, when the exercise of market power in a

<sup>1</sup> *Belton Electronics Corp.*, 100 F.T.C. 68, 208 (1982). The Commission identified two different adverse effects upon interbrand competition that could satisfy this standard. First, the Commission indicated that non-price vertical restraints might in some circumstances support or increase the likelihood of collusion among competing firms. *Id.* at 206-07. Second, the Commission indicated that non-price vertical restraints might in some circumstances create or enhance the market power of one or more competing firms. *Id.* at 207.

properly defined relevant market is unlikely,<sup>2</sup> we consider non-price vertical restraints to be efficiency enhancing in purpose and effect, and therefore lawful, without further inquiry.

Market power can be exercised either by a dominant firm or through the action of competitors acting in concert. Because no firm can claim dominance in the recording equipment market (*see* pp. 6-8, *infra*), we will focus our attention on the possibility of collusive activities in this market.<sup>3</sup> In this context, our concerns are: (1) whether the firms that use the questioned non-price vertical restraints constitute a significant competitive threat; and (2) whether such a threat is effectively constrained by the remainder of the market.

In general, the likelihood of collusion depends on the expected gains from and costs of forming and enforcing a collusive scheme. Collusion is attractive only to the extent [5] that there are potential gains from cooperation, such as when market demand is inelastic at the competitive price. As the elasticity of market demand at the competitive level increases, the potential gains from collusion decline. Collusion becomes less likely as the costs of forming or enforcing a collusive agreement increase. The likelihood of collusion is directly related to, among other things, the overall level of market concentration, the distribution and aggregate value of the market shares of the firms using the challenged practice, and the presence and significance of barriers to entry. The likelihood of collusion is inversely related to, among other things, the number of fringe firms and the diffusion of their market shares.<sup>4</sup>

The factors that affect the feasibility of successful collusion often can be used to conclude that it is probably not a threat to consumer welfare in a given market. For example, collusion is unlikely to be successful in an unconcentrated [6] market.<sup>5</sup> Moreover, even in a somewhat concentrated market, if the firms actually using the vertical restraint at issue do not collectively possess and are not likely to secure market power, then the restraint is unlikely to facilitate the creation or maintenance of market power. In particular, non-price

<sup>2</sup> The Commission adheres to the principles of relevant market definition it adopted in 1982. *Statement of Federal Trade Commission Concerning Horizontal Mergers ("FTC Merger Statement")*, Trade Reg. Rep. (CCH) No. 546 (June 16, 1982), at 71, 84-85.

<sup>3</sup> The imposition of vertical restraints as a result of collusive activities in the recording equipment market might arise in one of two forms. First, distributors or retailers might act in concert to coerce manufacturers to impose vertical restraints on their competitors in order to limit competition in distribution or retailing. Second, manufacturers might impose vertical restraints in concert in order to facilitate the monitoring of a collusive agreement or otherwise to enhance the exercise of collusive market power.

<sup>4</sup> *E.g.*, R. Posner, *Antitrust Law: An Economic Perspective* 56-59 (1976). The Commission has recognized that other factors, in addition to those enumerated, also affect the likelihood of successful collusion. *FTC Merger Statement*, *supra* note 2, at 71, 75-80.

<sup>5</sup> In the context of horizontal mergers, the Justice Department has broadly characterized markets with Herfindahl-Hirschman Indexes ("HHIs") below 1000 as "unconcentrated," and markets with HHIs equal to or above 1000 as "moderately concentrated." *Justice Department Merger Guidelines*, 49 FR 26823, 26830-31 (1984). An HHI of 1000 or less certainly indicates an unconcentrated market; however, for the purpose of analyzing non-price vertical restraints, it may also be appropriate to characterize markets with somewhat higher HHIs as unconcentrated.

vertical restraints implemented by new entrants or small established firms are unlikely to threaten consumer welfare. The absence of barriers to entry is also likely to prevent successful collusion. On the facts in this case, we need go no further than to determine that successful collusion in the recording equipment market is highly unlikely. We do not confront a market in which non-price vertical restraints may create both market power and consumer benefits, and we therefore do not need to balance positive and negative effects upon competition and consumer welfare.

## II.

We commence our analysis of the TEAC request by evaluating the threat of the exercise of market power. TEAC competes in the home and professional recording equipment segments of the high fidelity audio components market. The facts pertaining to the recording equipment industry indicate that no firm has a dominant [7] position and that the chance of successful collusion is remote. TEAC's share of the home recording market fell substantially between 1974 and 1983, so that it is now only the sixth largest firm in the industry. Moreover, only one firm has more than eight percent of the home recording market. The structure of the distribution and retailing segments of the home recording equipment market is even more diffuse. Thus, existing levels of concentration in this market at the manufacturer, distributor, and retailer levels are significantly lower than the threshold level that should trigger concern with the possibility of successful collusion.

