March 17, 2015

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC–5610 (Annex J)
Washington, DC 20580

Re: Remedy Study, FTC File No. P143100

Dear Secretary:

The American Antitrust Institute respectfully submits these comments in response to the Federal Trade Commission's notice of proposal to conduct a study to update and expand on the its study of divestitures conducted in the mid-1990s.

Sincerely,

Diana Moss

Diana L. Moss
President

American Antitrust Institute
1730 Rhode Island Avenue NW
Suite 1100
Washington DC 20036
202-536-3408
720-233-5971
dmoss@antitrustinstitute.org
www.antitrustinstitute.org

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE (FTC File No. P143100)

I. INTRODUCTION

The American Antitrust Institute (AAI) offers these comments in response to the Federal Trade Commission's (FTC or the Commission) notice of proposal to conduct a study to update and expand on its study of divestitures conducted in the mid-1990s.[1] The AAI heartily endorses and applauds the Commission for undertaking this effort and submits these comments in the spirit of enhancing the effectiveness of the proposed study. The AAI frequently comments on proposals by the federal antitrust enforcement agencies and other regulatory agencies to conduct studies that inform policies and practices, or proposals to issue new or revised rules and policy guidelines.[2] These are important initiatives that can improve competition enforcement and policy and also provide essential transparency and guidance.

As a third-party advocacy organization with expertise that spans a wide variety of issues and industries, the AAI is uniquely positioned to offer commentary on merger remedies. AAI has filed comments under the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (the Tunney Act) and similar state-level proceedings in a number of key merger cases.[3] In these and other commentaries, the AAI has offered analysis and recommendations

---

[1] Federal Trade Commission, Agency Information Collection Activities; Proposed Collection; Comment

[2] The AAI is an independent non-profit education, research, and advocacy organization. AAI's mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. For more information, see www.antitrustinstitute.org.

[3] *See, e.g.,* AAI Urges Massachusetts Court to Reject Conduct Remedy for Anticompetitive Hospital Merger (Sep. 12, 2014), http://www.antitrustinstitute.org/content/aai-urges-massachusetts-court-reject-conduct-remedy-anticompetitive-hospital-merger. *See also*, American Antitrust Institute, Letter to William H. Stallings, *United States v. US Airways Group, Inc. and AMR Corp.*, No. 1:13-cv- 01236 (CKK), Comments of the American Antitrust Institute, AirlinePassengers.org, Association for Airline Passenger Rights, Business Travel Coalition,

on whether proposed remedies are likely to fully restore competition lost by a merger. Those comments, along with other evidence and analysis, provide the basis for our comments on the Commission's proposal to update the 1999 divestiture study ("1999 study").[4]

Almost sixteen years have passed since the Commission last conducted a broad-based study of the effectiveness of its merger remedies. Much has happened in that time. Concentration has increased in key industries. Technological developments, the rise of the Internet, legislative and regulatory initiatives that affect important markets (e.g., implementation of the Hatch-Waxman Act in generic pharmaceuticals and network neutrality in telecommunications), and landmark judicial decisions regarding competitive conduct, have had fundamental effects on competition and merger activity.

Importantly, there is a growing body of evidence from retrospective studies that mergers have, on average, raised prices to consumers.[5] Even Chicago-School proponents conclude that industry concentration has increased and that increase is attributable in part to the relaxation of merger standards.[6] Other evidence casts significant doubt on Chicago-School based claims that mergers have produced efficiencies.[7]

In light of these developments, it is particularly important that the proposed study be well-framed, appropriate in scope, and methodologically sound in order to fully evaluate the

---

Consumer Travel Alliance, and FlyersRights.org (February 7, 2014), http://www.antitrustinstitute.org/sites/default/files/No.%201-13-cv-01236%2C%20Comments%20of%20the%20American%20Antitrust%20Institute%20et%20al.pdf.

[4] Federal Trade Commission, A Study of the Commission's Divestiture Process (1999), https://www.ftc.gov/sites/default/files/documents/reports/study-commissions-divestiture-process/divestiture_0.pdf.

[5] *See, e.g.,* John Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY, MIT Press (2015). Professor Kwoka is a member of AAI's Board of Directors.

[6] *See, e.g.,* Sam Peltzman, Industrial Concentration Under the Rule of Reason, 57 JOURNAL OF LAW AND ECONOMICS S101 (August 2014).

[7] *See, e.g.*, Scott A. Christofferson, Robert S. McNish, and Diane L. Sias, Where Mergers Go Wrong, MCKINSEY ON FINANCE 2004, at 2-3, http://www.ceoexpress.com/asp/mckinseyalls4.asp?id=m0286. *See also* Diana L. Moss, Delivering the Benefits? Efficiencies and Airline Mergers, American Antitrust Institute (November 21, 2013), http://www.antitrustinstitute.org/content/aai-issues-white-paper-delivering-benefits-efficiencies-and-airline-mergers.

effectiveness of the Commission's remedies policies and practices. The AAI's comments focus on a number of important areas where the Commission's proposal would benefit from clarification, expansion, or revision. Key observations are:

- The proposed study should set forth clear criteria for a successful merger remedy and a methodology for evaluating study results against such criteria.
- The limited sample of merger cases to be studied will likely exclude important data, information, and context.
- The proposed study relies heavily on the results of interviews.
- Contemplated short cuts in data and information collection may increase the difficulty of obtaining useful results.
- The proposed approach to collecting sales data excludes other important metrics for evaluating remedies.
- The study is unlikely to answer the important question of whether a structural remedy would have been more effective for the transactions to be studied.

II. THE PROPOSED STUDY SHOULD SET FORTH CLEAR CRITERIA FOR A SUCCESSFUL MERGER REMEDY AND A METHODOLOGY FOR EVALUATING STUDY RESULTS AGAINST SUCH CRITERIA

The objective of the FTC's proposal to update the 1999 study is to (1) assess the effectiveness of its policies and practices involving remedy orders, and (2) identify the factors that contributed to the success (or lack thereof) in achieving the goals of such orders.[8] While the study would collect and analyze information with the intention of updating the 1999 study, the proposal does not clearly articulate the criteria under which remedies will be evaluated and, more important, explain how the methodology will assess the study results against that standard(s). Without criteria for evaluating a successful remedy, the study results and recommendations will be self-limiting, much like a playbook of strategies or post-game analysis has little value without a clear articulation of the rules of the game. This

[8] FTC Proposal, *supra* note 1, at 2423.

heightens the risk that the major questions asked and answered by the proposed study will simply validate the remedies pursued by the FTC in the time period studied.

Informed by the legislative history, intent, and enforcement of Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, the 1999 study noted that the purpose of merger remedies is to fully restore competition following an anticompetitive merger.[9] But even the earlier study did not fully articulate what the standard actually means or explain how study results should be evaluated against the standard. One of the costs of this vagueness was that the 1999 study focused primarily on the viability of potential divestiture assets. However, many factors other than the viability of potential divestiture assets go into determining whether a remedy fully restores competition lost by an anticompetitive merger.

For example, the competition that should be restored following an anticompetitive merger is not just a function of current market participants and conditions. It is also a function of potential outcomes based on the pre-merger resources, expertise, and ambitions of the players in the market, those firms capable of entering the market, and those participants having some interest in or reason to enter. This calculus is more involved than simply taking stock of a static pre-merger landscape. It requires assessing likely new competitive strategies and challenges that are not yet present in a market, but that make competitive business sense. It is also true that fully restoring competition post-merger may require more intrusive remedies in order to generate deterrence. In other words, simply making consumers whole in connection with the merger at hand may not always be enough.

To better frame the proposed study, the AAI suggests that the Commission clearly articulate the well-known standard that the objective of any remedy is to fully restore the

[9] 1999 Study, *supra* note 4, at p.

competition that would otherwise be lost as a result of an anticompetitive merger.[10] The proposal should also explain how the methodology will ensure that the various forms of information to be collected are assessed against this standard, so as to appropriately frame the Commission's policy recommendations.

III. THE LIMITED SAMPLE OF MERGER CASES TO BE STUDIED COULD EXCLUDE IMPORTANT INFORMATION AND CONTEXT

The Commission proposes to limit the merger cases to be studied to a narrow sample. For example, the proposal would consider only mergers (1) within a subset of the total time period that has expired since the 1999 study and (2) in which a remedy was required, as opposed to cleared mergers. These constraints may produce too limited a universe of merger cases to serve as a basis for analyzing the effectiveness of FTC policies and practices regarding remedy orders.

The FTC proposes to study merger orders covering the seven-year period between 2006-2012. The 1999 study covered the five-year period 1990-1994. The Commission is to be commended for expanding the study period for the updated and expanded study. However, the truncated approach will omit close to 200 merger orders issued in the period between 1995 and 2005. This ignores almost 70% of the merger orders issued in the time since the 1999 study – a significant body of information that could potentially inform the Commission's results.

The Commission's major justification for limiting the time period of merger cases to review is that the parties might have forgotten the details and that 2006-2012 is a sufficiently

[10] *See generally* United States v. E.I. duPont de Nemours & Co., 366 U.S. 316, 326, 328-29 (1961). *See also, e.g.*, Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies 13 (Richard Feinstein, Director, Jan. 2012) ("The Commission's objective is to remedy the merger's likely anticompetitive effects and to maintain or restore competition in the relevant market.").

representative period to achieve the goal of the study. We note that the availability of *data* for merger cases from the missing decade is independent of interviewees' memories of post-remedy transitions. Moreover, truncating the study period could miss a particularly tough or unusual remedy, or fail to account for an industry that underwent significant changes that could inform remedy practices and policies. Without a more compelling reason for omitting a full decade of data and information, the AAI suggests that the Commission re-examine the proposed study period.

Another problem is that the FTC study proposes to evaluate only merger orders in which remedies were obtained. This excludes a substantial body of information from non-remedied mergers that could help the Commission assess the effectiveness of its remedies. Indeed, restoring competition after an anticompetitive merger is potentially informed as much by a study of mergers that were cleared as by mergers that were remedied, for a number of reasons.

First, empirical work has identified concentration "creep" in industries as the result of clearing all but the most anticompetitive mergers.[11] The effectiveness of remedies should be evaluated against the backdrop of this dynamic. For example, remedies implemented in a market with lower levels of concentration may not be as effective (or may be completely ineffective) in the same or similar markets but with higher levels of concentration.

Second, appropriate coverage of merger remedies is a critical metric of effectiveness. Studying non-remedied mergers is key to understanding, for example, whether the type, frequency, and severity of merger remedies are sufficient. For example, the merger of white goods manufacturers Whirlpool and Maytag went unchallenged by the U.S. Department of

[11] Kwoka, *supra* note 5.

Justice (DOJ) but has been shown empirically to result in post-merger price increases.[12] Had a remedy that fully restored competition been applied, what would it have looked like and how could it have informed remedy policy in similar scenarios? Likewise, a number of airline mergers have been allowed on the grounds that they would result in substantial consumer benefits and cost savings. But empirical research indicates that airfares have increased in the wake of mergers in the 2000s. What would remedies (or more aggressive remedies) have looked like in Delta-Northwest or United-Continental, and how would that experience inform future remedies policies and practices?

The foregoing questions highlight the importance of looking beyond cases in which the Commission required remedies. This could include cases in which the agencies did not believe a remedy was feasuble at the time, mergers that were cleared subject to a non-enforceable remedy, or those that FTC unsuccessfully tried to block. Identifying such non-remedied mergers would require a search for representative "illustrations." Information on cleared mergers that pose unique fact patterns, outcomes, or implications could be a useful tool for insight into the effectiveness of the FTC's remedy practices and policies. As such, the AAI suggests that the Commission consider expanding its proposed study to also consider DOJ merger consent decrees. Capitalizing on the rich body of remedies experience between the two agecies through a joint study would only serve to enhance the Commission's efforts.

IV. THE PROPOSED STUDY RELIES HEAVILY ON THE RESULTS OF INTERVIEWS

Close to 60% of merger orders to be studied will be examined using an interview methodology similar to the 1999 study. This approach assumes that the technique was

[12] Orley C. Ashenfelter & Daniel S. Hosken & Matthew C. Weinberg, The Price Effects of a Large Merger of Manufacturers: A Case Study of Maytag-Whirlpool, 5 AMERICAN ECONOMIC JOURNAL: ECONOMIC POLICY 239 (2013).

suitable for and successful in achieving the objective of the earlier study. Simply extending the previous approach, however, risks embedding any errors that could limit the objectivity and usefulness of the new study. Nor does it account for the important changes in the competitive landscape since the 1999 study that, as noted earlier, are generating increasing levels of scrutiny and concern.

Heavy reliance on interviews as a way to glean information on the effectiveness of remedies raises a number questions. First, market participants may simply have forgotten what happened in consent orders negotiated in the mid-2000s (at the start of the study period). Second, the FTC proposes to interview only those firms that are still in the market. Those may be firms that did not encounter post-merger problems in competing against the merged firm, or even those firms that fear retaliation from the merged entity and therefore may not be forthcoming to the FTC. Indeed, a lack of enforcement actions involving remedies may suggest that companies are reluctant to complain against the merging firm, even when the remedy fails. What the study does not propose is to interview competitors that exited the market after a merger. Those then-rivals could provide important information that could affect the Commission's assessment.

V. SHORT-CUTS IN DATA AND INFORMATION COLLECTION MAY INCREASE THE DIFFICULTY OF OBTAINING USEFUL RESULTS

The FTC study proposes to use a different approach to merger orders in areas where it has "extensive experience." For example, about 16% of orders will be examined primarily through questionnaires and 26% (involving pharmaceutical industry mergers) will be examined mostly through reviews of monitor reports. In the first case, the proposed approach will produce information that is only as good as the survey questions and overall survey design. Ensuring that questionnaires produce objective results is sometimes difficult

and may require more Commission resources than anticipated.

In the case of pharmaceuticals, the Commission proposes relying on information provided in monitor reports as the major vehicle for information collection. However, pharmaceutical cases are generally more complex than other mergers. They typically involve intellectual property, regulatory, and R&D issues that pose distinct challenges for remedies relative to non-pharmaceutical mergers. Moreover, unlike interviews or questionnaires, which can be standardized, it is unclear how the Commission will address the inherent vagaries and differences in monitor reporting. For these reasons, pharmaceutical mergers should receive more careful attention in the updated and expanded study.

VI. THE PROPOSED APPROACH TO COLLECTING SALES DATA EXCLUDES OTHER IMPORTANT METRICS FOR EVALUATING REMEDIES

The Commission's proposal relies heavily on sales data as the principal metric for evaluating the effectiveness of remedies. The AAI suggests that this one-size-fits-all approach may be inadequate, for two major reasons. First, the FTC proposes to examine data collected for three years before the remedy was imposed, the year in which it was imposed, and three years post-remedy. This raises the broader question of defining the appropriate time fame for evaluating a merger's impact.

Post-remedy transitions are likely to differ across industries (e.g., consumer goods versus innovation markets). Thus, three years of post-remedy data may be insufficient to aid in the assessment of a remedy across all markets examined. Moreover, a remedy's effect may be different when evaluated two years post-merger versus five years post-merger. Capturing this dynamic would require that information be collected not only at three years out, but also at another time interval (e.g., six years out). The proposed study does not, as currently framed, provide for this possibility. Seeking best estimates of appropriate study periods from

a survey of experts might aid in establishing pre- and post-merger study periods.

Second, collecting sales data may work well for pharmaceutical merger divestitures, most of which are in the generic drug industry where pricing information is readily available. But sales information may not tell the whole story of post-merger transitions in cases where other parameters are important. These include, among others, observations on product and service quality, safety and reliability, and R&D.

As framed, the proposal does not explain the rationale for the proposed data collection timeframes or consider additional variables that would be essential in achieving the objective of the updated and expanded study. Among other benefits, modifying the study proposal along these lines would facilitate comparing the results of interviews with the empirical outcomes of the mergers evaluated. Public disclosure of this comparison in the study report would be valuable information for merger enforcement, market participants, and analysts of merger enforcement and policy.

VII. THE STUDY IS UNLIKELY TO ANSWER THE IMPORTANT QUESTION OF WHETHER A STRUCTURAL REMEDY WOULD HAVE BEEN MORE EFFECTIVE FOR THE TRANSACTIONS TO BE STUDIED

Of the mergers that the Commission proposes should be studied through interviews, only about 10% involve behavioral (conduct) remedies or other remedial conditions. Historically, the FTC and DOJ have advocated for structural remedies. Only recently has the DOJ revised its remedies guidelines to be more receptive to behavioral remedies.[13] In practice, conduct remedies are used often, particularly in cases where potential divestitures would need to be relatively large to fully restore competition and if there are economies of

[13] U.S. Department of Justice, Antitrust Division Policy Guide to Merger Remedies (June 2011), http://www.justice.gov/opa/pr/antitrust-division-issues-updated-merger-remedies-guide. *See also*, John E. Kwoka and Diana L. Moss, Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement, 57 ANTITRUST BULLETIN 979 (2012).

coordination and other vertical efficiencies that would be sacrificed as a result of divestiture. In light of this, it would be appropriate to put special emphasis on behavioral remedies so that the Commission can take advantage of a clear opportunity to explore whether empirical results support the shift in policy.

More emphasis on conduct remedies is also appropriate because their effectiveness in fully restoring competition has come under fire in a number of key merger cases, including Comcast-NBCU and Ticketmaster-LiveNation. Moreover, the incremental ratcheting up of market concentration over time is likely to have a material impact on the need for structural versus conduct remedies. In light of the controversy surrounding conduct remedies, the AAI suggests that the FTC proposal focus significantly more on a comparative assessment of structural and conduct remedies to determine whether a structural remedy would have been more effective. This inquiry, however, may be limited by the structure of the FTC's proposed study. To the extent there are behavioral remedies in merger cases during the omitted 1995-2005 period, the Commission should consider including that period in the study.

Respectfully submitted,

Diana Moss
President

American Antitrust Institute
1730 Rhode Island Avenue NW
Suite 1100
Washington DC 20036
202-536-3408
720-233-5971
dmoss@antitrustinstitute.org
www.antitrustinstitute.org