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FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission ("Commission" or "FTC").

ACTION: Notice and request for comment.

SUMMARY: The Commission plans to conduct a remedy study to update and expand on the divestiture study it conducted in the mid-1990s 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. This is the second of two notices required under the Paperwork Reduction Act ("PRA") in which the FTC seeks public comments on its proposed study in connection with Office of Management and Budget ("OMB") review of, and clearance for, the collection of information discussed herein.

DATES: Comments must be received on or before [insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write "Remedy Study, FTC File No. P143100" on your comment. File your comment online at https://ftcpublic.commentworks.com/ftc/hsrdivestiturestudypra2, by

following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Daniel P. Ducore, Assistant Director, 202-326-2526, Compliance Division, Bureau of Competition, Federal Trade Commission, Washington, DC 20580, or Timothy Deyak, Associate Director, 202-326-3742, Bureau of Economics, Federal Trade Commission, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

Each year, the FTC, along with the Antitrust Division of the Department of Justice, challenges a number of transactions that are alleged to violate the antitrust laws. Most of these challenged transactions are resolved through a consent order that remedies the competitive concern. Taking advantage of its unique research and study function, the Commission began a study in 1995, evaluating remedial divestitures the Commission ordered from 1990 through 1994. The earlier study focused on the thirty-five divestiture orders the Commission issued over that four-year period. FTC staff interviewed thirty-seven buyers out of the fifty that acquired divested assets. The study yielded valuable information, which was synthesized, summarized, and made available to the public in a report in August 1999. The report is available at http://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf.

The Commission refined and improved its divestiture orders partly as a result of that

study. Those improvements included shortening the divestiture period, more often requiring up-front buyers, and 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.

Given the benefits resulting from the prior study, on January 16, 2015, the Commission published a Federal Register Notice ("FRN"), *see* 80 Fed. Reg. 2423, seeking comment under the PRA on a new FTC remedy study that will focus on more recent orders, spanning the years 2006 through 2012, and will evaluate both structural and non-structural relief. In response to the PRA Notice, the Commission received four comments related to the proposed remedy study. These four comments are available at https://www.ftc.gov/policy/public-comments/initiative-602.

II. FTC's Proposed Study

A. Study Description

Between the end of 1994 and 2013, the Commission issued 281 orders in merger cases. Of those, the Commission proposes to study all ninety orders issued from 2006 through 2012.[1] The Commission chose this period because it is sufficiently long ago to assess the order's impact (*i.e.*, whether divestiture orders created new competitors and whether merger orders, including divestiture orders, achieved their remedial goals), but recent enough so that participants will remember relevant facts and events.

Given the scope of the proposed study and to best use its resources, the Commission will

[1] The January 16, 2015 FRN stated that the study would include 92 orders. Two of those orders, C4231, *In the Matter of Flow International Corp.*, and C4299, *In the Matter of Air Products and Chemicals, Inc.*, relate to transactions that were abandoned. Accordingly, those have been eliminated from the proposed remedy study.

use different methodologies to evaluate different orders. The Commission proposes to evaluate the majority of the orders using a case study methodology similar to that used in the earlier study, consisting of interviews with buyers of divested assets, customers, and competitors, and seeking limited sales information from the divestiture buyer and other major competitors. For orders relating to supermarkets, drug stores, funeral homes, hospitals and other healthcare clinics, the Commission proposes to study information from divestiture buyers through voluntary questionnaires. For orders relating to the pharmaceutical industry, the Commission proposes to study information it already has, as well as publicly available information.

The Commission proposes to use the case study methodology for fifty-one of the ninety orders in the proposed study. The Appendix identifies the fifty-one orders in chronological order based on the date first accepted by the Commission. Of those fifty-one orders the Commission issued during this period, forty-one required divestitures to fifty-six different Commission-approved buyers.[2] The Commission proposes interviewing those fifty-six buyers and, on average, two other significant competitors in each affected market, including the respondent. Additionally, the Commission proposes to interview, on average, two customers in each affected market. 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 significant competitors in each affected market, including the respondent, and, on average, two customers in each affected market.

Although the FTC will seek voluntary interviews in the first instance, it may rely on compulsory process where necessary to obtain the information needed for the study. Each

[2] The January 16, 2015 FRN stated that the study would involve 47 different divestiture buyers. Upon further review, staff has determined that 56 buyers purchased divested assets relating to the orders included in the proposed study.

interview will, to the extent possible, be conducted by attorneys and economists who are familiar with the relevant order from their work when it issued. Each interviewer will use similar outlines for the interviews, focusing broadly on the same topics. To the extent unique issues arise regarding particular divestitures, the interviewer will pursue those issues as well.

Although the buyer interviews will be similar to those in the earlier study, staff will focus on several specific issues, some of which address the changes made to the divestiture process based on the earlier study. Those issues include:

- Whether the increased use of buyers-up-front hindered the buyer's ability to conduct adequate due diligence.
- Whether shortening the divestiture period had any adverse effect on the buyers or the process.
- To what extent the staff's review of buyers and monitors may have been inadequate.
- Whether the orders have effectively defined the assets of an autonomous business (when that was the purpose).
- Whether assets outside of the relevant market have been properly included in the divestiture package when necessary.
- Whether Commission orders have effectively required sufficient technical assistance or other nurturing provisions when necessary.
- Whether monitors have provided the oversight that the circumstances warranted.
- Whether the respondent impeded the buyer's ability to compete in the market.

As noted above, in addition to interviewing buyers, the Commission will also interview customers and other competitors, including the respondent, in each affected market. The additional interviews will be used, along with the buyer interviews, to assess further whether the

Commission's orders achieved their remedial goals. These interviews will, where appropriate, cover some of the issues noted above, and address some additional points, including:

- Identification of the leading suppliers (and their market shares) before and after the remedy.
- Whether the buyer competed in a manner that was as effective as the prior owner of the divested assets.
- Whether any other significant changes occurred in the market after the remedy was implemented (*e.g.*, entry, exit, or other merger).
- The interviewee's views on how the merger would have affected the competitive environment absent the remedy.
- The interviewee's views about the market's competitiveness before and after the merger and remedy.

In addition to conducting interviews, the FTC will require information from each buyer and significant competitor, including the respondent, in each market by issuing orders to file special reports under its authority in Section 6(b) of the FTC Act. Information will be sought from about 250 firms operating in approximately 190 distinct product or geographic markets.[3] For each of the markets identified in the order, the special reports will request annual unit and dollar sales data for seven years, centered on the year the remedy took place.[4] These data are sufficiently limited in scope to enable the Commission to use them in a timely and useful manner

[3] This number is lower than the 280 participants estimated in the January 16, 2015 FRN because, upon further review, staff has determined that there are fewer significant competitors in the markets affected by the 51 orders.

[4] If the order became final in the first six months of the year, then that year will be used as the year the remedy took place. If the order became final in the last six months of the year, then the following calendar year will be used as the year the remedy took place.

to supplement and complement information received during the interviews.[5]

The Commission proposes to use different methods to evaluate merger orders in certain industries where the Commission has extensive expertise crafting remedies: supermarkets, drug stores, funeral homes, hospitals and other healthcare clinics, and pharmaceuticals. Because of this experience, the Commission uses well-established methods and standard provisions tailored to each industry, and, accordingly, staff is less likely to uncover any significant new information regarding the structure of Commission remedies in these industries. As identified in the Appendix, in those markets, the Commission issued fifteen orders requiring over forty divestitures between 2006 and 2012. For these orders, the Commission proposes sending voluntary questionnaires to the buyers of the divested assets. Through the questionnaire, the Commission intends to learn about the buyer's due diligence process, the adequacy of the divestiture package and the transitional services, and the buyer's post-divestiture operations. Staff will determine, on a case-by-case basis, whether follow-up interviews with these buyers may be necessary.

For the twenty-four orders that the Commission issued from 2006 through 2012 requiring divestitures in the pharmaceutical industry, staff will synthesize information already in the Commission's possession. The Bureau of Competition's Compliance Division maintains close contact with the monitors appointed in these orders, and the monitors and respondents file periodic reports as required by the orders. As a result, the FTC has substantial information regarding the competitive dynamics of these divested products. Staff will review the information

[5] If a company has fiscal year dollar and unit sales figures that are not calendar year sales, it will be asked to describe its fiscal year, to provide the data requested for the company's fiscal years closest to the calendar years requested, to estimate the requested calendar year dollar and unit sales, and to describe the basis upon which those estimates were made. If the requested data are not available for the product and the geographic market, the company will be asked to estimate the dollar and unit sales data requested and to describe the basis upon which its estimates were made.

already in its possession and will follow-up with interviews with the monitors, buyers, and customers as needed.

B. PRA Burden Analysis

In its January 16, 2015 FRN, 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.

III. Confidentiality

Some of the information the Commission will receive in connection with the study is information of a confidential 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, and 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 CFR 4.9–4.11.

IV. Analysis of Comments

As referenced above, 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.

A. 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.

B. 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."[6] 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 exiting competition in the relevant market or markets."[7] 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."[8]

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[6] 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.").

[7] 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 .

[8] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

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 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.

C. 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.

V. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [insert date 30 days from FEDERAL REGISTER date of publication]. Write "Remedy Study, P143100" on your comment. Your comment – including your name and your state – will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission website, at http://www.ftc.gov/os/publiccomments.shtm. As a matter of discretion, the Commission tries to

remove individuals' home contact information from comments before placing them on the Commission website.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any "[t]rade secret or any commercial or financial information . . . which is privileged or confidential," as provided in Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you must follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[9] Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at https://ftcpublic.commentworks.com/ftc/hsrdivestiturestudypra2, by following the instructions on

[9] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

the web-based form. If this Notice appears at http://www.regulations.gov/#!home, you also may file a comment through that website.

If you file your comment on paper, write "Remedy Study, P143100" on your comment and on the envelope, and mail it to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before [30 days from FEDERAL REGISTER date of publication]. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see http://www.ftc.gov/ftc/privacy.htm. For supporting documentation and other information underlying the PRA discussion in this Notice, see http://www.reginfo.gov/public/jsp/PRA/praDashboard.jsp.

Comments on the information collection requirements subject to review under the PRA should additionally be submitted to OMB. If sent by U.S. mail, they should be addressed to Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Building, Docket Library, Room 10102, 725 17th Street, NW, Washington, DC 20503. Comments sent to OMB by U.S.

postal mail, however, are subject to delays due to heightened security precautions. Thus, comments instead should be sent by facsimile to (202) 395-5806.

APPENDIX

Interviews and special orders requesting sales data

	Date First Accepted by the Commission	Docket number	Matter Name
1	04/20/06	C 4164	Boston Scientific Corp / Guidant Corp
2	07/07/06	C 4165	Hologic, Inc. / Fischer Imaging
3	07/18/06	C 4163	Linde / BOC
4	08/18/06	C 4173	EPCO / TEPPCO
5	10/03/06	C 4188	The Boeing Company / Lockheed Martin Corp
6	10/17/06	C 4170	Thermo Electron / Fisher Scientific
7	12/28/06	C 4181	General Dynamics OTS
8	01/25/07	C 4183	Kinder Morgan Inc.
9	08/09/07	C 4196	Jarden Corporation / K2, Inc
10	09/15/07	C 4202	Fresenius AG / American Renal Association
11	10/09/07	C 4201	Kyphon, Inc. / Disc-o-tech
12	10/26/07	C 4210	Compagnie de Saint-Gobain / Owens Corning
13	04/28/08	C 4228	Talx Corporation
14	05/05/08	C 4219	Agrium Inc. / UAP Holding Corporation
15	06/30/08	C 4233	Carlyle Partners / JP Morgan
16	07/17/08	C 4224	Pernod Ricard / V&S Spirits
17	07/30/08	C 4225	McCormick & Company / Unilever Group
18	09/15/08	C 4236	Fresenius SE / Daiichi Sankyo
19	09/16/08	C 4257	Reed Elsevier PLC / ChoicePoint Inc.
20	12/23/08	C 4244	Inverness Medical Innovations, Inc. / ACON
21	01/23/09	C 4243	Dow Chemical / Rohm & Haas
22	01/29/09	C 4251	Getinge AB / Datascope Corp
23	02/26/09	C 4254	Lubrizol / Lockhart Chemical
24	04/02/09	C 4253	BASF / Ciba Specialty Chemicals
25	09/25/09	C 4273	K&S AG / Dow Chemical
26	11/24/09	C 4274	Panasonic / Sanyo
27	01/27/10	C 4283	Danaher Corp / MDS
28	02/26/10	C 4301	PepsiCo Inc. / Pepsi Bottling
29	05/07/10	D 9342	MDR (The Dunn & Bradstreet Corp) / QED
30	05/14/10	C 4292	Varian, Inc. / Agilent, Inc.
31	06/30/10	C 4293	Pilot/Flying J
32	07/14/10	C 4297	AEA Investors / Wilh.Werhahn
33	07/16/10	C 4300	Fidelity / LandAmerica
34	07/28/10	C 4298	NuFarm / A.H. Marks Holdings, Ltd.
35	09/27/10	C 4305	Coca-Cola / Coca-Cola Enterprise
36	10/11/10	C 4307	Simon Property Group / Prime Outlets
37	12/29/10	C 4314	Keystone / Compagnie de Saint-Gobain
38	05/26/11	C 4328	Irving / Exxon Mobil
39	10/28/11	C 4340	IMS Health / SDI Health

40	12/08/11	C 4341	LabCorp / Orchid Cellmark
41	01/11/12	C 4346	Amerigas / ETP
42	02/29/12	C 4349	Carpenter / HHEP-Latrobe
43	03/05/12	C 4350	Western Digital / Hitachi
44	04/26/12	C 4368	CoStar / Loopnet
45	05/01/12	C 4355	Kinder Morgan / El Paso
46	06/11/12	C 4363	Johnson & Johnson / Synthes
47	08/06/12	C 4366	Renown Health / Reno Heart Physicians
48	10/12/12	C 4381	Magnesium Elektron
49	10/31/12	C 4380	Corning, Inc.
50	11/15/12	C 4376	Hertz Global Holdings
51	11/26/12	C 4377	Robert Bosch

Questionnaires

	Supermarkets and drug stores		
1	06/04/07	C 4191	Rite Aid/Eckerd
2	06/05/07	D 9324	Whole Foods
3	11/27/07	C 4209	A&P/Pathmark
4	08/04/10	C 4295	Topps
5	06/15/12	C 4367	Giant/Safeway
	Funeral homes		
6	11/22/06	C 4174	SCI/Alderwoods
7	11/24/09	C 4275	SCI/Palm
8	3/25/10	C 4284	SCI/Keystone
	Hospitals and other clinics		
9	03/30/06	C 4159	Fresenius AG
10	10/07/09	D 9338	Carilion Clinic
11	11/25/10	C 4309	Universal/PSI
12	07/21/11	C 4339	Cardinal/Biotech
13	09/02/11	C 4334	Davita/DSI
14	02/28/12	C 4348	Fresenius AG
15	10/5/12	C 4372	Universal/Ascend

By direction of the Commission.

Donald S. Clark,
Secretary.

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