

**Amended Supporting Statement for a Study of the  
Effectiveness of Commission  
Remedies in Merger Cases  
OMB Control No. 3084-NEW  
August 12, 2015**

The Federal Trade Commission (“FTC” or “Commission”) plans to conduct a remedy study to update and expand on the divestiture study it conducted in the mid-1990s. The new study is designed to: (1) assess the effectiveness of the Commission’s policies and practices regarding remedial orders in cases in which the Commission has permitted a merger but required a divestiture or other remedy, and (2) identify the factors that contributed to the Commission successfully or unsuccessfully achieving the remedial goals of the orders.

**A. JUSTIFICATION**

**1. Necessity for Collecting the Information**

The Commission is directed to prevent “unfair methods of competition” under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Under this authority, the Commission examines consummated and proposed transactions to determine whether the transaction has resulted in or is likely to result in anticompetitive effects in violation of the antitrust laws the Commission enforces. 15 U.S.C. 45, 15 U.S.C. 18 (Section 7 of the Clayton Act). Each year, the Commission reviews thousands of proposed and consummated mergers, examines hundreds of them more closely, and challenges between fifteen and twenty, on average. Most of the challenges are resolved through a consent order in which the parties agree to remedy the Commission’s antitrust concerns. In horizontal mergers, which represent the majority of the transactions remedied by the Commission, the Commission typically requires a divestiture of assets, referred to as structural relief. In a much smaller number of cases in which a divestiture is not possible or would not be effective, the Commission may order respondents to engage in certain other conduct, referred to as non-structural relief. In vertical merger cases, the Commission is more likely to order relief that protects confidential information, prohibits discrimination, or requires access to certain assets or services, also referred to as non-structural relief.

In the mid-1990s, taking advantage of its unique research and study function under Section 6 of the Federal Trade Commission Act, 15 U.S.C. 46, the Commission authorized a study of Commission-ordered divestitures. FTC staff focused on thirty-five orders in which the Commission ordered divestitures, issued from fiscal year 1990 through fiscal year 1994. Staff of the FTC’s Bureau of Competition and Economics interviewed, on a voluntary and confidential basis, thirty-seven buyers out of the fifty that acquired assets under these orders. The study yielded valuable information. The FTC’s Bureau of Competition synthesized, summarized, and made available to the public the learning gained from the interviews in a report issued in August 1999. The report is available on the FTC’s web site at <http://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf>.

Based on the study, the Commission implemented several changes to its divestiture process. First, it shortened the divestiture period from a largely standard twelve months to six or fewer months. Second, recognizing the risks posed by divestitures of assets that comprised less than an ongoing business, the Commission began more consistently requiring upfront buyers in cases in which it allowed such a divestiture. Third, the Commission began requiring monitors more frequently, particularly in divestitures in technology and pharmaceutical industries. These changes were implemented almost immediately, and the Commission and its staff still rely on the findings from the study as they craft and enforce the Commission's remedies.

Since implementing these changes fifteen years ago, however, the FTC has not conducted another broad review of its remedies to focus on those changes and to examine recent remedies. Accordingly, the Commission now proposes a new study to focus on more recent orders, many of which incorporated the above-described changes resulting from the earlier study, and some of which did not require divestitures. In addition, in contrast to the earlier study, which focused on whether the buyer of divested assets acquired the assets and competed in the market of Commission concern at the time, the proposed study will attempt to collect information that will enable Commission staff to assess whether the remedy achieved the order's remedial goal.

As described below, the proposed study will partly mirror the earlier study, but will also be more expansive in its scope and method. The Commission will process the information it obtains from this study and apply the learning, as appropriate, to its policies and practices. This learning, in turn, will enhance the FTC's law enforcement efforts.

## **2. Collection and Use of the Information**

### **A. OVERVIEW**

The proposed study is directed at gathering comprehensive information to assess the effectiveness of the Commission's policies and practices in securing relief and, where necessary, to modify or refine those policies and practices. The Commission believes that securing information about divested businesses and attempting to understand their impact on the markets of concern to the Commission at the time of the anticompetitive merger will provide a better understanding of what order provisions are most likely to lead to a successful remedy. The FTC's Bureaus of Competition and Economics carefully devised this proposed study to collect only information that is needed and that may be used in a timely, useful, and reliable way to improve the Commission's remedial process and, as a result, enhance its law enforcement efforts.

The FTC's Bureaus of Competition and Economics devised and conducted the earlier study of the Commission's orders, which produced valuable information that resulted in almost immediate modifications to the divestiture process. The Bureau of Competition's Compliance Division is responsible for crafting remedies and enforcing and monitoring compliance with those remedies. As part of its responsibilities, the Compliance Division routinely obtains and

maintains information on the Commission's remedies. This information lends support to the Commission's existing policies and practices, but a more systematic review of merger orders, particularly more recent ones, many of which incorporate the changes implemented in large part as a result of the prior study, would further inform the Commission and enable it to further improve the divestiture process, if necessary. The Commission thus believes it would be instructive for the Bureaus of Competition and Economics to conduct a review similar to the earlier one, focusing on more recent orders that it has issued since the earlier study. Recognizing, however, the limitations of the earlier study, the Commission is proposing a more comprehensive one.

First, the earlier study included approximately thirty-five horizontal merger orders, issued during a five-year period, in which the Commission ordered divestiture of assets. The proposed study will include over ninety orders issued during a more recent seven-year period. The earlier study included only those orders that remedied the effects of horizontal mergers by requiring a divestiture of assets. The proposed study will also include orders that remedied vertical mergers and others in which only non-structural relief was required. Thus, the proposed study will include a larger number of orders and a wider variety of remedies.

