UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. THE THOMSON CORPORATION, HARCOURT GENERAL, INC., and REED ELSEVIER INC., Defendants.	Case Number: 1:01CV01419 Judge: Gladys Kessler Deck Type: Antitrust Date Stamp: 06/27/2001 Civil Action No. (Antitrust) Filed: 6/27/2001

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 June 27, 2001, the United States filed a civil antitrust Complaint alleging that the proposed acquisition by The Thomson Corporation ("Thomson") of the college textbook publishing and computer-based testing businesses of Harcourt General, Inc. ("Harcourt") from Reed Elsevier Inc. ("Reed Elsevier") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that Thomson and Harcourt, two of the world's largest publishers of textbooks and other educational materials, are direct competitors in the development, marketing, and sale of textbooks and print and Internet-based supplemental educational materials used in college courses. For dozens of college courses, they publish textbooks that are close substitutes.

Unless the acquisition is blocked, competition in certain markets for college textbooks and ancillary educational materials will be substantially lessened and likely will lead to higher textbook prices and a reduction in the number and quality of ancillary educational materials provided to teachers and students.

Thomson and Harcourt also are direct competitors in the market for nationwide delivery and administration of certain high stakes computer-based tests used by professional organizations and state and local government agencies for licensure and certification. . Further, the Complaint alleges that competition in the market for nationwide delivery and administration of certain high stakes computer-based examinations will be substantially lessened and likely will result in both test sponsors and candidates paying higher prices for such examinations and in a reduction in the quality of test delivery and administration services.

The request for relief in the Complaint seeks: (1) a judgment that Thomson's proposed acquisition would violate Section 7 of the Clayton Act; (2) a preliminary and permanent injunction preventing consummation of the merger agreement; (3) an award of costs to the plaintiff; and (4) such other relief as the Court may deem just and proper.

Shortly before the Complaint was filed, the parties reached a proposed settlement that permits Thomson to complete its acquisition of Harcourt's college textbook publishing and computer-based testing businesses, yet preserves competition in the markets in which the transaction would raise significant competitive concerns. Along with the Complaint, the parties filed a Hold Separate Stipulation and Order and a proposed Final Judgment which establishes the terms of the settlement.

The proposed Final Judgment orders the defendants to divest sixty-eight (68) college textbooks and related ancillary educational materials so that competition in the development, marketing, and sale of textbooks in each of the thirty-eight (38) courses identified in the Complaint will be preserved. In addition, the proposed Final Judgment orders the defendants to make certain divestitures of Harcourt's computer-based testing business, specifically, Harcourt's subsidiary Assessment Systems, Inc. ("the Complete ASI Assets") or ASI, which includes all the assets of Assessment Systems, Inc., excluding the Agency Information Management Services Business and the State Testing Business, as such terms are defined in the proposed Final Judgment. Unless the United States agrees to an extension of time, the defendants must complete all of these divestitures within one hundred and twenty (120) calendar days of the filing of the Complaint, or within five (5) days of the expiration of the sixty-day (60) statutory notice-and-comment period that commenced upon the publication of this Competitive Impact Statement, whichever is later.

If defendant Thomson does not complete the college textbook divestitures within the appropriate time period, the Court, upon application of the United States, will appoint a trustee selected by the United States to complete the remaining divestitures. Should defendant Thomson fail to complete the computer-based testing business divestitures within the specified time period, the Court, upon application of the United States, will appoint a trustee selected by the United States to accomplish the divestiture of the Complete ASI Assets. The proposed Final Judgment also requires the defendants to take all steps necessary to maintain, operate, and market the

divestiture assets as independent and active competitors until the divestitures mandated by the proposed Final Judgment have been accomplished.

The plaintiff and defendants have stipulated that the Court may enter the proposed Final Judgment after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce provisions of the Final Judgment and punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendants and the Proposed Transaction

The Thomson Corporation is a foreign corporation organized and existing under the laws of Canada, with its headquarters in Toronto, Ontario. Thomson publishes textbooks and other educational materials used in higher education under such names as Southwestern, Wadsworth, Heinle & Heinle, and Brooks/Cole. It is one of the world's largest commercial publishers and a leading competitor in many segments of the educational publishing marketplace. In addition, through its subsidiary Prometric, Inc., a Maryland corporation, Thomson offers computer-based testing services, including test delivery and administration, throughout the United States. Prometric is one of the few companies that operates a nationwide network of testing facilities, and/or is offering high stakes computer-based testing delivery and administration services.

