

information prior to the consummation of the transaction. Access to such information raises significant antitrust risks, as it could be used to enter into an illegal agreement that would be harmful to competition if the transaction is subsequently abandoned. Notwithstanding, there may be situations during the due diligence process in which an acquiring person may need information regarding pending contacts to value the business properly. Section IV(D) of the proposed Final Judgment permits GTV to obtain such information, subject to appropriate limitations and confidentiality undertakings.

C. Compliance

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

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

These provisions are adequate to prevent recurrence of the type of illegal conduct alleged in the Complaint. The proposed Final Judgment should ensure that, in future transactions, GTV will not enter into agreements to limit

competition during the pre-consummation period. Consequently, customers will receive the benefits of free and open competition.

D. Civil Penalties⁵

Under section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1), any person who fails to comply with the Act shall be liable to the United States for a civil penalty of not more than \$11,000 for each day during which such person is in violation of the Act.⁶ Both Gemstar and TV Guide were in violation of section 7A from the first full day following execution of the merger agreement until the expiration of the statutory waiting period. The Defendants have agreed to pay, within thirty days of the entry of the proposed Final Judgment, civil penalties reflecting \$11,000 per day per Defendant (or \$5,676,000). This is the maximum civil penalty the Court could impose on the Defendants at trial.

V. Remedies Available to Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal district court to recover three times the damages the person has suffered, as well as the costs of bringing a lawsuit and reasonable attorneys fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private

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

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

antitrust damage action. Under the provisions of section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no effect as prima facie evidence in any subsequent private lawsuit that may be brought against Defendants.

Procedures Available for Modification of the Proposed Final Judgment

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

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Sherman Act injunction contained in the Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**. The United States will evaluate and respond to comments. All comments will be given due consideration by the DOJ, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with this Court and published in the **Federal Register**. Written comments should be submitted to: James R. Wade, Chief, Litigation III, United States Department of Justice, Antitrust Division, 325 7th St., NW., Suite 300, Washington, DC 20530.

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

VII. Alternatives to the Proposed Final Judgment

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