IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff, v. VERIFONE SYSTEMS, INC., and HYPERCOM CORPORATION, Defendants.	Case: 1:11-cv-00887 Assigned to: Kessler, Gladys Assign. Date: 5/12/2011 Description: Antitrust

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THIS PROCEEDING

On November 17, 2010, VeriFone Systems, Inc. ("VeriFone") entered into a $485 million merger agreement to acquire Hypercom Corporation ("Hypercom") that would combine two of only three significant sellers of Point of Sale ("POS") terminals in the United States. On April 1, 2011, VeriFone and Hypercom entered into an agreement whereby Hypercom's United States POS business would be licensed to Ingenico S.A. ("Ingenico"), the only other substantial provider of POS terminals. The United States

filed a civil antitrust Complaint on May 12, 2011, seeking to enjoin VeriFone's proposed acquisition of Hypercom and the related licensing agreement with Ingenico because the likely effect of the transactions would be to lessen competition substantially for POS terminals in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would result in less innovation and higher prices for POS terminals. On May 19, 2011, Defendants announced they would abandon the agreement to license certain Hypercom assets to Ingenico. Therefore, the United States filed an Amended Complaint on June 22, 2011 to dismiss Ingenico as a defendant in this matter

On August 4, 2011, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition in the United States. Under the proposed Final Judgment, which is explained more fully below, VeriFone and Hypercom are required to divest Hypercom's entire business engaged in the development, production, distribution, and sale of POS terminals in the United States (hereafter, the "Divestiture Assets"). Under the terms of the Hold Separate, VeriFone and Hypercom will take certain steps to ensure that the Divestiture Assets are operated as a competitive independent, economically viable and ongoing business that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. 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 to punish and remedy violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The POS Terminal Industry

POS terminals enable retailers and other firms to accept a wide range of non-cash payment types, such as credit cards and debit cards, at millions of locations nationwide. Given the increasing popularity of electronic payments, the vast majority of merchants need to accept non-cash payment options and use POS terminals to handle on-site electronic payments. POS terminals can be operated as standalone machines, commonly referred to in the industry as "countertop" machines, or connected to an electronic cash register or similar device as part of an integrated point of sale system, commonly referred to in the industry as "multi-lane" machines.

Countertop POS terminals can be connected to payment networks by a standard telephone line, by wired or wireless internet protocol technologies, or cellular networks. Countertop POS terminals are typically sold to small- or medium-sized businesses or retailers to enable them to accept credit and debit cards.

Multi-lane POS terminals are connected to an electronic cash register or similar device as part of an integrated point of sale system. POS terminals of this type are typically used by large retailers such as a multi-lane retail merchant or department store to accept credit and debit cards.

B. The Defendants and the Proposed Transaction

VeriFone, a Delaware corporation, is the leading seller of both countertop and multi-lane POS terminals in the United States. VeriFone offers POS terminals and

related software designed for numerous applications, including financial, retail, petroleum, government, and healthcare. VeriFone markets dial-up, IP-enabled, and wireless POS terminals. In addition, VeriFone provides POS operating systems for its POS terminals. Merchants using VeriFone terminals vary in size and transaction volume from small, local businesses to national, multi-lane retail chains. In the fiscal year ending October 31, 2010, VeriFone earned more than $1 billion in revenues worldwide.

Hypercom, a Delaware corporation, is the third largest provider of POS terminals in the United States, with a large presence in the countertop POS terminals market and an emerging presence in the multi-lane POS terminals market. Its customers include financial institutions, electronic payment processors, transaction network operators, retailers, system integrators, independent sales organizations, and distributors. It also sells products to companies in the hospitality, transportation, healthcare, and restaurant industries. Hypercom's products include POS terminals and peripheral devices, including a range of PIN pads and keyboards, card readers, and payment controllers designed to permit the efficient integration of payment functionality in a variety of self-service environments, such as transportation ticketing, gasoline station pumps, parking machines, and general purpose kiosks. In 2010, Hypercom earned more than $450 million in revenues worldwide.

On November 17, 2010, following approximately eighteen months of negotiations, VeriFone agreed to purchase Hypercom in a $485 million deal that would combine two of only three significant sellers of POS terminals in the United States. The proposed acquisition would extend VeriFone's position as the largest seller of POS terminals in the United States. This transaction would substantially lessen competition in

the market for POS terminals and is the subject of the Amended Complaint and proposed Final Judgment filed by the United States in this matter.