The earlier study focused primarily on the buyers of divested assets. Commission staff interviewed the buyers, solely on a voluntary basis, to ascertain their perceptions of the divestiture and its effects. The Commission attempted to interview other parties as well, but was unable to do so, in part because of time constraints. For a large number of the orders to be included in the proposed study, the Commission will interview, not only buyers but also respondents, other competitors, and customers. These additional interviews will provide a different perspective on the information the Commission obtains from the buyers directly, confirming where appropriate and modifying where necessary.

The previous study requested data from the participants in the interviews on a voluntary basis, but very few submitted the requested data. In the proposed study, the Commission proposes to acquire a very limited set of data from all of the significant competitors in the markets of concern when the order was issued by using its 6(b) authority to require submission of the data. The Commission will be able to use these data to supplement and complement the analysis of the information obtained through interviews in order to determine whether the divestiture achieved the order's remedial goal.

The Commission issued 281 orders in merger cases from 1995, when the earlier study ended, through 2013. Of those, the Commission proposes to study the ninety orders<sup>1</sup> issued from

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<sup>1</sup> The Federal Register Notice announcing the Commission's intent to seek OMB approval of a new study identified 92 merger orders. 80 Fed. Reg. 2423 (Jan. 16, 2015). Upon further review of those orders, it has been determined that two of those orders relate to mergers that were abandoned by the parties. As a result, the respondents were not required to comply with the divestiture obligations of the respective order, and thus there is no remedy to study.

2006 through 2012. Limiting the study to a period that is not so distant that the parties likely will have forgotten details, but that is long enough to assess whether divestiture orders created new competitors and whether merger orders (including divestiture orders) achieved their remedial goals, will be instructive.

The Commission proposes to use a case study method similar to that used in the earlier study to evaluate the majority of the merger orders the Commission issued during this period. (See below subsection B. to this item's response for further discussion of the study's goals.) Staff will employ this approach in studying fifty-one orders in which the Commission required a remedy in a variety of markets ranging from fishing lines, pipelines, and specialty metals to medical market research, pesticides, rock salt, and chemical rust inhibitors. Of the fifty-one merger orders the Commission issued during this period, forty-one orders required divestitures; of those, the Commission approved divestitures to fifty-six<sup>2</sup> different buyers. The Commission proposes interviewing the fifty-six buyers and two other competitors, on average, including the respondent, and, on average, two customers in each of the affected markets. For the ten orders in which the Commission ordered only non-structural relief, and where there are therefore no buyers, the Commission proposes interviewing, on average, two competitors, including the respondent, and, on average, two customers in each market. The additional interviews will be used (along with the buyer interviews) to assess further whether the Commission's orders achieved their remedial goals. All the interviews will be conducted by telephone.

Although the FTC will seek voluntary telephone interviews in the first instance, it may rely on compulsory process where necessary to obtain the information it needs for the study. Each interview, to the extent possible, will be conducted by attorneys and economists who are familiar with the relevant order from their work during the original merger investigation. Each interviewer will use similar outlines for the interviews, focusing broadly on the same topics. To the extent unique issues arise with respect to particular divestitures, the interviewer will pursue those issues as well. The interview outlines are being provided as part of this submission. FTC staff anticipates interviewing approximately three hundred participants in 190 different geographic and product markets.

As noted in the preceding paragraph, the FTC will request voluntary participation for the telephone interview in the first instance. We believe that the voluntary nature of the interviews conducted in the earlier divestiture study led to extremely forthright and open discussion, so we would like to achieve a similar tone during these interviews. To the extent that firms decline to participate voluntarily, we will consider using the Commission's 6(b) authority to require responses from those firms. We anticipate that a significant percentage of the proposed participants will agree to participate voluntarily, and we will assess our need to use 6(b) authority as the study progresses.

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<sup>2</sup> The January 2015 Federal Register Notice identified forty-seven buyers; however, upon further review, it appears that there are fifty-six buyers.

In addition to conducting interviews, FTC staff will obtain information in each market from each buyer and significant competitor, including the respondent, by issuing orders to file special reports under its authority in Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. 46(b). Information will be required from as many as 250 participants.<sup>3</sup> The orders to file special reports will request annual unit and dollar sales data for seven years centered on the year the Commission's order became final.<sup>4</sup> These data will supplement and complement the interview information to enable the Commission to assess whether the remedies achieved the remedial goals of the Commission's orders.

The Commission proposes to use a different method to evaluate merger orders in certain other industries. It has extensive expertise in evaluating mergers and crafting remedies involving supermarkets, drug stores, funeral homes, hospitals and other clinics, and pharmaceuticals. It has implemented remedies relating to mergers in those industries using well-established methods and standard provisions tailored to each industry. In the ongoing monitoring in which the Compliance Division attorneys engage, it appears that these remedies, in general, maintain the status quo that existed before the anticompetitive merger. Because of its experience and expertise in these industries, the Commission believes that it is not necessary to conduct interviews. Nor is it necessary to require submission of additional data. Instead, for the fifteen orders the Commission issued from 2006 through 2012 concerning supermarkets, drug stores, funeral homes, and hospitals and other clinics in which the Commission required over forty divestitures, the Commission proposes sending, for voluntary response, brief questionnaires to those buyers asking focused, specific questions relating to issues that have arisen regarding divestitures in those industries. [A sample questionnaire is being provided as part of this submission.] Interviews with all participants are not necessary; however, after staff receives responses to the questionnaires, it will determine, on a case-by-case basis, whether follow-up phone calls with the buyers might be instructive.

The Commission also has significant experience analyzing mergers in the pharmaceutical industries and remedying the ones it determines are anticompetitive. In addition, the Commission has a vast amount of information available to it, both from confidential reports it receives from respondents and from monitors, as well as from publicly available information. Thus, although it recognizes the complexities inherent in these industries, the Commission believes that it has sufficient information upon which to draw conclusions about these remedies.

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<sup>3</sup> In the first of two required Federal Register notices under the Paperwork Reduction Act, FTC staff estimated that 280 entities would receive Commission orders to file special reports. See 80 Fed. Reg. 2423, 2424 (Jan. 16, 2015). Upon further analysis, FTC staff believes the Commission will send orders to file special reports to no more than 250 entities.

<sup>4</sup> It often takes time for the asset transfers to be fully implemented and for the acquirer of the divested assets to deploy them fully. In order to ensure that we have sales data for a period after the assets have been transitioned, we use the year the order became final as our centering point for those matters whose order date is January-June, and use the year following the final order year as our centering year for those matters whose order date falls in the July-December time period.

For the twenty-four orders that the Commission issued from 2006 through 2012 requiring divestitures in the pharmaceutical industry, instead of interviewing all of these buyers, staff will synthesize the information the Commission already has and will contact the monitors for follow-up information if necessary. Occasionally, follow-up phone calls with the buyers may be necessary; however, staff will decide that on a case-by-case basis. Any requests for follow-up information will be specific to the remedial order at issue.

## **B. GOALS OF THE STUDY**

As described above, all components of the proposed study are designed to expand the Commission's knowledge by eliciting, across a broad spectrum of industries, information to evaluate the Commission's remedies, while at the same time minimizing as much as possible the burdens on participating entities. FTC staff will review and synthesize the information collected in order to assess the effectiveness of its remedial process. This assessment may uncover ways to improve the process, and to thereby enhance the Commission's law enforcement efforts.

As the Commission stated in the Federal Register Notice, the study's goals are to:

“(1) assess the effectiveness of the Commission's policies and practices regarding remedial orders where the Commission has permitted a merger but required a divestiture or other remedy, and (2) identify the factors that contributed to the Commission successfully or unsuccessfully achieving the remedial goals of the orders.”<sup>5</sup>

Using primarily a case study method, the FTC will evaluate each order to determine whether and to what extent the remedy prevented the merger from substantially lessening competition in violation of Section 7 of the Clayton Act; in other words, in those orders in which divestiture was required (the vast majority of the orders to be studied), we will evaluate whether the remedy preserved the operation of the divested assets (or replaced the lost competitor) as a viable competitive business so as to maintain or restore competition in the markets that would be affected by the merger.<sup>6</sup>

The main remedy the Commission uses to prevent mergers from resulting in less competition is to require divestiture of a carefully defined package of assets to a buyer approved by the Commission. If the divested assets comprise an autonomous, on-going business, the divestiture of that asset package to a Commission-approved buyer would immediately establish a new firm in the market. The buyer of those divested assets would quickly be expected to make

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<sup>5</sup> The Federal Register Notice also noted that the Commission will assess “whether divestiture orders created new competitors.” January 16, 2015 FRN at 34416. See also Supporting Statement at 3 - 4.

<sup>6</sup> Every divestiture order issued by the Commission for many years has expressed the remedial purpose as follows: “The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing, viable facilities engaged in the . . . [market] businesses and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.”

sales, retain existing customers, and compete for new customers. If the buyer has taken the place of the seller and is operating the assets in a similarly competitive manner, the divestiture will have maintained competition, remedying the expected anticompetitive effects of the merger. Other orders, for a variety of reasons, require divestiture of selected assets with the goal of eliminating or reducing barriers to entry so that the buyer could, over time, enter, or expand in, the market and take the place of the acquired firm.<sup>7</sup> In those cases, we would expect that the successful entry and/or expansion by the buyer of the assets would restore or maintain competition in a timely manner.

Merger enforcement is fact-driven, as are merger remedies, so the FTC's case studies will seek to identify the types of remedial provisions that seem to have worked to maintain or restore competition, and, where problems have occurred, to determine whether future Commission orders could address these deficiencies to avoid similar problems. Although every case is unique, and every remedy has unique factors, we do consistently use a variety of remedial tools (order provisions) in merger orders and we believe there is much we can learn from these cases that can be used in future cases. For example, in the previous study, we learned that allowing firms to hold onto divestiture assets for sometimes over a year before they were divested often led to deterioration of assets or businesses; the Commission thus shortened the amount of time between consummation of the merger and the required divestiture and frequently requires those divestitures to take place at the same time the acquisition is consummated ("up front"). This time, where the order provided for a short divestiture schedule, we plan to explore whether up-front buyers had enough time to engage in sufficient due diligence.

For orders in which divestiture was the required remedy, we plan to interview buyers of divested assets, the merged entity, other competitors in the market, and customers. The sales data collected from the 6(b) orders will supplement the information we obtain in these interviews. To the extent that the buyer has not performed as we had expected, we will attempt to ascertain why. If it has lost sales, that may be attributable to many causes, some of which might be unrelated to the Commission's remedy.<sup>8</sup> For example, revenues could have decreased because the product mix sold trended more towards lower-priced products to meet changing demands. If, however, it appears that the loss in sales indicates that the buyer is not as competitive as we would have expected, we will examine whether that loss might be attributed to an element of the Commission's remedy. If we detect similar issues in other orders, we will determine whether we need to correct for the common issue in future cases. Accordingly, using the data we expect to collect in conjunction with the interviews with market participants, we will determine whether the buyer's sales in the relevant markets increased, decreased, or stayed the

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<sup>7</sup> Some orders have remedied the substantial lessening of competition by requiring certain conduct other than divestiture, for example by requiring the merged firm to release customers, and key employees, to facilitate entry by a new competitor or by imposing firewalls and other confidentiality requirements to protect competitors' information.

