

**Supporting Statement for a Paperwork Reduction Act  
Submission to OMB  
FTC Study of Patent Assertion Entities**

The Federal Trade Commission (“Commission” or “FTC”) proposes to collect information about the organization, structure, economic relationships, and activity of Patent Assertion Entities (“PAEs”), including their acquisition, assertion, litigation, and licensing practices. The Commission will seek the information necessary to prepare this analysis through compulsory process under Section 6(b) of the FTC Act, 15 U.S.C. § 46(b) (“Section 6(b”).<sup>1</sup>

**PART A – JUSTIFICATION**

**1. Necessity for Information Collection**

PAEs<sup>2</sup> are firms that purchase patents and then seek to generate revenue by asserting them against, and securing licenses from, persons who are already practicing the patented technology.

Currently, the public record of PAE activity is based on publicly available litigation data. PAE activity, however, encompasses a wide range of non-public behavior related to acquisition, assertion, and licensing practices, together with issues related to the organization and economic relationships of PAEs. Data that would permit an analysis of these aspects of PAEs is not available through the public record or from any single private source. The proposed collection of largely non-public information is necessary, therefore, to facilitate a better understanding of the operation and competitive effects of PAEs.

Members of Congress have expressed their support for the FTC’s proposed study. Urging the Commission, “to address the abusive practices of patent assertion entities (PAEs) that are a drag on innovation, competition, and our economy,” Senator Amy Klobuchar has stated that she “appreciate[s] Chairwoman Ramirez’s intention to ask the full Commission to commence a study under Section 6(b) of the Federal Trade Commission (FTC Act).”<sup>3</sup> Representative Lipinski

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<sup>1</sup> Section 6(b) of the FTC Act empowers the Commission to require the filing of “annual or special . . . reports or answers in writing to specific questions” in order to obtain information about “the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals” of the entities to whom the inquiry is addressed.

<sup>2</sup> The Commission distinguishes PAEs from other non-practicing entities or NPEs that primarily seek to develop and transfer technology, such as universities, research entities and design firms. FED. TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION, 8 n.5 (2011), *available at* <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>.

<sup>3</sup> Letter from Senator Amy Klobuchar to The Honorable Edith Ramirez, Chairwoman, The Honorable Julie Brill, Commissioner, The Honorable Maureen K. Ohlhausen, Commissioner, and The Honorable Joshua D. Wright, Commissioner (June 24, 2013).

“strongly urge[s] the FTC to follow through with [a Section 6(b) study of PAE activity],”<sup>4</sup> and Representative Murphy “looks forward to reviewing the results of [the FTC’s] inquiry.”<sup>5</sup>

PAE activity is a growing issue for the United States’ economy. For example, last June, the Executive Office of the President reported that the number of “suits brought by PAEs have tripled in just the last two years, rising from 29 percent of all infringement suits to 62 percent of all infringement suits,” and this activity may have “a negative impact on innovation and economic growth.”<sup>6</sup> In February of this year, the President renewed his call for legislation to combat abusive PAE practices,<sup>7</sup> and several bills pending in Congress address reforms directed toward PAE activity.<sup>8</sup>

The Commission has studied PAE activity for several years, and its research points to the need for an empirical record covering non-public PAE activity. The Commission first discussed the rise of the PAE business model in its 2011 Report, “The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition.”<sup>9</sup> In that report, the Commission defined a PAE as a firm with a business model focused primarily on purchasing and asserting patents, typically against operating companies with products currently on the market. In addition, on December 10, 2012, the Commission and the Antitrust Division of the United States Department of Justice (DOJ) jointly sponsored a workshop to explore the claimed harms and efficiencies of PAE activity and the impact of PAE activity on innovation and competition more broadly.<sup>10</sup>

Workshop panelists and commenters associated with the 2011 Report and the 2012 workshop provided anecdotal evidence of potential harms and efficiencies of PAE activity. These participants stressed the lack of comprehensive empirical evidence, and urged the Commission to use its Section 6(b) authority to collect information on PAE acquisition, litigation, assertion, and

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<sup>4</sup> Letter from Representative Daniel Lipinski to The Honorable Edith Ramirez, Chairwoman (June 25, 2013).

<sup>5</sup> *Subcomm. on Oversight and Investigations Hearing on “The Impact of Patent Assertion Entities on Innovation and the Economy”* 113rd Cong. 1 (2013).

<sup>6</sup> EXECUTIVE OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION at 1-2 (2013), *available at* [http://www.whitehouse.gov/sites/default/files/docs/patent\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf).

<sup>7</sup> Press Release, Office of the Press Secretary, FACT SHEET-Executive Actions: Answering the President’s Call to Strengthen Our Patent System and Foster Innovation (FEB. 20, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/02/20/fact-sheet-executive-actions-answering-president-s-call-strengthen-our-p>.

<sup>8</sup> *See, e.g.* H.R. 3309, 113 Cong. (2013); S. 1720, 113 Cong. (2013). The proposed 6(b) study has been cited as a potential resource to be considered in connection with pending reform legislation. *Subcomm. On Oversight and Investigations Hearing on “The Impact of Patent Assertion Entities on Innovation and the Economy”* 113rd Cong. 1 (2013) (statement of Rep. Murphy) (“we look forward to reviewing the results of this [6(b)] inquiry and in the meantime will continue to further our understanding of such practices.”).

<sup>9</sup> FED. TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (Mar. 2011), (“2011 IP Report”), *available at* <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>.

<sup>10</sup> *See* Patent Assertion Entity Activities Workshop, Fed. Trade Comm’n, <http://www.ftc.gov/opp/workshops/pae/>.

licensing practices. Respondents to the Commission's first Federal Register Notice for this study<sup>11</sup> likewise stressed the need for Commission research in this area.

The Government Accountability Office (GAO) has also recognized deficiencies in the existing record of non-public PAC activity. As part of the America Invents Act,<sup>12</sup> Congress directed GAO to study the costs, benefits, and economic impact of PAE litigation, and to make policy recommendations. GAO issued its report on August 22, 2013.<sup>13</sup> It found that over the period 2007 to 2011, the share of all patent lawsuits accounted for by PAEs rose from 17 percent to 24 percent and that suits by PAEs included about twice as many defendants as suits by manufacturing companies.<sup>14</sup> GAO, however, emphasized several data deficiencies that limited its ability to examine the issues identified by Congress. First, GAO reported that patent assertions frequently do not result in litigation, which is publicly observable, and that it could not obtain reliable data on such assertions.<sup>15</sup> Second, GAO could not collect information on litigation costs from court records or the sample data, nor obtain information on the settlements that resolve most cases.<sup>16</sup>

Responding to these requests, and recognizing its own role in competition policy and advocacy, the Commission proposes a Section 6(b) study that will provide a better understanding of the organizational structure and economic relationships of PAEs, as well as their activity and associated costs and benefits.

## **2. How the Data Will Be Used**

The Commission will use the study to publish a report describing non-public PAE activity that would otherwise not be available. The proposed study has two components: (1) a case study of 25 PAEs reflecting different types of PAE business models; and (2) a case study comparing patent assertion by manufacturing firms and non-practicing entities ("NPEs")<sup>17</sup> in the wireless chipset industry.

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<sup>11</sup> See Agency Information Collection Activities; Proposed Collection; Comment Request, 78 Fed. Reg. 61,352 (Oct. 3, 2013).

<sup>12</sup> Pub. L. No. 112-29 § 34 (2011).

<sup>13</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, ASSESSING FACTORS THAT AFFECT PATENT INFRINGEMENT LITIGATION COULD HELP IMPROVE PATENT QUALITY (2013) at 17, available at <http://www.gao.gov/products/GAO-13-465>. The GAO study used different terminology to describe patent assertion activity, referring to both NPEs and "patent monetization entities," defined as companies that "buy patents from others for the purpose of asserting them for profit." *Id.* at 2.

<sup>14</sup> *Id.* at 118.

<sup>15</sup> *Id.* at 26-27, 35.

<sup>16</sup> *Id.* at 25-26, see also Sara Jeruss, Robin Feldman & Joshua Walker, *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 DUKE TECH. L. REV. 357, 361 (2012) ("[F]or many years, discussions about non-practicing entities have featured ample speculation, but lacked empirical data.").

