UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. LEUCADIA NATIONAL CORPORATION, Defendant.	Civil Action No. 151-01547 (RDM)

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement to set forth the information necessary to enable the Court and the public to evaluate the proposed Final Judgment that would terminate this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THIS PROCEEDING

On September 22, 2015, the United States filed a Complaint against Defendant Leucadia National Corporation ("Leucadia"), related to Leucadia's acquisition of voting securities of KCG Holdings, Inc. ("KCG") in 2013. The Complaint alleges that Leucadia violated Section 7A of the Clayton Act, 15 U.S.C. § 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). The HSR Act states that "no person shall acquire, directly or indirectly, any voting securities of any person" exceeding certain thresholds until that person has filed pre-acquisition notification and report forms with the Department of Justice and the Federal Trade Commission (collectively, the "federal antitrust agencies" or "agencies") and the post-filing waiting period has expired.[1] The purpose of the notification and waiting period is to allow the agencies an opportunity to conduct an antitrust review of proposed transactions before they are consummated.

The Complaint alleges that Leucadia, via an entity it controls, acquired voting securities of KCG in excess of the statutory threshold ($70.9 million at the time of acquisition) without making the required pre-acquisition filings with the agencies and without observing the waiting period, and that Leucadia and KCG each met the statutory size of person threshold at the time of the acquisition (Leucadaia and KCG had sales or assets in excess of $141.8 million and $14.2 million, respectively).

The Complaint further alleges that Leucadia previously violated the HSR Act's notification requirements when it acquired shares in Goober Drilling LLC ("Goober") in 2007. On August 15, 2007, Leucadia acquired 8% of the non-corporate interests in Goober which, when combined with its then existing interest in Goober, gave Leucadia control of Goober as defined in the HSR Rules. Although it was required to do so, Leucadia did not file under the HSR Act prior to acquiring Goober membership interests on August 15th. On October 24, 2008, Leucadia made a corrective filing under the HSR Act for the August 15, 2007, acquisition of Goober non-corporate interests. In a letter accompanying the corrective filing, Leucadia acknowledged that the transaction was reportable under the HSR Act, but asserted that the failure to file and observe the waiting period was inadvertent. On January 7, 2009, the Premerger Notification Office of the Federal Trade Commission sent a letter to Leucadia indicating that it would not recommend a civil penalty action regarding the 2007 Goober acquisition, but stated

[1] 15 U.S.C. § 18a(a).

that Leucadia would be “accountable for instituting an effective program to ensure full compliance with the [HSR] Act’s requirements.”[2]

At the same time the Complaint was filed, the United States also filed a Stipulation and proposed Final Judgment that eliminates the need for a trial in this case. The proposed Final Judgment is designed to deter Leucadia’s HSR Act violations. Under the proposed Final Judgment, Leucadia must pay a civil penalty in the amount of $240,000.

The United States and the Defendant have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States first withdraws its consent. Entry of the proposed Final Judgment would terminate this case, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and punish violations thereof. Entry of this judgment would not constitute evidence

On July 1, 2013, Leucadia, through Jeffries, acquired 16,467,774 shares of KCG voting securities. Leucadia's voting securities represented approximately 13.5% of KCG's outstanding voting securities and were valued at approximately $173 million. This exceeded the HSR Act's $70.9 million size-of-transaction threshold then in effect.

Prior to acquiring the Leucadia voting securities, Leucadia sought advice from experienced HSR counsel as to whether the transaction was subject to the HSR reporting requirements. Counsel concluded that the transaction was exempt under Section 802.64 of the HSR Rules because Jeffries was a broker-dealer within the meaning of the HSR Rules, Jeffries was acquiring the voting securities solely for the purpose of investment, and KCG was not a

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment imposes a $240,000 civil penalty designed to deter this Defendant and others from violating the HSR Act. The United States adjusted the penalty downward from the maximum because the violation was unintentional, the Defendant promptly self-reported the violation after discovery, and the Defendant is willing to resolve the matter by consent decree and avoid prolonged investigation and litigation. The penalty also reflects Defendant's previous violation of the HSR Act, as well as Defendant's good faith efforts to comply with HSR by seeking advice from counsel prior to the acquisition. The United States expects this penalty to deter Leucadia and others from violating the HSR Act. The relief will have a beneficial effect on competition because the agencies will be properly notified of acquisitions, in accordance with the law. At the same time, the penalty will not have any adverse effect on competition.

IV. REMEDIES AVAILABLE TO POTENTIAL 0 Td [(t)-d [(t)-Tw 1.26 0 Td [(R)5th26 0 Td [((I

comments regarding the proposed Final Judgment. Any person who wishes to comment should

Complaint and to deter violations by similarly situated entities in the future, without the time, expense, and uncertainty of a full trial on the merits.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that remedies contained in proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment is "in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").[3]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, 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 Microsoft, 56 F.3d at 1458-62. 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) (quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981)); see also Microsoft, 56 F.3d at 1460-62; United States v. Alcan, Inc., 152 F. Supp. 2d 37, 40 (D.D.C. 2001); InBev, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he 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

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[4] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." SBC Commc'ns, 489 F. Supp. 2d at 17; see also U.S. Airways, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); Microsoft, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); United States v. Archer-Daniels-Midland Co., 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[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.'" United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975)), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983); see also U.S. Airways, 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing Microsoft, 56 F.3d at 1461)); United States v. Alcan Aluminum Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would

[4] Cf. BNS, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). See generally Microsoft, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." SBC Commc'ns, 489 F. Supp. 2d at 17.

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, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against ne

Airways, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). 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 Sen. 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.[5] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. U.S. Airways, 38 F. Supp. 3d at 76.

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Date: April 20, 2016

Respectfully Submitted,

/s/ Kenneth A. Libby
Kenneth A. Libby
Special Attorney

[5] See United States v. Enova Corp., 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); United States v. Mid-Am. Dairymen, Inc., No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to