

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA *et al.*,

Plaintiffs,

v.

CVS HEALTH CORPORATION

and

AETNA INC.,

Defendants.

Case No. 1:18-cv-02340-RJL

**THE UNITED STATES' UNOPPOSED MOTION TO EXCUSE
FEDERAL REGISTER PUBLICATION OF COMMENTS**

As authorized by 15 U.S.C. § 16(d), the United States moves this Court, for good cause, to excuse *Federal Register* publication of the comments received in this case and instead to authorize electronic publication of those comments. The United States proposes to meet its statutory obligations by posting the public comments on the Antitrust Division's publicly available website and publishing the internet address for those comments in the *Federal Register*. Defendants do not object to this motion.

Background

On October 10, 2018, the United States filed a proposed Final Judgment in this case. As required by the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)–(h) (the “Tunney Act”), the United States then published the proposed Final Judgment in the *Federal Register*, *see* 83 Fed. Reg. 52558 (October 17, 2018), and had summaries of the terms of the proposed Final Judgment published in *The Washington Post* on October 12–18, 2018. At the hearing on

December 18, 2018, the United States informed the Court that it had received approximately 95 public comments in this matter. Since the December 18 hearing, the United States has received 78 additional comments, for a total of 173.

Argument

The Tunney Act requires the United States to publish the comments and its response to those comments in the *Federal Register* before moving the Court for entry of the proposed Final Judgment. 15 U.S.C. § 16(d). In 2004, the Tunney Act was amended in light of the benefits of electronic publication and the costs of publication in the *Federal Register*. The amendment authorizes the Court to order an alternative publication method when the expense involved exceeds the public-interest benefits to be gained:

Upon application by the United States, the district court may, for good cause (based on a finding that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication), authorize an alternative method of public dissemination of the public comments received and the response to those comments.

15 U.S.C. § 16(d).¹

Here, the expense of publication would be significant. The 173 comments in total amount to approximately 1,890 pages, and the United States would incur approximately \$165,000 to \$200,000 in expenses to publish these comments in the *Federal Register*.

Furthermore, since the 2004 amendment to 15 U.S.C. § 16(d), courts have repeatedly granted motions by the United States to excuse *Federal Register* publication of Tunney Act comments where, as here, such publication would involve significant expense that would exceed

¹ At the Senate hearing on the 2004 Tunney Act amendment, Senator Leahy of the Judiciary Committee noted that *Federal Register* publication can offer “little benefit, because those materials are, if anything, more accessible on the Web than in a library.” 150 Cong. Rec. 6,328 (2004). Senator Kohl echoed those comments, stating, “[t]his provision is intended to avoid unnecessary expense in publishing proposed consent decrees if alternative means are available, such as, for example, posting the proposed decrees electronically, which are sufficient to inform interested persons of the proposed consent decree.” *Id.* at 6,332.

the public-interest benefits of such publication.² The United States thus proposes to publish the 173 public comments on the Antitrust Division’s website and publish in the *Federal Register* the internet address at which the comments can be read and downloaded. This alternative would save the expense of full *Federal Register* publication while preserving the public-interest benefits associated with public access to the materials.

* * *

For these reasons, the United States respectfully requests that the Court enter the Proposed Order authorizing an alternative method of public dissemination of the public comments in this matter—namely, the publication in the *Federal Register* of a link to the Antitrust Division’s website, where those comments can be viewed and downloaded.

Dated: February 1, 2019

Respectfully submitted,

/s/

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² See, e.g., *United States v. Bayer AG, et al.*, No. 1:18-cv-01241-JEB (D.D.C. Jan. 2, 2019) (attached as Ex. 1); *United States v. Anheuser-Busch InBev SA/NV, et al.*, No. 1:16-cv-01483-EGS (D.D.C. Jan. 19, 2017) (attached as Ex. 2); *United States v. Anheuser-Busch InBev SA/NV, et al.*, No. 1:13-cv-00123-RWR (D.D.C. Aug. 2, 2013) (attached as Ex. 3); *United States v. United Techs. Corp.*, No. 1:12-cv-1230-RC (D.D.C. Mar. 25, 2013) (attached as Ex. 4).

CERTIFICATE OF SERVICE

I, Jay D. Owen, hereby certify that on February 1, 2019, I caused a copy of the foregoing document to be served upon Plaintiffs State of California, State of Florida, State of Hawaii, State of Washington, and Defendants CVS Health Corporation and Aetna Inc., via the Court's CM/ECF system, and to be served upon Plaintiff State of Mississippi by mailing the documents electronically to its duly authorized legal representative:

Counsel for State of Mississippi:

Crystal Utley Secoy
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_____/s/_____
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Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAYER AG,
MONSANTO COMPANY, and
BASF SE,

Defendants.

Civil Action No. 1:18-cv-01241 (JEB)

~~PROPOSED~~ ORDER

Having reviewed the United States' Unopposed Motion to Excuse *Federal Register* Publication of Comments, the Court finds that the expense of publication of such comments in the *Federal Register* exceeds the public interest benefit to be gained from such publication, and therefore GRANTS the Motion and AUTHORIZES, as an alternative method of dissemination, publication in the Federal Register of a link to the United States Department of Justice website, where the comments can be viewed and downloaded.

IT IS SO ORDERED by the Court, this 2nd day of Jan., 2019.


United States District Judge

Exhibit 2

CLOSED,TYPE-A

**U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:16-cv-01483-EGS**

UNITED STATES OF AMERICA v. ANHEUSER-BUSCH	Date Filed: 07/20/2016
InBEV SA/NV et al	Date Terminated: 10/22/2018
Assigned to: Judge Emmet G. Sullivan	Jury Demand: None
Cause: 15:1 Antitrust Litigation	Nature of Suit: 410 Anti-Trust
	Jurisdiction: U.S. Government Plaintiff

Date Entered	#	Docket Text
01/13/2017	16	RESPONSE TO PUBLIC COMMENTS in Antitrust Case by UNITED STATES OF AMERICA. (Attachments: # 1 Attachment 1, # 2 Attachment 2, # 3 Attachment 3, # 4 Attachment 4, # 5 Attachment 5, # 6 Attachment 6, # 7 Attachment 7, # 8 Attachment 8, # 9 Attachment 9, # 10 Attachment 10, # 11 Attachment 11, # 12 Attachment 12, # 13 Certificate of Service)(Seltzer, Michelle) (Entered: 01/13/2017)
01/19/2017		MINUTE ORDER granting 15 unopposed motion for authorization to excuse Federal Register publication of comments and attachments. The Court authorizes, as an alternative method of dissemination, publication in the Federal Register of a link to the United States Department of Justice website, where the comments and attachments can be viewed and downloaded. Signed by Judge Emmet G. Sullivan on 1/19/2017. (lcegs4) (Entered: 01/19/2017)

Exhibit 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANHEUSER-BUSCH InBEV SA/NV, et al.,

Defendants.

Civil Action No. 13-127 (RWR)

~~PROPOSED~~ ORDER

Upon reviewing the United States's Unopposed Motion and Supporting Memorandum for Authorization to Excuse *Federal Register* Publication of Comments and Attachments, the Court finds that the expense of publication of such comments and attachments in the *Federal Register* exceeds the public interest benefit to be gained from such publication, and therefore GRANTS the motion and AUTHORIZES, as an alternative method of dissemination, publication in the *Federal Register* of a link to the United States Department of Justice website, where the comments and attachments can be viewed and downloaded.


United States District Judge

Dated:

8/2/13

Exhibit 4

CLOSED

**U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:12-cv-01230-KBJ**

UNITED STATES OF AMERICA v. UNITED
TECHNOLOGIES CORPORATION et al
Assigned to: Judge Ketanji Brown Jackson
Cause: 15:1 Antitrust Litigation

Date Filed: 07/26/2012
Date Terminated: 05/29/2013
Jury Demand: None
Nature of Suit: 410 Anti-Trust
Jurisdiction: U.S. Government Plaintiff

Date Entered	#	Docket Text
03/21/2013	33	Unopposed MOTION for Order <i>Excusing Federal Register Publication</i> by UNITED STATES OF AMERICA (Attachments: # 1 Exhibit GPO Circular 851, # 2 Text of Proposed Order Proposed Order)(Quin, Kevin) (Entered: 03/21/2013)
03/21/2013	34	Unopposed MOTION for Order <i>for Leave to File Public Comments Under Seal</i> by UNITED STATES OF AMERICA (Attachments: # 1 Supplement Redacted Comments, # 2 Text of Proposed Order)(Quin, Kevin) (Entered: 03/21/2013)
03/25/2013		MINUTE ORDER Upon consideration of the plaintiff's consent motion to be excused from publishing in the Federal Register the attachments to the Comment of Mr. Jefferis 33 , it is hereby ORDERED that the motion is GRANTED. SO ORDERED. Signed by Judge Rudolph Contreras on 3/25/13. (TA) (Entered: 03/25/2013)

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UNITED STATES OF AMERICA *et al.*,

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v.

CVS HEALTH CORPORATION

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AETNA INC.,

Defendants.

Case No. 1:18-cv-02340-RJL

[PROPOSED] ORDER

Having reviewed the United States' Unopposed Motion to Excuse *Federal Register* Publication of Comments, the Court finds that the expense of publication of such comments in the *Federal Register* exceeds the public-interest benefit to be gained from the publication, and therefore GRANTS the Motion and AUTHORIZES, as an alternative method of dissemination, publication in the *Federal Register* of a link to the U.S. Department of Justice website, where the comments can be viewed and downloaded.

IT IS SO ORDERED by the Court, this _____ day of _____, 2019.

United States District Judge