

## U.S. Dep't of Justice, Antitrust Div., Antitrust Division Manual Ch. 4 D (5th ed. updated Mar. 2014)

### D. Negotiating and Entering Consent Decrees

In general, adequate relief in a civil antitrust case is relief that will (1) stop the illegal practices alleged in the complaint, (2) prevent their renewal, and (3) restore competition to the state that would have existed had the violation not occurred. Normally, the Government is entitled to any relief that is reasonable and necessary to accomplish these ends. While the scope of relief obtained in prior antitrust cases may be viewed as precedent, the theory behind equitable relief is that it should be fashioned to fit the particular facts of the case at issue.

It is often possible to obtain effective relief without taking the case to trial. This section describes the procedures used by the Antitrust Division in negotiating and entering civil consent judgments under the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16 (APPA, Act, or Tunney Act).

#### 1. Antitrust Procedures and Penalties Act

The APPA was enacted in 1974 and amended in 2004. The APPA subjects the Division's consent judgments to public scrutiny and

comment. The Division must ensure complete compliance with the requirements of the APPA.

**a. The Competitive Impact Statement**

The first significant requirement of the APPA is that the Government file with the court a Competitive Impact Statement (CIS) at the time the proposed consent judgment is filed. This document must be self-contained, setting forth the information necessary to enable the court and the public to evaluate the proposed judgment in light of the Government's case. Its object is to explain why the proposed judgment is appropriate under the circumstances and why it is in the public interest. Because the CIS is directed to the public, as well as to the court, it should be written in a narrative style that avoids technical jargon. As a general rule, the CIS should not use extensive verbatim quotations from the complaint and judgment. Rather, care should be taken to make the CIS as understandable and persuasive as possible. Although the CIS should be tailored to each matter, the Division has developed standard language that should be used to reduce the drafting burden.

The CIS is the Division's explanation of its case, the judgment, and the circumstances surrounding the judgment. Therefore, it should not be the subject of discussion or negotiation with defense counsel, and defense counsel will not be permitted to review the CIS prior to its filing with the court.

The APPA requires that the CIS "recite" certain topics, and all CISs are organized according to the statutory requirements: (1) the nature and purpose of the proceeding; (2) a description of the practices giving rise to the alleged violation; (3) an explanation of the proposed final judgment; (4) the remedies available to potential private litigants; (5) a description of the procedures available for modification of the judgment; and (6) the alternatives to the proposed final judgment considered by the Division. Although the statute does not specify that the CIS must discuss determinative documents, a seventh section on determinative documents is usually added to the CIS as this is a convenient place to publicly state what the determinative documents are or, more commonly, that there are no determinative documents. *See Massachusetts School of Law v. United States*, 118 F.3d 776, 784-85 (D.C. Cir. 1997) (discussing what qualifies as a determinative document). CISs also routinely discuss the standard of judicial review under the Tunney Act, even though this discussion is not required by the APPA.

The CIS's description of the nature and purpose of the proceeding and the practices or events giving rise to the alleged violation should go beyond the allegations in the complaint. The CIS should describe the defendants, the trade and commerce involved, and the challenged activity in sufficient detail to convey the essence of the alleged violation. For instance, in a merger case, the industry, the parties'

relationship to the industry and to each other, and the theory of the violation should be explained. In a nonmerger case, the CIS should make clear what the defendant did and explain the resulting competitive harm. The Division drafts CISs not only to meet the requirements of the APPA, but also to provide the bar with useful instruction and guidance on the Division's enforcement intentions.

The CIS should describe the proposed relief in a manner that the public will understand. All material provisions of the proposed judgment should be discussed. The reasoning behind the Division's acceptance of the proposed relief and the anticipated competitive effect of the relief must also be set forth. Although this discussion should be persuasive, it should be candid as well.

The CIS must also describe and evaluate alternative forms of relief actually considered. This does not mean that negotiated language changes must be discussed unless such changes significantly alter the judgment's scope. Similarly, defendant's proposals which were unacceptable need not be discussed, unless they would have provided significantly broader relief than that ultimately accepted. Even if a proposal met either of these two criteria, in general it would not qualify as an alternative form of relief actually considered unless it was (a) in the prayer of the complaint, (b) submitted to defense counsel in writing during negotiations, or (c) submitted to the Assistant Attorney General in final form for approval. In rare instances, a seriously considered alternative that does not meet these three criteria may exist (*i.e.*, where extended negotiations were conducted with the defendant concerning a specific relief proposal). In such cases, staff should consult with the chief, the Director of Civil Enforcement, and the General Counsel about whether it is appropriate to include a discussion of that proposal in the CIS. The discussion of alternatives and the Division's reasons for not adopting them should be candid.

The court must approve the relief accepted by the Government if it is within the "reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995) (citations omitted). In making that determination, the Court is required to consider:

- 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
- 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 Government 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). "More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree." *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981) (citations omitted). 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 *Bechtel Corp.*, 648 F.2d at 666); *see also Microsoft*, 56 F.3d at 1460-62. 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. The United States District Court for the District of Columbia recently confirmed in *SBC Communications*, that 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). The language wrote into the statute 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.

The CIS must also discuss the remedies available to potential private plaintiffs. This discussion will be brief and in most instances will be standardized.

#### **b. Materials and Documents**

The APPA requires the Division to file with any proposed consent judgment all materials and documents considered determinative in formulating the judgment. This is to be distinguished from materials and

documents supportive of the litigation. See *Massachusetts School of Law v. United States*, 118 F.3d 776, 784-85 (D.C. Cir. 1997). In most cases, the relief is determined by the sum total of the Division's investigation and evidence. There will seldom be any particular document or documents that influenced the formulation or rejection of a particular item of relief. The materials and documents to be filed, if any, might consist of submissions by the defendants or other persons, including other Government agencies or experts' studies that were determinative in formulating the judgment, or contracts that embody the terms of a divestiture. Staff should consult with the Director of Civil Enforcement and the General Counsel if there is any question about interpreting this requirement in a given case.

**c. Publications in the Federal Register**

The APPA requires that the proposed judgment and the CIS be published in the Federal Register "at least 60 days prior to the effective date of such judgment." There is, however, at least a five-working-day delay between submission of materials to the Federal Register and their publication. Because the Division does not request publication until the filings are made with the court, there consequently will usually be at least an additional five days added to the 60-day waiting period.

The APPA also requires that before the judgment can be entered, the Division must publish in the Federal Register any public comments the Division receives about the proposed judgment during the notice and comment period and the Division's reply to them. The Division may respond to each comment directly by letter and attach each letter to a court filing, or it may have a unified response. Although which choice is appropriate depends on the circumstances, it is generally preferable to answer comments by a single response, filed and published, if possible, before the expiration of the waiting period. If meeting that target date is not practicable because of, for example, the actual or possible receipt of comments just prior to the close of the waiting period, the Division should file and publish all comments and one unified response as promptly as possible after the period has expired. As a matter of policy, the Division calculates the 60-day comment period from the date of publication in the Federal Register, or the last date of publication in the newspaper, whichever occurred later.

The Office of Operations will arrange for the necessary Federal Register publications. Federal Register notices are standardized, and should be prepared for the signature of the Director of Civil Enforcement. See [Sample Federal Register Notice](#). This sample is typical of a merger case requiring a divestiture. Notices for civil nonmerger cases are similar but tend to exhibit more variation given the diversity of practices being challenged and of proposed relief. Staff can obtain copies of recent published Federal Register notices from the appropriate special assistant.

#### **d. Newspaper Publication**

The newspaper notices required by the APPA, which summarize the proposed judgment and CIS and outline procedures available for the submission of comments, must begin appearing at least 60 days prior to the effective date of the judgment and must appear in the legal notice section. To provide interested persons with at least 60 days to submit comments, the Division calculates the 60-day comment period from the date of publication in the Federal Register, or the last date of publication in the newspaper, whichever occurred later.

Newspaper notices should be brief—if at all possible limited to 30 typewritten lines—to reduce the costs of publication. See [Sample Newspaper Notice](#). As with the sample Federal Register notice, the same newspaper notice is typical of a merger case requiring a divestiture. Staff can obtain copies of recent notices from the appropriate special assistant.

The APPA requires that in every case a newspaper notice be placed in a newspaper in general circulation in the district where the action was filed and in a newspaper of general circulation in the District of Columbia. The Court may also order additional publications. Normally, the defendants are expected to arrange and pay for publication of a newspaper notice written by the Division in its sole discretion. The defendants are also required to submit the necessary affidavits of publication that will provide the basis for the Division to certify to the court that such publication has occurred.

Because newspapers occasionally fail to publish a notice or do so inaccurately, staff should check the text of the copy of the notice that the defendants will send them from the newspaper in which publication is made, to ensure the correctness of the notice. If the newspaper notice is incorrect, the Office of Operations should be notified immediately and the defendants should be advised to take corrective action.

## **2. Internal Procedures**

It is the general practice of the Division not to begin settlement discussions until the Assigned DAAG has decided that there is good cause to believe that the antitrust laws have been broken. Once defense counsel has broached the issue, however, the component to which the case is assigned is free to prepare a proposed first draft of a judgment if its chief believes it is advisable for the Government to make a proposal.

The chief and the staff must submit to the Director of Civil Enforcement any written settlement proposal they want to submit to defense counsel. Under no circumstances should a draft settlement proposal be submitted to the defendants without the approval of the Director of Civil Enforcement and concurrence of the General Counsel and the Assigned DAAG.

Judgment negotiations are conducted by staff under the immediate supervision of the chief. In some cases, the negotiations will be fairly straightforward and follow the general parameters of the original written settlement proposal. Where negotiations raise significant issues that were not addressed in drafting the original proposal, staff should seek further consultation with the Director of Civil Enforcement, the General Counsel, and the Assigned DAAG. The chief should provide a summary of the new issues involved, describe any areas of disagreement, and recommend the appropriate scope of relief.

Staff should make clear to defense counsel that final authority to approve the judgment rests with the Assistant Attorney General and, pursuant to the APPA, the judgment is subject to withdrawal or change at any time prior to its formal entry by the court. Defense counsel should also be advised that the APPA requires each defendant to file a description of specified oral and written communications with the Government concerning the decree. 15 U.S.C. § 16(g). Defense counsel should also be informed that they will not be permitted to review court papers, other than the proposed judgment and hold separate stipulation and order, prior to filing with the court.

In preparing its proposed draft decree, staff should consult the Division's Internet site and Work Product Document Bank for form and language used by the Division in its recent decrees. For merger decrees, staff should start with the model consent decree. Once staff's proposed draft decree has been approved, staff should conduct negotiations consistent with the overall plan of relief contained in the approved draft. Staff may consult informally with the Director of Civil Enforcement and the General Counsel to determine current Division practice and alternative relief proposals. Also highly useful to staff in framing appropriate relief is the [Division's Policy Guide to Merger Remedies](#).

With regard both to the preparation of proposed draft decrees by staff as well as to decree proposals that may be made by defendants, note that the Division's standard decree language requires that the consent decree expire on the tenth anniversary of its entry by the court. Staff should not negotiate any decree of less than 10 years' duration absent unusual circumstances and the approval of the Front Office, although decrees of longer than 10 years may be appropriate in certain circumstances.

When the proposed final version of the consent judgment is submitted for approval, the chief will submit a recommendation to the Director of Civil Enforcement. The recommendation should be processed through the General Counsel and the Assigned DAAG and requires the approval of the Assistant Attorney General. The recommendation should include all necessary papers, including the stipulation, the decree, the competitive impact statement, the Federal Register, and the proposed press release. The Federal Register notice should be prepared for the

signature of the Director of Civil Enforcement. All papers should be forwarded for review with the recommended consent judgment. In many merger cases, a hold-separate order has been appropriate. The hold-separate order and stipulation should be combined into the same document.

At the time of filing the judgment with the court, the requirements of the APPA and the procedures for complying with the Act should be explained to the court by filing an explanation of the procedures, with a copy to counsel, if local practice permits. It should be emphasized that the waiting period may exceed 60 days because of the publication requirements and the possibility of receiving last-minute comments and that the judgment cannot validly be entered before the comment period is complete. The court should not sign and enter the decree until the requirements of the APPA have been met. Staff will file a certificate of compliance when the requirements are met. The Office of Operations must be notified immediately after the case has been filed and provided with the name of the judge and the file number. In addition, the Office of Operations must be notified as soon as the decree has been entered.

### **3. Consent Decree Checklist**

Staff should keep track of the various requirements of the APPA for each consent decree. See [sample checklist](#).

### **4. Consent Decree Standard Provisions**

The Antitrust Division uses a number of decree provisions that are essentially standardized in form and that appear in virtually all decrees. Such provisions cover matters such as the form of stipulation, the preamble to the decree, jurisdictional and applicability clauses, notice of corporate changes provisions, the visitorial clause, the term of the judgment, and retention of jurisdiction. Division decrees also contain provisions (*e.g.*, the compliance provisions) that may vary somewhat from one decree to another, due to the nature of the violation alleged or the specific circumstances of the industry or defendant involved. To ensure appropriate Division consistency in the selection and wording of decree provisions, staff should always (1) consult the Division's Policy Guide to Merger Remedies, (2) review several of the most recent decrees contained in the Division's Internet site and Work Product Document Bank that closely parallel the case being settled; and (3) obtain from Operations the current standardized decree provisions. The Work Product Document Bank may also be reviewed to obtain recent copies of pleadings that are filed with the court during the process of entering consent decrees.

### **5. Certificate of Compliance with Provisions of APPA**

Upon completion of compliance with the APPA, staff should file a Certificate of Compliance setting forth precisely how compliance was accomplished. See, *e.g.*, sample [Certificate of Compliance, United](#)

[State's Revised Certificate of Compliance with the Antitrust Procedures and Penalty Act](#) (*United States v. Alcan Inc., et al*). The Certificate serves as a check-off schedule, assuring that compliance has actually been effected and serving as a court record of that compliance. When appropriate, staff may wish to send an accompanying letter to the court explaining the significance of the Certificate of Compliance.

At the time of filing the proposed Final Judgment, counsel for each of the defendants should be reminded of his or her responsibilities under Section 16(g) of the APPA. If there have been no reportable communications, counsel should file a statement to that effect. Because the Certificate of Compliance certifies compliance with the APPA, staff should ascertain that the necessary filings have been made under Section 16(g).

Because circumstances in each case will vary and the Antitrust Division does not have complete control of the mechanics of complying with the APPA, there should be constant communication during this period between the office of the appropriate Director of Enforcement and the section or field office handling the case in order to prevent mistakes.