UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. COMPUTER ASSOCIATES INTERNATIONAL, INC. and PLATINUM *TECHNOLOGY* INTERNATIONAL, *INC*., Defendants.	Civil Action No. 1:99CV01318 JUDGE: Gladys Kessler DECK TYPE: Antitrust DATE STAMP:

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Amended Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On May 25, 1999 the United States filed a civil antitrust Complaint, and on June 8, 1999, the United States filed amendments to the Complaint (hereinafter the Complaint and the amendments to the Complaint will be referred to collectively as "Complaint, as amended"). The Complaint, as amended, alleges that the proposed acquisition by Computer Associates International, Inc. ("CA") of PLATINUM *technology* International, *inc*. ("Platinum") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. CA is the dominant competitor with market shares of 70% or more in a number of mainframe systems management software products for the MVS (now named OS/390) and VSE operating systems that run on IBM and IBM-

compatible mainframe computers. Platinum is either the only substantial competitor or is among the most significant of a very few competitors attempting to challenge CA's dominance in the sale of these mainframe systems management software products. Platinum has aggressively marketed its products to CA's customers by offering better pricing and more responsive customer service.

The Complaint, as amended, alleges that the acquisition would eliminate substantial competition, and result in higher prices, lower quality product support, and less innovation, in seven product markets for systems management software used with mainframe computers: MVS (OS/390) job scheduling and rerun software; MVS (OS/390) tape management software; MVS (OS/390) change management software, MVS (OS/390) job accounting and chargeback software, VSE job scheduling and rerun software; VSE automated operations software, and VSE job accounting and chargeback software. The Complaint, as amended, seeks adjudication that CA's acquisition of Platinum would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and requests that the Court grant preliminary and permanent injunctive relief, and such other relief as the Court deems appropriate.

Simultaneously with the filing of the amendments to the Complaint, the United States filed the proposed Amended Final Judgment. At the time the original Complaint was filed on May 25, 1999, the United States also filed a proposed Final Judgment and a Hold Separate Stipulation and Order ("Hold Separate"); the Court entered the Hold Separate on May 26, 1999. The proposed Amended Final Judgment that is the subject of this Competitive Impact Statement supercedes the initial proposed Final Judgment and provides for relief in all of the markets that are the subject of allegations in the Complaint, as amended.

Prior to the announcement of CA's proposed acquisition of Platinum, Platinum granted to another firm, CIMS Inc., an exclusive license, together with an option to purchase, certain products, collectively known as the "CIMS product line," that Platinum had developed, marketed and sold in the markets for MVS (OS/390) job accounting and chargeback software and VSE job accounting and chargeback software. The defendants proposed to complete the divestiture of the CIMS product line by conveying to CIMS Inc. all of Platinum's remaining rights, titles, and interests in the CIMS product line in a "fix-it-first" transaction to be approved by the United States and to be consummated contemporaneously with CA's acceptance for payment of the tendered shares of Platinum. Because such a conveyance would have resolved any competitive problems that would otherwise arise if CA were to acquire the CIMS product line, the original Complaint did not contain allegations pertaining to the effect of the proposed acquisition in the markets for MVS (OS/390) job accounting and chargeback software and VSE job accounting and chargeback software. However, the United States insisted and defendants agreed in the Hold Separate that the United States could amend the Complaint and file a proposed Amended Final Judgment if the defendants were unable to convey the CIMS product line in the manner described above. The parties agreed that an amended Complaint would add allegations in the product markets in which the CIMS product line is developed, marketed and sold and an Amended Final Judgment would add the CIMS product line to the group of products to be divested and such additional provisions as the United States deems necessary to obtain relief from the additional violations alleged in the amended Complaint.

On May 28, 1999, subsequent to the filing of the original Complaint, CA announced the expiration of its tender offer for Platinum shares and acceptance for payment of all validly

tendered shares, but the defendants failed to make the requisite conveyance of the CIMS product line. The United States therefore filed its amendments to the Complaint on June 8, 1999, adding allegations pertaining to the markets for MVS (OS/390) job accounting and chargeback software and VSE job accounting and chargeback software.