<sup>8</sup> Competition cannot be measured simply by sales and market share; accordingly, if a buyer's market share dropped a few points, we would not automatically conclude that the divestiture was less than successful.

same, and attempt to determine whether any changes are indicative of the competitive effectiveness of the buyer of the divested assets, or whether the changes are unrelated to the remedy.

It is important for the Commission to conduct a systematic review of its remedies and to modify its practices and policies to the extent learning from the study suggests that changes are necessary.

### **3. Consideration of the Use of Information Technology to Reduce Burden**

The Commission is requiring submission of limited sales data from each buyer and significant competitor for the fifty-one orders described above. Where feasible, the Commission will allow submission of that data in electronic form, which may reduce burden. The Commission is also sending questionnaires to approximately forty buyers of divested supermarkets, drug stores, funeral homes, and hospitals and other clinics. It will allow submission of answers to those questionnaires in electronic form as well.

### **4. Efforts to Identify Duplication**

There is no credible, systematic information elsewhere that can be used for these purposes. No other similar study of the Commission's remedies has been done other than the one the Commission previously conducted of an earlier time period.

There have been various FTC and private sector case studies of specific FTC merger orders or of specific industries, but there has not been a systematic study of all Commission merger orders since the Commission's study during the 1990s.

### **5. Efforts to Minimize Burden on Small Organizations**

Some of the buyers of the divested assets are small organizations; however, the burden on these organizations will be minimal. Wherever possible, the FTC has attempted to minimize the time needed to respond to the various information collections proposed (i.e., questionnaire, interviews, sales data sought through compulsory process). For example, as noted in item 3 above, the Commission will allow submission of data in electronic form where feasible, which may further reduce the burden. Moreover, the data requests are very limited, requesting only sales data for specific products over a seven-year period.

### **6. Consequences to Conducting the Collection Less Frequently**

The last time the Commission collected similar information was in the mid-1990s. Although Commission staff has conducted follow-up telephone interviews with some buyers of divested assets over the last ten years, the Commission has not attempted to collect similar information on a systematic basis since the previous study.



The burden of the information collection in the proposed study has been reduced as much as possible. As discussed above, the results of the study will help the Commission carry out its mission of protecting consumers and competition under Section 5 of the FTC Act and Section 7 of the Clayton Act.

## **7. Circumstances Requiring Collection Inconsistent With Guidelines**

The collection of information in the proposed study is consistent with all applicable guidelines contained in 5 C.F.R. 1320.6 and 5 U.S.C. 1320.5(d)(2).

## **8. Public Comments/Consultation Outside the Agency and Actions Taken**

### **a. Public Comments**

As required by 5 C.F.R. 1320.8(d) and as noted above, the Commission published a Federal Register Notice seeking public comment on the proposed collection of information. The Commission published a second Federal Register Notice when it submitted its associated clearance request to OMB, consistent with 5 C.F.R. 1320.10(a). In response to the January 16, 2015 FRN, the Commission received four comments related to the proposed study. A majority of the commenters support the need for the FTC's proposed study and recognize the importance of the modifications that the Commission has implemented, largely as a result of its prior study of merger orders. Each commenter, however, suggests what he or she views as improvements to the proposed study.

Kenneth Davidson, a former FTC staff attorney who, as he noted, was significantly involved in the design and implementation of the earlier study, suggests that the Commission narrow the scope of the study to focus on whether the recommendations of the prior study have been implemented in more recent orders and, in orders in which they have not, whether the failure to do so had an impact on the effectiveness of the remedy. Dr. John Kwoka, a professor of economics at Northeastern University, and the American Antitrust Institute ("AAI"), a non-profit advocacy group that focuses on antitrust issues, both suggest that the Commission expand the study significantly and question whether the scope of the data to be collected will be sufficient. Finally, the Electronic Privacy Information Center ("EPIC"), a non-profit advocacy group that focuses on privacy issues, recommends a shift in the focus of the study to include privacy issues, a topic not studied in the prior study and not addressed in the orders proposed to be studied. Each comment is described in more detail below, and Commission responses follow.

### ***Kenneth Davidson comment***

Mr. Davidson supports further study of remedies but has several concerns regarding the structure of the proposed study. First, he believes any further study should be voluntary and anonymous, as the earlier study was. He believes much of the valuable information disclosed in the earlier interviews was made available because of the voluntary, confidential nature of the interview. Mr. Davidson suggests, as an alternative to the proposed interviews, that in future

orders the Commission require buyers of divested assets to file compliance reports. Second, he describes the study as relying “primarily on the enforcement attorney and the economist who investigated the antitrust violation” and asserts that such reliance may result in biased and inconsistent results. He instead recommends using two or three Compliance Division attorneys and the same number of economists to provide expertise and assure more consistency, similar to the structure used in the prior study.

Mr. Davidson also believes the number of orders included in the study imposes too much burden on limited resources and recommends selecting a smaller subset of divestitures to study, starting with those identified as problematic. In particular, he urges that the study focus on the orders in which the changes recommended by the prior study were not implemented to determine whether that may have led to problems with the remedy. Mr. Davidson suggests several considerations for the interviews, including requesting a timeline of milestones for the entire process from both the buyer of the divested assets and the seller to help assess the pacing of divestitures. Finally, Mr. Davidson contends that the requested data will have limited use and questions the value of using the Commission’s compulsory process authority to obtain it. He suggests, instead, that profits or costs might be better measures of competitive impact; however, he acknowledges the difficulty in obtaining consistent data allowing for reliable comparisons. He recommends that the Commission consider voluntary submissions of data, rather than using compulsory process. He also recommends that the Commission provide greater detail about how the data will be used.