C. Relevant Markets

Antitrust law, including Section 7 of the Clayton Act, protects consumers from anticompetitive conduct, such as a firm's acquisition of the ability to raise prices or reduce choice. Market definition assists antitrust analysis by focusing attention on those markets where competitive effects are likely to be felt. Well-defined markets encompass actors including both sellers and buyers whose conduct most strongly influences the nature and magnitude of competitive effects. To ensure that antitrust analysis takes account of a broad enough set of products to evaluate whether a transaction is likely to lead to a substantial lessening of competition, defining relevant markets in merger cases frequently begins by identifying a collection of products or set of services over which a hypothetical monopolist profitably could impose a small but significant and non-transitory increase in price.

Here, the United States' investigation revealed two distinct markets for POS terminals. The first market consists of countertop POS terminals, which are directly connected to credit card processors through a telephone line, internet connection or cellular network. The second market consists of multi-lane POS terminals, which are integrated into a merchant's cash register and integrated point of sale system. There are no reasonable alternative payment devices to countertop or multi-lane POS terminals to which merchants could turn to defeat a price increase. Accordingly, both countertop and multi-lane POS terminals are relevant product markets.

Antitrust analysis must also consider the geographic dimensions of competition. Here, the relevant markets exist within the United States and are not affected by competition outside the United States. POS terminals sold in the United States must be customized for the demands of the United States purchaser and comply with distinct technical specifications and certifications unique to the United States. Therefore, the competitive dynamic for POS terminals market is distinctly different outside the United States.

D. Competitive Effects

The POS terminals industry in the United States is extremely concentrated, and would become substantially more so if VeriFone were to acquire Hypercom. VeriFone and Hypercom are two of only three dominant providers of POS terminals in the United States. In 2009, according to a leading market analyst report, VeriFone had a 48 percent share of the sale of all POS terminals in the United States, while Hypercom had an 18 percent share. The only other significant company to offer POS terminals in the United States is Ingenico, representing a 26 percent share of the sale of all POS terminals in the United States.

In the United States, VeriFone and Hypercom together control over 60 percent of the countertop POS terminals market. VeriFone, Hypercom and Ingenico together control well over 90 percent of the multi-lane POS terminals market in this country. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), the proposed transaction would substantially increase the HHI in each relevant market in excess of the 200 points presumed to be anticompetitive under the Horizontal

Merger Guidelines issued by the Department of Justice and the Federal Trade Commission.

The vigorous competition between VeriFone and Hypercom in the development, distribution and sale of countertop and multi-lane POS terminals has benefitted customers through better prices and increased innovation, quality, product variety and service.

The proposed transaction would eliminate this competition between VeriFone and Hypercom and likely result in unilateral and coordinated effects. The acquisition would likely result in unilateral effects in each relevant market as VeriFone would be able to raise the price of both VeriFone and Hypercom products because it would recapture some sales that would have been lost absent the acquisition as purchasers reacted to such price increases by switching between VeriFone and Hypercom products. The elimination of Hypercom as a competitor would also reduce the number of significant competitors from three to two in the POS terminals markets, resulting in a duopoly and heightening the potential for coordinated behavior. Coordination, whether tacit or explicit, is especially likely because the acquisition would enhance each company's ability to deter competitive behavior in one market by retaliating across a range of other product and geographic markets.

The POS terminals markets are protected by high barriers to entry. These barriers include the need to obtain certifications for countertop POS terminals or the ability for the multi-lane POS terminal to work with a merchant's integrated payment system, keeping up with changing payment regulations, having sufficient scale, being in close proximity to customers, having a broad portfolio of customer applications, and the need for a reputation for reliability.

As a result of these barriers to entry, entry or expansion by any other firms into the countertop or multi-lane POS terminals markets would not be timely, likely, or sufficient to prevent the anticompetitive effects that would result from the proposed transaction.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the likely anticompetitive effects of the acquisition in the development, production, distribution, and sale of POS Terminals in the United States by establishing a new, independent and economically viable competitor. The proposed Final Judgment requires defendants to divest Hypercom's entire business engaged in the development, production, distribution, and sale of POS Terminals in the United States. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant markets.

The proposed Final Judgment designates Gores as the company to which the divested assets must be sold.[1] The Final Judgment will enable Gores to become a new, independent, economically viable competitor in the sale of POS Terminals in the United States. In addition to defining the assets to be divested to Gores, the Final Judgment requires VeriFone to (1) license the intellectual property necessary to compete in the

[1] The Hold Separate requires that until the assets being divested are sold according to the terms of the Final Judgment, VeriFone and Hypercom must continue to operate their entire businesses as independent, ongoing, and economically viable businesses that are held entirely separate, distinct and apart. VeriFone and Hypercom shall not coordinate their production, marketing or terms of sales until the assets being divested are sold. It is necessary to keep Hypercom's entire business separate from VeriFone's business in the event the divested assets are not sold to Gores for any reason. If the assets are not sold to Gores, VeriFone and Hypercom will be unable to combine their operations, thus preserving Hypercom as an independent competitor in the POS Terminals markets.

provision of POS Terminals in the United States to Gores; (2) provide access to Hypercom employees; and (3) provide transitional support to Gores.

The United States typically requires that ownership of intellectual property is divested to the acquirer and if required a license to the intellectual property is granted back to the seller. The structure of the intellectual property transfer in this instance is unique due to the nature of the divestiture relative to the entire global market. VeriFone will retain ownership of Hypercom's international POS Terminals business which relies on similar, and in some instances the same, intellectual property rights relied upon in Hypercom's United States POS Terminals. Therefore, VeriFone retaining ownership of Hypercom's intellectual property and licensing those rights to Gores allows Gores to compete effectively in the United States and VeriFone to utilize the Hypercom intellectual property abroad.

The Final Judgment allows Gores access to Hypercom employees and prohibits VeriFone interfering with any negotiations by Gores to employ any Hypercom employee who is agreed to by the Defendants and Gores to be an employee to be transferred in connection with the divestiture of the Divestiture Assets. It also requires VeriFone to waive any non-compete agreements for Hypercom employees who are agreed to by the Defendants and Gores to be an employee to be transferred in connection with the divestiture of the Divestiture Assets. These provisions will provide Gores will access to the engineering and sales talent at Hypercom which will help to ensure that Gores can operate effectively as a standalone competitor to VeriFone.

Gores may require assistance in transitioning the databases, software, and technical support that relates to the divested assets and may require time to develop their

own capabilities to manage these items on an ongoing basis. Therefore, the Final Judgment allows for Gores to enter into a transitional support agreement for up to one year after the sale of the divestiture assets. These transition services will enable Gores to compete effectively in providing POS Terminal in the United States. In addition, the Final Judgment forecloses VeriFone from taking any action to impede the operation of the transitional support services agreement.

Gores, a privately held acquisition and management company, is well suited to acquire the divestiture assets. Gores specializes in acquiring technology organizations and managing them for growth and profitability. In addition, it has experience in the POS Terminal industry. In 2001, Gores purchased VeriFone from Hewlett-Packard Company. Gores and another firm recapitalized VeriFone, focused the company on its POS Terminals products and services, and made VeriFone a profitable company. In 2005, VeriFone launched an initial public offering and became an independent company. Given Gores' financial resources, management expertise and POS Terminals industry knowledge, Gores is well positioned to successfully compete with the merged firm in the development, production, distribution, and sale of POS Terminals in the United States

In the event that Defendants do not accomplish the divestiture to Gores as prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed the proposed Final Judgment provides that defendants 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 the divestiture is accomplished. After his or her appointment becomes effective, the trustee

will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States 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.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the development, production, distribution, and sale of POS terminals in the United States.

IV. REMEDIES APPLICABLE 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 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 *prima facie* effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES APPLICABLE FOR APPROVAL OR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed 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 Final Judgment is in the public interest.

The APPA provides a period of at least 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 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, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. 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:

James J. Tierney
Chief, Networks & Technology Enforcement Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 7100
Washington, DC 20530

The proposed 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 Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, seeking preliminary and permanent injunctions against Defendants' transaction and proceeding to a full trial on the merits. The United States is satisfied, however, that the relief in the proposed Final Judgment will preserve competition in the markets for countertop and multi-lane POS Terminals. Thus, the proposed Final Judgment would

protect competition as effectively as would any remedy available through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, 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)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the United States is entitled to "broad discretion to settle with the Defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3 (D.D.C. Aug. 11, 2009)

(noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").[1]

Under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. 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) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held 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 the 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.

[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

In addition, "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.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

[2] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'").

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Because 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 did not pursue. *Microsoft*, 56 F.3d. at 1459-60. Courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he 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." 119 *Cong. Rec.* 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the

public interest determination is left to the discretion of the Court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3]

VIII. DETERMINATIVE DOCUMENTS

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

Dated: August 4, 2011

Respectfully submitted,

FOR PLAINTIFF
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_____/s/_____

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[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("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."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").