<sup>17</sup> NPEs are patent owners who primarily seek to develop and transfer technology. This differs from PAEs, whose business model focuses primarily on purchasing and asserting patents. See 2011 IP Report at 8, n.5.

The proposed case studies will provide policymakers with a far better understanding of PAE activity. The Commission intends to prepare both a descriptive summary of its findings, explaining PAE business strategy in greater detail than is currently available, as well as a quantitative summary, describing the practices of PAEs. While the findings of these case studies will not be generalizable to the universe of all PAE activity, the results will provide a uniquely valuable and highly useful view of activity that is not currently available through the public record.

The proposed information requests cover, among other things, information regarding: (1) how PAEs are organized; (2) what types of patents PAEs hold, and how they organize their holdings; (3) how PAEs acquire patents; (4) the strategies PAEs employ to assert their patents and secure licenses, and the characteristics of the resulting agreements, (5) costs for and revenues from PAE assertion activity.

**How are PAEs organized?** The Commission intends to gather data regarding the corporate structure and legal organization of PAEs, including the identity of their parent, subsidiary, and related firms. The Commission will use this data to understand how PAEs are organized and why they might choose different forms. For example, there is evidence that some PAEs assert their patent holdings through shell companies, which can increase the costs of negotiating licenses (transaction costs) for technology adopters and frustrate their ability to negotiate global settlements that would cover a broader range of patents.<sup>18</sup> There is also some evidence that a PAE with legal or economic ties to a manufacturing firm may have incentives to assert patents against the rivals of the manufacturer (sometimes referred to as “privateering”). Because PAEs do not face the same risk of countersuit as manufacturers, privateering may increase the costs of doing business for some competitors, and burden competition in the targeted markets. The nature and extent of these relationships, as well as the potential to change market dynamics, however, is not well understood. The data the Commission seeks on PAE legal structure will provide a more robust picture of PAEs as business organizations, which is relevant for understanding the competitive implications of PAE activity.<sup>19</sup>

**What types of patents do PAEs hold, and how do they organize their holdings?** The study will collect data regarding PAE patent holdings, including the characteristics of PAE patent portfolios. To reduce the burden on respondents of collecting this information, the Commission has worked with the United States Patent and Trademark Office (USPTO) to collect USPTO’s publicly available data on patent holdings. The Commission will use this data to

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<sup>18</sup> See, e.g., EXECUTIVE OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION at 4 (2013) (noting that it is “generally seen” that PAEs “may hide their identity by creating numerous shell companies and requiring those who settle to sign non-disclosure agreements, making it difficult for defendants to form common defensive strategies (for example, by sharing legal fees rather than settling individually).” See also Feldman at 4.

<sup>19</sup> See Chairwoman Edith Ramirez, Competition Law & Patent Assertion Entities: What Antitrust Enforcers Can Do, Opening Remarks at Computer & Communications Industry Association and American Antitrust Institute Program at 9 (June 20, 2013) (“The assertion of patent rights by a PAE may also raise antitrust concerns, especially if the PAE is effectively acting as a clandestine surrogate for competitors ... But hybrid PAE activities may fall within the scope of antitrust enforcement where there is evidence of harm to competition and consumers.”)

develop a better understanding of the types of patents held and asserted by PAEs, which will inform a number of policy issues.

The Commission also intends to use this data to determine whether PAEs employ strategies in patent acquisition that may have an adverse competitive impact. There have been some reports that PAEs tend to acquire late-term or low-quality patents.<sup>20</sup> Assembling portfolios of substitute patents may also raise competition concerns.<sup>21</sup> Collecting data about PAE patent portfolio characteristics will help shed light on the extent to which these practices occur, the strategies they reflect, and the impact they may have on competition.

The proposed requests also call for information regarding all commitments made to Standard Setting Organizations. Patent holders that participate in the standard-setting process often make commitments to Standard Setting Organizations to license their patents to third parties to encourage implementation of a standard that incorporates the patents. Some have expressed concern that PAEs could attempt to evade that commitment by later transferring these encumbered patents to a new entity.<sup>22</sup> The Commission intends to observe the extent to which this may occur in practice.

**How do PAEs acquire patents?** All of the various kinds of PAEs share a common characteristic: they do not themselves engage in research and development activities to generate the patents they own; they acquire patents from third parties. The Commission intends to investigate how PAEs acquire patents and, in particular, their economic relationships with inventors. Very little is known about the relationships between PAEs, the previous owners of patents acquired by PAEs, and the entities that finance PAEs' purchases of patents. Some have argued that PAEs can provide an otherwise unavailable opportunity for inventors, often individuals or small businesses, to generate revenues and profits from their patents by serving as a cost-effective means of licensing them more widely. If that is the case, PAEs might help to promote innovation by enhancing the economic incentives of inventors to invent. The proposed information requests will show whether this claim is borne out in practice among the PAEs in the case study, and whether PAE activity has benefitted the relevant inventors.<sup>23</sup>

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<sup>20</sup> See, e.g., EXECUTIVE OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION at 4 (2013) (noting that it is “generally seen” that PAEs “acquire patents whose claim boundaries are unclear, and then (with little specific evidence of infringement) ask many companies at once for moderate license fees, assuming that some will settle instead of risking a costly and uncertain trial.”).

<sup>21</sup> Ramirez, *supra* note 19 at 9 (“With respect to PAEs, antitrust concerns may arise with respect to their formation – the assembly of a patent portfolio through one or more acquisitions – or the assertion of a portfolio once assembled. Portfolio acquisitions that combine substitute patents, for example, may raise the risk of harming competition.”)

<sup>22</sup> See, e.g., Verizon Comment (Verizon) at 2. Public comments responding to the FTC’s October 3, 2013 Federal Register Notice (78 Fed. Reg. 61,352) announcing the study are available at <http://www.ftc.gov/policy/public-comments/initiative-501>.

<sup>23</sup> Ramirez, *supra* note 19, at 7 (“On the benefits side of the equation, we know little more today than we did in 2011. One recent widely cited study claims PAE’s return approximately 25% of the costs imposed on defendants back to inventors. ... Thus, the limited evidence we have today tends to support the Commission’s concern that PAEs may do more to distort than improve incentives to invent.”); Commissioner Joshua D. Wright, What Role Should Antitrust Play in Regulating the Activities of Patent Assertion Entities?, Remarks at Dechert Client Annual

**What strategies do PAEs employ to assert their patents and secure licenses, and what are the characteristics of the resulting agreements?** Patent assertion is a key aspect of PAE activity. As noted above, the limited empirical research of PAE activity to date is based on publicly available litigation data, which does not include any information about licenses, even when secured through settlements of litigation. The Commission’s proposed requests will gather information about both licenses secured through non-litigation assertion activity and licenses secured through litigation.

The principal way PAEs monetize their patents is by licensing firms allegedly using the patented technology. PAEs may secure licenses with or without commencing litigation. However, while the filing of an infringement claim is public, the majority of settlement activity is not. Even if settlement follows the filing of a lawsuit, the terms of patent settlements rarely are public. The Commission also intends to request that PAEs submit copies of “demand letters” they have sent during assertion efforts to understand more fully the strategies PAEs employ when asserting patents. The collection of currently unavailable information on settlement characteristics and assertion strategies will provide a more thorough basis for any policy analysis of the likely impact of PAE activity on competition and innovation.

**What does assertion activity cost PAEs and what do PAEs earn through assertion activity?** The study will reveal PAEs’ costs and revenues for acquiring and asserting patents, providing a deeper understanding of the economics of PAE activity within the study sample. Because PAEs specialize in patent assertion, including litigation, they may be able to assert patents at lower costs than the original inventors. Some market participants have claimed that PAEs have lower discovery costs than operating companies, and that this lower cost allows them to bargain more effectively. The data will provide insight into whether, as some commentators claim, the PAE business model enjoys lower costs due to specialization, which may be beneficial to competition.<sup>24</sup>

The proposed information requests also ask whether the responding firms have ever assigned a value to any of their patents. There is some evidence to suggest that PAEs demand licensing fees that are significantly greater than the acquisition costs of the patents.<sup>25</sup> The study will examine the difference between patent acquisition costs and licensing fees, and endeavor to understand the factors that allow PAEs to extract greater value from the patents they acquire, and how these features of the PAE business model are likely to impact competition.