In addition, since the original order was entered, at least twenty manufacturers have entered and/or increased their participation in the high fidelity audio components market and its tape recording equipment segment, indicating the absence of significant impediments to entry. There is similarly no evidence of barriers to entry into the distribution or retailing of home recording equipment. For example, the typical TEAC dealer carries as many as seven competing lines of tape recording equipment. The professional recording segment is similarly competitive. There are at least twelve manufacturers of professional recording equipment. Moreover, professional equipment is sold to knowledgeable buyers on a bid basis by geographically dispersed dealers, making successful collusion among manufacturers even more difficult and unlikely. [8]

In summary, the low levels of concentration and the absence of barriers to entry into the manufacture, distribution, and retailing of recording equipment make the creation of market power in this industry an extremely remote possibility.

## CONCLUSION

The transshipment provision in question has served its remedial purpose. There is no indication that TEAC has engaged in RPM (or has breached the transshipment provision) from October 24, 1975 to date, and nothing in the record suggests that there is a need to retain the transshipment provision as a fencing-in mechanism to ensure that TEAC does not reinstitute RPM.

The transshipment provision does not appear to be needed to prevent anticompetitive effects from non-price vertical restraints either. Because the recording equipment market and its constituent segments are unconcentrated at the manufacturer, distributor and retailer levels, and because there has been substantial entry, we conclude that neither market dominance nor successful collusion is likely. The record presented by TEAC and other information indicate that transshipment restraints imposed by TEAC would pose no threat to interbrand competition. At the same time, Paragraph I(11) imposes unnecessary costs by requiring TEAC to prospectively specify and apply qualification standards for all dealers who seek to secure TEAC products transshipped by TEAC's authorized dealers, including dealers not served directly by TEAC. We therefore conclude that an effort by TEAC to control transshipment is very unlikely to harm competition. [9]

Accordingly, *it is ordered* that this matter be, and it hereby is, reopened and that Paragraph I(11) of the order be, and it hereby is, deleted.

Commissioner Bailey voted in the negative.

## IN THE MATTER OF

## GROLIER, INCORPORATED, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket 8879. Final Order, March 9, 1982—Modifying Order, Nov. 19, 1984*

This Order reopens the proceeding and modifies the 1978 Commission Order, 91 F.T.C. 315, revised December 10, 1981 and made final March 9, 1982, 99 F.T.C. 379, which required a seller of encyclopedias to cease engaging in certain unfair and deceptive trade practices in connection with the sale of its products and the recruitment of door-to-door sales personnel. Pursuant to the company's petition, the Order has been modified to closely conform with the modification granted in *Encyclopaedia Britannica, Inc., et al.*, 100 F.T.C. 500. Among other things, the Order no longer requires the firm to include in employment ads information such as the nature of the employment, the location of the company or the basis of compensation, so long as they provide such information to potential employees during the initial job interview. The company may provide information concerning income and expenses to prospective employees when an actual job offer is made. The Order no longer requires the company to disclose in advertisements and promotional material that a sales representative will contact consumers who return inquiry cards, provided the firm can demonstrate through surveys that most readers of the ads understand this implicitly. The business cards of company's sales representatives may be reduced from three-by-five to two-by three-and-a-half inches, and the respondent may follow relevant Commission guidelines when making "free" offers, and is no longer required to attach lists of prices and free products to encyclopedia contracts.

ORDER REOPENING THE PROCEEDING AND MODIFYING  
CEASE AND DESIST ORDER

On October 13, 1983, respondents, Grolier, Incorporated, et al., filed a "Request to Reopen Proceedings To Modify Order and Application for Stay of the Order." ("Request") The Order became effective on October 11, 1983. On August 23, and October 4, 1984, Grolier supplemented the "Request" with a revised Appendix B, which sets out the methodology to be used by Grolier to show compliance with Paragraph II.A. of the proposed Order.

Grolier granted the Commission until November 19, 1984 to decide it's "Request". The Commission previously granted Grolier's "Request for Extension of Time" for the Commission to act to allow Grolier more time to complete its surveys bearing on the disclosures required by Paragraphs II.A. and B., which are subject paragraphs of the pending "Request".

Grolier seeks Order modifications virtually identical to those the Commission made to a similar Commission Order against *Encyclo-*

*paedia Britannica* (Docket No. 8908) [100 F.T.C. 500] on October 5, 1982.

On November 23, 1983 the Commission granted the stay as to Order Paragraphs I C. (2)(3) and (4); I D.; I E.; II A.-E.; II G. (7); II M. (1) and (2); II S.; and Paragraph V, pending resolution of the request for Order modification.