### ***Commission Response***

#### *1. The confidential information of participants will be protected.*

Section 6(f) of the Federal Trade Commission Act protects confidential information from public disclosure for as long as it qualifies as a trade secret or confidential commercial or financial information. 15 U.S.C. 46(f). In issuing any report on the study, the Commission will take appropriate steps to protect such information or to give notice before any public disclosure of such information, as specified further below. Accordingly, we do not anticipate that the use of compulsory process here will affect the quality of responses received.

#### *2. Because of the importance of the sales data requested, the Commission has decided to use its authority under Section 6(b) of the FTC Act to require submission of the data.*

Although FTC staff agrees that the prior study yielded valuable information, very little of the financial data that FTC staff requested from participants on a voluntary basis in the prior study was submitted, as Mr. Davidson acknowledges. The proposed study is designed to obtain sales data from each buyer and significant competitors. Because of the potential value of that information and the need to obtain that information from market participants, the Commission has decided to compel its production under Section 6(b) of the Federal Trade Commission Act to ensure that participants provide the desired information.

3. *Attorneys and economists who were involved in the initial investigation will add significantly to the evaluation of the Commission's remedies, and their participation will enable the FTC staff to complete the interview component of the study in a timely manner.*

The study will engage teams of experienced professionals to conduct the interviews, including, where possible, the enforcement attorney and economist who conducted the antitrust investigation of the underlying merger, the Compliance Division attorney who handled the remedy aspect, and a paralegal or research analyst. The attorneys and economists who were involved in the initial investigation will bring significant knowledge of the industry and the parties to the process and will use that background to add significantly to the quality of the interviews. In addition, FTC staff supervising the overall study, who were not involved in the initial investigation, will attend the interviews. Relying on multiple teams, including the investigative staff, to conduct the interviews will enable FTC staff to complete the interviews more quickly and effectively than relying solely on Compliance Division staff.

An initial meeting will be held with each case team prior to the interviews to review the issues raised by the remedy. Consistency will be maintained from interview to interview by relying on standardized outlines prepared by FTC staff, which will be adapted for the order and markets at issue consistent with the issues discussed at the initial meeting. Mr. Davidson points out several interesting topics for the interviews, and FTC staff has added them to the interview outlines. Obtaining timeline information where possible will help the Commission determine whether its timing assumptions are correct.

Mr. Davidson is concerned that the scope of the study may tax the Commission's resources, but the study is structured to meet its goals without placing undue burden on participants or Commission resources. The Commission believes that the scope of the study is manageable, particularly as structured in the manner described. The Commission further believes that limiting the study to only remedies raising concerns, as Mr. Davidson suggests, would limit the learning. Valuable lessons for the Commission's mission may be derived equally from successful and unsuccessful remedies alike.

Finally, Mr. Davidson believes that the annual dollar and unit sales information will be of limited value beyond confirming claims of the buyers that they are participating in the market. He suggests it may be difficult to compare before and after divestiture performance and that additional investigation will be needed to understand the data. The Commission believes, however, that the data will be useful in confirming those claims of the buyers. More generally, combining this information with the qualitative information obtained through the interviews will enable the Commission to assess whether the order has achieved its remedial goals.

***Dr. John Kwoka and AAI comments***

Dr. Kwoka and AAI offer similar suggestions for improving the study. First, Dr. Kwoka suggests that the Commission state more clearly the criteria for a successful remedy. He states

that “[t]he criterion for a successful remedy is that it preserve or restore the competition that would otherwise be lost as a result of the merger being approved.” Next, Dr. Kwoka suggests that the Commission consider adding some pre-2006 orders, especially orders that required only non-structural relief. He also is concerned that the study too heavily relies on information obtained in the interview portion of the study, and notes that interviews are not being conducted in all components of the study. Dr. Kwoka questions that failure to adhere to the same methodology throughout the study, which could lead some readers to find the results less convincing. He also suggests that the Commission consider collecting information beyond the sales data it will be collecting, including information on non-price variables such as expenditures on research and development. He suggests that the Commission use a more flexible time frame that may vary with each order, because the proposed seven-year time frame may not be the most appropriate time frame for each remedy. Finally, he suggests that the Commission obtain information about monitors and trustees, particularly the procedures used by these third parties, the contractual arrangements, the costs imposed by their use, and their effectiveness.

AAI also suggests providing a clearer articulation of the criteria for evaluating a successful remedy. Like Dr. Kwoka, AAI suggests that the appropriate standard for determining a successful remedy is whether the remedy “fully restore[s] competition that would otherwise be lost as a result of an anticompetitive merger.” AAI asserts that without a clearly articulated standard the design of the proposed study will merely validate the conclusions of the prior study. AAI also suggests expanding the number of orders studied to include all orders the Commission has issued since the prior study as well as Department of Justice merger decrees. In addition, AAI suggests that FTC staff study the effects of mergers that the Commission did not remedy. AAI also recommends expanding the time period covered by the study in order to capture more remedies in which the Commission required non-structural relief. AAI urges that the FTC staff also interview firms that have exited or never entered the market because the design relies too heavily on interviews of current participants in the markets of concern to the Commission. Like Dr. Kwoka, AAI believes that the portion of the study designed to evaluate divestitures in the pharmaceutical industry and of supermarkets, drug stores, funeral homes, and hospitals and other healthcare clinics is too narrow. Regarding the data collection, AAI believes that the seven-year time frame may not be the correct choice in certain cases, and that the Commission should also seek non-price metrics, such as quality and reliability.