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Antitrust Spring Seminar at 9 (April 17, 2013) (“the key issue regarding PAEs from an antitrust perspective, and for which we have very little evidence, is the extent to which PAE activity contributes to innovation. To answer that we need to know ... What share of these costs goes to inventors (or patentees)? ... To what extent is this added compensation to inventors stimulating innovation?”).

<sup>24</sup> See Ramirez, *supra* note 19, at 3 (“Rewarding genuine invention is good for competition and consumers. PAEs can serve that goal by reducing the enforcement hurdles facing small inventors and start-ups ... PAEs may also increase liquidity in the secondary market for patents, which can drive funding to R&D); Wright, *supra* note 22, at 9 (“In short, PAEs hold themselves out as intermediaries between inventors who engender patents and technology-driven practicing entities. The critical question is, of course, to what extent these benefits increase innovation or otherwise enhance consumer welfare.”)

<sup>25</sup> See Microsoft Corp. Comment (Microsoft) at 2; Apple, Inc. Comment (Apple) at 3.

In addition, the proposed information requests will examine how the costs and revenue associated with PAE activity are distributed among third parties. Understanding how the risks of gain and loss, as well as costs and revenues, are shared between the PAEs and interested third parties is essential to understanding whether PAEs may foster innovation or have the potential to affect competition adversely. For example, this information may shed light on whether PAE activity has any potential to affect the incentive to innovate because it provides returns to inventors.

### **3. Information Technology**

Improved information technology may assist in gathering and producing this information. Consistent with the aims of the Government Paperwork Elimination Act, 44 U.S.C. § 3504 note, the Commission will allow the submission of information through electronic or automated collection techniques. It will provide all study subjects with an electronic template in which to enter much of the requested information. The template should significantly reduce the burden of responding to the requests. It will also facilitate the Commission's analysis of the data collected, permitting it to more easily collect, compare, and contrast responsive information submitted by different parties. In addition, the Commission will use database software to compile information and further facilitate its review and analysis.

### **4. Efforts to Identify Duplication/Availability of Similar Information**

Currently, there is no sufficiently comprehensive and public source of information that would allow the Commission to otherwise achieve the goals of the proposed study. Existing studies of PAE activity rely on publicly available patent and litigation information and note the limitations of the available data. A significant portion of PAE activity is conducted through communications and agreements that are confidential or not publicly available and often are subject to non-disclosure agreements. In addition, there is no publicly available source for cost and revenue information, including the details of assertion activity, settlements, and licensing.

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

Because the requests focus on portfolio and assertion information, the burden on small organizations that hold relatively few patents and engage in limited assertion activity will be minimal. The Commission has made efforts to ensure that the burden imposed by the requests is largely proportional to each study subject's (1) patent holdings, and (2) volume of patent acquisition and assertion activity. In addition, because patent acquisition and assertion is the primary business activity of most PAEs, the information necessary to respond to the requests should be readily accessible to all responding firms. Therefore, the Commission expects that the requests will not have a significant impact on a substantial number of small entities.

### **6. Consequences to Federal Program and Policy Activities and Obstacles to Reducing Burden**

If the information is not collected, the Commission will not have the data necessary to prepare a well-documented study describing non-public PAE activity that can inform future Commission policy, as well as the policymaking of other interested federal agencies that address

competition, innovation, and intellectual property issues. For example, as discussed above, this lack of empirical data has already complicated GAO's attempts to study PAE activity.

The Commission believes that the proposed study will enable it to provide a more comprehensive descriptive picture of PAE structure, organization, acquisition, and assertion behavior, which will assist many organizations and individuals to understand more fully the scope of PAE activity in the economy. This one-time collection will not create a repetitive burden for respondents. As described in the responses to the comments, the Commission has endeavored to minimize the burden of the information requests by carefully limiting them to the information necessary to complete the study and by providing a template to assist in the organization and submission of the data.

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

The collection of information in the proposed survey is consistent with all applicable guidelines contained in 5 C.F.R. § 1320.5(d)(2).

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

As required by 5 C.F.R. § 1320.8(d), the Commission published a notice seeking public comment on the proposed collections of information, and, consistent with 5 C.F.R. § 1320.10(a) is doing so again contemporaneous with this submission. To maximize transparency, and support robust commenting, the Commission published all of the questions that it proposed to direct to respondents. The Commission also extended the comment deadline in response to requests for additional time to respond.

The Commission received 70 comments on the proposed information collection requests. Responses came from a wide variety of commenters including Intellectual Ventures, Acacia Research Corporation, Microsoft, Intel, Qualcomm, Apple, Nokia and Verizon. A number of professional and bar associations, such as the Intellectual Property Owners Association (IPO), the American Antitrust Institute (AAI), and the American Intellectual Property Law Association (AIPLA), also submitted comments, together with trade associations representing both small and large businesses.<sup>26</sup> In addition, the Commission received comments from a number of law professors and attorneys general,<sup>27</sup> individual inventors, attorneys, and interested members of the public.<sup>28</sup>

Almost all commenters recognized the lack of existing public information and expressed support for a study of PAE activity. Some commenters proposed ways to increase the utility, or

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<sup>26</sup> These include the National Restaurant Association, the Application Developers Alliance, the Food Marketing Institute, the Consumer Electronics Association, the Computer & Communications Industry Association, the Direct Marketing Association, and the Software & Information Industry Association.

<sup>27</sup> This includes Professors Michael Risch (Villanova University), Robin Feldman (University of California, Hastings) and Jorge Contreras (American University), as well as Kamala Harris, Attorney General of California and the National Association of Attorneys General, joined by the Attorneys General of 43 states.

<sup>28</sup> See, e.g., comments of Philip Conrad, Todd Glassey and William Redmann.

decrease the burden, of responding to requests. Most comments stated that the proposed study will have practical utility, that it is necessary for the proper performance of the Commission's functions, or otherwise stressed the importance and value of the study. As discussed below, the Commission has incorporated many of the suggestions by the commenters into its revised study.

**A. Practical Utility of the Proposed Study/Necessity for the Proper Performance of the Commission's Functions**

**Comment:** The FTC has a unique dual mission that encompasses both consumer protection and competition concerns. In addition to its enforcement authority, which covers both “unfair or deceptive acts and practices” and “unfair methods of competition,” Congress also empowered the Commission to use compulsory process to: “gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce....” 15 U.S.C. § 46(a). The Commission judiciously uses its study authority to examine and better understand industries and practices that are likely to affect competition and consumers.

Although the particular mechanisms of PAE operation are not well understood, the Commission's past studies, more recent scholarship, and our 2012 Workshop all suggest that PAE activity may be affecting competition, innovation, and consumers in a variety of ways that are not fully understood at this time.

Almost all commenters on the first Federal Register Notice supported the Commission's study of PAE activity. Intellectual Ventures noted that “a well-designed and executed 6(b) study would provide useful insights into the effect of PAE activity.”<sup>29</sup> Acacia Research Corporation noted that it “welcomes the FTC's study of this important issue.”<sup>30</sup> Microsoft similarly noted that it “supports the FTC's efforts to gather additional information to both supplement current knowledge of PAEs and to better understand the costs and benefits of their behavior.”<sup>31</sup> The Stop Patent Abuse Now (SPAN) Coalition stated that it “strongly supports the Commission's decision to conduct a 6(b) study of patent trolls.”<sup>32</sup> Likewise, AIPLA explained that there “is an urgent need for more information to ensure that policy decisions are appropriately grounded.”<sup>33</sup> The United States Telecom Association (USTelecom) noted that “the opaque nature of the PAE business model makes the FTC's inquiry into their activities both timely and imperative.”<sup>34</sup>

Commenters agreed that data generated by the proposed requests will illuminate critical aspects of PAE activity and have practical utility. Professor Robin Feldman noted that the

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<sup>29</sup> Intellectual Ventures at 1.

<sup>30</sup> Acacia Research Corp. Comment (Acacia) at 3.

<sup>31</sup> Microsoft at 1.

<sup>32</sup> SPAN Coalition Comment (SPAN) at 1.

<sup>33</sup> AIPLA Comment (AIPLA) at 2.