The proposed Amended Final Judgment is designed to eliminate the anticompetitive effects of CA's acquisition of Platinum, and requires the defendants to divest, through a trustee to be appointed by the United States, Platinum's products in the seven mainframe systems management software product markets named in the Complaint, as amended ("Divested Products"), together with certain related assets (collectively, the "Platinum Assets"). The defendants are required to assist the trustee in accomplishing the required divestitures and may not impede or interfere with the trustee's work. If the trustee is unable to complete the required divestitures within 120 days after appointment, the Court is authorized to enter such orders as it shall deem appropriate to carry out the purpose of the trust, which may, if necessary, include extending the trustee's appointment by a period requested by the United States, or directly ordering the divestiture of the Platinum Assets on such terms as the Court deems appropriate.

The Hold Separate includes a stipulation by the United States and the defendants that the proposed Amended Final Judgment may be entered after compliance with the APPA. The Hold Separate also obligates the defendants to comply with the terms of the proposed Amended Final Judgment until it is entered by the Court, or until all appeals have been completed stemming from any court ruling declining entry of the proposed Amended Final Judgment. Until all divestitures have been completed, the Hold Separate specifies that the defendants will take certain steps to ensure that the Platinum Assets will be held and operated separate and apart from

the defendants' other assets and businesses. The defendants must appoint an interim, separate and independent management acceptable to the United States to manage the business operations relating the Platinum Assets until the divestitures have been completed. Confidential business information relating to the Platinum Assets will, to the maximum extent feasible, be screened from the defendants. The defendants must maintain promotional and sales efforts, development funding, and technical support for the Divested Products. In particular, the defendants are required to maintain at current or previously approved levels, whichever are higher, research and development funding for the Divested Products and to continue to serve the needs of existing customers. The purpose of these interim steps is to ensure that the Platinum Assets will continue to be maintained and operated, until the divestitures are completed, as an independent, ongoing and economically viable concern, free from defendants' control and influence.

Entry of the proposed Amended Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Amended Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

CA is a Delaware corporation with its principal place of business in Islandia, New York. In its 1998 fiscal year, CA had revenues in excess of $4.7 billion and net profits of $1.17 billion. CA produces and markets software for a variety of computers and operating systems, including systems management software for mainframe computers running the two most popular operating systems, IBM's MVS (now renamed "OS/390" by IBM), and VSE operating systems. Aside

from IBM, which writes the operating system software that runs almost all mainframe computers, CA is the largest vendor of software for IBM and IBM-compatible mainframe computers. CA is also a significant vendor of systems management software and other software for computers and computer networks running UNIX or Windows NT (recently renamed Windows 2000) operating systems.

Platinum is a Delaware corporation with its principal place of business in Oakbrook Terrace, Illinois. Platinum's fiscal year 1998 revenues exceeded $968 million. Platinum sells a variety of computer software and related services for mainframe, UNIX, and Windows NT computer systems and is also a leading vendor of systems management software for IBM and IBM-compatible mainframe computers.

On March 31, 1999, CA filed with the United States a premerger notification stating that it had entered into a definitive agreement with Platinum to purchase all issued and outstanding shares of Platinum's common stock through a $3.5 billion cash tender offer. CA announced on May 28, 1999, that it had accepted for payment all validly tendered shares, which comprise about 98% of Platinum's outstanding common stock. This acquisition forms the basis of the government's suit.

B. Mainframe Systems Management Software

Mainframe computers are the large and powerful computers used by industrial, commercial, educational, and governmental enterprises for large scale data processing applications. Mainframe computers provide unique storage, throughput, and security features and functions that make them superior data processing devices for large corporate and institutional computer users throughout the world.

An operating system is software that controls the operational resources of the computer (including the central processor unit, memory, data storage devices, and other hardware components) and allows "applications" software (programs that perform user-directed tasks requested of the computer, such as programs that perform transactions or maintain payroll, inventory, sales, and other business accounts of a company) to run on the computer. The vast majority of the world's mainframe computers run with operating systems developed by IBM, of which the two most widely used are the MVS (OS/390) and VSE operating systems. MVS (OS/390) is generally used by users of larger mainframes and those needing the highest levels of performance and functionality. VSE is a significantly less costly operating system that has less capability and fewer features. VSE is generally used with smaller mainframes, with fewer users and smaller data sets.

