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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	
Plaintiff,	**CIVIL NO. 90-00904 DAE**
v.	**COMPETITIVE IMPACT STATEMENT**
FIRST HAWAIIAN, INC.; and FIRST INTERSTATE OF HAWAII, INC.,	Filed: 3/7/91
Defendants.	Judge Ezra

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 Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On December 28, 1990, the United States filed a civil antitrust complaint under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, alleging that the proposed acquisition of First Interstate of Hawaii, Inc. ("FIHI") by First Hawaiian, Inc. and FHI Acquisition Corporation (referred to collectively as "FH") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

The complaint alleges that the effect of the acquisition may be substantially to lessen competition in the provision of business banking services in the Honolulu, East Hawaii, West Hawaii, Maui, and Kauai geographic markets. Business banking services are services, such as checking accounts and loans, offered to commercial customers. Both FH and FIHI compete directly in offering a variety of business banking services to commercial customers in each of the geographic markets. The proposed acquisition would result in substantial increases in concentration in markets that are already highly concentrated and have substantial entry barriers. The complaint alleges that the proposed acquisition would, in particular, hurt the many small to medium-sized commercial customers purchasing business banking services in Hawaii. The complaint seeks, among other relief, to enjoin the proposed transaction and thereby to prevent its anticompetitive effects.

On March 7, 1991, the United States and FH and FIHI filed a Stipulation by which they consented to the entry of a proposed Final Judgment. Under the proposed Final Judgment, as explained more fully below, defendants would be required to sell designated commercial banking branches[1] in each geographic market and to terminate their license for use of the "First Interstate System" franchise in the state of Hawaii. The United States and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the government withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations of the Judgment.

II.

EVENTS GIVING RISE TO THE ALLEGED VIOLATION

On May 11, 1990, FH and FIHI entered into an Agreement and Plan of Merger by which FH, through its subsidiary FHI Acquisition Corporation, would purchase 100 percent of the voting shares of FIHI for approximately $140 million. FH is the second largest banking organization in the state of Hawaii, as measured by total deposits and assets. FH has assets totalling $5.2 billion and controls deposits of approximately $4.7 billion which represent

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[1] The proposed Final Judgment requires divestiture of six commercial bank branches. In addition, one financial services loan company is being divested to a commercial bank that will use the purchased assets and deposits to facilitate the growth of its business banking services business.

approximately 32 percent of total deposits in commercial banking organizations in Hawaii. FH operates one commercial bank subsidiary, First Hawaiian Bank, and one FDIC-insured financial services loan company, First Hawaiian Creditcorp. FH operates 58 offices located throughout the state.

FIHI is the fourth largest commercial banking organization in the state of Hawaii. FIHI has assets totalling $858.2 million and controls deposits totalling approximately $770.9 million which represent approximately 6 percent of the total deposits in commercial banking organizations in Hawaii. FIHI operates 20 First Interstate Bank of Hawaii offices located throughout the state.

On November 30, 1990, the Federal Reserve Board approved the proposed acquisition of FIHI by FH.[2] The Federal Reserve Board's order required the defendants to divest the Lihue (Kauai market), Kona (West Hawaii market), Wailuku and Lahaina (Maui market) branches of FIHI and the Hilo (East Hawaii market) branch of First Hawaiian Creditcorp, a financial services loan company. The Federal Reserve divestiture permitted the sale of the branches to anyone other than the Bank of Hawaii, the largest commercial bank in the state of Hawaii. Under Section 11 of the Bank Holding Company Act, as amended, 12 U.S.C. § 1849,[3] the United States had

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[2] First Hawaiian, Inc., 77 Fed. Res. Bull. 52 (1990).

[3] Section 1849(b)(1) provides in pertinent part that:

> The Board shall immediately notify the Attorney General of any approval by it pursuant to section 1842 of this title of a proposed acquisition, merger, or consolidation transaction. . . . [T]he transaction may not

30 days from the date of the Federal Reserve Board's decision to prevent the proposed acquisition by filing a complaint with the Court.

The United States filed its complaint because the proposed acquisition would likely reduce competition in the provision of business banking services in the relevant markets in Hawaii. The likelihood of competitive harm appears greatest for small to medium-sized commercial customers because the proposed acquisition would eliminate one of only a few financial institutions serving these customers and would likely result in higher prices for business banking services.

Investigation and discovery by the United States shows that FH and FIHI compete in the provision of a wide range of banking services, including services to individual consumers and services to businesses in Hawaii. Many other financial institutions compete with FH and FIHI in the provision of consumer banking services. Only a few institutions, however, are competitors for commercial customers. These competitors are limited to those firms that, at

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> be consummated before the thirtieth calendar day after the date of approval by the Board. Any action brought under the antitrust laws arising out of an acquisition, merger, or consolidation transaction approved under section 1842 of this title shall be commenced prior to the earliest time under this subsection at which the transaction approval under section 1842 of this title might be consummated. The commencement of such an action shall stay the effectiveness of the Board's approval unless the court shall otherwise specifically order.

12 U.S.C. § 1849(b)(1).

a minimum, provide transaction accounts and commercial loans.[4] FH and FIHI are two of the largest of these few firms. FH and FIHI each offer a variety of business banking services, and compete directly with one another in the relevant geographic markets of: Honolulu, East Hawaii, West Hawaii, Maui, and Kauai. Nine other firms offer business banking services in the state of Hawaii, but not every one of these firms compete in each of the five relevant geographic markets. In the Honolulu market, eight other financial institutions (American Savings Bank, Bank of Hawaii, Bank of Honolulu, Central Pacific Bank, City Bank, EastWest Bank, Hawaii National Bank and Liberty Bank) offer business banking services. In the East Hawaii market, five other financial institutions (American Savings Bank, Bank of Hawaii, Central Pacific Bank, City Bank and Hawaii National Bank) offer business banking services; and in the West Hawaii market, only two other financial institutions (American Savings Bank and Bank of Hawaii) offer business banking services. In the Maui market, six other financial institutions (Aloha National Bank of Maui, American Savings Bank, Bank of Hawaii, Central Pacific Bank, City Bank and EastWest Bank) offer business banking services. In the Kauai market, three other financial institutions (American Savings Bank, Bank of Hawaii, and Central Pacific Bank) offer business banking services.

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[4] Commercial loans include all loans to commercial customers not fully secured by real estate. Additional business banking services offered to commercial customers include but are not limited to cash and coin, lockbox, cash management, and business expertise and advice.

Few other financial institutions currently offer or appear likely to start offering within a reasonably short period of time these business banking services in the state of Hawaii. Savings and loan associations are limited by law in the extent to which they make commercial loans; moreover, their ability to begin offering these services to businesses is substantially affected by capital requirements and their own capital positions. Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989,[5] new, more significant capital requirements and other restrictions were placed upon the lending activities of savings and loan associations. Moreover, savings and loan associations in Hawaii, with one exception, do not currently provide business banking services to any significant degree.[6] The United States' investigation revealed that the above factors coupled with other economic factors concerning the cost, scale and expertise involved in offering business banking services, make it unlikely that savings and loan associations in Hawaii will be likely entrants into the provision of such services.

The investigation also revealed that credit unions in Hawaii are generally not current or potential competitors in business banking services due to a combination of legal and economic restraints. Financial services loan companies are not permitted to

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[5] 12 U.S.C. § 1467(t).

[6] The United States found that some of the savings and loan associations had provided some business banking services in small amounts, but do not provide them now nor are likely to do so within a reasonable period of time in an amount sufficient to affect the prices of those firms currently offering such services.

offer transaction accounts,[7] and the characteristics of their loans are generally different from those made by commercial banks. Finally, under current statutes,[8] out-of-state bank organizations and bank holding companies are legally prohibited from entry into the state.

The United States concluded that, for business banking services in Hawaii, the relevant geographic markets were the major islands or parts of those islands in the state of Hawaii. Based on a variety of measures, the United States' investigation and discovery indicates that of the firms providing business banking services, only a few firms have very significant market shares; the other firms are significantly smaller. FH and FIHI are in the category of the largest firms. This market structure is significant, because it means that a combination of the two firms will significantly increase concentration. Concentration is important because it indicates the likelihood that a group of firms could exercise market power (i.e., raise prices or reduce output). In addition, the United States concluded that it was unlikely that entry of new competitors into these markets, or rapid expansion of the smallest firms currently in the markets would occur so as to prevent any anticompetitive effects. Under the Justice

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[7] Hawaii Revised Statutes, Chapter 408 at § 14. Financial services loan companies did not consider themselves in competition with the firms offering business banking services because they do not offer transaction accounts and could not extend loans at interest rates competitive with those charged by those firms offering business banking services.

[8] See Bank Holding Company Act, 12 U.S.C. § 1842(d); McFadden Act, 12 U.S.C. § 36.

Department's Merger Guidelines,[9] when the Herfindahl-Hirschman Index ("HHI"),[10] a measure of market concentration, is over 1800, additional concentration resulting from a merger is a matter of significant concern. Where the HHI would increase by more than 50 points, the Department is likely to challenge the merger unless the Department concludes, on the basis of other relevant factors, that the merger is not likely substantially to lessen competition.

In Honolulu County, the HHI, calculated based on total deposits[11] of the firms that offer business banking services, would increase (as a result of ten firms going to nine) by 298 to 3033 if the proposed acquisition occurred. In the East Hawaii market, the HHI would increase (as a result of seven firms going to six) by approximately 301 to 3266. In the West Hawaii market, the HHI would increase (as a result of four firms going to three) by approximately 711 to 4063. In the Maui market, the HHI would

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[9] Department of Justice Merger Guidelines, 2 Trade Reg. Rep. (CCH) ¶ 13,102 at 20,529-30.

[10] The HHI is a measure of market concentration calculated by squaring the market share of each firm in the market and then summing the resulting numbers. For example, for a market supplied by four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 900 + 900 + 400 + 400 = 2600$). The HHI takes into account the relative sizes and distribution of firms in a market. It approaches zero when a market is supplied by a large number of firms of relatively equal size and reaches its maximum of 10,000 when a market is supplied by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparities in size among these firms increases.

[11] There is a relationship between the ability to accept deposits and the granting of credit and the provision of other business banking services. The deposits accepted by a financial institution are the primary source of the loans made by it and a principal source of funds to support other services.

increase (as a result of eight firms going to seven) by approximately 383 to 3264. In the Kauai market, the HHI would increase (as a result of five firms going to four) by approximately 413 to 3501. These measures indicate highly concentrated markets that would be further concentrated as a result of the proposed acquisition.

Furthermore, the United States found that the form and nature of branch divestitures offered by the defendants and approved by the Federal Reserve Board would not prevent substantial increases in concentration. The United States' determination in this regard was based on the fact, that under the Federal Reserve Board order, the divested branches could have been sold to all but the largest in-market bank. Further, FH had plans to divest to the second-largest (or in some cases the third-largest) competitor, and the United States determined that those divestitures, in light of the high concentration in these markets, would not adequately protect competition.[12] Moreover, the United States found that the number of branch divestitures in some markets was insufficient to resolve competitive concerns.

For all the above reasons, the United States found that each of these geographic markets is highly concentrated; that each would become substantially more concentrated as a result of the proposed

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[12] In addition, divestiture of the Hilo First Hawaiian Creditcorp's, a financial services loan company, assets and deposits was not restricted to purchase only by a firm offering business banking services. Thus, if it were sold to a firm that does not provide business banking services, it would not ameliorate the harm to competition caused by the increase in concentration in the East Hawaii market.

acquisition, even with the divestitures directed by the Federal Reserve Board; and that entry and expansion were unlikely to offset the anticompetitive effects.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The risk to competition posed by this acquisition would be substantially reduced by the relief provided in the proposed Final Judgment. The proposed Final Judgment provides structural relief in each of the relevant geographic markets through divestiture of branches, and also provides additional relief by requiring the defendants to relinquish use of the First Interstate System franchise.

The ownership of the First Interstate System franchise appears to have been a significant factor in FIHI's growth and position as a provider of business banking services, as well as other banking services. Use of the First Interstate name, a banking name recognized in numerous mainland bank markets and well established in Hawaiian markets, assists the franchisee's growth and fee income in drawing banking business from tourists and from customers relocating from the mainland to Hawaii. The franchisee also receives "custom-tailored" assistance from the franchisor in offering a variety of consumer and business banking services that reduces its costs of providing those services. Termination of the defendants' ownership of the First Interstate System franchise (i.e., freeing it up for a smaller competitor) will facilitate the

growth of a new First Interstate System franchisee over time into a strengthened and more aggressive provider of business banking services.

Specifically, Section IV. of the proposed Final Judgment requires that FH or FIHI provide notice within two business days after entry of the proposed Final Judgment to First Interstate Bancorp (the franchisor) of their intent to terminate use of the First Interstate System franchise. Defendants are required to relinquish all control and use of the franchise license no later than one year[13] from the date of termination notice and are prohibited from purchasing or attempting to purchase the franchise license until after the expiration of the proposed Final Judgment. In addition, FH is required to maintain the First Interstate System franchise in such a manner as to facilitate its marketability to a new franchisee after FH has surrendered control and use of the franchise.

In addition to the franchise termination, FH is required, by Section V. of the proposed Final Judgment, within six months (with the exception of the Hilo First Hawaiian Creditcorp office, in the East Hawaii market, which has been sold, contingent upon entry of this proposed Final Judgment) of the filing date of the proposed Final Judgment to divest the following banking branches.

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[13] This is the minimum time for termination provided by the franchise agreement. Based on representations by the defendants and franchisor that it would take at least a year to set up a new franchisee, the United States concluded that requiring immediate relinquishment of the franchise might negatively affect the value of the franchise to a new franchisee in the state of Hawaii.

1. In the Honolulu County market, the FIHI Hawaii Kai and Kailua branch assets and deposits;

2. In the Maui market, the FIHI Lahaina and Wailuku branch assets and deposits;

3. In the West Hawaii market, the FIHI Kailua-Kona branch assets and deposits; and

4. In the Kauai market, the FIHI Lihue branch assets and deposits.

The proposed Final Judgment prohibits the sale of any of the above branches to Bank of Hawaii. In addition, FH cannot sell the Lahaina, Wailuku, Kona, Lihue or Hilo branches to American Savings Bank. FH cannot sell the Hawaii Kai, Kailua, Lahaina, Wailuku, Lihue or Hilo branches to Central Pacific Bank. In the event that no sale of the Lahaina and Lihue branches is made by FH, and those branches are assigned to a trustee for sale, then Central Pacific Bank may be considered as a purchaser.[14] In the West Hawaii market, the United States, subject to the review procedures provided for in the proposed Final Judgment, has agreed that Central Pacific Bank, which operates in Hawaii, but currently does not have a branch in that market, is an acceptable purchaser for the Kailua-Kona branch assets and deposits.

All purchasers must demonstrate to the satisfaction of the United States that they have a good faith intention to operate the divested branches as banking branches that offer business banking

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[14] The United States agreed to Central Pacific Bank, subject to the review procedures provided for in this Final Judgment, as a purchaser of the Lahaina and Lihue branch assets and deposits because it would result in a lower level of concentration than would otherwise occur should FH keep the branches or a larger competitor be permitted to purchase them.

services. The proposed Final Judgment also requires that FH preserve the assets of the divested banking branches until purchased by a buyer. If FH fails to sell the branches within six months of the filing date of the proposed Final Judgment, FH shall file with the court and notify plaintiff within thirty days of the date the purchase contracts were required to be entered into by FH. The United States can then proceed under the terms of Section VI. of the proposed Final Judgment to appoint a trustee to accomplish the branch divestitures.

The divestitures required by Section V. of the proposed Final Judgment require structural relief, along with the release of the franchise, designed to ensure that the markets remain competitive despite the proposed acquisition. The proposed Final Judgment requires the divestiture of branches to financial institutions that do not currently have significant competitive presences in each of the relevant markets. The divestitures will bring about the entry of a new provider or make larger an existing, small provider of business banking services in each of these markets, thereby, ensuring that competition is not substantially lessened by the acquisition.

The United States and FH and FIHI have stipulated that the proposed Final Judgment may be entered by the Court at any time after compliance with the APPA. The proposed Final Judgment constitutes no admission by any party as to any issue of fact or law. Under the provisions of Section 2(e) of the APPA, entry of the proposed Final Judgment is conditioned upon a determination by

the Court that the proposed Final Judgment is in the public interest.

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.[15] Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust actions under the Clayton Act. 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 private lawsuit that may be brought against the defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

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[15] Section II of the Bank Holding Company Act, 12 U.S.C. § 1849, however, prevents the filing of an antitrust suit (other than a suit under § 2 of the Sherman Act) later than 30 days after the Federal Reserve Board's decision on November 30, 1990. The United States is not aware of any private suit filed during the 30 day period.

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 the comments, determine whether it should withdraw its consent, and respond to the comments. The comments and responses of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to Constance K. Robinson, Chief, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, 555 Fourth Street, N.W., Washington, D.C. 20001.

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

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered the following alternatives regarding divestiture of bank branches. In the East Hawaii market, the United States considered requiring the defendants to divest either a FH or FIHI commercial banking branch in Hilo, rather than the Hilo First Hawaiian Creditcorp office. That alternative was considered because the First Hawaiian Creditcorp office does not currently provide the types of business banking services at issue in this case. Therefore, it was not clear that divestiture of that office would provide an effective remedy for anticompetitive

effects in the provision of business banking services in the East Hawaii market. In order to resolve those concerns, defendants agreed to find a buyer for that office before the filing of the proposed Final Judgment, so that the government could conduct sufficient inquiries to determine that the purchaser could and would use the divested assets and deposits to increase its offering of business banking services in the East Hawaii market. The government has made that determination. It has approved Hawaii National Bank as the purchaser and is satisfied as to that bank's intention to offer business banking services in the East Hawaii market.

Second, the United States also considered requiring more branch bank divestitures on the island of Oahu. The United States rejected this alternative in light of the franchise termination which the United States believes will supplement the proposed divestitures (which were not in the Federal Reserve Board's order) and will primarily resolve its competitive concerns on the island of Oahu where all but one of the institutions offering business banking services currently have some branches.

As a final alternative to the proposed Final Judgment, the United States considered continued litigation for seeking an injunction to block FH's acquisition of FIHI. The United States rejected that alternative because the termination of the franchise and the sale of the commercial bank branches will establish viable independent competitors to FH in all the relevant markets and

likely will prevent the proposed acquisition from having significant anticompetitive effects in those markets.

VII.

STANDARD OF REVIEW UNDER THE TUNNEY ACT FOR PROPOSED FINAL JUDGMENT

The Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16 (1974), requires that proposed consent judgments in antitrust cases brought by the United States are subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed judgment "is in the public interest". In making that determination,

> the court may consider--
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> (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;
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> (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). The courts have recognized that the term, "public interest", "take(s) meaning from the purposes of the regulatory legislation."[16] Since the purpose of the antitrust laws is to "preserv(e) free and unfettered competition as the rule

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[16] NAACP v. FPC, 425 U.S. 662, 669 (1976).

of trade,"[17] the focus of the "public interest" inquiry under the Tunney Act is whether the proposed final judgment would serve the public interest in free and unfettered competition.[18] In conducting this inquiry, "(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."[19] Rather,

> (a)bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making the 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.[20]

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[17] Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958). See also National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978).

[18] Accord 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. (CCH) ¶ 66,651 at 63,046 (D.D.C. 1985).

[19] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., supra, 406 F.Supp. at 715. A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Responses 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. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. CODE CONG. & AD. NEWS 6535, 6538.

[20] United States v. Mid-America Dairyman, Inc., supra, 1977 Trade Cas. at 71,980.

It is also unnecessary for the district court to "engage in an unrestricted evaluation of what relief would best serve the public."[21] 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 reaches of the public interest." (citation omitted) More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree. (emphasis added).[22]

A proposed consent decree 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.[23]

The proposed consent decree, therefore, should not be reviewed under a standard of whether it is certain to eliminate every

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[21] 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).

[22] United States v. Bechtel, supra; United States v. BNS, Inc., supra, 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. 713, 716 (D. Mass. 1975). See also United States v. American Cyanamid Co., supra.

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

anticompetitive effect of a merger 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)."[24]

VIII.

DETERMINATIVE MATERIALS AND DOCUMENTS

The United States considers FH's contract with Hawaii National Bank for the sale of the Hilo First Hawaiian Creditcorp office, an affidavit from Hawaii National Bank stating its intent to use the divested assets and deposits in offering business banking services, and a letter from HonFed Bank stating that it will not attempt to purchase the First Interstate System franchise during the duration of this Final Judgment to be determinative documents. These documents relate to terms of the proposed divestitures and

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

franchise termination provisions and were determinative to the United States in formulating this proposed Final Judgment. Accordingly, these documents are being filed with this Competitive Impact Statement.

Respectfully submitted,

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Laury E. Bobbish

Jennifer L. Otto

Dated: