

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

SOCIETY CORPORATION and
AMERITRUST CORPORATION,
Defendants.

Filed: 3/13/92

Civil No. 1:92CV0525

Judge Bell

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 March 13, 1992, 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 merger between Society Corporation ("Society") and Ameritrust Corporation ("Ameritrust") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

The complaint alleges that the effect of the transaction may be substantially to lessen competition in the provision of business banking services to small businesses in the relevant geographic markets reasonably approximated by: (1) Cuyahoga County, Ohio; and (2) Lake County, Ohio. Business banking services offered to business customers include, either collectively or individually, services such as commercial loans, commercial checking accounts, cash and coin, lockbox, cash management, and business expertise and advice. Both Society and Ameritrust compete directly in offering a variety of business banking services to business customers, including small businesses, in the relevant geographic markets. The proposed acquisition would result in substantial increases in concentration in markets that are already highly concentrated and for which regulatory and other market factors make it unlikely that effective entry or expansion will cure the transaction's anticompetitive effects.

The complaint alleges that the proposed transaction would, in particular, hurt the many small business customers purchasing business banking services in the relevant geographic markets. Small businesses are defined as businesses generating total revenues of \$10 million or less annually. The complaint seeks

to enjoin the proposed transaction and thereby prevent its anticompetitive effects.

On March 13, 1992, the United States, Society and Ameritrust 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, deposits, and accompanying small business loans, in Cuyahoga and Lake Counties.^{1/} 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 after considering public comments on the proposal. Entry of the proposed Final Judgment would terminate this action except that the Court would retain jurisdiction to construe, modify, and enforce the Judgment and to punish any violations.

II. EVENTS GIVING RISE TO THE ALLEGED VIOLATION

Society, headquartered in Cleveland, is the third largest bank holding company in Ohio and the third largest commercial bank in Cuyahoga County, as measured by total deposits. In 1991, Society maintained consolidated assets of \$15.4 billion,

^{1/} The proposed Final Judgment requires divestiture of 28 bank branches in Cuyahoga and Lake Counties, totaling approximately \$1 billion in deposits and \$40 million in small business loans. In Cuyahoga County, the proposed Final Judgment requires that 26 offices with \$973 million in deposits and \$35.7 million in small business loans be divested; in Lake County, the required divestitures total two offices with approximately \$76.5 million in deposits and \$4.7 million in small business loans.

with total deposits of \$11.6 billion. Through its five subsidiary banks, Society operates 289 full service banking offices in Ohio and has a significant presence in Indiana and Michigan. In the market approximated by Cuyahoga County, Society controls total deposits of approximately \$3.3 billion, representing approximately 21% of total deposits held by depository institutions.^{2/} Society has 53 offices in Cuyahoga County, representing approximately 16% of total offices. In adjacent Lake County, Society controls deposits of \$193.7 million (11% of total deposits), and 11 offices (16% of total offices).

Ameritrust, also headquartered in Cleveland, is the fifth largest bank holding company in Ohio and the largest commercial bank in Cuyahoga County, as measured by deposits. In 1991, Ameritrust reported consolidated assets of \$10.6 billion, with \$8.7 billion in total deposits. Ameritrust's six subsidiary banks serve markets throughout most of Ohio, as well as a significant number of markets in Indiana and Michigan. In the Cuyahoga County market, Ameritrust controls \$4.8 billion in deposits, approximately 30.3% of the market. Ameritrust has a vast branch network of 83 offices (25.5% of total offices) spread throughout the market. In the Lake County market,

^{2/} Market share calculations include all depository institutions -- thrift institutions as well as commercial banks -- that currently offer, or would likely offer in the event of a supracompetitive price increase, business banking services. A more detailed discussion of market share is included below.

Ameritrust controls \$251.6 million in deposits (14.5%) and has six offices (8.7%).

On November 12, 1991, Society and Ameritrust submitted their formal application to the Federal Reserve Board ("Board" or "FRB") for consummation of the transaction. The Board announced its approval of the application by a vote of 6-1 on February 13, 1992, subject only to divestitures in Starke County, Indiana, and Ashtabula County, Ohio.^{3/} The Board did not order any divestitures in the Cleveland FRB market.^{4/} Under the Bank Holding Company Act, as amended, 12 U.S.C. § 1849,^{5/} the United States had thirty days from the date of the

^{3/} Society Corporation, Federal Reserve System Order, February 13, 1992. Federal Reserve Board Governor Angell dissented from the order approving the merger, and agreed with the conclusions expressed by the Department of Justice in its February 6, 1992 letter to the Board. Id., at 21.

^{4/} The Cleveland FRB market is substantially larger than the markets alleged in the complaint. The FRB market encompasses all of Cuyahoga, Lake, Geauga, and Lorain counties, as well as portions of Portage, Erie, Medina and Summit counties, while the complaint alleges county-wide markets.

^{5/} 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 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

(Footnote continued on next page.)

Federal Reserve Board's decision to seek to prevent the proposed acquisition by filing suit.

The merger arose out of financial difficulties experienced by Ameritrust in early 1990. These difficulties stemmed from asset quality problems in the areas of commercial real estate loans and highly leveraged transactions.^{6/} In the wake of these developments, Ameritrust received various expressions of interest and proposals from a number of institutions, including Society, National City Bank ("NCB"), and Banc One. After abandoning announced merger plans with Cleveland's second largest bank, NCB, in mid 1991, Ameritrust ultimately decided to merge into Society.

The United States filed its complaint because the proposed merger would likely reduce competition in the provision of business banking services to small businesses in the relevant geographic markets reasonably approximated by Cuyahoga and Lake Counties. The likelihood of competitive harm appears greatest for small business customers, and would likely result in higher prices for business banking services for these customers.

(Footnote continued from previous page.)

order. In any such action, the court shall review de novo the issues presented.

^{6/} Although it had long been the market leader among depository institutions in Cuyahoga County, home of the Cleveland-metro area, in 1990 Ameritrust reported a net loss of \$96 million while recording a provision for loan losses of \$325 million. During the latter half of 1990, Ameritrust experienced significant management changes, including the loss of its chairman and chief executive officer.

Investigation by the United States shows that Society and Ameritrust compete in the provision of a wide range of banking services, including services to individual consumers and services to businesses in the two markets. While many other financial institutions, particularly thrifts, compete with Society and Ameritrust in the provision of consumer banking services, only commercial banks and a small number of thrift institutions are currently competitors for business customers in those markets. These are the only firms that either currently provide, or are likely in the event of a supracompetitive price increase to begin to provide business banking services, as defined by the complaint.

Society and Ameritrust each offer a variety of business banking services, and compete directly with one another in the geographic markets. A significant number of small business customers purchase both transactions accounts and commercial loans, as well as other business banking services from Society and Ameritrust.

Few financial institutions that currently do not offer business banking services appear likely to start offering these services in the Cuyahoga and Lake County markets within a reasonable time even if the proposed merger results in a supracompetitive price increase. Savings and loan associations currently face tax incentives to limit the extent to which they make commercial loans; moreover, their ability to begin offering these services to businesses, including small businesses, is substantially affected by capital requirements and their own

capital positions. Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989,^{1/} new, more significant capital requirements and other restrictions were placed upon the lending activities of savings and loan associations. Moreover, the vast majority of savings and loan associations in the two markets do not currently provide business banking services.

The United States' investigation revealed that the above factors, coupled with other economic factors concerning business banking services, make it unlikely that most savings and loan associations in the relevant geographic markets would begin to provide such services. However, the investigation did uncover a small number of thrift institutions that indicated that they might offer such services in the event of a small but significant and non-transitory price increase. The United States included these institutions in the relevant market in its competitive analysis. Because of statutory and regulatory constraints on the offering of non-mortgage commercial loans by thrifts, however, when considering the competitive influence in the relevant markets of these few thrifts the United States has appropriately weighted their deposits and offices at 40% while weighting commercial bank deposits and offices at 100%.

The investigation also revealed that credit unions in the Cleveland area are not generally current or potential competitors in business banking services due to a combination of

^{1/} 12 U.S.C. § 14647(t).

legal and economic restraints. Credit unions may offer services to individual consumers, but are not permitted to offer most business banking services such as those provided to the small business customers served by commercial banks and certain thrifts.

Loan production offices ("LPOs") of commercial banks headquartered elsewhere do not offer transaction accounts and, under current regulation, are prohibited from doing so. Moreover, the LPOs in Cuyahoga and Lake County serve large business customers and do not currently provide commercial loans to small businesses. Based upon available evidence, even with a significant, non-transitory price increase for commercial loans to small businesses, LPOs are unlikely to begin to make such loans.

Non-depository institutions may provide one or even a few of the services provided by commercial banks and certain thrift institutions. For example, investment or brokerage houses offer products that are offered by commercial banks or thrift institutions. Non-depository institutions, however, do not provide certain important business banking services, such as transaction accounts for business customers, which are offered by commercial banks and some thrift institutions. Moreover, they do not offer products that are close substitutes for these business banking services. Even these business services that are provided by non-depository institutions to business customers are generally only provided to large businesses. Loans offered by non-depository institutions to commercial loan

customers are sufficiently different in price or terms than loans offered by commercial banks and some thrifts that they are not close substitutes for these products. For these reasons, such firms do not compete with depository institutions in offering business banking services.

Banking organizations in Cuyahoga and Lake Counties that accept deposits in more than one market may have the ability to shift funds from one market to another, offering more services, particularly loans, in one market than deposits in that market alone would support. There are, however, constraints on the amount of out-of-market funds that a depository institution can effectively utilize for loans in a market. In addition to considerations relating to risk, an institution needs an effective means of delivering banking services, including loans, to customers. Among other things, it needs a network of branch offices and trained loan personnel sufficient to provide convenient service to customers throughout the relevant markets. It is particularly important to small business customers that an office of their depository institution be convenient to their place of business. Thus, the number of offices a depository institution has in a market can also be a useful indicator of its capacity to provide business banking services in that market.

The United States estimates that over 30,000 small businesses operate in Cleveland. Such businesses generally are economically able to obtain business banking services only from banks which have offices located in the geographic markets where

the business is situated -- in this case Cuyahoga County or Lake County. Small business customers typically engage in "relationship" banking, and purchase a number, if not all, of their different banking services from a single bank. For example, a business customer might use the bank for a checking account, credit for the purchase of inventory, payroll services, night deposit, and cash and coin services. The United States' investigation revealed that both small business customers and business banking institutions view it as beneficial to engage in this relationship banking. By purchasing more than one business banking service, such as transactions accounts and commercial loans, from the same institution, the customer typically obtains better overall rates or service. Similarly, the bank benefits from economies in cross-selling a variety of products to a single commercial customer. In fact, most business banking institutions in Cuyahoga and Lake Counties strongly encourage a business customer to maintain its primary transaction account at the institution as long as the institution is the customer's leading source of depository institution credit.

The United States concluded that the relevant geographic markets are Cuyahoga and Lake Counties, Ohio and not the larger market defined by the Federal Reserve Bank of Cleveland.^{8/} The investigation disclosed that small business banking customers operating in Cuyahoga and Lake Counties can only obtain business

^{8/} See footnote 4.

banking services from depository institution offices in the areas reasonably approximated by their home counties. For a variety of reasons, including but not limited to convenience, such businesses cannot practicably turn to a depository institution outside of their home county, even in the event of a supracompetitive price increase.

Seventeen commercial banks operate in the Cuyahoga County market and nine commercial banks operate in the Lake County market. In addition, there are five thrifts operating in one or both of the counties that either currently offer business banking services or are likely to do so in the event of a supracompetitive price rise for these services. A few of these institutions have very large market shares and the others are much smaller. The Cuyahoga County market is dominated by three very large banks, two of which are Society and Ameritrust, and two smaller banks. Lake County is similarly dominated by five large commercial banks.

In Cuyahoga County, Ameritrust, although declining financially, is the leading firm with over 30% of total deposits.^{9/} Following National City Bank with 27%, Society is the third largest institution with 21% of total deposits. Two other firms have 7% and 4% and are within the top tier in

^{9/} All market share calculations include those thrifts that the United States has concluded are in the market or are likely to enter in the event of a supracompetitive price increase. As noted above, these thrift deposits and offices are weighted at 40%.

Cuyahoga County. The remaining firms in the market all have shares well below 2%. This market structure means that combining two of these largest three firms will significantly increase concentration in the market.

In Lake County, Ameritrust controls 14.5% of deposits and Society controls 11%. Banc One is the market leader with 36% of deposits, National City Bank is third with 13% and Fifth Third Bank is fifth with 11%. All of the remaining institutions in Lake County have 4% or less of total deposits.

Under the Justice Department's Merger Guidelines,^{10/} when the Herfindahl-Hirschman Index ("HHI"),^{11/} a measure of market concentration, is over 1800, the market is considered highly concentrated. A merger that increases the HHI by more than 50 points is of significant competitive concern and may be unlawful, depending upon an analysis of all other relevant factors.

^{10/} Department of Justice Merger Guidelines, 2 Trade Reg. Rep. (CCH) ¶ 13,102 at 20,529-30.

^{11/} The HHI is a measure of market concentration calculated by squaring the market shares 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 2600, or $(30 \times 30) + (30 \times 30) + (20 \times 20) + (20 \times 20) = 900 + 900 + 400 + 400 = 2600$. 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 increase.

In the Cuyahoga County market, the HHI, calculated on the basis of total deposits^{12/} of firms offering business banking services, would increase as a result of the merger by 1265 points to 3416. In Lake County, a similar HHI calculation results in a 323 point increase to 2274. These measures indicate highly concentrated markets that would be further concentrated as a result of the proposed merger.

The United States' investigation concluded that an adequate branch network delivery system is of great importance in serving the various needs of small business customers throughout the geographic markets. Calculating the HHI using total number of bank branches as a measure of concentration produces an increase in Cuyahoga County of 833 points to 2342, and an increase in Lake County of 277 points to 1629. These markets are also concentrated according to this measure, and the merger results in a significant increase in concentration, which raises strong competitive concerns.

The investigation of the United States concluded that without divestiture, this merger would serve to facilitate coordinated behavior among the leading banks in Cuyahoga County and Lake County. The merger reduces the number of leading banks in both Cuyahoga and Lake Counties from five to four and

^{12/} There is a relationship between the ability to accept deposits and the granting of credit and the provision of other services. The deposits accepted by a financial institution are an important and often least expensive source of the loans made by it and a principal source of funds to support other services.

increases concentration in those markets, thereby enhancing the ability of firms to reach and enforce an anticompetitive understanding. In addition, there is ample opportunity in both markets for banks to monitor the pricing of their competitors, detect any discounting, and punish such "cheaters" or discounters by targeting their customers. The United States further concluded that entry by outside firms or expansion by firms already operating within the markets would not be sufficiently timely or of sufficient magnitude to remedy such anticompetitive concerns.

For all of the above reasons, the United States concluded that there is a significant probability that, absent divestiture, the merger would substantially lessen competition in the provision of business banking services to small business customers in Cuyahoga and Lake Counties.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The risk to competition posed by this transaction will be substantially reduced by the structural relief provided in the proposed Final Judgment whereby there will be divestitures of commercial bank branches and accompanying levels of deposits and small business commercial loans.

Society is required, by Section IV. of the proposed Final Judgment, within six months of the filing date of the proposed Final Judgment to divest 28 Ameritrust bank offices and the deposits of individuals and small businesses, with a few

exceptions, held at these offices. Those deposits currently total approximately \$1.05 billion. The offices are:

1. Within Cuyahoga County, Ohio -- Bedford, 680 Broadway Avenue, Bedford, Ohio; Berea, 118 Front Street, Berea, Ohio; BP America, 200 Public Square, Cleveland, Ohio; Broadview-Pearl, 4175 Pearl Road, Cleveland, Ohio; Brookpark-Broadview, 2132 Brookpark Road, Cleveland, Ohio; Cedar-Lee, 2211 Lee Road, Cleveland Heights, Ohio; Clark-25th, 3104 West 25th Street, Cleveland, Ohio; Detroit-Columbia, 25653 Detroit Road, Westlake, Ohio; Eastgate, 1485 S.O.M. Center Road, Mayfield Heights, Ohio; Emery-Richmond, 25890 Emery Road, Warrensville Heights, Ohio; Euclid-97th, 9701 Euclid Avenue, Cleveland, Ohio; Euclid-260th, 25811 Euclid Avenue, Euclid, Ohio; Food Terminal, 4100 Woodland Avenue, Cleveland, Ohio; Franklin-25th, 1720 West 25th Street, Cleveland, Ohio; Galleria, 1301 East 9th Street, Suite 100, Cleveland, Ohio; Garfield Heights, 5007 Turney Road, Garfield Heights, Ohio; Independence, 4500 Rockside Road, Independence, Ohio; Lakeshore-264th, 26410 Lakeshore Boulevard, Euclid, Ohio; Lorain-98th, 9740 Lorain Avenue, Cleveland, Ohio; Puritas-150th, 4423 West 150th Street, Cleveland, Ohio; Ridge-Biddulph, 6610 Biddulph Road, Brooklyn, Ohio; Shaker Square, 13117 Shaker Square, Cleveland, Ohio; Southgate, 5384 Northfield Road, Maple Heights, Ohio; Strongsville, 14444 Pearl Road, Strongsville, Ohio; Terminal Prospect, corner of Prospect Street and Ontario Street, Cleveland, Ohio; and Wilson Mills-Richmond, 5134 Wilson Mills Road, Richmond Heights, Ohio.
2. Within Lake County, Ohio -- Mentor East, 9572 Mentor Avenue, Mentor, Ohio; and Willoughby, 4098 Erie Street, Willoughby, Ohio.

Society is also required, by Section IV. of the Final Judgment, to divest all of the small business loans accompanying the above-mentioned branches and other small business loans sufficient to raise the total level of Ameritrust small business loans divested so that the percentage of loans divested is approximately equivalent to the offices divested. The United States calculates the total of these loans at approximately \$35 million for the total Cuyahoga County package of offices, and

approximately \$4.7 million for the package of Lake County offices.

To ensure that the divestitures are accomplished in such a way as to maintain competition, the proposed Final Judgment prohibits the sale of the branches to certain very large firms that already have a significant competitive presence in the Cuyahoga and Lake County markets. The proposed Final Judgment prohibits the sale of any of the above branches to National City Bank, Huntington Bank, or Banc One. The divestitures will bring about the entry of a new provider or make larger an existing, small provider of business banking services in the relevant markets, thereby ensuring that competition is not substantially lessened by the transaction.

The divestiture package will provide the buyer with well located and profitable branches that comprise an adequate branch network delivery system for business loans and transaction accounts, an adequate commercial and retail deposit gathering base, and a solid base of commercial loan relationships from which to serve small business customers in the two markets. The branch network will also facilitate the shifting of lending capacity by the buyer, both within the markets and from other outside markets, thereby permitting it to expand small business lending relatively quickly in the relevant markets. Finally, in reaching this settlement the United States took into account the fact that Ameritrust has recently experienced financial difficulties resulting in a somewhat diminished presence in these markets. The United States concludes that these

divestitures will adequately remedy the risk of anticompetitive behavior in Cuyahoga and Lake Counties arising from the merger.

Any purchaser must demonstrate to the satisfaction of the United States that it has a good faith intention to utilize the divested branches in a banking network that offers business banking services. The proposed Final Judgment also requires that Society preserve the assets of the divested banking branches until purchased by a buyer. If Society fails to sell the branches within six months of the filing date of the proposed Final Judgment, the United States will proceed under the terms of Section V. of the proposed Final Judgment to bring about the appointment of a trustee to accomplish the divestitures.

The United States, Society and Ameritrust 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 attorney's fees.^{13/} 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 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 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 the comments, determine whether it should withdraw its consent, and respond to the comments. The comments and any responses of the United States will be filed with the Court and published in the Federal Register.

^{13/} 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 thirty days after the February 13, 1992, Board order.

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., Room 8104, 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 both smaller and slightly larger divestiture packages as possible alternatives to the package designated in the proposed Final Judgment. After evaluating the alternatives, the United States concluded that the package in the proposed Final Judgment adequately addresses its competitive concerns, although a smaller package would not have done so.

As a final alternative to the proposed Final Judgment, the United States considered litigation seeking an injunction to block the merger between Society and Ameritrust. The United States rejected that alternative because the divestiture of the bank branch package will, for reasons stated above, establish a significant and viable competitor in the provision of business banking services to small businesses in Cuyahoga and Lake Counties and will prevent the proposed transaction from having any significant anticompetitive effects in those markets.

**VII. STANDARD FOR 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 be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed final judgment "is in the public interest". In making that determination,

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 upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). The courts have recognized that the term, "public interest", "take(s) meaning from the purposes of the regulatory legislation."^{14/} Since the purpose of the antitrust laws is to "preserv(e) free and unfettered competition as the rule of trade,"^{15/} 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.^{16/} In conducting this inquiry, "(t)he Court is

^{14/} NAACP v. FPC, 425 U.S. 662, 669 (1976).

^{15/} 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). (Footnote continued on next page.)

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."17/ 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 reasonable² under the circumstances.18/

It is also unnecessary for the district court to "engage in an unrestricted evaluation of what relief would best serve the public."19/ 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 one that will best serve society, but

(Footnote continued from previous page.)

16/ Accord United States v. American Cynamid 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).

17/ 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and 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 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.

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

19/ 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).

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 add).^{20/}

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.^{21/}

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

^{20/} 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., *supra*, 406 F. Supp. at 716. See also United States v. American Cynamid Co., *supra* note 16.

^{21/} United States v. Armour & Co., 402 U.S. 673, 681 (1971).

falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted)."22/

VIII. DETERMINATIVE DOCUMENTS

No documents were determinative in the formulation of the proposed Final Judgment. Consequently, the United States has not attached any such documents to the proposed Final Judgment.

March 13, 1992

Respectfully submitted,

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