

The consequences of a violation of the proposed Final Judgment, apart from the significant civil penalties discussed below, are severe and substantial. Under Section IV.A of the proposed Final Judgment, if the Compliance Officer concludes that Northrop discriminated in its own favor in either its payload selection or the selection process, the Secretary of the Air Force is given "the sole discretion to choose the [payload supplier]" and to dismiss Northrop's selection. Under Section IV.B of the proposed final judgment, if the Compliance Officer concludes that Northrop discriminated in favor of its in-house team, or failed to negotiate in good faith or enter into a commercially reasonable teaming agreement or contract, the Secretary of the Air Force is given "the sole discretion to decide with whom, and on what terms, Northrop enters into such teaming relationships. * * * " In effect, if the Compliance Officer determines that Northrop has discriminated in its own favor in a manner prohibited by the proposed Final Judgment, the Secretary of the Air Force is authorized to reverse any decision made by Northrop and to determine whether and on what terms Northrop will participate in the bid under consideration. These provisions collectively ensure that the U.S. Government, after the merger, will be able to detect discriminatory conduct prohibited by the proposed Final Judgment and to remedy quickly any selection or agreement that violates the proposed Final Judgment.

Sections VI, VII and VIII of the proposed Final Judgment confirm the significant investigative and enforcement authority of the Antitrust Division of the U.S. Department of Justice in this matter and the continuing supervisory jurisdiction of the Court in implementing the Judgment. The Antitrust Division, among other things, will be permitted to inspect and copy Northrop's documents; interview Northrop's officers, employees, or agents; and request reports from Northrop. The Antitrust Division will also have the discretion to seek enforcement of the proposed Final Judgment from the Court, which may order Northrop to pay civil penalties of up to \$10 million for each violation of the Final Judgment. It is anticipated that the Antitrust Division and the General Counsel of the DoD will work closely together in enforcing the terms of the Final Judgment, and the Antitrust Division may take enforcement actions either on the recommendation of the General Counsel of the DoD or on its own initiative.

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. 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 the defendants.

V. 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 the Court after compliance with the provisions of the APPA, if 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. 15 U.S.C. 16(e).

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. 15 U.S.C. 16(b). 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 the comments. All comments will be given due consideration by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the United States' responses will be filed with the Court and published in the **Federal Register**. Written comments should be submitted to: J. Robert Kramer II, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 1401 H Street, NW., Suite 3000, Washington, DC 20530.

The proposed Final Judgment provides that the Court will retain 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, a full trial on the merits against defendants Northrop and TRW. The United States could have brought suit and sought preliminary and permanent injunctions against Northrop's acquisition of TRW.

When the United States determines that a horizontal or vertical merger would result in a substantial lessening of competition, it generally seeks to block the merger or obtain structural relief. However, when a merger offers significant efficiencies, which cannot be obtained absent the merger or if a structural remedy is imposed, the United States will consider behavioral remedies.

With respect to this transaction, DoD, the only customer for the highly complex reconnaissance satellite systems affected by the transaction, determined that, with an appropriate decree resolving the vertical integration problems identified, the proposed acquisition offers the possibility of increased competition for DoD space requirements generally and of significant competitive benefits to DoD that would not be realized if the merger did not occur. Following a thorough review of the transaction, DoD concluded that entry of the proposed Final Judgment would remedy its potential anticompetitive effects, while permitting the potential achievements of significant benefits. Given the DoD's conclusion that the

United States would benefit from the transaction if the competitive problems could be remedied, and given the importance of a vertically integrated firm structure to the achievement of those benefits, the Department of Justice determined that the proposed Final Judgment, containing strict behavioral prohibitions and significant potential sanctions, is the best available means of satisfying the public interest in competition. Neither the Department of Justice nor the DoD considers this proposed Final Judgment to be a general approval of behavioral remedies for all vertical or horizontal mergers, but rather consider it appropriate here under the unique circumstances of this case.

VII. Standard of Review Under the APPA for Proposed Final Judgment

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." 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). As the Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458–62 (D.C. Cir. 1995).

In conducting this inquiry, "the [C]ourt 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."² Rather "absent a showing of corrupt failure of the government to discharge its duty, the Court,

² 119 Cong. Rec. 24598 (1973). *See also 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 Response 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. No. 93–1463*, 93rd Cong. 2d Sess. 8–9 (1974), reprinted in 1974 U.S.C.A.N. 6535, 6538.