UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, 325 7th Street, N.W. Suite 300 Washington, D.C. 20530, Plaintiff, v. **GEMSTAR-TV GUIDE INTERNATIONAL, INC.**, 135 North Los Robles Avenue, Suite 800 Pasadena, CA 91101, and **TV GUIDE, INC.**, 7140 South Lewis Avenue Tulsa, OK 74136, Defendants.	)	Civil Action No. 03 CV 000198 Filed: 3/19/03

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to the Antitrust Process and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement to set forth the information necessary to enable the Court and the public to evaluate the proposed Final Judgment that would terminate this civil antitrust proceeding.[1]

[1]On February 6, 2003, the United States filed a civil Complaint, a Stipulation and Order, a proposed Final Judgment, and a Memorandum Regarding Procedures for Entering Judgments. As set forth in the Memorandum, the proposed Final Judgment would settle this case pursuant to the APPA, which applies to civil antitrust cases brought and settled by the United States. The APPA requires that the United States file a competitive impact statement in such proceedings. 15 U.S.C. §16(b).

I. NATURE AND PURPOSE OF THIS PROCEEDING

On February 6, 2003, the United States filed a four-count Complaint against Gemstar-TV Guide International, Inc. ("GTV") and its subsidiary TV Guide, Inc. ("TV Guide") related to the conduct of GTV's predecessor Gemstar International Group, Ltd. ("Gemstar") and TV Guide before July 2000, when Gemstar and TV Guide were competitors in the provision of interactive program guides, or "IPGs," to cable, satellite and other multi-channel subscription television service providers ("service providers").

The Complaint alleges that the Defendants entered into various agreements to fix prices and to allocate markets and customers, and that they began jointly conducting their IPG business, eliminating competition between them in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1. Specifically, the Complaint alleges that, in June 1999, as Gemstar and TV Guide began the negotiations that would ultimately result in a merger agreement, they agreed that they would "slow roll" (*i.e.*, delay on-going contract negotiations with) certain customers. Upon agreeing to merge in October 1999, Gemstar and TV Guide also agreed that Gemstar would phase out its IPG marketing operations to service providers and that they would allocate specific customers between them. Additionally, Gemstar and TV Guide agreed on the prices and material terms that TV Guide would offer to service providers before consummating the proposed merger.

The Complaint also alleges that the Defendants violated Section 7A of the Clayton Act, 15 U.S.C. § 18a, which requires certain acquiring and acquired parties to file pre-acquisition Notification and Report Forms with the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") and to observe a statutorily mandated waiting period before consummating the acquisition. The fundamental purpose of the waiting period is to prevent the merging parties

from combining during the pendency of an antitrust review and to maintain their identity as separate and independent actors.

In October 1999, Gemstar and TV Guide executed a merger agreement that required the filing of the Notification and Report Forms under Section 7A of the Clayton Act. Rather than wait for the expiration of the statutory waiting period, however, Gemstar and TV Guide merged most of their IPG decision-making processes, transferred control over important assets, and acted jointly on numerous business decisions.

The Complaint seeks an adjudication that the Defendants' agreements violate Section 1 of the Sherman Act, such other relief as the Court deems appropriate, and a civil penalty for violation of Section 7A of the Clayton Act.

The United States and the Defendants have reached a proposed settlement that eliminates the need for a trial in this case. The proposed Final Judgment remedies the Sherman Act violations by enjoining the Defendants from reaching similar anticompetitive agreements with competitors. The proposed Final Judgment also provides that customers that signed IPG agreements with TV Guide between June 10, 1999, and July 12, 2000, may elect to terminate their contracts within nine months of the filing of this proposed Final Judgment.

To resolve the Clayton Act violation, the proposed Final Judgment prohibits the Defendants, during the period between executing an agreement subject to Section 7A and the expiration of the statutory waiting period, from entering into any agreement with the other contracting parties to combine, merge, or transfer, in whole or in part, any operational or decision-making control over the marketing or distribution of any to-be-acquired product, service, or technology. In addition, GTV has agreed to pay a civil penalty of $5,676,000, which

is the maximum civil penalty available to address the Section 7A violation.

The United States and the Defendants have stipulated that the proposed Final Judgment may be entered into after compliance with the APPA, unless the United States first withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and punish violations thereof. Entry of this judgment would not constitute evidence against, or an admission by, any party with respect to any issue of fact or law involved in the case and is conditioned upon the Court's finding that entry is in the public interest.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS OF THE ANTITRUST LAWS

A. The Defendants and Their Merger

GTV is a Delaware corporation with its principal place of business in Pasadena, California. GTV is, as was its predecessor Gemstar, an international media and communications company that, among other things, develops, markets, and supports interactive program guides ("IPGs") and IPG technology to providers of multi-channel subscription television services ("service providers") as well as to manufacturers of consumer electronics ("CE") hardware, such as televisions and video cassette recorders. An IPG is a software application that allows television viewers to display and sort program listings on the TV screen.

TV Guide is a Delaware corporation with its principal place of business in Tulsa, Oklahoma. TV Guide is a leading provider of IPGs to service providers. In addition to its sales of IPGs, TV Guide offers several other television guidance products, including the *TV Guide* magazine.

In Spring 1999, Gemstar and TV Guide were negotiating a settlement of pending patent

infringement and antitrust litigation. By June 1999, settlement discussions focused on the possible formation of a joint venture through which Gemstar and TV Guide would jointly market IPGs to service providers. By early August, the parties found that they could not reach final agreement on the proposed joint venture. By August 12, 1999, negotiations between Gemstar and TV Guide had shifted to the possibility of merging or entering into a cross-license agreement.

On October 4, 1999, Gemstar and TV Guide announced an agreement to merge, pursuant to which Gemstar would acquire substantially all of the outstanding TV Guide stock and the two companies would form a new entity. They also entered into an optional agreement to cross-license their patents (the "Back-Up Cross License"). The Back-Up Cross License would take effect only if the merger failed to close by a certain date and if TV Guide, at its sole option, elected to trigger the agreement.

Gemstar and TV Guide filed the pre-acquisition Notification and Report forms required by Section 7A of the Clayton Act in November 1999. After reviewing the parties' filings, the DOJ opened an investigation into the competitive effects of the proposed transaction. The mandatory statutory waiting period expired on June 19, 2000, although the parties voluntarily extended the time for the DOJ to conduct its investigation.

The DOJ ultimately did not file a Complaint seeking to enjoin the merger, and the parties consummated their agreement to merge on or about July 12, 2000. TV Guide is now a wholly owned subsidiary of GTV.

B. Competition in the Relevant Product Markets

A relevant product market defines the boundaries within which competition meaningfully exists. In this instance, one relevant product market consists of the provision of IPGs to service providers for use in providing digital cable and satellite television services in the United States. Service providers offer their subscribers multi-channel packages of television programming. The adoption of digital transmission allowed these providers to offer hundreds of programming options. Service providers considered an IPG -- which allows the viewer to sort through these options – a navigational tool for which there was no realistic substitute.

Another relevant market is the market for providing IPGs to cable television service providers with systems committed to the GI/Motorola digital technology platform. In this context, a "platform" consists of hardware installed at various points in the cable television system, including digital set-top boxes deployed in television viewers' homes. Once a service provider has committed a system to a particular platform, it can only use IPGs that are compatible with the chosen platform on that system.

The relevant geographic market is the United States, given the need for close technical cooperation and support between IPG providers and U.S.-based set-top box manufacturers, service providers, and software companies.

Gemstar and TV Guide were direct competitors in these markets. Indeed, during the relevant 1999-2000 period, Gemstar and TV Guide were the only two established providers of IPG technology and services compatible with the GI/Motorola digital platform.

C. Illegal Sherman Act Agreements

1. The "Slow Roll" Agreement

In late Spring 1999, Gemstar was in the final phases of negotiating a long-term IPG agreement with Cox Communications, Inc. ("Cox"), a large service provider. TV Guide was also vying for Cox's business, having sent a draft IPG contract proposal to Cox in April. Similarly, both Gemstar and TV Guide were competing to sign Charter Communications, Inc. ("Charter") to a long-term IPG deal.