Systems management software is used to help manage, control, or enhance the performance of mainframe computers. While IBM's mainframe operating systems contain some limited systems management capabilities, separate systems management software programs such as the products offered by CA and Platinum provide additional functionality that is demanded by most mainframe users. Mainframe systems management software generally is designed to function only with a specific operating system. Therefore, users of MVS (OS/390) must purchase systems management software designed specifically for that operating system, while VSE users are limited to buying systems management software designed for the VSE operating system. Users generally cannot switch between the MVS (OS/390) and VSE operating systems without facing very substantial costs. Therefore, customers using one mainframe operating

system are unlikely to switch to another to escape even a very substantial increase in price of the systems management software on their present mainframe operating system platform.

In recent years, some mainframe computer systems users have transferred applications from their mainframes to distributed client/server computing environments. However, most users continue to remain highly dependent on their mainframe computers for other "mission-critical" business applications which cannot be switched at all or in an economically viable manner. Moreover, conversion of applications from mainframe to distributed client/server computing environments entails substantial costs and time, is generally disruptive of business operations and is fraught with risks. The cost of the mainframe systems management software that is the subject of the violation alleged in the Complaint, as amended, constitutes only a small portion of the overall operating costs of a mainframe computer system. Therefore, users would not switch from mainframe computer systems to distributed client/server computing systems to escape even a very substantial increase in the price of these mainframe systems management software products.

CA and Platinum both develop and sell a variety of mainframe computer systems management software products and are direct competitors in the development and sale to mainframe users of each of the products that is the subject of the violation alleged in the Complaint, as amended, and described below. Each specific product or product combination solves particular problems or meets specific needs of mainframe users, and users cannot economically switch to different products to obtain the same functionality.

(1) Job scheduling and rerun software for the MVS (OS/390) operating system. Job scheduling and rerun software directs a mainframe to prioritize and run particular

“batch” processing operations (called "jobs") based on user requirements as to time, date, and other parameters, to link jobs together so that they are performed in the correct sequence, and to organize the results of these jobs. Rerun software interfaces with the job scheduler and automatically collects the data on jobs that were not operated successfully and performs the necessary remedial operations and reruns the job or alerts the operator that intervention is necessary. Rerun software is almost always sold to those users who need it for use together with the specific job scheduling software product for which it was designed to interoperate.

(2) Job scheduling and rerun software for the VSE operating system. These VSE products perform essentially the same functions as MVS (OS/390) job scheduling software.

(3) Tape management software for the MVS (OS/390) operating system. Tape management software is used to control the cataloguing, loading, formatting, and reading of the magnetic tapes used for archival storage of data processed by mainframes. Many mainframe computer system users store information on hundreds or thousands of tapes, and tape management software specifies which tapes, and which information on the tapes, need to be loaded for particular operations. Tape management software also protects the information on the tape by ensuring that active information is not overwritten or erased.

(4) Change management software for the MVS (OS/390) operating system. Change management software tracks, manages, and archives versions of computer

programs while those programs are being developed, modified, and tested. It also helps to control the versions of the programs as they are used in normal business activities by the customer, when there may be a need to modify, repair, or update the programs, or to uninstall the programs and reinstall a prior version that is known to work.

(5) Automated operations software for the VSE operating system. Automated operations software is used to automate computer management to reduce human interaction with the system and thereby improve efficiency and minimize errors. Among the functions of automated operations software is automating computer console operations, message and error handling, and enabling systems management from remote locations or computers.

(6) MVS and OS/390 job accounting and chargeback software. Job accounting and chargeback software monitors the use of computer resources so that computer resource costs may be allocated and charged among internal corporate divisions and/or third party client users. The software collects data that shows which computer resources were being used by whom, when, and for how long. This data is then used to measure, allocate and charge shared costs to internal corporate divisions and/or third party client users. Job accounting and chargeback software, including such software sold by CA and Platinum, is often combined with a capacity planning software feature, which uses the data compiled by the job accounting and chargeback software to report on measures such as system

response performance, system availability, resource utilization, and future utilization projections.