### ***Commission Response***

*1. The Commission agrees that an appropriate standard by which we evaluate the effectiveness of each remedy is necessary, and has articulated clear criteria consistent with that suggested by the commenters.*

The prior study focused on whether the buyer of the divested assets obtained the assets it needed and whether it competed in the market of concern to the Commission after the divestiture. There was some criticism at the time that the study did not go further to evaluate whether the remedy achieved the remedial goal of the order. The proposed study addresses that

criticism and has been designed to “assess whether divestiture orders created new competitors and whether merger orders, including divestiture orders, achieved their remedial goals.”

The criteria the FTC uses to determine if a remedy is acceptable are spelled out in case law, as well as the Bureau of Competition’s Statement on Negotiating Merger Remedies, which states: “an acceptable remedy must [...] maintain or restore competition in the markets affected by the merger.”<sup>9</sup> The Bureau of Competition’s Frequently Asked Questions About Merger Consent Order Provisions similarly explains, “Every order in a merger case has the same goal: to preserve fully the existing competition in the relevant market or markets.”<sup>10</sup> The predictive nature of Clayton Act Section 7 enforcement requires the FTC to look to the facts and evidence specific to each case in determining whether a remedy fully maintains or restores existing competition in any particular matter. The overriding goal is always the same: as the Supreme Court has stated, restoring competition is the “key to the whole question of an antitrust remedy.”<sup>11</sup> These criteria are consistent with the commenters’ recommendations.

*2. Expanding the study to cover more orders is unlikely to improve the quality of the information learned, especially when considering the additional burden imposed on the public.*

Studying a subset of the universe of orders that the Commission has issued since the last study permits the FTC to complete the study in a timely manner without imposing an undue burden on participants in the study. As proposed, this study is more comprehensive and includes more merger orders for study than the Commission’s prior study, which itself yielded valuable information that led to important changes to the Commission’s process. The Commission believes that expanding the number of orders studied beyond that proposed is unlikely to improve the quality of the information obtained or the ability to draw reliable, useful conclusions to a sufficient degree to warrant the added burden on the participants and the Commission. On the other hand, to complete this more comprehensive study, the Commission will rely on the expertise and experience of its staff, many of whom helped with the underlying merger investigation. This experience allows the Commission to limit the burden on outside parties for the orders not included in the interview portion of the study.

*3. The data component has been purposefully designed to minimize the burden on participants as much as possible while providing quantitative evidence*

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<sup>9</sup> Statement of the Federal Trade Commission’s Bureau of Competition on Negotiating Merger Remedies, available at <https://www.ftc.gov/tips-advice/competition-guidance/merger-remedies>. See also *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) (“The relief in an antitrust case must be ‘effective to redress the violations’ and ‘to restore competition.’ . . . Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.”).

<sup>10</sup> Federal Trade Commission, Bureau of Competition, Frequently Asked Questions About Merger Consent Order Provisions, available at <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq>.

<sup>11</sup> *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

*that will complement and supplement the information obtained through the interviews.*

This study differs from the prior study primarily in its use of the Commission's Section 6(b) authority to issue orders to file special reports. The Commission anticipates sending orders to as many as 250 participants, requesting annual unit and sales data for a seven-year period. These data will supplement and complement the interview information for assessing whether the Commission's orders achieved their remedial goals. The Commission believes that requesting this limited type of data over a seven-year time period will provide useful information for the study, but minimize the burden on recipients of the orders.

### ***EPIC comment and FTC staff response***

EPIC is an advocacy group that focuses on privacy issues and protecting consumers' privacy rights. EPIC recommends that the Commission review past mergers of data aggregators with a focus on non-price factors such as data collection and the merger's impact on consumer privacy. EPIC identifies a series of such mergers that the Commission has reviewed, but for which it has imposed no conditions relating to privacy issues (AOL's acquisition of Time Warner), or not imposed conditions at all (Double Click's acquisition of Abacus, Google's acquisition of Double Click, and Facebook's acquisition of WhatsApp). EPIC recommends that the Commission study the effects of those mergers on privacy rights.

Although EPIC raises very important issues, these questions go beyond the scope of the proposed study, which focuses on the remedies that the Commission has actually imposed rather than on issues or mergers where it determined that no remedy was warranted.

### **b. Consultation outside the agency**

Before devising this proposed study, FTC staff spoke with attorneys and economists at several international competition agencies, all of whom had conducted their own remedy studies, modeled on the Commission's earlier one. FTC staff discussed their studies to ascertain whether they had used any of the methods FTC staff was considering in this proposed study. Although some consideration was given to obtaining more detailed sales data, the other governmental agencies had not attempted to do so for a variety of reasons.

Consistent with 5 C.F.R. 1320.10(a), the FTC is again seeking public comment contemporaneously with this submission.

### **9. Payments and Gifts to Respondents**

Not applicable.

## **10./11. Assurances of Confidentiality/Matters of a Sensitive Nature**

Some of the information the Commission will receive in connection with the study is information of a confidential or sensitive nature. Under Section 6(f) of the FTC Act, such information is protected from public disclosure for as long as it qualifies as a trade secret or confidential commercial or financial information. 15 U.S.C. 46(f). Material protected by Section 6(f) also would be exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552. Moreover, under Section 21(c) of the FTC Act, a submitter who designates information as confidential is entitled to 10 days' advance notice of any anticipated public disclosure by the Commission, assuming that the Commission has determined that the information does not, in fact, constitute Section 6(f) material. 15 U.S.C. 57b-2(c).