On June 10, 1999, Peter C. Boylan III, then President and Chief Operating Officer of TV Guide, met with Henry Yuen, then Chief Executive Officer of Gemstar, to discuss the possibility that the two firms could settle their litigation by forming a joint venture that would market their IPG products and services. In a contemporaneous memorandum summarizing the June 10 meeting, Mr. Boylan stated that Dr. Yuen and Mr. Boylan had "both acknowledged the need to slow roll Charter and Cox." What he meant was to cease or suspend competing for these customers' business until Gemstar and TV Guide could act jointly. Three days later, Dr. Yuen backed away from a draft contract with Cox, and thereafter ceased negotiating with Cox and Charter. TV Guide also stopped competing for their business during the joint venture discussions.

2. Market and Customer Allocation Agreements

At almost the same time that Gemstar and TV Guide announced their agreement to merge, they reached a broad agreement that Gemstar would phase out its marketing operations in the relevant markets in order to focus on sales and licensing of IPGs to consumer electronics ("CE") firms while TV Guide negotiated IPG agreements with most service providers. Pursuant

to this agreement, Gemstar stopped actively marketing its IPG to service providers, except for certain very small systems that used technology platforms that were different from those used by traditional cable and satellite television service providers. TV Guide had not previously sought to compete for this business and had not adapted its IPG to the platforms used by these companies.

Gemstar and TV Guide also agreed to allocate specific customers between them, reaching understandings as to whether TV Guide or Gemstar would approach and negotiate with particular customers during the period between the merger agreement and the consummation of the merger (the "interim period"). Specifically, Gemstar and TV Guide agreed that TV Guide would negotiate with most service providers during the interim period.

3. Agreements to Fix Prices and Material Terms to Service Providers

Gemstar and TV Guide also agreed on the prices and terms that they would offer to most service providers during the interim period. To effectuate this agreement, they shared detailed and specific information about offers and counter-offers to service providers and kept each other apprised of individual contacts with customers. TV Guide provided Gemstar with its "rate card," which included both rates and non-price terms, and, on at least two occasions, TV Guide provided Gemstar with full drafts of proposed IPG contracts before they were sent to service providers. On at least two occasions, Gemstar sent to TV Guide red-lined comments on TV Guide's draft IPG contracts. In the course of maintaining regular contact with Gemstar, TV Guide blind-copied or forwarded to Gemstar electronic correspondence between TV Guide and service providers related to negotiations for IPG agreements.

As a result of this agreement, the prices and terms that TV Guide offered during the

interim period substantially differed from offers it had made prior to June 1999, when it began coordinating with Gemstar. During this period eight service providers entered into IPG agreements with TV Guide under prices and terms that conformed to the illegal agreement.

D. Pre-Merger Acquisition of Assets

Through their agreements and other actions, Gemstar and TV Guide, in effect, merged their IPG decision-making processes, and each acquired substantial operational and decision-making control over important assets of the other, before the expiration of the statutory waiting period prescribed by Section 7A of the Clayton Act. Gemstar, for example, gained review and veto authority over TV Guide's IPG contract offers, converted TV Guide into its agent in various respects, and gained substantial influence over TV Guide's separate IPG advertising business. TV Guide, for its part, acquired substantial amounts of control over Gemstar's business of providing IPGs to service providers, including Gemstar's business opportunities and customer relationships. In addition, the parties shared confidential business information and made joint decisions regarding various business opportunities.

E. The Defendants' Conduct Violates Antitrust Laws

1. Sherman Act Violations

Section 1 of the Sherman Act prohibits any "contract, combination or conspiracy" in "restraint of trade." In the context of a merger, Section 1 requires competitors that have agreed to merge to maintain their status as independent economic entities throughout the pre-consummation period, *i.e.*, until they can be legally combined. Here, the Complaint alleges three specific anticompetitive agreements that violated Section 1 -- to cease competing for customers, to allocate markets and customers, and to fix prices and terms. These agreements eliminated competition and

foreclosed the possibility that customers could have obtained lower prices and secured better contract terms during the time before the merger could be legally consummated. Stand-alone agreements to fix prices, allocate markets or customers, or otherwise cease competition have long been condemned as per se violations of Section 1 of the Sherman Act. Given their harmful effect on competition and lack of any redeeming virtue, they are conclusively presumed to be unreasonable, without the need for an elaborate inquiry into the harm actually caused or to any potential business justifications for their use.

Here, the Antitrust Division concluded that no special circumstances justified the Defendants' conduct or removed it from the per se illegal category. The "slow roll" agreement, the market and customer allocations, and the fixing of prices and terms were not reasonably necessary to effectuate their merger agreement or the Back-Up Cross License Agreement, and thus were not ancillary to a legitimate business transaction. None of the restraints settled, or were reasonably ancillary to settling, the pending litigation. Similarly, the fact that many of the agreements were reached after the Defendants had agreed to merge did not change the character of the illegal restraints. The extensive coordination on prices and terms to be offered, whether in long-term contracts or otherwise, was not justified as necessary to protect any legitimate interest that Gemstar may have had in preserving TV Guide's business, or in preventing a material change in TV Guide's conduct that might adversely affect the value of the to-be-acquired business.

The Defendants' illegal agreements had the effect of lessening or eliminating competition between Gemstar and TV Guide in the provision of IPG technology and services in violation of Section 1 of the Sherman Act and denied customers the benefits of that competition. During the period when those agreements were in effect, some service providers signed long-term IPG

contracts based on the fixed prices and terms. Moreover, but for the illegal agreements, some service providers may have signed long- or short-term IPG agreements on better prices and terms than the Defendants had agreed to offer.

2. Clayton Act Section 7A Violation

Section 7 of the Clayton Act is the principal statute used by the antitrust agencies to challenge anticompetitive mergers and acquisitions. It provides in pertinent part:

> No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.[2]

Prior to the enactment of Section 7A of the Clayton Act, the DOJ and FTC often were forced to investigate anticompetitive acquisitions that had already been consummated without public notice. In those situations, the agencies' only recourse was to sue to unwind the parties' merger. The combined entity had the incentive to delay litigation so that years elapsed before adjudication and attempted relief. During this extended time consumers were harmed by the reduction in competition between the acquiring and acquired firms and, if the court ultimately found that the merger was illegal, effective relief was often impossible to achieve.

Congress enacted Section 7A as a measure to strengthen and improve antitrust enforcement by giving the enforcement agencies an opportunity to investigate certain large acquisitions before

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[2] 15 U.S.C. § 18.

they are consummated. In particular, Section 7A prohibits certain acquiring parties from consummating the acquisition before a prescribed waiting period expires or is terminated.[3] The parties are required to remain separate during the statutory waiting period and to preserve their status as independent economic actors during the antitrust investigation. The legislative history of Section 7A underscores Congress' desire that competition existing before the merger should be maintained to the extent possible pending review by the antitrust enforcement agencies and the court.

The Complaint alleges that the Defendants violated Section 7A by, in effect, merging their IPG decision-making and by giving Gemstar significant control over TV Guide's IPG business before the expiration of the statutory waiting period, thus accomplishing a *de facto* acquisition of assets under Section 7A. Whether a *de facto* acquisition has occurred depends on the facts of each particular case. Courts have recognized that the execution of an acquisition agreement, combined with the assumption of significant operational or decision-making influence over the to-be-acquired business, can amount to an "acquisition" under Section 7 of the Clayton Act, even if the parties have not formally consummated the transaction. Similarly, once parties have entered into an executory agreement subject to Section 7A's requirements, they may not effectuate the acquisition by, for example, merging their operations or otherwise transferring significant

[3]Section 7A requires that "no person shall acquire, directly or indirectly, any voting securities or assets of any person" exceeding certain thresholds until both have made premerger notification filings and the post-filing waiting period has expired. 15 U.S.C. § 18a(a). At the time of the Defendants' conduct, the post filing waiting period was either 30 days after filing or, if the enforcement agency requested additional information, 20 days after the parties complied with the enforcement agency's request. 15 U.S.C. § 18a(b). The enforcement agency may grant early termination of the waiting period, 15 U.S.C. § 18a(b)(2), and often does so when a merger poses no competitive problems.

operational, management or decision-making control over the to-be-acquired assets. In other words, once Section 7A is triggered, parties to a merger agreement must, at a minimum, avoid combining prematurely in a way that would constitute an acquisition under Section 7.[4]

Such premature combination of operations and assets significantly undermines the statutory scheme, which is designed to give the antitrust agencies the opportunity to conduct an investigation *before* the parties have combined their operations or acquired significant assets. It can contaminate the antitrust agencies' investigation by, among other things, providing a skewed picture of the competitive landscape and making it difficult or impossible to obtain meaningful relief should the antitrust agencies successfully enjoin a transaction.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment contains equitable relief designed to prevent future violations of Section 1 of the Sherman Act and Section 7A of the Clayton Act, addresses the effects of the Defendants' conduct, and secures a monetary civil penalty for Gemstar's and TV Guide's violation

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[4]This conclusion accords with the FTC regulations, which define an "acquiring person" as one who will "hold" voting securities or assets directly or indirectly through third parties. 16 C.F.R. § 801.2(a). "Hold" is further defined to mean "beneficial ownership," 16 CFR § 801.1(c). In its "Statement of Basis and Purpose" ("SBP"), 43 Fed. Reg. 33450 (July 31, 1978), which accompanied the regulations, the FTC stated that the existence of "beneficial ownership" was to be determined "in the context of particular cases" with respect to the person enjoying the "indicia of beneficial ownership." *Id*. at 33459. The execution of a reportable agreement, combined with the assumption of significant influence over the to-be-acquired securities or assets, transfers sufficient "indicia of beneficial ownership" to amount to "holding" the securities or assets under the regulations. *See* William J. Baer, Report from the [FTC] Bureau of Competition (April 15, 1999) ("In the jargon of [Section 7A], signing the contract transfers some indicia of beneficial ownership. By itself, that transfer is entirely lawful. But the transfer of additional indicia of ownership during the waiting period -- such as assuming control through management contracts, integrating operations, joint decision making, or transferring confidential business information for purposes other than due diligence inquiries -- are inconsistent with the purposes of [Section 7A] and will constitute a violation.")

of Section 7A. The proposed Final Judgment sets forth required and prohibited conduct, a compliance program the Defendants must follow, and procedures available to the United States to determine and ensure compliance with the Final Judgment. Section IX provides that these conditions will expire ten years after the entry of the Final Judgment.

A. Prohibited Conduct

Section IV(A) of the proposed Final Judgment is designed to prevent future Clayton Act violations of the sort alleged in the Complaint. During the "pre-consummation period" -- after executing an agreement subject to the reporting requirements of Section 7A and until the expiration of the statutory waiting period -- the Defendants are prohibited from entering into any agreement with the other contracting parties to combine, merge, or transfer, in whole or in part, any operational or decision-making control over the marketing or distribution of any to-be-acquired product, service, or technology. This injunction applies to all transactions subject to the reporting requirements of Section 7A, regardless of the particular products involved or whether the other party to the transaction competes with the Defendants. The injunction also applies to partial assumptions of control over the marketing or distribution of any to-be-acquired asset.

Section IV(B) is designed to prevent future violations of Sherman Act. It enjoins the Defendants from entering into various agreements with competitors between the beginning of negotiations until the consummation or abandonment of certain specified types of transactions. Specifically, this provision covers any agreement between the Defendants and any firm offering a competing product to acquire assets or securities, form a joint venture, settle litigation, or license intellectual property. During this period, the Defendants may not reach agreements with the other party affecting price or output, allocating markets or customers, or eliminating or delaying

competition. Section IV(B) also enjoins the Defendants from disclosing, or seeking the disclosure of, competitively sensitive information during this period.

In addition, Section IV(C) of the proposed Final Judgment requires GTV to permit specified service providers, those that signed IPG agreements conforming to the agreed-upon prices and terms during the period between June 10, 1999, and July 12, 2000, the option to terminate, without penalty, those agreements. The decision to terminate those agreements rests solely with the service provider.

B. Permitted Conduct

Section V of the proposed Final Judgment identifies certain agreements and conduct that are permitted by the Judgment. Sections V(A) and V(B) ensure that the decree will not be interpreted to forbid certain "conduct-of-business" covenants that are typically found in merger agreements. Section V(A) permits the use of agreements obligating the to-be acquired person generally to operate its business in the ordinary course of business consistent with past practices. Section V(B) permits the use of "material adverse change" provisions, which give the acquiring person certain rights to prevent material changes in the way a to-be-acquired firm conducts its business. These are customary provisions found in most merger agreements and are intended to protect the value of the transaction and prevent a to-be-acquired person from wasting assets.

Section V(D) recognizes a narrow exception to the prohibition on the exchange of competitively sensitive information. As a general rule, competitors should not obtain prospective customer-specific price information prior to the consummation of the transaction. Access to such information raises significant antitrust risks, as it could be used to enter into an illegal agreement that would be harmful to competition if the transaction is subsequently abandoned.

Notwithstanding, there may be situations during the due diligence process in which an acquiring person may need information regarding pending contracts to value the business properly. Section IV(D) of the proposed Final Judgment permits GTV to obtain such information, subject to appropriate limitations and confidentiality undertakings.

C. Compliance

Sections VI and VII of the proposed Final Judgment set forth various compliance procedures. Section VI sets up an affirmative compliance program directed toward ensuring GTV's compliance with the limitations imposed by the proposed Final Judgment. The compliance program includes the designation of a compliance officer who is required to distribute a copy of the Final Judgment to each present and succeeding director, officer, employee, and agent with the responsibility for mergers and acquisitions, brief each such person regarding compliance with the Final Judgment, and obtain a certification from each such person that he or she has received a copy of the Final Judgment and understand his or her obligations under the judgment. In addition, the compliance officer must provide a copy of the Final Judgment to a merger partner before the initial exchange of a letter of intent, definitive agreement or other agreement of merger. Section VI of the proposed Final Judgment further requires the compliance officer to certify to the United States that GTV is in compliance and to report any violations of the Final Judgment.

To facilitate monitoring GTV's compliance with the Final Judgment, Section VII grants DOJ access, upon reasonable notice, to GTV's records and documents relating to matters contained in the Final Judgment. GTV must also make its personnel available for interviews or depositions regarding such matters. In addition, GTV must, upon request, prepare written reports relating to matters contained in the Final Judgment.

These provisions are adequate to prevent recurrence of the type of illegal conduct alleged in the Complaint. The proposed Final Judgment should ensure that, in future transactions, GTV will not enter into agreements to limit competition during the pre-consummation period. Consequently, customers will receive the benefits of free and open competition.

D. Civil Penalties[5]

Under Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1), any person who fails to comply with the Act shall be liable to the United States for a civil penalty of not more than $11,000 for each day during which such person is in violation of the Act.[6] Both Gemstar and TV Guide were in violation of Section 7A from the first full day following execution of the merger agreement until the expiration of the statutory waiting period. The Defendants have agreed to pay, within thirty days of the entry of the proposed Final Judgment, civil penalties reflecting $11,000

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[5]The United States does not believe that the payment of civil penalties under Section 7A is subject to the APPA, and courts in this district have consistently entered consent judgments for civil penalties under Section 7A without employing APPA procedures. *See, e.g.*, *United States v. Hearst Trust, et al.*, 2001-2 Trade Cases ¶ 73,451 (D.D.C.); *United States v. Input/Output, et al.*, 1999-1 Trade Cas. (CCH) ¶ 72,528 (D.D.C.); *United States v. Blackstone Capital Partners II Merchant Banking Fund, et al.*, 1999-1 Trade Cas. (CCH) ¶ 72,585 (D.D.C.); *United States v. Mahle GMBH, et al.*, 1997-2 Trade Cas. (CCH) ¶ 71,868 (D.D.C.); *United States v. Figgie Int'l, Inc.*, 1997-1 Trade Cas. (CCH) ¶ 71,766 (D.D.C.); *United States v. Foodmaker, Inc.*, 1996-2 Trade Cas. (CCH) ¶ 71,555 (D.D.C.); *United States v. Titan Wheel International, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,406 (D.D.C.); *United States v. Automatic Data Processing, Inc.,* 1996-1 Trade Cas. (CCH) ¶ 71,361 (D.D.C.); *United States v. Trump*, 1988-1 Trade Cas. (CCH) ¶ 67,968 (D.D.C.). Thus, in consent settlements seeking both equitable relief and civil penalties, courts have not required use of APPA procedures with respect to the civil penalty component of the proposed final judgment. *See United States v. ARA Services, Inc.*, 1979-2 Trade Cas. (CCH) ¶ 62,861 (E.D. Mo.). Consequently, the civil penalties component of the proposed Final Judgment is not open to public comment. The other provisions of the proposed Final Judgment, including the equitable relief to resolve the alleged violations of Section 7A, are covered by the APPA and subject to comment.

[6]*Id.*; *see also* Pub. L. 104-134 § 31001(s) (Debt Collection Improvement Act of 1996); 16 C.F.R. § 1.98 (increasing maximum penalty to $11,000 per day).

per day per Defendant (or $5,676,000). This is the maximum civil penalty the Court could impose on the Defendants at trial.

V. REMEDIES AVAILABLE TO 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 district court to recover three times the damages the person has suffered, as well as the costs of bringing a lawsuit and reasonable attorneys fees. Entry of the proposed 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 Final Judgment has no effect as *prima facie* evidence in any subsequent private lawsuit that may be brought against Defendants.

VI. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

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

comments and the response of the United States will be filed with this Court and published in the *Federal Register*. Written comments should be submitted to:

James R. Wade
Chief, Litigation III
United States Department of Justice
Antitrust Division
325 7th St., NW, Suite 300
Washington, DC 20530

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

VII. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against the Defendants. The United States is satisfied, however, that the proposed injunctive relief and payment of civil penalties are sufficient to address the harm alleged in the Complaint.

VIII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that injunctions of anticompetitive conduct contained in proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) 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, the 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 on 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 the determination of the issues at trial.

15 U.S.C. § 16(e). As the Court of Appeals for the District of Columbia has 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. See *United States v. Microsoft*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

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 proceedings."[7] Rather,

> absent 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.[8]

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*

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[7]*United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975) *citing* 119 CONG. REC. 24598 (1973). 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, these procedures are discretionary. 15 U.S.C. § 16(f). 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. Rep. No. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6538-9.

[8]*United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, 71980 (W.D. Mo. 1977); *see also United States v. Loew's Inc.*, 783 F.Supp. 211, 214 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.,* 662 F.Supp. 865, 870 (S.D.N.Y 1987).

States v. BNS, Inc., 858 F.2d 456, 462-63 (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 at 1458. Precedent requires that

> [t]he 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 one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[9]

The proposed 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.'"[10]

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States alleges in its Complaint, and does not authorize

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[9] *United States v. Bechtel Corp.*, 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, 1142-3 (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 558, 565 (2d Cir. 1983).

[10] *Gillette*, 406 F.Supp. at 716; *See also United States v. Alcan Aluminum, Ltd.*, 605 F.Supp. 619, 622 (W.D. Ky. 1985); *United States v. Carrols Dev. Corp.*, 454 F.Supp. 1215, 1222 (N.D.N.Y. 1978).

the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Since the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that the court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id*.

IX. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

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Respectfully Submitted,

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