(7) VSE job accounting and chargeback software. These VSE products perform essentially the same functions as MVS and OS/390 job accounting and chargeback software.

Even substantial price increases for the software products described above would not cause users to switch to any other types of mainframe software products or software products for different operating systems. Each of the systems management products for each operating system, therefore, constitutes a separate relevant product market in which to assess the competitive effects of CA's acquisition of Platinum. Vendors sell these products to customers located throughout the United States, and for each of the product markets, the United States constitutes a relevant geographic market in which to assess the competitive effects of the proposed acquisition.

D. Competition Between CA and Platinum

CA and Platinum compete against each other for sales of the above-described MVS (OS/390) and VSE systems management software products throughout the United States. They compete with respect to license royalties they charge users of systems management products and the flexibility of the license terms they offer. Both firms market their products under licenses that require royalty payments for the right to use the product and payments for maintenance of and upgrades to the products.

Moreover, CA and Platinum compete in providing product support and service to their customers. Due to the "mission-critical" nature of the work done with mainframe computers,

users highly value the speed and effectiveness of a vendor's installation, maintenance, and technical support of systems management products. CA and Platinum also compete to improve, upgrade, and enhance their systems management products, both in terms of developing products of greater performance or functionality and in terms of improving operability so that the products become easier to install, use, and maintain.

In addition to competition for new users, substantial competition in the markets for these mainframe systems management software products primarily occurs when current users, and particularly current users of CA's products, consider whether they should convert to a different product. Platinum has aggressively marketed its products in competition with CA by offering better pricing, more responsive customer services, and improved product features. Because conversion from one product to another product is costly, difficult, time-consuming, and potentially disruptive to a firm's ongoing mainframe computer operations and overall business, most users are reluctant to incur the costs and risks of switching. In particular, Platinum has invested significant resources in demonstrating that, notwithstanding the costs and risks of conversion, Platinum's products are superior alternatives for current users of CA's products. This competition from Platinum has caused CA to respond with lower prices, better service, and improved product features for its own products.

E. Anticompetitive Consequences of the Acquisition

The Complaint, as amended, alleges that CA's acquisition of Platinum would substantially lessen competition in each of the markets for the systems management software products described above. The combined annual U.S. sales of all competitors in the relevant product markets exceed $590 million. Each of the relevant markets already is highly

concentrated, and the acquisition would substantially increase concentration. In each market, CA already has a dominant share of 70% to 90%. Platinum is the only substantial competitor or among the most significant of only a few competitors in these markets.

The Complaint, as amended, alleges that in the markets for each of the products described above, the reduction or elimination of competition from CA's acquisition of Platinum would likely lead to higher prices, lower levels of product service and support, and a lessening of product innovations and development. The Complaint, as amended, further alleges that the competitive harm resulting from the acquisition is not likely to be mitigated by the possibility of new entry. Entry into any of the markets would entail expenditures of substantial costs and time for the development of a competitive product that would be acceptable to mainframe customers. A new entrant would also be required to invest significant time and resources to develop a reputation as a reliable vendor of these products to attract significant sales in what are substantially product replacement markets. Such entry would not be timely, likely, or sufficient in scale to counteract or deter a price increase or a reduction in service or product quality in any of the relevant markets.

III.

EXPLANATION OF THE PROPOSED AMENDED FINAL JUDGMENT

The proposed Amended Final Judgment is designed to preserve competition in each of the mainframe systems management software markets in which CA's acquisition of Platinum would be anticompetitive. The proposed Amended Final Judgment will remain in effect for ten years and requires CA to divest all of the Platinum Assets through a trustee selected by the United States, and imposes obligations on CA to cooperate in the trustee's sale efforts.

The proposed Amended Final Judgment provides that the assets must be divested in such a way as to satisfy the United States that the Platinum Assets can and will be operated by the purchaser or purchasers as part of a viable, ongoing business or businesses that can compete effectively in the selling of the Divested Products. The CIMS product line will be sold subject to any rights in those Divested Products held by CIMS Inc. as a result of the licensing agreement and option to purchase that it obtained from Platinum prior to CA's announcement of its proposed acquisition of Platinum. The proposed Amended Final Judgment provides that CA will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which divestiture is accomplished. After the trustee's appointment becomes effective, the trustee will confer regularly with the parties and file biweekly reports with the parties and the Court setting forth the trustee's efforts to accomplish divestiture. At the end of 120 days, if the divestiture has not been accomplished, the trustee and the parties will make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment or ordering the divestiture of any or all of the Platinum Assets to such purchasers and on such terms as the Court deems appropriate.

The proposed Amended Final Judgment sets forth the minimum assets and rights that must be conveyed in a divestiture. These include requiring the transfer to the purchaser or purchasers of: all of Platinum's transferrable ownership rights in the Divested Products, as well as Platinum's rights in other assets included in the Platinum Assets that are used in conjunction with the development, support or maintenance of the Divested Products; all customer licenses

and maintenance agreements for the Divested Products; broad rights to the information necessary to service customers, to interface Platinum's job scheduling products with the Platinum UNIX/NT job scheduling product to be acquired by CA, and generally to compete with CA and other vendors of software products in the markets described above; and the right to negotiate, without interference from CA, for the employment services of the Platinum employees who have job responsibilities relating to the Divested Products.

The proposed Amended Final Judgment also prohibits CA from financing the purchase of the Platinum Assets or entering into continuing royalty payment arrangements with any purchaser of the Divested Products. This provision prevents CA from having a relationship with its new competitor that might impair competition between the new competitor and CA.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Amended Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)), the proposed Amended Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED AMENDED FINAL JUDGMENT

A. APPA Procedures

The United States and defendants have stipulated that the proposed Amended Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Amended Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Amended Final Judgment within which any person may submit to the United States written comments regarding the proposed Amended Final Judgment. Any person who wishes to comment should do so within (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Amended Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Nancy M. Goodman, Chief
Computers & Finance Section
Antitrust Division
United States Department of Justice
600 E Street, N.W., Suite 9500
Washington, DC 20530

B. The Court's Continuing Jurisdiction

The proposed Amended Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Amended Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED AMENDED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Amended Final Judgment, litigation against defendants CA and Platinum. The United States could have brought suit and sought preliminary and permanent injunctions against CA's acquisition of Platinum. The United States is satisfied, however, that the complete, and irrevocable divestiture of the Platinum Assets to a suitable purchaser and the other relief outlined in the proposed Amended Final Judgment will preserve competition in the relevant mainframe systems management product markets alleged in the Complaint, as amended, that would otherwise have been impaired by the acquisition. The relief specified in the proposed Amended Final Judgment will achieve all of the competitive benefits that the United States could have obtained through protracted litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the government's Complaint, as amended.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED AMENDED FINAL JUDGMENT

The APPA requires that proposed final judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine

whether entry of the proposed final judgment "is in the public interest." In making that determination:

> [T]he court may consider--
>
> > (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
> >
> > (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the Court of Appeals for the District of Columbia Circuit held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. United States v. Microsoft, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995). The courts have recognized that the term " 'public interest' take[s] meaning from the purposes of the regulatory legislation." NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to preserve "free and unfettered competition as the rule of trade," Northern Pacific Railway Co. V. United States, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the APPA is whether the proposed Amended Final Judgment would serve the public interest in free and unfettered competition. United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir.1983), cert. denied, 465 U.S. 1101 (1984); United States v. Waste Management, Inc., 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, "the Court is nowhere compelled to go to trial

or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[1] Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988) quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). See also Microsoft, 56 F.3d 1448 (D.C. Cir.1995). Precedent requires that:

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the

[1] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass.1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

> reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

A proposed final judgment is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

> waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

The proposed Amended Final Judgment therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted)."[3]

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[2] United States v. Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d at 565.

[3] United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

VIII.

DETERMINATIVE DOCUMENTS

In deciding to consent to the proposed Amended Final Judgment, the United States considered no documents that were determinative within the meaning of the APPA. Consequently, no such documents have been filed with this Competitive Impact Statement.

Dated: June 8, 1999

Respectfully submitted,

_____/s/_____
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