<sup>34</sup> USTelecom Comment (US Telecom) at 3.

proposed requests “are a rational and reasonable approach to understanding a complex problem.”<sup>35</sup> The Computer & Communications Industry Association (CCIA) noted that “the set of questions that the FTC has prepared are thorough and properly directed toward information that should shed light on the heretofore-mysterious PAE business model.”<sup>36</sup> Red Hat noted that, “as put forward by the FTC, the proposed 6(b) industry study will add significantly to the existing literature and evidence on PAE behavior.”<sup>37</sup> The Consumer Electronics Association (CEA) noted that the proposed requests “are necessarily broad and will illuminate the many dimensions of PAEs’ conduct in a way that no other entity is capable.”<sup>38</sup> The National Association of Attorneys General expressed that “we believe the merits of the proposed information request are beyond question.”<sup>39</sup> Kellogg Huber Hansen noted that the proposed requests “are necessary to determine the net effect of PAE activity on innovation.”<sup>40</sup> Verizon noted that “developing the full scope of the information requested in the FTC’s draft questions is likely to enable important research into the effects of PAE activity.”<sup>41</sup> As noted in more detail below, commenters also made a number of proposals to increase the utility of specific requests, which we have taken into account in revising the requests.

In addition, several respondents recognized that the Commission’s use of its 6(b) authority will address the limitations of previous studies that relied upon publicly available litigation data. The National Retail Federation noted that the Commission’s 6(b) authority makes the study “a unique opportunity to gain a complete picture of patent troll activity through the collection of nonpublic information including licensing agreements, patent acquisition information, and data on PAEs’ costs and revenue.”<sup>42</sup> The Software & Information Industry Association (SIIA) noted that previous “studies have focused primarily on publicly available litigation data,” and that “certain licensing agreements, patent acquisition information, and cost and revenue data that was not available to researchers in prior studies would be potentially available to the FTC.”<sup>43</sup> Professor Feldman noted that “lack of information is particularly problematic for the 90% of patent demand activity that occurs outside the courthouse.”<sup>44</sup>

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<sup>35</sup> Feldman at 5.

<sup>36</sup> CCIA Comment (CCIA) at 2.

<sup>37</sup> Red Hat, Inc. Comment (Red Hat) at 1.

<sup>38</sup> CEA Comment (CEA) at 4.

<sup>39</sup> National Association of Attorneys General Comment, joined by 43 State Attorneys General (NAAG) at 2.

<sup>40</sup> Kellogg Huber Hansen Todd Evans & Figel, PLLC Comment, on behalf of Adobe Systems, Inc., Canon U.S.A., Inc., Cisco Systems, Inc., Dell Inc., Ford Motor Company, Google, Inc., Hewlett-Packard Company, Limelight Networks, Inc., Rackspace US, Inc., and SAP Americas, Inc. (Kellogg Huber Hansen) at 6.

<sup>41</sup> Verizon Comment (Verizon) at 1.

<sup>42</sup> National Retail Federation Comment (NRF) at 1. *See also* Public Knowledge, the Electronic Frontier Foundation, and Engine Advocacy Comment (Public Knowledge) at 1 (“the Section 6(b) study would generate substantial empirical data particularly useful not only to the FTC for carrying out its mission of protecting consumers, but also to businesses, researchers, and policymakers.”)

<sup>43</sup> SIIA Comment (SIIA) at 2.

<sup>44</sup> Feldman at 3.

Professor Contreras noted that the study “is likely to inform the policy debate concerning this contentious topic, and should become a valuable resource for industry, scholars, and policymakers.”<sup>45</sup> The Internet Commerce Coalition noted that “an FTC investigation is the only realistic way to obtain information” about these PAEs.<sup>46</sup>

Many commenters believed that that any burden imposed by the proposed requests is justified. Intel said that “any burden that the Commission’s information requests will impose on PAEs is insignificant in relation to the burdens that PAEs impose on the economy...”<sup>47</sup> Similarly, Kellogg Huber Hansen, writing on behalf of a number of technology companies, noted that “the cost to the PAEs of complying with the information requests is small compared to the burden PAEs impose on the economy.”<sup>48</sup> Public Knowledge, the Electronic Frontier Foundation, and Engine Advocacy noted that “the public value of the information to be retrieved vastly outweighs the minimal burden of producing information on the part of PAEs and other entities.”<sup>49</sup> Professor Feldman noted that that the requests in the “proposed inquiry are not unduly burdensome and are reasonably related to finding essential information.”<sup>50</sup> The Retail Industry Leaders Association similarly noted that “the proposed Section 6(b) request strikes the appropriate balance between the benefits of the information to be obtained ... and the potential burdens imposed.”<sup>51</sup> The SAS Institute noted that the study “is well worth the burdens it may impose.”<sup>52</sup>

**Response:** The proposed study directly supports the FTC’s mission critically to examine industries and practices that affect the economy. It will aid the Commission, other agencies engaged in policymaking with respect to competition, innovation, and patents, as well as industry and researchers to gain a better understanding of the operation and potential effects of PAE activity. No other public agency is as well situated as the Commission to undertake the study, and many have urged the FTC to do so. As is more fully discussed, below, the Commission has addressed concerns expressed in the comments about the utility and burden of the proposed requests by modifying them in significant ways to sharpen their focus and reduce their likely burden.

## **B. Suggestions to Reduce Burden**

As discussed more fully below, the Commission has seriously considered Commenters requests to reduce the burden of this study. For example, the Commission has: (1) simplified the

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<sup>45</sup> Professor Jorge Contreras Comment (Contreras) at 1.

<sup>46</sup> ICC Comment (ICC) at 1.

<sup>47</sup> Intel Comment (Intel) at 3.

<sup>48</sup> Kellogg Huber Hansen at 1.

<sup>49</sup> Public Knowledge at 7.

<sup>50</sup> Feldman at 4.

<sup>51</sup> Retail Industry Leaders Association Comment (RILA) at 1.

<sup>52</sup> SAS Institute Inc., Limelight Networks Inc., VIZIO, Inc., Newegg, Inc., Citrix Systems, Inc., Xilinx, Inc., ABBYY USA Software House, Inc., and Altera Corporation Comment (SAS Institute, *et al.*) at 2.

study questions and removed questions that could lead to attorney-client privileged information; (2) narrowed the beginning of the study from January 1, 2008 to January 1, 2009; (3) clarified that the comparative case study focuses on the wireless chipset sector, not the broader wireless industry; (4) clarified that the comparative case study includes fewer questions directed towards manufacturing firms and NPEs; and (5) worked with the USPTO to remove questions directed towards publicly available information.

## 1. Document Requests Calling for “All Documents”

**Comment:** The Commission’s initial proposed requests called for “all documents” related to a number of topics, including patent acquisition, demands, and licensing. Several commenters expressed the concern that these requests were too broad. Intellectual Ventures noted that “such requests are overbroad, unduly burdensome, and perhaps most important, will not provide the Commission with the information needed to meet its goals.”<sup>53</sup> Qualcomm noted that such requests would call for information that “may be entirely irrelevant to the issues surrounding PAE activity.”<sup>54</sup>

Some commenters proposed that the Commission reduce the scope of its requests.<sup>55</sup> InterDigital suggested that several document requests be revised to “require only high level presentations or ‘documents sufficient to show’ instead of ‘all documents.’”<sup>56</sup> Intellectual Ventures suggested that requests be limited to documents “such as board and investor presentations or regulatory disclosures that reflect the culmination and finalization of ideas that were considered, refined, and accepted or rejected, and facts and data that were accumulated and validated.”<sup>57</sup>

**Response:** To avoid unnecessary burden while still collecting the information necessary to provide a robust study, the Commission has substantially reduced the scope of its document requests. In most instances, the Commission has replaced its requests for “all documents” with narrower requests tailored to specific types of documents. For example, the Commission replaced its request for “all documents Relating to the Firm’s Acquisitions” of patents with specific requests for “agreements... relating to any Acquisitions” as well as related Reports, limited to “studies, analyses, and reports which were prepared by or for any officer(s) or director(s) of a corporate entity ... or presented to any Person outside the Firm.”

## 2. Information Requests Calling for Additional Analysis

**Comment:** Some commenters expressed the concern that some of the initial proposed requests may call for the creation of factual or legal analyses that might not be in the possession

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<sup>53</sup> Intellectual Ventures at 13.

<sup>54</sup> Qualcomm Comment (Qualcomm) at 7.

<sup>55</sup> Intellectual Ventures at 13-19; InterDigital at 11; Qualcomm at 8.

<sup>56</sup> InterDigital at 11.

<sup>57</sup> Intellectual Ventures at 14.

of a responding firm. Intellectual Ventures noted that several requests “require respondents to summarize the documents they produce.”<sup>58</sup> Nokia suggested that “where information will clearly be available from requested documents, recipients should not also be put to the additional burden and expense of setting out information abstracted from the documents to the FTC.”<sup>59</sup>

Some comments expressed concern about proposed requests calling for the identification of specific patents subject to license agreements or licensing commitments. InterDigital noted that answering the proposed request calling for “whether the Firm has licensed the Patent to any Person(s),” would “entail legal analysis and opinion” because “many agreements do not list the licensed patents by number.”<sup>60</sup> The AIPLA similarly noted that “licensing commitments to Standard Setting Organizations are often made by a generic reference to all patents one owns which are essential,” and that “the requests related to standard setting organizations should be limited to patents specifically enumerated as essential.”<sup>61</sup> InterDigital also noted that responding to requests drawn toward identifying patents in portfolios “would require a significant expenditure of time and money” because companies often do not “neatly segregate their patents into a list of defined portfolios.”<sup>62</sup>

Other comments identified areas where document requests called for analyses that might not have been created in the ordinary course of business. The AIPLA noted that requests drawn toward portfolio valuations “presume that valuations are performed on patents, which is not necessarily the case,” and InterDigital suggested that the request be revised to “not require recipients to conduct any *de novo* valuations.”<sup>63</sup> Similarly, Nokia noted that proposed requests called for “effective royalty rates from license agreements that may not be generated or tracked by recipients,” and should be revised to “make it clear that recipients are not under any obligation to produce or develop information that does not already exist.”<sup>64</sup> The IPO noted that responding to the proposed request seeking “the cost of R&D related to each patent held by the company” would “often be nearly impossible for a single patent, much less thousands of them.”<sup>65</sup>

**Response:** While the Commission is authorized to require creation of data necessary to respond to a 6(b) study, it revised a number of the proposed requests to address these concerns and reduce burden, while retaining the utility of the responses.

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<sup>58</sup> *Id.* at 20.

<sup>59</sup> Nokia Comment (Nokia) at 3.

<sup>60</sup> InterDigital at 9. *See also* AIPLA at 3 (“The nature of some questions fails to recognize that licenses sometimes extend to one’s entire portfolio of patents.”).

<sup>61</sup> AIPLA at 3; *see also* InterDigital at 8.

<sup>62</sup> *Id.* at 9-10.

<sup>63</sup> *Id.* at 9-10; AIPLA Comment at 3.

<sup>64</sup> Nokia at 3. *See also* AIPLA at 3 (“Some information, such as royalty bases, might only be available from licensees.”).

<sup>65</sup> IPO at 2. *See also* AIPLA at 3 (“the requested details of the R&D relevant to each patent are not necessarily recorded and will frequently require considerable investigation on an invention-by-invention basis.”).

Some of the proposed requests for data regarding requested documents, such as the parties and products subject to license agreements, are necessary to organize data for analysis and comparison. The Commission has retained these in the revised request. However, the Commission refined and narrowed the definition of terms such as “License” and “Legal Right” to provide respondents with additional clarity and guidance regarding how to respond. Such data should be readily available to responding firms.

The Commission also incorporated the suggestions of a number of the other comments. It revised its request regarding patents declared to Standard Setting Organizations to require listing only specific patents when “specific patents have been identified as subject to a Licensing commitment.” Similarly, the revised request only requires the identification of patents in a patent portfolio “[when] the Firm identifies the Patent(s) included in the Patent Portfolio.”

Finally, the Commission replaced its request regarding the cost of research and development activity related to each patent with a request for any “studies, analyses, or reports” that “evaluate or analyze any research and development activities relating to any Patent.” Similarly, the Commission revised its request for the “Firm’s valuation of” patent portfolios to “whether the Firm has assigned a value to the Patent Portfolio.” The Commission revised its request regarding patent assertion to request documents that “evaluate or analyze the calculation of any payment Relating to the sale” of a patent, instead of calling for a description of how the payment is calculated.

### **3. Financial Data**

**Comment:** Two commenters expressed concern regarding certain requests for financial data. Intellectual Ventures suggested that request for “all documents” related to financial data would be too broad, and asked that the request be limited to documents or data sufficient to show relevant financial information.<sup>66</sup> InterDigital similarly suggested that these document requests are redundant of other requests that call for cost and revenue data.<sup>67</sup> Two additional respondents noted that respondents may not track financial information at the level of detail sought in the requests.<sup>68</sup>

**Response:** The Commission has eliminated the request for “all documents” relating to costs and revenue data. Instead, the requests ask for “documents sufficient to show” such data. In order to provide a useful basis for comparison, specific cost and revenue data is needed, so specific requests for detailed cost and revenue data have been retained.

### **4. Privileged Information**

**Comment:** Two commenters expressed concern that certain requests could call for material potentially subject to confidentiality under the attorney-client privilege. InterDigital

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<sup>66</sup> Intellectual Ventures at 19.

<sup>67</sup> InterDigital at 12.

<sup>68</sup> Nokia at 3; Qualcomm at 8.

noted that answering requests to identify whether patents are subject to a standard setting organization’s licensing commitment “requires legal analysis” and that “such legal conclusions are privileged.”<sup>69</sup> Nokia claimed that requests for “a firm’s rationale for asserting patents” and “projected revenues or return on investment from patent assertions” may be privileged.<sup>70</sup> Nokia also noted that requests for “all documents” related to patent acquisition could call for privileged materials.<sup>71</sup>

**Response:** The Commission has amended its requests to minimize the need to collect or review potentially privileged materials. As noted above, it has revised requests in many circumstances where such requests may be interpreted to call for legal analysis. Further, in order to reduce the need to analyze or log documents for claims of privilege, the Commission revised many requests originally calling for “all documents” to call for only “Reports,” defined as “studies, analyses, and reports which were prepared by or for any officer(s) or director(s) of the company ... or presented to any Person outside the Firm.” This limitation should eliminate the need to collect and review many drafts or internal communications that could raise privilege issues. Despite these changes, the Commission expects that some privilege issues will arise because of the central role of attorneys in PAEs’ acquisition, licensing, and litigation of patents. These issues will be handled on a case-by-case basis as needed.

### **C. Suggestions to Change Study Design**

**Comment:** The Commission received a number of comments suggesting that it alter the design of the PAE study. For example, InterDigital suggested that the Commission “clarify that it is interested in the costs and benefits of PAE activity to *innovation and competition*.”<sup>72</sup> Microsoft suggested that “the study should more closely examine PAE practices that involve asserting patent(s) or patent portfolios for amounts far greater than the acquisition cost of those patents ....”<sup>73</sup> Apple suggested that the study “could attempt a full accounting of the economics that motivate PAEs,” focusing on “(1) PAEs’ valuations of, and methods of valuing, patents at the time of acquisition; (2) PAEs’ royalty demands at the time of assertion; (3) PAEs’ costs of asserting their patents; and (4) defendants’ costs of defending against PAEs’ assertions.”<sup>74</sup> The AIPLA suggested focusing on “abusive practices during infringement litigation as well as demand notices from patent owners.”<sup>75</sup> Intellectual Ventures suggested that the Commission limit its requests to those patents that have been specifically identified in litigation or a demand—not every patent in a recipient’s portfolio.<sup>76</sup>

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<sup>69</sup> InterDigital at 8-9; *see also* IPO at 2.

<sup>70</sup> Nokia at 2.

<sup>71</sup> *Id.*

<sup>72</sup> InterDigital at 3.

<sup>73</sup> Microsoft at 2.

<sup>74</sup> Apple at 3.

<sup>75</sup> AIPLA at 2.

<sup>76</sup> Intellectual Ventures at 10-11.

**Response:** The Commission has narrowed requests to focus on relevant issues. Responding to public comments, the Commission also has clarified that the study includes two case studies, where the first is a descriptive study of PAE activity, and the second is a comparative study including activity in the wireless chipset sector. The FTC has also clarified the focus on the wireless chipset sector, rather than the wireless industry more generally. Finally, the Commission has revised the questions to focus on “yes/no” answers and qualitative information to allow the FTC to synthesize the data, as well as to reduce the burden on respondents.

**Comment:** Some comments addressed the number and/or type of study subjects. The California Attorney General suggested that the Commission “broaden the number of entities from which it collects information.”<sup>77</sup> Similarly, the National Association of Attorneys General suggested that the Commission “increase the number of PAEs, Manufacturing Firms, and NPEs to which the information request will be submitted.”<sup>78</sup> The Internet Commerce Coalition maintained that “the Number of Entities reviewed should be increased, as this is the first study of its kind in an area shrouded in considerable secrecy.”<sup>79</sup> A number of other commenters suggested that specific types of entities that should be included in the study: “owner-operators” that license or practice wireless patents;<sup>80</sup> “other participants in the secondary patent market;”<sup>81</sup> practicing entities which have “stand-alone licensing subsidiaries or divisions;”<sup>82</sup> and “parties that have sold or transferred a large number of patents to the PAEs being examined.”<sup>83</sup> Acacia suggested that inventors also be studied.<sup>84</sup>

The Commission also received comments regarding the comparison of PAEs and Manufacturing Firms in the wireless communications sector. Kellogg Huber Hansen noted that “the Commission’s proposed study of manufacturing firms ... will provide a potentially useful benchmark for evaluating whether PAEs are an efficient means of rewarding patentees.”<sup>85</sup> Similarly, the SPAN Coalition noted that “the current structure of the study ... seems well-suited to evaluating many of the details of patent enforcement by patent trolls in [the wireless communication] sector,” but proposed “the addition of at least one additional category of patent” such as “web technology-related patents or wireless networking.”<sup>86</sup> Similarly, the Direct Marketing Association commented that it “would welcome a broadening of the study beyond the

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<sup>77</sup> Kamala D. Harris, Attorney General of California Comment (California Attorney General) at 1.

<sup>78</sup> NAAG at 3.

<sup>79</sup> ICC at 2.

<sup>80</sup> Kellogg Huber Hansen at 20.

<sup>81</sup> Microsoft at 28.

<sup>82</sup> Intel at 15.

<sup>83</sup> AAI at 8.

<sup>84</sup> Acacia at 4.

<sup>85</sup> Kellogg Huber Hansen at 7.

<sup>86</sup> SPAN at 2.

wireless telecommunications sector.”<sup>87</sup> Verizon suggested broadening the study to “investigate the effects of PAEs on wireline communications services and other high-tech industries.”<sup>88</sup> Intellectual Ventures similarly noted that “the Commission should also expand its inquiry beyond operating companies in the wireless communications sector.”<sup>89</sup>

The Commission received conflicting comments regarding the scope of requests sent to Manufacturing Firms: Microsoft suggested that “the information requests to Manufacturing Firms should ...be reconsidered and revised by narrowing their scope,” while Intellectual Ventures noted that “it is essential to obtain the same information about patent assertion activity in the same markets from both PAEs and non-PAEs.”<sup>90</sup>

**Response:** As currently designed, the study will provide a comparative view of a variety of PAE business models, as well as a focused comparison of PAE activity to activity of non-PAEs in the wireless chipset sector. While commenters have suggested expanding the scope even further, focusing on the well-defined wireless chipset sector allows the Commission to balance the goals of and burden resulting from the study.

**Comment:** The Commission received comments on the time period covered by the initially proposed requests, which was from January 1, 2008 through the present. Several commenters stressed the importance of obtaining information for the entire proposed period. Verizon noted that “examining the entire time period covered by the draft questions is also important to discern trends.”<sup>91</sup> The Computer and Communications Industry Association (CCIA) noted that “the time frame of five years is necessary to understand the evolution of the PAE industry.”<sup>92</sup> The SPAN Coalition noted that “the time period of the study ... is necessary.”<sup>93</sup> In contrast, several commenters noted that the scope of information requests should be limited to January 2011 to the present in order to reduce the burden of the requests.<sup>94</sup>

**Response:** The requests now seek information beginning January 1, 2009. The Commission believes that at least five years of data is necessary to understand trends in patent enforcement. Empirical research suggests that PAE activity has increased significantly, and it is necessary to have a sufficient dataset to understand this trend and the reasons behind it. As the CCIA noted, “PAE litigation has increased sharply in the last five years, but the causes of that

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<sup>87</sup> Direct Marketing Association Comment Comment (DMA) at 2. *See also* ICC at 2 (“The narrower case study should by no means be limited to wireless as the effects of PAE activity are far, far broader than that.”).

<sup>88</sup> Verizon at 1.

<sup>89</sup> Intellectual Ventures at 8.

<sup>90</sup> *Id.* at 2; Microsoft at 2.

<sup>91</sup> Verizon at 1.

<sup>92</sup> CCIA at 2.

<sup>93</sup> SPAN at 1.

<sup>94</sup> Qualcomm at 8-9; InterDigital at 8. Acacia similarly suggested that the time period be limited to three years. *See* Acacia at 3.

increase are not well understood.”<sup>95</sup> Moreover, in 2011, the Leahy-Smith America Invents Act made several changes to the U.S. patent system. Collecting data before and after the Act’s passage, allows the Commission to study the impact of the Act on PAE activity.

#### **D. Suggestions Regarding Requests for Company Information**

**Comment:** Some of the comments related to the scope of requests for company information. Nokia noted that the request to identify all entities with an ownership interest in the firm could potentially call for an identification of all of its shareholders.<sup>96</sup> The AIPLA claimed that the company information requested would be “beyond the knowledge of clerical personnel or even mid-level management.”<sup>97</sup> Qualcomm also noted that the requests would call for an identification of patents invented by employees of the responding firm.<sup>98</sup>

In contrast, several other commenters suggested adding more detailed questions regarding PAE organization, ownership, and structure. These commenters proposed questions to illuminate the extent to which investors exert control over the PAEs.<sup>99</sup> For example, while the proposed requests inquired about entities that shared in the revenues derived from PAE activity, Kellogg Huber Hansen suggested extending these requests to cover entities that share in the costs of the activity.<sup>100</sup> Davis Polk & Wardwell noted that the request “could be too narrow, because it applies traditional ownership rights among businesses to a sector that is known for its novel and opaque business arrangements.”<sup>101</sup> Along these lines, commenters proposed extending the requests to include “both leading PAEs and the leading sources of patents for the selected PAEs,”<sup>102</sup> PAEs’ “advisers,”<sup>103</sup> and lawyers, “organizers,” and “persons or entities that exercise any supervision or control over the PAE.”<sup>104</sup>

**Response:** The Commission’s request about firm organization is critical because of the wide variety of business arrangements used by PAEs and the relative lack of knowledge of the details of these arrangements, which likely affect the economic incentives and hence the behavior and potential competitive impact of PAEs. The Commission has edited its requests to capture the range of PAE organizational structures, with the understanding that PAEs take many

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<sup>95</sup> CCIA at 2.

<sup>96</sup> Nokia at 3-4 (“Using Nokia as an example, the request could be read to require Nokia to produce a list of every shareholder in the company and every management employee that receives a bonus or has other financial incentives that are any way tied to the profitability or financial performance of Nokia.”).

<sup>97</sup> AIPLA at 3.

<sup>98</sup> Qualcomm at 6.

<sup>99</sup> Kellogg Huber Hansen at 18; Verizon at 2.

<sup>100</sup> Kellogg Huber Hansen at 18-19.

<sup>101</sup> Davis Polk & Wardwell LLP Comment (Davis Polk) at 4.

<sup>102</sup> AAI at 9.

<sup>103</sup> Verizon at 2.

<sup>104</sup> Kellogg Huber Hansen at 18.

forms and that it is difficult to anticipate the different types of activity that the study will find, but has also taken steps to reduce the burden of these requests.

The Commission expects that ownership and organizational information will be readily available to most respondents. In order to reduce burden, however, the Commission has narrowed the scope of Firm owners called for in the requests. With respect to publicly traded companies, the requests now call only for shareholders who hold 5% or more of the equity in the respondent. Further, the Commission amended the requests to make clear that they do not encompass patents assigned by employees of the firm.

## **E. Suggestions to Increase Utility of Responses**

### **1. Comments on Existing Requests**

**Comment:** The initial requests focused on patents “held” by each respondent. Commenters suggested, however, that “held” could be read as limited to patents that are “owned” by respondents, and cautioned that such a limitation would limit the value of the study, because it would not encompass other, important legal rights in patents that might influence PAE activity. They requested, therefore, that the scope of the study be extended to include not only patents owned by respondents, but also patents for which a respondent possesses the right to license or enforce the patent.<sup>105</sup> The Internet Association expressed the concern that responding firms would evade requests by “interpreting ‘held’ to mean only those patents for which it possessed and owned all rights.”<sup>106</sup> Similarly, Verizon suggested that the definition of acquire be expanded to “obtain legal rights to license or enforce.”<sup>107</sup>

**Response:** The Commission agrees that the information requests should extend to all forms of patent rights acquisition commonly used by PAEs, and understands that this may often involve not only the acquisition of a patent, but may also involve acquiring an exclusive license or other rights to enforce a patent. Accordingly, it has amended the requests to add a definition for the term “held,” which includes possessing a legal right in a patent, i.e. “any ownership interest in, an exclusive License to, or other rights adequate to License or enforce a Patent.”

### **2. Suggestions for Additional Requests**

**Comment:** Some Commenters proposed specific additional questions regarding patent acquisition and holdings, demand letters, litigation, and licensing.

For example, Intel suggested that requests be expanded to cover certain agreements and arrangements related to “privateering” activities.<sup>108</sup> The Internet Association suggested that the

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<sup>105</sup> Verizon at 2; Internet Association at 5; Kellogg Huber Hansen at 17.

<sup>106</sup> Internet Association at 5.

<sup>107</sup> Verizon at 1.

<sup>108</sup> Intel at 9.

requests include interactions between PAEs and original assignees and inventors.<sup>109</sup> Other commenters suggested that the requests explicitly ask whether PAEs submitted Hart-Scott-Rodino notifications for acquired portfolios.<sup>110</sup>

The Commission also received several comments that requested a broadening of the requests dealing with Standard Essential Patents (SEP). Several commenters suggested that these requests should encompass licensing commitments made outside of the setting of Standard Setting Organizations.<sup>111</sup> Kellogg Huber Hansen and Intel suggested requesting more detail regarding SEP licensing.<sup>112</sup>

Commenters also suggested expanding the requests regarding patent licensing demands. Several commenters suggested expanding the requests to ask for details on the process by which PAEs identify targets for their demands.<sup>113</sup> Another commenter suggested that the requests be expanded to obtain more detail regarding the product that is the subject of the demand.<sup>114</sup> Another commenter suggested that the requests explicitly ask for “the royalty base used to support any royalty demand.”<sup>115</sup>

Several parties suggested that the Commission seek to obtain more information regarding PAEs’ litigation strategies. This included asking for the number of documents produced by both parties in litigation, so as to identify asymmetries in the costs and other burdens of litigation on PAEs and the firms against which they assert their patents.<sup>116</sup> One commenter suggested analyzing litigation data to observe whether PAEs select specific judicial venues for strategic reasons.<sup>117</sup> One commenter suggested that the request include the inventor’s role or interest in litigation.<sup>118</sup> Another suggested requesting the identity of all expert witnesses retained by the PAE.<sup>119</sup> Finally, one commenter suggested that the requests regarding licensing be expanded, and proposed that respondents specify “not only the amounts but also the structure of payments

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<sup>109</sup> Internet Association at 5.

<sup>110</sup> AAI at 8; Davis Polk at 5. The Hart-Scott Rodino Antitrust Improvements Act of 1976 allows the Federal Trade Commission and the United States Department of Justice to review certain mergers, acquisitions, and consolidations that meet the Act’s thresholds. *See* 15 U.S.C. 18a.

<sup>111</sup> Contreras at 2; Kellogg Huber Hansen at 20; Internet Association at 5.

<sup>112</sup> Kellogg Huber Hansen at 14; Intel at 7.

<sup>113</sup> NAAG at 3; Intel at 11-12; SPAN Coalition at 3; SAS Institute, *et. al* at 2; DMA at 2.

<sup>114</sup> Kellogg Huber Hansen at 9.

<sup>115</sup> Intel at 11.

<sup>116</sup> Davis Polk at 5.

<sup>117</sup> Intel at 15-16.

<sup>118</sup> Kellogg Huber Hansen at 7; *see also* ADTRAN, Inc. Comment (ADTRAN) at 5.

<sup>119</sup> Verizon at 2.

or other compensation,” as well as “all” recipients of payments or compensation flowing from licensing.<sup>120</sup>

**Response:** The Commission considered all of these comments. The diverse set of commenters provided a wide variety of comments, each reflecting issues of unique importance to them. While many of the proposed additions would have utility, in many cases the additional information would focus on narrow issues that might not be justified by the additional burden to respond.

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

There is no provision for the payment of gifts to respondents.

## **10. Assurances of Confidentiality**

In connection with its requests, the Commission will receive information of a confidential nature. Under Section 6(f) of the FTC Act, such information is protected from disclosure while it remains confidential commercial information. 15 U.S.C. § 46(f).

## **11. Matters of a Sensitive Nature**

The collection of information does not include any questions of a sensitive nature involving matters that are commonly considered personal and private. The requests for confidential proprietary information are discussed above.

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

Several commenters noted that the Commission’s initial estimate of recipients’ burden was accurate. The National Association of Attorneys General noted that the Commission has estimated the burden “with a reasonable degree of accuracy.”<sup>121</sup> The SAS Institute, joined by Limelight Networks, VIZO, Inc., and five other firms, agreed that the estimates “appear reasonable.”<sup>122</sup> Similarly, Kellogg Huber Hansen, writing on behalf of Adobe Systems, Inc., Canon U.S.A., Inc., Cisco Systems, Inc., and seven other firms, noted that the Commission’s methodology for estimating the burden of complying with the information requests “is reasonable.”<sup>123</sup> The Retail Industry Leaders Association “agrees with the FTC’s calculation of the burden” and “find[s] the factors considered and estimated costs to be reasonable.”<sup>124</sup>

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<sup>120</sup> Kellogg Huber Hansen at 8.

<sup>121</sup> NAAG at 2.

<sup>122</sup> SAS Institute, *et. al*, at 1.

<sup>123</sup> Kellogg Huber Hansen at 20.

<sup>124</sup> RILA at 3.

In contrast, several commenters believed that the Commission's initial burden estimates were too low.<sup>125</sup> Intellectual Ventures claimed that the Commission's estimate was "substantially understated," but acknowledged that it "owns a large patent portfolio and understands that its compliance burden will be toward the upper end of the range of burden imposed on respondents."<sup>126</sup> The IPO noted that the burden estimate underestimated the efforts required to gather "all the different types of documents" responsive to document requests and prepare "legal analysis" required by the proposed requests.<sup>127</sup>

Several operating companies claimed that they would face a high burden to respond to the proposed requests. Qualcomm estimated that reviewing documents responsive to the requests as originally proposed would require "250,000 hours at a cost of more than \$25 million."<sup>128</sup> Microsoft estimated that it would cost it "several million dollars" and take "tens of thousands of hours" to comply with the requests as originally drafted.<sup>129</sup>

The Commission's initial hour burden estimates are consistent with previous PRA estimates and the Commission's experience with information requests that require financial data, answers to questions, and production of pre-existing documents. The *GENERIC DRUG REPORT*, as well as the *AUTHORIZED GENERIC DRUGS* report, involved requests for financial information and responses to questions, and the estimated hours burdens varied depending on the number of drugs covered. Similarly, the burden in this study will vary depending on a subject's number of patents and amount of assertion activity. In the generic drugs study, the burden was an estimated 100-500 hours, and in the authorized generics study, the burden was an estimated 138 to 456 hours.<sup>130</sup>

Even assuming that the Commission's initial estimate understated the burden, the Commission believes that its estimates are realistic given the modifications to the requests, which adopted many of the public comments' suggestions for reducing burden. Most significantly, many requests that originally called for "all" documents in given category now request a small subset of such documents. This will greatly reduce the burden of responding to the requests. For example, the Commission revised its proposed request to: "for each license agreement ... submit a copy of the agreement and all documents Relating to the agreement" to the narrower request to "submit ... all License agreements ... also submit all studies, analyses, and reports ... that evaluate or analyze the reasons for entering into the agreement." The Commission anticipates that this will reduce the number of responsive documents to only a handful of documents for each agreement, which will greatly reduce the burden of responding. For example, Microsoft claims that it has 557 license agreements, and that it would have 60,323

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<sup>125</sup> Intellectual Ventures at 21-23; Acacia at 3; Microsoft at 10-15; Qualcomm at 6; Nokia at 2; InterDigital at 5; Prof. Michael Risch Comment (Risch) at 1; GTW Associates Comment (GTW Associates) at 1.

<sup>126</sup> Intellectual Ventures at 21.

<sup>127</sup> IPO at 2.

<sup>128</sup> Qualcomm at 6.

<sup>129</sup> Microsoft at 15.

<sup>130</sup> 66 Fed. Reg. 12,512, 12,522-23 (2001); 72 Fed. Reg. 25,304, 25314 (2007).

documents responsive to the initial proposed request.<sup>131</sup> As revised, the Commission anticipates that Microsoft would have less than 3,000 responsive documents, or around 5% of Microsoft's estimate.

The Commission has amended its requests to reduce the burden on manufacturing firms, which may have the highest burden because of their size. Several comments stated that requests would unduly burden companies with large portfolios of patents that were developed by the company's employees.<sup>132</sup> The proposed requests have been modified to avoid unreasonable burdens on such companies. Similarly, the Commission limited its request for investor information for publicly traded firms, addressing the concern that this would call for the identification of shareholders.<sup>133</sup> Moreover, there are two different proposed information requests with different scopes: one to wireless chipset manufacturers and wireless chipset NPEs, and a more comprehensive request for PAEs.

The Commission has taken a number of additional steps to reduce the burden of response. To reduce the burden on responding parties, expedite responses, and facilitate the Commission's analysis of the information collected, it has prepared an electronic spreadsheet to be completed by respondents.<sup>134</sup> Further, as noted above, the Commission has revised its requests in many instances to minimize the legal or factual analysis required to respond.<sup>135</sup> In addition, in order to reduce the need to analyze or log documents for privilege, the Commission revised many requests originally calling for "all documents" to call for only "studies, analyses, and reports which were prepared by or for any officer(s) or director(s) of the company... or presented to any Person outside the Firm," which will reduce the number of responsive documents overall and those that may raise potential privilege issues.

#### **A. Estimated Hours Burden:**

The proposed information collection is a one-time endeavor that will not involve repeated responses. In its prior *Federal Register* notice, the Commission estimated that a recipient's burden for the PAE study would range from 90 to 400 hours depending on the recipient.<sup>136</sup>

The burden to respond to information requests will vary with the size of the responding firm's patent holdings, as well as the extent of its patent assertion activity. The Commission anticipates that the cumulative hours burden to respond to the information requests will range between 275 and 845 hours per firm. Nonetheless, the Commission conservatively assumes that, except as noted above with respect to firms with few holdings and little assertion activity, the

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<sup>131</sup> Microsoft at 15.

<sup>132</sup> Nokia at 3; InterDigital at 10.

<sup>133</sup> Nokia at 3.

<sup>134</sup> This approach has been suggested by several commenters. See SAS, *et al.*, at 2; Liu at 1; IPO at 2.

<sup>135</sup> InterDigital's view that the FTC's burden estimate was too low was based, in part, on its view that "determining which patents are or are not subject to licensing commitments and other encumbrances is not just a factual determination but a legal one that requires consultation with counsel." InterDigital at 6.

<sup>136</sup> 78 Fed. Reg. 61,352, 61,357 (Oct. 3, 2013)

average burden for each of the approximately 25 PAE firms will be 845 hours, and the cumulative estimated burden will be 21,125 hours. The Commission conservatively assumes that the average burden for each of the approximately 15 wireless chipset manufacturers and wireless chipset NPEs will be 565 hours per firm, and the cumulative estimated burden will be 8,475. Given these conservative estimates, the total estimated burden is 29,600 hours. These estimates attempt to include any time spent by other entities affiliated with the Firm that received the information requests, however, the numbers may be greater or lesser depending on the numbers of affiliated entities. The Commission seeks to understand the number of affiliated entities as part of the Information Requests.

Task	PAE Firms	Wireless Chipset Manufacturers and Wireless Chipset NPEs
Identify, obtain, and organize firm information; prepare response:	15-35 hours	15-35 hours
Identify, obtain, and organize patent information; prepare response:	40 – 65 hours	N/A
Identify, obtain, and organize patent portfolio information; prepare response:	40 – 65 hours	N/A
Identify, obtain, and organize acquisition information; prepare response:	70 – 150 hours	N/A
Identify, obtain, and organize transfer information; prepare response:	70 – 150 hours	70 – 150 hours
Identify, obtain, and organize assertion information; prepare response:	150 – 300 hours	150 – 300 hours
Identify, obtain, and organize aggregate revenue information; prepare response:	20 – 40 hours	20 – 40 hours
Identify, obtain, and organize aggregate cost information; prepare response:	20 – 40 hours	20 – 40 hours

TOTAL	425 – 845 hours	275 – 565 hours
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**B. Estimated Cost Burden:**

It is difficult to calculate precisely labor costs associated with this data production. Labor costs entail varying compensation levels of management and/or support staff among firms of different sizes. In addition, comments responding to the first Federal Register Notice suggested that some respondents expect to utilize outside legal counsel in responding to the requests, which may add additional costs. Consequently, although financial, legal, and clerical personnel may be involved in the information collection process, the Commission now assumes that mid-management personnel and outside legal counsel will handle most of the tasks involved in gathering and producing responsive information, and has applied an average rate of \$250/hour for all labor costs. Thus, except for firms with small patent portfolios and relatively little assertion activity, the labor costs per respondent may range between \$68,750 (275 hours x \$250/hour) and \$211,250 (845 hours x \$250/hour).

**13. Estimated Annual Capital or Other Non-labor Costs**

The Commission anticipates that the capital or other non-labor costs associated with the information requests will be minimal. Although the information requests may require the respondent to store copies of the requested information provided to the Commission, responding Firms should already have in place the means to store information of the volume requested. As the SAS Institute noted, “the requested information overlaps significantly with what a PAE would have to prepare in connection with asserting and litigating a patent.”<sup>137</sup> Further, the Internet Association observed that “because patents are PAEs’ primary assets, PAEs, whatever the size of their portfolios, likely have well-organized files relating to individual patents and patent portfolios.”<sup>138</sup>

Respondents may need to purchase minimal office supplies to respond to the request. The Commission estimates that each respondent will spend \$500 for such costs regarding the information request, for a total additional non-labor cost burden of \$20,000 (\$500 x 40 respondents).

**14. Estimate of Cost to the Federal Government**

The cost of the information collection to the federal government will include the cost of staff time used to design the information requests, analyze the data collected, and produce a report in an expeditious manner. It is difficult to quantify the total cost to the Commission to complete the study because multiple factors may vary, including how quickly and completely subjects respond to information collection requests and the actual amount of time needed to complete the study. Nonetheless, the Commission estimates that approximately 3 attorney work years (\$174,000 per work year, including benefits), 6000 economist hours (\$500,000 including

<sup>137</sup> SAS Institute, *et. al.* at 1.

<sup>138</sup> Internet Association at 3.

benefits), and 320 research assistant hours (\$11,000 including benefits) will be needed to complete the study. Thus, the total remaining cost to the Commission is about \$1,033,000. Clerical and other support services and costs of conducting the study are included in this estimate.

**15. Program Changes or Adjustments**

Not applicable. This is a new collection of information.

**16. Plans for Tabulation and Publication of Information**

Subject to OMB clearance, the Commission will collect information from respondents and prepare a public report based on the results. The estimated date for the completion of the report is 2015.

**17. Failure to Display the OMB Expiration Date**

Not applicable.

**18. Exceptions to Certification**

Not applicable.