Although materials covered by these sections are protected by stringent confidentiality constraints, the FTC Act and the Commission's rules authorize disclosure in limited circumstances (e.g., official requests by Congress, requests from other agencies for law enforcement purposes, administrative or judicial proceedings). Even in those limited contexts, however, the Commission's rules may afford protections to the submitter, such as advance notice to seek a protective order prior to disclosure in an administrative or judicial proceeding. *See* 15 U.S.C. 57b-2(c); 16 C.F.R. 4.9-4.11.

All of the members of the Commission staff are charged with the responsibility of being familiar with these requirements. Because its ability to obtain reliable information is contingent upon respondent's confidence in its ability to protect confidential information, the Commission and its staff take this responsibility seriously.

## **12. Estimated Annual Hours and Labor Cost Burden**

In its January 16, 2015 Federal Register Notice, the FTC provided PRA burden estimates for the research. FTC staff is revising certain assumptions based on a more precise calculation of the number of relevant orders, buyers, and market participants in each order.

As described above, one component of the proposed study concerns fifty-one merger orders approving fifty-six buyers of divested assets. Commission staff will attempt to interview those buyers as well as, on average, two customers and two competitors of each buyer in each affected market. The number of interviews conducted for each will vary based on the unique characteristics of each order. Ten of the fifty-one orders required only non-structural relief, so there are no buyers for those ten; the Commission proposes to interview, on average, two customers and two competitors in each of those affected markets. In several of the orders, the remedy applies to more than one relevant geographic or product market, even though there may be only one buyer of divested assets (or no buyer in the orders requiring only non-structural relief). Because a single buyer may operate in more than one geographic or product market, there may be different customers and competitors in each of the different markets.

In the January 16, 2015 FRN, FTC staff preliminarily estimated that there would be approximately ten orders implicating multiple markets that require interviews with additional customers and competitors. However, staff has now determined that because many of the same entities compete or are customers in more than one of the markets affected by a single consent, this number is actually smaller. Consequently, approximately 300 interviews will be required, rather than the 315 estimated in the January 16, 2015 FRN.

Commission staff expects that for each interview, two company personnel will participate: top-level managers (possibly the CEO or president) and a marketing or sales manager. In addition, in many cases, a company will likely request that its attorney also participate. Staff anticipates that the interviews will last approximately an hour to an hour-and-a-half, and that an hour of preparation time for each interviewee and three hours for the attorney may be required. Accordingly, the estimated total time involved for this portion of the study will be 2,850 hours [300 interviews x (4.5 interview hours + 5 preparation time hours)].

Based on external wage data, the estimated hourly wages for the expected participants are:

CEO	\$ 655
Sales/Marketing Manager	\$ 215
Attorney	\$ 135

If all three individuals participate for each firm, total wage costs for each firm, rounded, will be approximately \$2,783 [(\$655 x 2.5) + (\$215 x 2.5) + (\$135 x 4.5)]. If FTC staff interviews 300 different entities, the estimated total labor cost for this part of the study will be \$834,900 [300 x \$2,783].

As another component of the study, the FTC proposes sending brief questionnaires to the approximately forty buyers of divested assets in the fifteen orders issued from 2006 through 2012 requiring the divestiture of supermarkets, drug stores, funeral homes, or hospitals and other healthcare clinics. Commission staff estimates that the CEO or other top-level manager and a marketing or sales manager will spend one and two hours, respectively, to complete the questionnaire, followed by approximately three hours for attorney review. The estimated total time involved for three participants in this part of the study will be 240 hours [40 participants x 6 hours]. Commission staff anticipates that respondents will incur primarily labor costs to complete the questionnaire, with total wage costs for each firm estimated at \$1,490 [\$655 + (\$215 x 2) + (\$135 x 3)]. Staff anticipates obtaining completed questionnaires from the approximately forty buyers, resulting in total labor costs of \$59,600 [40 x \$1,490].

As the final component of this study, the FTC proposes obtaining and analyzing sales data to complement the information obtained in the interviews and to aid in the overall assessment of whether the orders achieved their remedial goals. As noted above, for each of the markets remedied by each order, the FTC will issue orders to file special reports requesting seven years of annual sales data (in units and dollars), centered on the year in which the order



became final, for all significant competitors in each remedied market. For most firms, these data are likely maintained as a part of their normal course of business and the request should not pose a significant burden. While the majority of these fifty-one remedied matters involve only a single market, others implicate multiple geographic and product markets. The FTC anticipates sending orders to file special reports to competitors in approximately 190 product and geographic markets, and that approximately 250 market competitors will receive the orders. FTC staff estimates that three people will be involved in the response to each order to file special report and that the total time involved in responding to each report will be ten hours. Accordingly, the total amount of time involved for the participants in this part of the study will be approximately 2,500 hours [250 orders to file special reports x 10 hours/report].

The majority of the costs incurred for compliance with the orders to file special reports will be labor costs. FTC staff anticipates that a top-level financial manager, an accountant or financial analyst, and an attorney will be involved in any discussions relating to the special reports and in responding to the orders to file special reports. Specifically, FTC staff anticipates that each of these individuals would be involved in a two-hour discussion with staff prior to compliance, and that the financial analyst would require four hours to compile the data. Based on external wage data, the estimated hourly wages for the expected participants are:

Financial Manager	\$75
Accountant	\$55
Attorney	\$135

Total labor costs for each special report will be \$750 [(\$75 x 2) + (\$135 x 2) + (\$55 x 6)]. If the Commission issues 250 orders to file special reports, the total labor cost of complying with compulsory process will be \$187,500 [250 x \$750]. Commission staff anticipates minimal capital or other non-labor costs.

### **13. Capital and Other Non-Labor Costs**

The majority of costs incurred will be labor costs. Commission staff anticipates minimal capital or other non-labor costs.

### **14. Estimated Cost to the Federal Government**

The cost of the information collection to the federal government will include the cost of staff time used to conduct the interviews, design the data requests, issue and compile the data responses, analyze the data and information collected, and produce a report in an expeditious manner. It is difficult to quantify the total cost to the Commission to complete the study because multiple factors may vary, including how quickly and completely subjects agree to interview requests and respond to information collection requests, and the actual amount of time needed to complete the study. Nonetheless, the Commission estimates that approximately four attorney work years (\$174,000 per work year, including benefits), four economist work years (\$174,000

including benefits), and four honors paralegals and research assistant work years (\$60,000 including benefits) will be needed to complete the study. Thus, the total remaining cost to the Commission is about \$1.6 million. Clerical and other support services and costs of conducting the study are included in this estimate.

**15. Changes or adjustment**

Not applicable. This is a new information collection.

**16. Plans for Tabulation and Publication**

The Bureau of Competition and Economics may publish a report summarizing results based on the information collected.

**17. Exception to Display of the Expiration Date for OMB Approval**

We are not requesting an exception.

**18. Exceptions to the “Certification for Paperwork Reduction Act Submissions”**

Not applicable.

**B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS**

**1. Description of Sampling Methodology**

The Commission conducted a similar, albeit more limited, study in the mid-nineties focusing on thirty-five merger orders issued by the Commission from 1990 through 1994, which required divestitures to fifty buyer approved by the Commission. Since that earlier study, the Commission has issued close to three hundred orders remedying anticompetitive mergers. In the proposed study, FTC staff will review the ninety merger orders that the Commission issued from 2006 through 2012. FTC staff chose that time period because it is recent enough that there is a reasonable likelihood that interviewees can recollect details, but distant enough that divestiture buyers have had time to make an impact in the market.

Participation in the earlier study was voluntary. Regarding the interviews, the participation rate was approximately 75% among the buyers of the divested assets. The participation rate among the respondents, the sellers of the divested assets, was far lower, approximately 20%. Regarding the financial information FTC staff requested, the participation was extremely low.

For the proposed study, FTC staff will invite participation in the interviews on a voluntary basis in the first instance, and FTC staff expects a significant rate of participation in

the interviews, at least as high as the rate of participation of the earlier study. FTC staff anticipates that more respondents will participate in this study than in the earlier study because of the positive publicity that the first study and its results received. FTC staff will, however, consider using the Commission's Section 6(b) authority to compel participation if a greater rate of participation is deemed necessary to validate the results obtained. FTC staff anticipates a high participation rate for both the interviews and the responses to the questionnaires.

The Commission will use its 6(b) authority to compel responses to the limited sales data request in the proposed study, in large part because of the lack of voluntary participation in the data collection component of the previous study. A significant participation rate will be necessary in order for the data to be useful in aiding the assessment of the effectiveness of the orders, and, because of the mandatory nature of the request, FTC staff expects significant participation in this component of the study.

## **2. Description of the Information Collection Procedures**

As discussed more fully above, the Commission will collect information in several different ways. First, FTC staff will interview buyers, competitors, and customers in the remedied markets. In addition, the Commission will require certain limited sales data from the competitors in each of those markets. Finally, the Commission will request answers to focused questionnaires from buyers of divested supermarkets, drug stores, funeral homes, and hospitals and other clinics.

Drawing reliable conclusions does not require one hundred percent participation in the interview or questionnaire component of the study. As described above, significant participation in the data request component, however, will be required.

## **3. Methods to Maximize Response Rates/Reliability of Sample Data**

For the information obtained via telephone interviews, FTC staff anticipates a high rate of participation from the approximately three hundred firms it will seek to interview. FTC staff will consider compelling participation, under the Commission's authority pursuant to Section 6(b) of the FTC Act, if necessary. Responses to the limited requests for data are mandatory, and thus FTC staff anticipates a high rate on participation.

For the information collected in response to the written questionnaire, FTC staff anticipates that the response rate for the buyers will be approximately 90%. FTC staff will consider compelling responses under the Commission's 6(b) authority if the participation rate is low; however, FTC staff does not anticipate that that will be the case.

#### **4. Testing of Procedures or Methods Undertaken**

The study design is consistent with the case study method that the Commission relied upon in the previous study and that other governmental agencies around the world have used in their studies. FTC staff found that method to be highly informative and reliable in the previous study and expects it to be similarly informative and reliable in the study proposed. In addition, FTC staff routinely conducts telephone interviews with possible witnesses and market participants and is fully aware of what questions are important and what information is necessary. Staff is also experienced in minimizing the amount of time that is necessary to conduct an effective interview.

The format of the questions included in the data production portion of the study is consistent with the format the Commission often uses in its investigations and analyses as part of its enforcement mission. The same is true of the format of the questionnaire portion of the proposed study.

#### **5. Individuals Who Will Collect and Analyze Information Collected**

The persons who will collect and analyze the information for the FTC are Daniel P. Ducore, Assistant Director for Compliance, Bureau of Competition (202-326-2526); Naomi Licker, Bureau of Competition (202-326-2851); Angelike Mina, Bureau of Competition (202-326-3118); Timothy A. Deyak, Associate Director for Competition Analysis, Bureau of Economics (202-326-3742); Elizabeth Callison, Senior Advisor to the Director, Bureau of Economics (202-326-3521); and Matthew Chesnes, Bureau of Economics (202-326-3083).