On the basis of the information provided by Grolier and in view of the Order modifications granted to *Encyclopaedia Britannica* the Commission has determined that pursuant to Section 2.51 of the Commission's Rules of Practice changed conditions of fact and the public interest require that the proceedings be reopened and the Order modified. *It is therefore ordered*, That the proceedings be reopened and the Order modified as follows:

I.

\* \* \* \* \*

B. Misrepresenting, in any manner, the amount of income to be earned by any person or that may be earned by any person, the expenses that may be incurred by any person, the method of payment, or any condition or limitation imposed upon the compensation of any person.

C. Failing to disclose, clearly and conspicuously, in all advertising offering employment in any way involving door-to-door sales that the respondent concerned is recruiting persons for the sole purpose of soliciting or selling.

\* \* \* \* \*

(2) [DELETED]

(3) [DELETED]

(4) [DELETED]

D. Failing to provide clearly and conspicuously, both orally and in writing, to any prospective sales employee at the initial face-to-face interview, and prior to executing any employment agreement with any such person, the following information:

(1) (a) that respondent is recruiting persons for the sole purpose of soliciting or selling;

(b) that the products or services being sold are encyclopedias or services to be used in connection therewith, or in the event that encyclopedias or such related services are not being sold, the products and services being sold; and

- (c) the basis for compensating persons so engaged;
- (2) that conditions or limitations upon the receipt of compensation, if any, do in fact exist, together with an example of such a material condition or limitation, and that all such conditions and limitations will be stated in detail in an interview in the event an offer of employment is made to such person;

\* \* \* \* \*

- (4) that expenses will be incurred by such person in performing required duties, together with an example of such a material expense, and that all such expense items will be stated in detail in an interview in the event an offer of employment is made to such person; and
- (5) that such soliciting or selling will be on an "in-home" basis, if such is the fact, or will include soliciting or selling on an "in-home" basis, if such is the fact.

E. Failing clearly and conspicuously to provide, both orally and in writing, to any prospective sales employee at an interview at which an offer of employment is made and prior to executing any employment agreement with any such person, the following information:

- (1) A complete and detailed description of each condition and limitation imposed upon the receipt of any compensation;
- (2) a complete and detailed description of any expense or expenses any such person may incur in performing the required duties;
- (3) (a) the total number of sales employees employed by the office offering the position during the most recent calendar quarter, and (b) the number of sales employees employed by the office who, during the prior calendar quarter, received net earnings equivalent to or greater than the amount represented in the advertisement to which the prospective employee is responding; *provided, however*, that if the office has been in existence for less than three months or has fewer than five sales employees, respondents shall provide the information described above pertaining to the Division in which the office is located; *provided further*, that such information need not be furnished if the prospective sales employee contacts respondents more than ten days following the dissemination of the most recent advertisement that contains representations of earnings. Respondents shall afford any prospective sales employee an adequate opportunity to review and consider the above information prior to requesting execution of any employment agreement.

F. Failing to furnish to persons at an interview when an offer of employment is made and prior to executing any employment agreement with any such person, a copy of Paragraphs I, II and V of this

Order together with a cover letter as set forth in Appendix A attached hereto. Respondents shall afford any prospective sales employee an adequate opportunity to review and consider these provisions of the Order prior to requesting execution of any employment agreement.

G. Making, distributing or using any training tapes, sales manuals, or any other document, method or device which contains any representation or instruction inconsistent with any provision of Paragraph I or Paragraph II of the Order.

## II.

\* \* \* \* \*

A. Representing, directly or by implication, in any advertisement or promotional material that solicits participation in any contest, drawing, or sweepstakes, or solicits any response to any offer of merchandise, service, or information, and that employs any return card, coupon, or other device to respond to such solicitation, that a person who replies as requested will not be contacted directly by a salesperson for the purpose of selling respondents' products, unless such is the fact. Such advertisements or promotional material shall comply with this Paragraph only if they meet the criteria set forth in Appendix B.

B. Failing, upon the written request of the Associate Director for Enforcement or his designee, to (1) submit any advertisement or promotional material or (2) test any such advertisement or promotional material, using the procedure set forth in Appendix B, to determine whether it complies with Paragraph II.A.

C. Failing to disclose clearly and conspicuously, during any telephone contact and before commencing any sales presentation to prospective customers, the fact that the individual making the call is either soliciting the sale, rental or lease of publications, merchandise or services for respondents, or is arranging for a sales solicitation to be made, and that if the prospective customer so agrees, the respondent concerned will send a salesperson to visit said prospect for the purpose of soliciting the sale, rental or lease of said publications, merchandise or services.

D. Visiting the home or place of business of any person for the purpose of soliciting the sale, rental or lease of any publications, merchandise or service, unless at the time admission is sought into the home or place of business of such person, a business card of at least 2 inches by 3 1/2 inches containing only the following information, is presented to such person: