Remedy Study, File No. P143100

Comments of Kenneth M. Davidson on the FTC's proposed study in response to the Commission's January 15, 2015 Federal Register Notice requesting comments on the proposed study. The study is designed to examine all 92 merger matters in which the Commission issued orders between 2006 and 2013.

I strongly favor additional studies of the Commission's merger remedies, but I have doubts that the study described in the Federal Register is the most suitable way to increase understanding of the reasons merger orders have or have not been effective, or how best to improve those orders. As described below, I believe the proposed study overcompensates for some of the shortcomings of the 1999 Report issued by the FTC's Bureau of Competition, and changes the design of the proposed study in ways that fail to appreciate how the earlier design contributed to the success of that project. I have separated my concerns into four categories: (1) that the information sought in this study is more likely to be obtained if participation by those interviewed is made totally voluntary and those interviewed can be assured that their personal statements about their companies will remain confidential; (2) that attorneys of the Compliance Division are more likely to have the skills to conduct the study interviews than enforcement attorneys or economists; (3) that focus of the study should be on determining whether the recommendations of the 1999 Report have been implemented, whether the orders which include those recommendations have been more successful than those that did not contain the recommended provisions, and whether other order provisions would have enabled the buyer of divested assets to become competitively significant more quickly; and (4) to investigate whether the kinds of financial and production data contemplate in the proposed plan are both relatively easy to collect and likely to be helpful in determining the competitive impact of divestitures.

A. The 1999 Staff Report

My comments are based primarily on work that I and others did to produce the 1999 Staff Report entitled, **A Study of the Commission's Divestiture Process.** That Study was recommended by the FTC's Bureau of Economics and the FTC's Bureau of Competition. As this Notice states the Commission and the Office of Management and Budget approved the Divestiture Study after a pilot study indicated that it was likely that buyers of divested assets would be willing to voluntarily participate in the Study. As the Acknowledgements to 1999 Report state the Study was conducted primarily by four members of the Staff, two economists and two attorneys. The design of the Study and the drafts of the 1999 Report were reviewed and commented on by a larger group of Staff and one outside consultant. I was one of the two attorneys who worked on the design and conduct of the Study and the drafting of the Report.

The four of us reviewed the Commission's documents relating to the divestiture orders (memoranda of both Bureaus concerning taking enforcement action, the proposed and final orders, compliance reports and other materials). On occasions, we discussed the matter with Staff members who had worked on the matter to obtain additional information, especially about who in the companies would likely be able to describe the divestiture process.

With that background, one of us would contact the companies and explain the purpose of the Study was to understand why merger orders were or were not successful, and it was not our intention to look for violations of order obligations that might involve civil penalty actions. Further, we assured the companies that any information supplied to us identifying the company or its employees would be kept confidential. We assured them that participation in the Study was entirely voluntary. We also said we had no objection to companies including an attorney on telephone interviews. In almost all interviews, the four of us were present and participated during the telephone conversations with the persons that had been identified as having relevant information. On some occasions, we added persons to be interviewed based on a prior interview. At the conclusion of the telephone interview, we stated that we would like the companies to submit some data concerning the relevant products or services.

From one point of view the study was a great success. The great majority of companies that bought divested assets made people with relevant information available for telephone interviews. Those people seemed very frank about their experience with the divestiture process. Our confidence in the truthfulness of those interviewed reflected the fact that buyers that bought divested assets readily described their successes and failures, including some serious mistakes that they had made in negotiating the divestiture contract. Buyers seemed equally frank that some of them took a long time to get into business and, those that failed to get into business, frequently identified reasons they were unsuccessful.

From another point of view, the study was not successful in obtaining interviews with the entities that divested assets or in determining the degree to which the divestiture had restored or maintained competition. This was primarily due to the fact that almost none of the companies submitted the written financial and production data that we requested. Even if the data had been submitted, it is not clear that it would have been sufficient to evaluate the competitive effects of the divestiture.

Those who read drafts of the Report believed that the interviews revealed a great deal of new information about divestitures. The Staff Report concluded that the overwhelming majority (over 75%) of divestitures that were examined enabled buyers of the divested assets to enter the relevant market that had been of concern to the Commission. Nevertheless, the Report concluded the divestiture process could be made more effective -- based on interviews with both the buyers that had launched businesses in the relevant competitive market and those who failed to do so. To strengthen the competitive effectiveness of future divestiture orders, the Report recommended that ten order provisions, which had been included only in some Commission orders, should be used more universally.

A critical insight from the interviews was that some of our working assumptions about buyers of divested assets had been wrong. The review of divestitures indicated that Staff had assumed that buyers (or prospective buyers) of divested assets had well informed views about the value and operational necessities of the business assets being divested and that the prospective buyers would tell the Commission Staff if they thought more assets should be included in the divestiture order and that they would complain to the Commission if the divesting company failed to provide all assets and assistance required by the order.

As the 1999 Report demonstrates, these assumptions tended to be more wrong than right. Some buyers of divested assets said they paid more than the assets were worth, even more buyers said they did not fully understand the needs of the business they were acquiring, and buyers who did not get all the assets or all of the assistance they needed or expected often failed to alert the Commission. This was true of both companies that were consulted during negotiations about a Consent Order and of buyers of divested assets who did not receive all of the assets or assistance that they were entitled to under the order or divestiture contract. Some buyers expressed the concern that another potential buyer would get to buy the assets if they complained during Consent negotiations about the inadequacy of the divested assets or assistance required by the contemplated order. Others said they did not complain to the Commission of inadequate help from the divesting firm because they doubted the Commission would be able to help them if the assets they received were not operational. For some buyers who did launch a business with divested assets, it was a tribute to their tenacity that they succeeded in getting into business. If the Commission was to have more effective orders, the 1999 Report concluded it would have to rely on more than views expressed by prospective buyers. DGComp of the European Commission conducted a similar review of the EU's merger orders and came to essentially the same conclusions as the 1999 FTC Report.

The recommendations of the Report have been largely included in and elaborated on in the FTC's online document titled "Negotiating Merger Remedies." It seems as if the guidelines of this document ought to form a reference point for any new study of merger remedies ordered by the Commission. A new study or studies ought to seek to determine whether the guidelines have been effective in orders where they have been included and whether orders that do not include the provisions and procedures recommended by the guidelines have been more prone to problems for the buyer of divested assets than those that follow the guidelines.

B. Concerns About the Proposed Merger Study

1. *The importance of Voluntary Participation and Anonymity*.

I believe that we would never have gotten the frankness from those we interviewed had we not promised that the Commission would not reveal the names of the individuals or the companies that were the subject of interviews. People we interviewed admitted to what seemed to be hugely embarrassing mistakes.

One buyer of divested assets had asserted during the negotiations that led to the divestiture order that it knew how to produce a product that it sold at retail. As a result, it claimed it did not need any machinery, technology, or personnel to become a viable competitor. This company, which was a major seller of the retail product, insisted it needed only a supply of a critical input material to manufacture that product which it had long sold.

The Bureau recommended and the Commission's Order provided for the divestiture of the critical input. The buyer of divested assets chose poor quality stocks of the critical input that turned out to be not acceptable in the premium market that was of competitive concern. It also found that the machinery it acquired was not suitable to produce the product and had to repurchase more expensive custom made machinery. Only then did it discover that the inputs were not of sufficient quality to sell in the premium market that it supplied. As a result, it had to sell its products in a low cost generic market that had not been of concern to the Commission. The company may or may not have refined its product after our interview and then been able to sell in the premium market. The interview made clear selling in the relevant market had been its intention when it acquired the divested assets.

Another buyer of divested assets bought technology to develop a product that it expected would expand its product line. Its marketing, development, and financial departments were enthusiastic about the acquisition. Unfortunately, the production department when asked to produce the then developed product advised the company that it did not have the kind of machinery needed to produce that product and that it would be uneconomic to buy the sets of machines and train the workers for a process that would be used solely for this one product. The company then sold the developed product to another company that believed it could produce the product for a saleable price.

These two divestitures may have ultimately led to competition in the relevant competitive markets but that had not occurred at the time of our interview. These kinds of mistakes by buyers of divested assets were not uncommon. One buyer bought production assets that were part of a multipurpose plant largely owned by the divesting firm. The contract assigned a large share of overhead and common costs to the buyer of divested assets. As a result it could not make a profit or challenge the pricing of the divesting company. Another buyer acquired electrical machinery that was unusable. The divesting firm refused to help the buyer adapt the machines and the buyer never entered the business. Such mistakes by buyers delayed the launch of a business or handicapped the divested entity in a way that made the divestiture competitively ineffective.

These revelations could have been seen as hugely embarrassing, easily avoidable, mistakes by the companies and their decision makers. I think it is improbable that any of these companies would have disclosed this kind of information if they had believed that the names of the individuals and the companies would ever be revealed by the Commission.

The new study proposal states that the Commission will keep confidential trade secrets and other confidential business information. I am unsure that the kinds of facts that we learned fall into any traditionally protected trade secrets. However, these kinds of mistakes described an essential dynamic of the Commission's divestiture process. It had to be discovered in order for the Staff to understand why some divestures worked and others divestiture orders did not. The 1999 Report sought to balance fears of embarrassment and fears of prosecution by not revealing the names of those participating in the study. The proposed study has already revealed more about the proposed study participants by listing the names of the parties to the orders and the titles of the interviewees it expects to interview. That will make it more difficult for any future report to describe individual matters without exposing the names of the people and companies involved.

Accordingly, the new study may not have the same degree of success in obtaining voluntary cooperation. If so, those conducting the study might conclude that less than full participation would defeat the objective of having a "generally representative" sample of mergers between 1995 and 2013. Under the proposed study plan, the Commission proposes to use its authority under section 6(b) of the FTC Act to require participation. The study plan says it intends to first seek voluntary interviews, and only use compulsory process where the parties refuse to cooperate. That is consistent with the normal practice of the Staff in investigational hearings concerning the lawfulness of proposed mergers. It is generally to the advantage of both the Staff and those testifying not to formalize who is going to testify about what in a subpoena. The formal procedures are slower and more cumbersome. However, such testimony backed by the authority to compel testimony is not generally considered to be "voluntary."

Transcribed compulsory testimony, with representation by lawyers, seems more likely to create an adversarial framework that would be slow, expensive, and ultimately less likely to reveal an accurate picture of the divestiture process. Instead of facing companies with the specter of compulsory testimony, I believe the new study should seek voluntary participation and promise full confidentiality to those interviewed and submitting data. If it turns out that voluntary participation is low, I think other methods of obtaining information for the study may be available. The suggestion in the study plan of using information from monitor trustees may be a useful (albeit incomplete) source. It might however disrupt the trust relationship between the trustee and the divesting and buying parties that has generally characterized the role of trustees.

There might be other means. The 1999 Report recommends that the buyer of assets to file detailed plans for entering into business with the assets and for re-divestiture of certain types of assets if the buyer fails to exploit them in the relevant market. That business plan ought to be the basis for routinely requiring reports from the buyer to the Commission on implementation of its plan. Such reports together with the compliance reports of the merged entity could provide the Commission with an ongoing picture of its divestitures. This would allow the Commission to track the results of divestitures even in the absence of trustees and without the need for a separate study.

Although compliance reports are not voluntary, they are the normal way that orders are enforced. Buyers of divested assets would be alerted to the reporting requirements before buying the assets and would have to decide before buying if they believe the reports would be too disruptive to make the acquisition. The availability of information from the buyer and seller of divested assets would provide information to analyze the effectiveness of Orders and make any future study of divestiture remedies easier to focus.

2. *Difficulties Posed by Using Enforcement Attorneys to Conduct the Study: Advantages of Using Compliance Attorneys*

The plan outlined in the Request for Comments is not specific on which employees of the Commission will conduct the interviews. It appears that the intention is to rely primarily on the enforcement attorney and economists who investigated the antitrust violation and recommended to the Commission the negotiated draft consent order with the merging parties. The idea of giving a lead role to economists in conducting interviews, as is suggested in paragraph 8.1.a of the proposed plan, does not seem to reflect the strengths of their experience and training. Economists present their separate views to the Commission on merger cases, but the orders are negotiated primarily by the enforcement attorneys who weigh both the competitive problems associated with a proposed merger and the litigation risks. Lawyers use interviews and depositions as part of their regular duties, whereas economists generally are limited to a more advisory and analytic role. Consequently the experience of economists seems to be less relevant than that of lawyers to lead the interviews for the study.

Enforcement attorneys generally do not have the time, the institutional incentives, or the training to evaluate the difficulties associated with divestitures. The enforcement divisions get credit for bringing cases and obtaining a resolution of the anticompetitive actions. In addition, if the interviews are to be conducted by the attorneys who recommended the Consent Order, they may have some personal investment in demonstrating that they negotiated a viable divestiture order. Moreover, they are not likely to obtain institutional credit for taking time from the investigation of current mergers to examine the results of old orders. Furthermore, by examining only the results of one or two divestitures, they may lack a perspective on how much of the success or failure of those divestitures are unique to their cases versus how much may reflect more general characteristics of the divestiture process.

As suggested above, the different circumstances of mergers will make it difficult to create a single template for the interviews. Without a uniform template, it may not be possible to use reports written by 20 or 30 different interviewers to obtain additional insights to the divestiture process. The most significant new information developed in the 1999 Report was volunteered by the persons interviewed. We did not have preset questions that would have elicited the most significant responses. Our conclusions were based on the description of the divestiture by the buyers and their responses to our follow up questions.

The eight questions detailed in the proposed plan for interviewers to enquire about are thoughtful well chosen issues that ought to be considered in framing most divestitures. I am less sure that an interviewer who talks to one or two sets of CEOs and marketing managers is likely to obtain the insights sought by the questions. In addition, the emphasis on a six month divestiture period seems misplaced or overly simplistic. The question reflects a recommendation in 1999 designed to reduce risks that delayed divestitures might lessen the competitive vitality of the asset package and risks that some businesses under order might unnecessarily delay serious negotiations with buyers until the last minute to pressure the buyer and Staff to accept quicker, less examined deals. It was a suggestion that divestiture efforts should begin sooner and not delayed. The Study notes that the six month period had already been used by the Commission with success. However, because it is possible that six months could be an unrealistically short period for some divesting entities to find a suitable buyer or might unfairly limit the buyer's ability to conduct adequate due diligence, the time period could warrant some examination in the proposed study.

As a general matter, however, it is more common for parties to begin to consider prospective buyers during negotiations over the scope of the order and the divestiture. The negotiation over divestitures can take months before the Staff is willing to recommend a Consent Order. Staff engages in discussions about what must be divested to restore or maintain competition and whether there are buyers interested in and capable of using those assets to compete. The Staff then seeks to verify the claims by interviewing prospective buyers. Consequently the six month period after the order becomes effective is not the only time period available for identifying potential buyers nor is signing a divestiture contract with a buyer necessarily the most significant indicator of the transfer of the divestiture package. The common inclusion of “upfront” buyers demonstrates that earlier divestiture agreements can be and are negotiated. Accordingly the six month period after the order is entered does not seem like the most important focus for the new study.

The signing and Commission approval of a buyer and a divestiture contract does not necessarily mark the launching of a new competitive business. Often it takes a significant amount of time to transfer physical assets, to complete supply agreements, and to conduct training assistance. It is equally important to investigate whether these obligations have been fulfilled in a timely and effective manner.

Even the seemingly most straightforward of the eight questions – whether the divestiture took place within the six month period -- may have complex answers that make it impossible to provide a simple yes or no answer. Two matters described in the 1999 Report illustrate how divestitures may have different outcomes, despite superficial similarities in the Orders. Both matters involved buyers that were manufacturing companies that had never made the particular products being divested. One Consent Order therefore required the transfer of technology, a manufacturing plant and its staff be transferred, as well as contracts with suppliers and customers for the products. The other required the transfer of machinery and technical assistance in using the machinery. That buyer found that the divested machinery was not entirely suitable to producing the product and that the technical assistance supplied by the divesting company was inadequate.

The other buyer, by contrast, maintained it did not need the divested research technology. It believed that it used superior technology in producing similar products and reported in the study interview that it quickly modified the existing production technology and surpassed the divesting firm in sales of existing and newly developed products.

So the answer to whether there is enough time for the buyers and the staff to complete the due diligence required depends on many factors: when the search for buyers start, the nature of the product or service, and the capabilities of the buyer. These are factors that an enforcement attorney may be knowledgeable about. In fact, enforcement attorneys may have have some control over the time available to potential buyers as a result of the Second Request period or by entering into an agreement with the parties not to consummate the merger without giving 30 days notice to the Commission. Despite such experience, a set of one or two interviews concerning the circumstances of divestitures are unlikely to be adequate for an attorney to form coherent generalizations to formulate probing follow-up questions about the divestiture process.

The same kind of problems exists with respect to whether the necessary assets have been included in the divestiture or whether the buyer was an appropriate business to operate the assets. These are not central to the normal inquiries made by enforcement attorneys.

Different problems exist if enforcement attorneys are to evaluate the selection and performance of trustees. They generally have no experience with trustees or how they supplement the actions of the Compliance Division and help to implement an order. Furthermore, CEOs or marketing managers of the buying or divesting companies do not necessarily have detailed knowledge of the actions of trustees.

It seems sensible that the plan envisages a separate investigational technique for divestitures that include trustees. Indeed, the issue of whether trustees are effective is an important one and ought to be investigated separately. During my time at the Commission, I worked with trustees who were surprisingly effective. They found ways to implement the order that the parties did not think of themselves or did not trust each other unless facts were verified by the trustee. In contrast, I found other trustees were less useful even though they did not engage in behavior that would have allowed the Commission to replace them. I am less confident that even the best trustees will have adequate knowledge of how the scope of the divestiture was determined or how effective the buyer of the assets is as a competitor in the industry. Generally, trustees are appointed after the terms of the order are settled and complete their duties when the transfer to the buyer is finished. As a result they may not be able to shed light on critical parts of the divestiture process.

The use of Compliance attorneys is a more promising alternative to enforcement attorneys. To be sure, they may have participated in the design of a divestiture that they examine. That might color their judgment as to whether the divestiture order, buyer, and contract were suitable if their advice was taken on the issues raised in those matters. Nevertheless, they have an institutional interest in framing better divestitures because it makes their job easier and their division gets credit for the effective implementation of orders that maintain or restore competition.

The Compliance Division receives reports from the merging entity that was required to divest assets. Its attorneys review the reports and work with trustees when they exist. They are responsible for investigating order violations and may bring civil penalty actions against businesses that have violated a Commission order. Although their training and responsibilities are appropriate for conducting the kinds of interviews contemplated by the proposed plan, it does not seem like a viable plan to dedicate the 12 or so attorneys of the division to examine the 92 merger orders or the 43 requiring divestitures. The Compliance Division has ongoing duties that need to be addressed on a daily basis.

It seems more feasible to assign 2 or perhaps 3 Compliance attorneys to undertake one or more divestiture studies with assistance from an equally small number of economists. The 1999 Report benefitted greatly from the fact that its coauthors had participated in all of the interviews and had discussed many of them with the economists who participated in the interviews. Exposure to widely different transactions allowed those conducting the Divestiture Study to improve the interviews during the Study. We began to see aspects of the divestiture process that seemed to reflect successful strategies and unsuccessful strategies. The interviews provided us with a dynamic picture of the divestiture process that could not have been gleaned from the Bureau reports to the Commission, the Commission orders, or the Compliance Reports filed with our division, or from conducting one or two interviews.

Because we were a small group that had participated in all of the interviews, we were able, with the help of notes, to capture and consider elements of the divestitures that seemed to lead to problems. As we proceeded through the interviews, we were able to build a clearer picture of how those problems might be avoided. In writing drafts of the Report, we were able to test whether our understanding seemed accurate by considering all of the interviews.

3. *The intention to examine 92 orders seems too demanding on the limited resources of the Commission and the abilities of those conducting a divestiture study.*

It is unclear why the plan suggests it is necessary to include all divestiture orders between 2006 and 2013 to obtain an adequate sample of the divestiture process. A random method of selecting a smaller number of mergers might be sufficient, might lessen the burden of the study on business, and make the sample more tractable to the Staff that looks for insights. The proposal suggests that the wide range of products or services is necessary to obtain a representative "full sample." Although merger matters will continue to include diverse products and services, it is difficult to think that each relevant product or service market will be the most critical procedural issue in framing a successful divestiture. It seems more likely that the type of assets, supplies, customer contracts, and technical assistance provided in the divestiture order and contract will be of greater importance. Equally important are the specific capacities of buying entities and their capacity to utilize effectively the divestiture package. In addition, the package may be viable only if it includes complementary products or processes that are needed to make the business in the relevant market viable.

It may be more feasible to undertake a series of smaller more focused studies than to attempt to look at the entire set of merger orders issued between 2006 and 2013. One way to narrow the number of orders to be investigated would be to read the orders and identify those that did not follow the recommendations in the 1999 Report or the guidelines in Negotiating Merger Remedies. Such a study could focus on these divestitures to determine whether they appeared to have implementation problems and whether these might have been avoided by following existing recommendations for merger orders.

The Commission does not always know if a buyer of divested assets has been unable to get into business with the divested assets or has failed after a brief time. Not every divestiture fails as spectacularly as the divestiture in the Hertz/Dollar Thrifty divestiture. However, it would less burdensome on the Commission and on the buyer of divested assets, to send a questionnaire, as a preliminary screening criteria, asking if the divestee got into business and if the business remains in operation. The staff could then focus on failed divestitures to try to determine the cause of the failure. The reasons might have to do with changes in technology, input prices, or considerations that might have been anticipated in the divestiture order. There is no way to predict what factors will be critical for every divestiture.

Or a study might be made of a narrower class of problematic divestitures. While I was at the Commission, there were a series of orders involving computer networks in which the Commission ordered “open access” remedies in Information Technology cases. My impression was that these orders tended to be ineffective in facilitating the entry of new businesses into the market. It would be useful to know if that is true and if other approaches might be more effective. This is an ongoing antitrust problem in both merger and non-merger cases as is demonstrated by the Microsoft, Intel, and Google litigation.

There are probably other subsets of merger remedies that could be separated into distinct studies. Such smaller studies could explore the effectiveness of the remedies in greater depth without making the study so time consuming, complex, and large that those conducting and analyzing the information will be overwhelmed by the number of interviews and amount of data.

The proposed plan appropriately emphasizes the need to interview the companies that divested assets. The 1990s study was much less successful in obtaining information from divesting entities. And the few entities that agreed to talk with us seemed less forthcoming in describing their divestiture process than the buyers. Divesting entities may have been reticent about describing their role in divestitures in which buyers had problems launching successful businesses on the grounds that they might be blamed for the difficulties.

a. Buyers of Divested Assets

Given the diversity of divestitures and the uncertainty of what variables were most important, interviews ought to be framed in a way that details the circumstances and divestiture experience of each buyer that is interviewed. For example, an interview might start by asking whether the buyer had an interest in and/or knowledge about the production and sale of the product or process prior to seeking to buy the divested assets. The interview could then turn to how the buyer first learned of the divestiture (whether it was contacted by the divesting firm, the Commission, etc.). It would be important to learn if the buyer was asked by Commission Staff whether the divestiture package was adequate during negotiations of the Consent Order. Equally important is the information the buyer had if it was asked for its opinion about the contemplated divestiture package and/or when it made its decision to purchase the assets. Was it, for example, given access to a data room that allowed it to project future costs and profits? Was it allowed to visit the production facility, the warehouse system, or the retail stores to determine whether the buyer would be able to operate the assets?

Did the buyer request information that was not made available and did the lack of such information turn out to be important? Did the buyer request information about ongoing research, technical assistance, inclusion of customer contracts, machinery, or personnel that were not included in the divestiture package? If the divestiture was part of the acquired company in the merger, was the divested portion of that company held separate or was the surviving company allowed to operate the divested assets and thereby given access to the plans and research of what would become a competitor in the hands of the buyer? Were the assets financially supported, operated in the normal course of business, and well maintained until the divestiture occurred? How long did it take to deliver the assets and technical assistance? What problems did the buyer have, if any, in launching or taking over the business? Did it have difficulties in maintaining or obtaining contracts with suppliers, distributors, or customers? Did the buyer also acquire in the divestiture package assets to sell complementary products to maintain production synergies or economies of scale? Have those synergies been achieved? What suppliers has the buyer used? Are they the same as those used before the divestiture? Have there been technological changes in the relevant market? Has there been entry or exit of businesses from the relevant market since the divestiture? Did input costs or prices to customers change significantly over the period covering the three years leading up to the divestiture contract or the three years thereafter?

The insights and recommendations of the 1999 Report and the guidelines of “Negotiating Merger Remedies” ought to be reexamined to see if they remain critical: it is possible that that the existence of the 1999 study, the “Negotiating Merger Remedies” guidelines, and another online document “Frequently Asked Questions about Merger Order Provisions” have diminished the disadvantages of buyers of divested assets. By alerting the buyers to the need for more information and requiring that divesting companies make more information available to buyers, by requiring: business plans from proposed buyers, by publicizing why the Commission should not rely solely on stated views of proposed buyers of divested assets, and by not relying on the lack of complaints from buyers holding the assets, the online documents may have changed the dynamics of divestiture. Nevertheless, it seems prudent to examine whether Commission orders have generally implemented its recommendations and guidelines.

The kind of interview outlined above ought to provide some evidence whether the guidelines have helped create more effective orders and whether there has been less success with divestitures that do not follow the recommendations.

Future interviews ought to seek more precise information on the timing of divestiture events from consultations during the negotiations on consent orders to the sale of products or services by the divested business. The earlier study concluded there are risks that the competitive potential of divestures may be diminished if divestitures are delayed. With a firmer idea of how much time the buyer had to understand the divestiture package and influence the contents of the package, it seems likely that the new study will be better able to answer most of the issues that are suggested as the "specific focus" of buyer interviews.

Getting accurate information about the timing of events through interviews may be difficult. The interviewers might help frame a time grid for the divested entity by creating a timeline before the interview by identifying when the merger was filed, when discussions about a divestiture remedy began, when potential buyers were consulted, when a likely buyer was first identified to the Staff, when a divestiture contract was signed, when the Commission approved the buyer and the contract, when the merged entity began to transfer the divestiture package, when interim supplies and technical assistance were due to be delivered, and when the divested entity sold its first products or services without assistance from the divesting entity. Some of these dates may be available from Commission documents or the Enforcement and Compliance attorneys who worked on the matter. Even so, it may be difficult to obtain from Staff or employees of the divested entity complete and accurate information about timing of events. It may require interviews with multiple employees who participated in different divestiture events. Even then Staff and employees may not have precise recollections about when events occurred.

Even if the timeline is not perfect, it seems like an important factor in evaluating the risks of delayed entry by the divested business. It may also permit a comparison of the effectiveness of remedies based on technology transfers with the effectiveness of transfers that include "stand-alone" businesses. Although the speed of entry is likely to vary based on the divestiture package and circumstances of the buyer, the Commission ought to be aware if, in general, technology transfers are much slower than divestitures that seek to transfer a stand-alone business that include ongoing contracts with suppliers and customers. In addition, the timeline ought to include when technical assistance and supplies from the merged entity begin and end as markers for when the divested entity becomes a fully independent competitor. Based on prior experience some supply contracts or technical assistance may not be complete at the time of the interviews.

Questions to the buyer about "whether the respondent impeded the buyer's ability to compete in the market" are appropriate but insufficient because the buyer may be unaware of actions by the divesting company. The 1999 Report indicates that buyers did not complain to the Commission about non-functional machinery, the lack of technical assistance, prices charged by respondents for supplies, or overhead. Some buyers assumed that they were at fault by not safeguarding their interests in the divestiture agreement. To the extent that these kinds of problems remain, the buyers are likely to identify them if their participation is voluntary and they receive assurances of confidentiality. The divesting entity might confirm many of these actions with the caveat that they followed what was required by the divestiture order and contract.

b. Divesting Entities

There is important information that divesting entities might be willing to divulge voluntarily. They ought to be willing to disclose when they entered into their merger or acquisition agreement and whether that agreement put restrictions on capital expenditures or other business actions by either party. Contract information is part of the HSR notification but may not have been retained and available to the interviewers from Commission documents. In addition it would be helpful to obtain a list of employees who left either of the merging companies during the waiting period after the merger was announced. It is important to start from the earliest point because if important employees leave it may not be possible to re-establish separate entities if the merger is blocked or may not be possible to establish an effective divestiture package without experienced and skilled personnel. It is also important to know whether the merger or acquisition contract contains limits on the kinds of business actions one or both companies may take after the contract is signed and before the transaction is consummated. Restricting actions such as making capital expenditures or bidding on particular contracts during the HSR waiting period could handicap a target company or the buyer of assets to be divested.

The divesting entity also might be willing to describe the steps they took in formulating their proposed divestiture package. They could describe who they approached as potential buyers of a divestiture package and whether potential buyers were permitted to view a data room, what information was included in the data room, whether the identities of all the potential buyers were revealed to Staff. It would be important to know how the divesting entity chose the buyer that it proposed to the Staff. For example, did the divesting entity choose the highest bidder? Did the entity choose a bidder that indicated it would be satisfied with fewer assets in the relevant market or fewer complementary assets that might have been important in achieving scale economies? Did the entity allow the buyer to view the operations of the facility that made the product or provided the service? Has there been entry or exit of businesses in the relevant market since the divestiture? Have there been technological changes that have affected the relevant market? Have there been changes in the suppliers or customers of the product or service?

It would be helpful to discuss these questions with the Staff attorneys who investigated the merger and negotiated a proposed Consent. That could provide the interviewers with information to frame better questions. It might be worthwhile to interview other bidders and ask what information they were given and whether they wanted to acquire the divestiture package. Again the enforcement attorneys ought to be consulted. They may have learned much of this information during the negotiations over the Consent Order.

Divesting entities are less likely to be as forthcoming about other actions if they appear to be designed to handicap the buyer. Beginning with the selection of a proposed buyer, the divesting entity has a wide range of tactics that can reduce the chances of the buyer becoming a powerful competitor. Because the divesting entity proposes the buyer to the Commission, the divesting entity has the opportunity to pick a company that is less likely to be able to fully exploit the asset package and/or willing to leave out important competitive elements from the package. Competitive incentives of the divesting entity are to make the divestiture package as weak as possible and still attract a plausible buyer and obtain approval from the Commission.

The experience in the 1999 Report is that few divesting entities were willing to talk with the Staff conducting the Divestiture Study. I think that result might be improved if it could be demonstrated that the conclusions of the proposed study might benefit merging parties by clarifying what they are allowed to do during the waiting period. Most actions by merging parties have not led to civil penalty actions if possibly inappropriate actions were reversed before the end of the waiting period. Even if the divesting entity is willing to talk solely about matters that had been discussed with Staff, it would be worth asking the divesting entity to elaborate on why they engaged in problematic pre-consummation actions. That discussion might lead to conclusions that Orders need to explicitly prohibit some of those actions or to Commission statements that some actions are inherent in the merger process and must be allowed.

For example, it has been a continuing matter of discussion between merging parties and Staff whether it is permissible for the parties to tell employees if they will retain their jobs after the merger. My answer to this question was almost always that they could not tell or hint that particular employees would be fired (even though public statements often state that the merged company planned to save costs by reducing the labor force). The danger of warning employees that they might be fired is that the best, most marketable employees, might leave for other jobs which might damage the target firm if the merger is blocked and might weaken a division that is destined to be divested. Generally, Staff has advised merging parties that they should try to maintain their workforce by appropriate means such as offering a bonus to employees who stay during the waiting period and are subsequently laid off.

c. Other interviews

The proposed plan rightly suggests that it may be important to interview other competitors in the relevant market, suppliers, and customers. Former employees of what became the divested entity may also be useful sources of information. As a general matter, interviews with these sources may not be necessary in all matters studied. They could be reserved for matters in which there appears to be a need to verify information from the buyers and divesting entities. Or, in matters where the divesting entity refuses to cooperate, these sources might compensate for the lack of information from the divesting entity. Although information from these sources might add useful information to the study or studies, the interviews are likely to add to the time required to complete the study and the complexity of the issues presented to those analyzing the information.

4. The Collection of Annual Dollar Unit and Sales has Limited Use.

There is no doubt that verifiable data about annual sales revenues and units produced can provide useful confirmation of claims by buyers of divested assets that they have launched businesses with the divested assets. It is less clear what else the information will be able to demonstrate. Production data and revenues (and production capacity) have been used to determine the concentration of producers in a market using the Herfindal-Hershman Index (HHI). Initially the 1982 Antitrust Merger Guidelines relied heavily on the degree of concentration before a merger and the amount that concentration would be increased by a proposed merger. Later iterations of the merger guidelines, especially the current 2010 guidelines, have deemphasized concentration data and replaced it with a greater focus on cost margins and the potential for price increases by the merged entity. They also consider entry and exit conditions in the market, innovation, and products not generally included in the market that might be used as substitutes if the merger is consummated and prices are increased.

Although the HHI methodology does do not require production data from all market producers to produce concentration ratios, they generally require data from all large producers. However to estimate the market impact on consumers of changes in concentration from mergers and divestitures requires, as the merger guidelines indicate, more information of the sort described in the paragraph above. Some of this information may be available from the interviews conducted of divesting entities and buyers of divested assets. However it is unclear from the proposed plan how the revenue and production date will be integrated with the interviews.

Studies of mergers and divestitures have generally attempted to determine whether mergers have achieved synergies or obtained anticompetitive profits by examining whether post merger profits or prices have increased and whether post merger stock market valuations of the merged entity have increased. They have also looked to determine if there has been a decline in value of the merged entity or its product prices and to determine if the merged company or some of its divisions have exited from the market. A new book by Professor John Kwoka, *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy (2015)* provides a comprehensive review and analysis of studies of mergers that occurred between 1976 and 2006.

Rather than conduct new studies of the large number of mergers that occurred during that time period, Kwoka, a former economist at the FTC and DOJ, analyzed over 40 studies of the effects of those mergers and the impact of antitrust enforcement actions concerning the mergers. His conclusions indicate that the antitrust agencies challenged only a minority of mergers that resulted in substantial price increases. Furthermore, even mergers in which the agencies obtained a divestiture remedy resulted in average price increases of over 6 %. Average price increases were over 12 %, in mergers where the agencies resolved matters with conduct remedies. This latter conclusion suggests that the agencies were correct in identifying the dangers of those merger but mistaken in the effectiveness of conduct remedies. Twelve percent is substantially higher than the overall average price increases of 4.3% that is associated with all mergers that were studied. He also concluded that mergers were associated with substantial declines in R&D expenditures and the quality of products and services. This book provides a quantitative framework for those who undertake the proposed study that separates the data according to types of remedies used by the agencies to resolve merger matters.

Annual profits or annual costs of the products are better measures of the competitive impact of the divesting entity and the buyer of the divested assets. If the selling price and profits of both companies rise in the three years following divestiture that may be more significant than the total units and sales data that are collected. If the profits of the divested entity are much lower that would be significant. Unfortunately, it is difficult to establish uniform criteria for determining profits and costs. For example, the tax laws allow the buyer of divested assets to restart depreciation deductions for those assets that may have been fully depreciated by the divesting company. This could show higher profits for the buyer without changing the cost of producing the product. Tax and accounting conventions may distort the way a company calculates its costs and profits for both the divesting and the buyer of the divested assets. These kinds of problems make it difficult use price or profit measures to compare the competitive impact of the divestiture on the product market. Because of those difficulties, a report based on unit sales and revenues may present a more objective data set than profit information. However as discussed above, production data seems to be at best a preliminary measure of competitive performance. The proposed plan ought to be explain how these are an acceptable substitute for more direct measures of the competitive impact of the divestiture.

a. Problems with the six years of data that the proposed plan intends to collect.

The proposed plan assumes that supplying this unit and sales data will not be burdensome for the two companies. In the best case scenario where a plant is divested fully staffed with supply and customer contracts transferred along with research technology, facilities, and intellectual property it is most likely to be possible to compare the data for three years prior and three year after the divestiture. Even in this best of all possible instances, it may be difficult to determine the reasons if there are changes in the data of the merged entity and the divested entity. For example, the buying company might have a decline in revenues or units due to its inexperience with industry. It might make mistakes in allocating capital to marketing or research and development. The buyer might alter the product from a premium product, to a lower cost generic product as a way to find a niche in which it can obtain some return on its investment. Or, as was true of at least one of the buyers described in the 1999 Report, the buyer of the divested assets might perform better than the business it acquired. In that acquisition, the buyer claimed its better performance was due to selling a selling improved products and finding new sets of customers. It is not clear how these revenues should be counted if the business of the divested entity then competed less directly with the merged company.

The same problem exists if the divesting company alters the focus of its retained business. For example, the divesting company might decide to reduce its production to create a more distinctive premium version of the product. Some of the shift in the merger guidelines has moved in response to observations by economists that merged companies have sometimes increased the prices of existing brands to raise profits on smaller number of sales and recouped the lost sales by switching customers to other products that had not been considered as part of the relevant market. Such changes in unit and sales data may not be discernable from data concerning units and revenue.

The proposed plan seems to contemplate a further investigation to determine the reasons for changes, but it is not clear that this would be a reasonable use of limited Commission resources or an appropriate burden to place on the divesting companies. To clarify the reasons for the change in annual performance, the study might need to examine all of the factors that are examined in a horizontal merger investigation—interviews or hearings with suppliers, customers, competitors, an investigation of new entrants, of the development of substitute products, etc. Some of this information may be available from the interviews described in the proposed plan. Although such in depth investigations might reveal why the divesting company or the buyer performed better, the significance of the differences in post divestiture performance may not lead to clear insights to how an order might have been made better at the time the divestiture order or contract was entered.

A more common problem of comparing before and after divestiture performance is presented when the remedy is limited to a license for a process technology. The divested technology may or may not have produced revenues for the divesting company. It is likely the buyer of the divested technology will need time to develop the product or service in a marketable form or integrate it with the buyer's existing business. In such circumstances, the buyer may become successful but not have significant revenues in the years preceding the interview. In addition, there may be no way to separate out the contribution of the technology to annual sales data of a product or service where the technology represents only a component of the product or service that is sold.

In licensing remedies and other partial divestitures, it is common to grant the buyer a right to purchase supplies or products from the divesting firm to cover the period before it can make its own products. Such supplies are generally sold to the buyer at a price stated in the divestiture contract. Such supply contracts use negotiated non market based prices, consequently, the revenues and unit sales may not reflect the likely competitive potential of the buyer until it is able to produce or acquire from independent companies its own supplies.

Another common type of order requires the divestiture of a single product of a merging company that produces a larger array of products. If the divested product had been made in a single facility that produces multiple products, was marketed by a sales force that sells multiple products, and advertised under a common brand name, or sold in groups with other products it may be difficult to separate out the revenues generated by the divested product. The buyer of divested assets may have an entirely different cost calculation if it has different production efficiencies as a result of differently integrated operations. Or if the divested assets relate to the production of a component of an integrated product, the buyer may not be able to calculate the impact of the divestiture on its sales or profits. In other words the use of a component of a large integrated product or a process component of integrated production operations may make it impossible for the divesting company to separate the revenues attributable to the acquisition of the divested asset. In some instance, the company will have revenue data for sales of its product and know the number units sold but the competitive relevance of this data may be obscure unless the cost variations of its product or service can be related directly to sales, cost and profits of the buying firm. Similarly, where a line of products is sold, the company may not keep its records in a way that allows it to detail the annual performance of single products.

Another variable that may well affect the comparisons of the divesting firms and the buyer of divested assets during the time period selected in the proposed plan is the Great Recession. Since 2008, it has been difficult for many businesses to obtain loans. Loans were extremely difficult to obtain even for established businesses. Presumably they were even more difficult for those opening new businesses. These financial hurdles may be the key to differences in sales and unit performances during these years. On the other hand, if the buyer of the divested assets was a cash rich company and the divesting company became cash poor as a result of the merger, the buyer might have an advantage.

These and other circumstances can blur inferences from the six year data comparisons. The data is most likely to be useful to signal the need for additional investigation to understand the data. This investigation is likely to require examination of the circumstances of the buyer of divested assets and for a more intensive investigation of the entire market that concerned the Commission. The plan seems to recognize this in suggesting it might be important to examine the industry more closely by looking at entry and exiting of businesses and technological innovations during the time period. It is not clear that such in depth investigations would not unduly burden members of the industry because even if the additional information explains the results of individual divestitures, it may not provide any guidance for how the Commission might frame its divestiture orders and contracts better.

These complexities do not make the unit and revenue data useless. They simply indicate that some comparisons will have limited usefulness.

b. *Consider whether it makes sense to aggregate data of the six year period of the 92 or 53 orders given the differing types of divestitures they include.*

Would an average time for signing a divestiture agreement after an order becomes final, or an average time for launching a competitive business be meaningful? To be meaningful, the divestitures need to be grouped into like categories. The transfer of a turnkey operation, with all facilities, contracts, and personnel ought to be quick. The transfer of pharmaceutical products that require building new manufacturing facilities and FDA approval is inevitably slow. The transfer of intellectual property to create or facilitate the development of a business using the assets might be quick if it can be immediately added to existing operations or it might take a long time or might never happen. Any of these outcomes might promote competition or might be ineffective.

It could be useful to identify whether there appear to be timing patterns that generally apply to these and other types of divestitures. If the Commission had good estimates of how much time particular types of divestiture need to become effective, such information would be useful to the Commission when deciding what kind of remedy it will accept when it concludes that the proposed merger is likely to have anticompetitive effects.

Good estimates of the likely impact of different kinds of remedies could provide helpful information when the Commission is deciding on whether it should accept a particular remedy. But to be helpful, it would be necessary to successfully segregate the data on existing orders into relevant categories and apply that data to the particular type of remedy proposed by the Staff and the merging parties. It might be worthwhile to attempt to categorize the impact of different remedies by looking at the provisions of orders and divestiture contracts, but it may be difficult to define useful categories without sufficient data to make the results reliable. It might be more effective to require future buyers of divested assets, as part of their approval process, to submit detailed plans of how they intend to implement the remedy, how long they expect the implementation to take, and then to report on implementation of their plans after the divestiture.

c. *The failure of companies to supply the data request in the 1990s study suggests that it may be difficult to obtain the unit and sales data that is requested here*.

It seems clear that the proposed inclusion of the Commission's powers to require information under section 6(b) of the FTC Act is designed to obtain data that was not provided in the study during the 1990s. I think this is a strategy that puts at risk both the collection of production data and the voluntary cooperation that was the hallmark of the earlier study.

There is some history to the use of compulsory process to collect large amounts of data from private companies that is not directly related to the investigation of a law violation. The Commission's Line of Business program that was launched in the 1970s was stopped by Congressional action as a result of complaints by the business community. The data was kept confidential in ways that made it inaccessible to enforcement staff of the Commission. Nevertheless, Congress acted even though LOB data was used solely for academic research and not used in the prosecution of antitrust violations.

One reason that there was widespread voluntary participation in the 1990s study may have been that companies were more confident that revealing non quantitative data did not pose a significant risk of providing the Commission with unequivocal indications of law violations. By empowering the Commission to use compulsory process in the proposed plan, companies may be reluctant to provide more than minimal cooperation during interviews or in submitting data. On the other hand the record of the Commission in keeping LOB data confidential and not using information gained in the 1999 study to bring antitrust or civil penalty actions may have demonstrated to the business community that cooperation in interviews and submitting data does not risk prosecutions.

It is difficult to predict the reactions of the business community but the comments to this proposed plan may provide some indications. If there are comments objecting to the use of compulsory process in the proposed study, the Commission ought to abandon the use of compulsory process in the proposed new study of divestiture remedies.

C. The Value of Voluntary Participation

Even if there is not an outcry against compulsory submission of information, voluntary participation has advantages. Some of the 1990s interviews had the flavor of genuine collaboration between the interviewers and those we interviewed. For at least several of the buyers of divested assets, telling the story of their acquisition of divested assets seemed to serve as a way for them to analyze the effectiveness of what they had done and how they might negotiate a better contract in the future.

The company that bought assets that were part of a multi-business complex never made any money from that plant but counted the experience as a positive one. The executives said the company benefitted because it learned how to make the product and took that learning to its freestanding operations. The executives also said that they had learned how to negotiate profitable participation in business complexes that produced products for several independent companies and they had recently negotiated a successful contract in buying an interest in another multi-business complex. Another company modified its contract to allow the divesting company to move supposedly equivalent machinery in return for a much lower price. These machines did not work as well but the buyer was able to produce the relevant product. That company, like the one that could not operate the machines it acquired, felt that it had learned valuable lessons for the future. One of those was that the Compliance Division might be able to help them if it appears that the divesting company had taken unfair advantage of the buyer. This community of interest between the buyer and the Commission was perhaps most important to those buyers who were repeat buyers of divested assets.

It could be useful to point future buyers of divested assets to the 1999 Report, "Negotiating Merger Remedies," and any future study so they may avoid the mistakes of past buyers. The Commission might help buyers avoid such mistakes by demanding of buyers more information about their prior experience in the market and their plans for using the divested assets.

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*The views expressed in this comment are mine and not necessarily those of the American Antitrust Institute.