Harcourt General, Inc. is a corporation organized and existing under the laws of Delaware, with its headquarters in Chestnut Hill, Massachusetts. Harcourt publishes textbooks and other educational materials under the Harcourt, Saunders, Dryden, and Holt Rinehart Winston imprints. It is one of the world's largest publishing companies and a leading competitor

in many segments of the educational publishing marketplace. In addition, through its subsidiary Assessment Systems, Inc., a Pennsylvania corporation, Harcourt offers computer-based testing services, including test development, delivery, and administration, throughout the United States. Assessment Systems, Inc. is one of the few companies that operates a nationwide network of facilities, and/or is offering high stakes computer-based testing delivery and administration services.

Reed Elsevier Inc. is a corporation organized and existing under the laws of Massachusetts, with its headquarters in Newton, Massachusetts. Reed Elsevier and Harcourt reached an agreement on October 27, 2000, under which Reed Elsevier will purchase all of the assets of Harcourt. On the same date, Reed Elsevier and Thomson reached a separate agreement under which Thomson will acquire from Reed Elsevier: (1) Harcourt's Higher Education Group, which publishes textbooks and print and Internet-based ancillary educational materials in major academic disciplines in higher education, and (2) most of Harcourt's Corporate and Professional Services Group, the latter of which includes Assessment Systems, Inc.

B. Product Markets

1. College Textbook Markets

a. Description of the Markets

Publishers market textbooks and ancillary educational materials to professors and in colleges and universities throughout the country. College professors generally select textbooks to serve as the primary teaching material for their courses. Textbooks provide the core written material for a course, serve as the foundation for the professor's overall lesson plan, and establish

the framework for class discussions. Professor choose among textbooks that can provide this core content and structure. Students then buy the selected textbooks, typically at college bookstores.

Publishers often attempt to induce a professor to select their textbooks by offering free ancillary educational materials, such as a teacher's edition of the textbooks, audio-visual teaching tools, and copies of the textbooks for teaching assistants. In addition, sometimes students buy the textbooks as part of a discounted package that includes further ancillary educational materials, such as CD-ROMs, workbooks, and study guides.

The Complaint identifies thirty-eight (38) college courses in which Thomson and Harcourt are among the leading competitors in the provision of textbooks and related educational materials. These courses fall primarily within the disciplines of chemistry, communications, finance, foreign languages, philosophy, and psychology. In most of these courses, textbooks are used as a primary teaching material. A small but significant increase in the price of textbooks for a college course — or a small but significant decrease in the number or quality of ancillary educational materials provided with the textbooks — would not cause a significant number of professors or students to switch to alternative products. In addition, used textbooks cannot defeat an increase in the price of new textbooks or a decrease in the supply of ancillaries provided with them. The supply of used textbooks is limited, and professors usually require their students to use the newest edition of a textbook, which, generally, is revised every three to four years.

b. Harm to Competition as a Consequence of the Merger

In each of the thirty-eight (38) college textbook markets identified in the Complaint, Thomson and Harcourt compete vigorously by offering textbooks that are close substitutes. Together, they account for a major share of new textbook sales and face significant competition from only a few other publishers. Thus, the proposed acquisition would significantly increase concentration in already highly concentrated markets.

Competition between Thomson and Harcourt has resulted in lower prices and has created a significant incentive for each to publish new titles and improve product quality. The proposed acquisition would eliminate this competition, giving Thomson the ability to raise the prices of its or Harcourt's textbooks or reduce the number or quality of ancillary educational materials provided with the textbooks.

In each of the thirty-eight (38) college textbook markets, there is unlikely to be timely entry by any company that would be sufficient to defeat an anticompetitive increase in textbook prices or a decrease in the number or quality of ancillary educational materials or that would spur continuing innovation in the development and production of such products. Successful entry involves a costly and time-consuming process in which a publisher must locate an author qualified to write a new textbook and assemble an editorial staff to edit and develop the textbook, which then must be reviewed by numerous professors prior to its publication. In addition, effectively selling college textbooks requires a trained and knowledgeable sales force to visit and foster relationships with professors at each school to which the textbooks are sold, along with direct

mail solicitation and participation in educational conventions. Entry is also impeded by the difficulty in challenging the reputation of successful incumbent textbooks.

The Complaint alleges that the transaction likely will have the following effects:

i. actual and future competition between Thomson and Harcourt will be eliminated;

ii. competition generally in the markets for the textbooks and ancillary educational materials for each of the college courses identified in the Complaint will be substantially lessened;

iii. prices for college textbooks and ancillary educational materials for each of the college courses identified in the Complaint will increase or the number and quality of materials will decline; and

iv. competition in the development and improvement of college textbooks and ancillary educational materials in each of the college courses identified in the Complaint will be substantially lessened.

2. Computer-Based Testing Markets

a. Description of the Markets

Many different test sponsors, including professional associations and state and local governments, use computer-based testing for licensing and certification. The creation, delivery, and evaluation of a test involves three stages: (1) developing test content; (2) delivering and administering tests; and (3) processing and reporting test results. Test sponsors using computer-based testing generally rely upon outside companies to perform each of the steps involved in developing and delivering their tests and evaluating the results.

Test sponsors' examinations may be classified as either "high stakes" or "low stakes." High stakes tests involve those that have very important consequences for the candidates, such as real estate or stockbroker licenses, and certification to assist in surgical procedures, while low

stakes tests include practice, training, and self-improvement tests. Test sponsors invariably require a higher level of security during the delivery and administration of high stakes tests than of low stakes tests.

Traditionally, licensing and certification examinations have been administered through paper-and-pencil tests. However, computer-based testing offers both test sponsors and candidates a number of significant advantages compared to paper-and-pencil testing. Typically, paper-and-pencil tests are given only a few times each year at specified dates and times, while computer-based testing allows test sponsors to offer a test throughout the year on multiple days of the week. Candidates can therefore schedule the test at a convenient time. Such flexible scheduling also benefits test sponsors, enabling them to distribute work more evenly throughout the year, rather than in concentrated periods surrounding the test dates, thus increasing the efficiency of their business operations.

Computer-based testing also allows the use of more innovative testing features than paper-and-pencil testing. Computer-based tests can be scored instantly, and test questions are more easily updated and improved. Computer-based tests also allow test sponsors to better identify questions that lead to false positives or false negatives. Further, "computer adaptive testing" allows for the test to adapt to the test taker's performance (e.g., correct responses lead to increasingly difficult questions), thereby providing for more effective evaluations.

Test sponsors that offer high stakes computer-based examinations to a nationwide pool of candidates require that the computer-based testing company with whom they contract have a network of testing centers throughout the United States. Test sponsors require that, while

examinations are occurring, such testing centers be devoted solely to testing and have adequate security to ensure the integrity of the sponsor's examination and to prevent candidates from cheating. Requisite security measures include having secure computer servers, checking each candidate's identification prior to the examination, and providing proctors to ensure that candidates are not using unauthorized materials during the examination period. Because the proctors' attention and time must be dedicated to monitoring the candidates, they cannot perform other tasks during the examination period. Additional security measures that may be used include video cameras, fingerprint checks, viewing windows, and additional proctors.

Test sponsors using or considering nationwide high stakes computer-based tests would not turn to any alternative product in sufficient numbers to defeat a small but significant increase in the price of delivery and administration services provided through a secure testing center network. As discussed above, computer-based testing provides numerous advantages over paper-and-pencil testing. As a result, the existence of paper-and-pencil testing cannot defeat an increase in the price of computer-based test delivery and administration given through a nationwide secure testing center network.

Test sponsors also would not self-deliver and administer computer-based tests in response to a small but significant increase in the price of such services. Individual test sponsors do not have the testing volume to justify operating a network of year-round testing centers or purchasing the necessary computer equipment and software to operate such centers. Additionally, computer-based testing administered via the Internet cannot defeat a small but significant increase in the price of delivery and administration services given through a secure testing center network

because the security required for high stakes examinations still requires that they be administered in a secure, proctored environment. Currently, the technology is not available to enable test proctoring via the Internet.

b. Harm to Competition as a Consequence of the Acquisition

Both Prometric and Assessment Systems, Inc. offer a nationwide network of secure testing centers for the delivery and administration of high stakes computer-based examinations that are close substitutes. They are among the very few firms that compete to provide such a network and account for a significant share of all new contracts.

Competition between Prometric and Assessment Systems, Inc. to provide nationwide high stakes computer-based testing delivery and administration services has resulted in lower prices for test sponsors and candidates, and has created significant incentives for each to maintain and expand its nationwide network of testing centers and improve service quality. The proposed transaction would eliminate this competition, give Prometric the ability to raise the prices for, or reduce the quality of, its high stakes computer-based testing delivery and administration services, and significantly increase concentration in this already highly concentrated market.

If Thomson acquires Assessment Systems, Inc. there is unlikely to be timely entry by any company offering a nationwide network of secure testing sites for the delivery and administration of high stakes computer-based examinations sufficient to defeat an anticompetitive increase in the price of such services. Successful entry requires a computer-based testing vendor to develop a nationwide network of approximately 200 secure testing centers that meet the requirements for

high stakes computer-based testing. The ongoing, day-to-day operation of such a network is costly and time-consuming.

In addition, to successfully enter the market for nationwide delivery and administration of high stakes computer-based tests, a vendor must be able to obtain contracts with enough test sponsors to cover the cost of building and maintaining a nationwide network. A new entrant faces a number of hurdles in attempting to obtain the requisite amount of business. First, the duration for contracts for high stakes computer-based testing delivery and administration services typically is several years, and test sponsors generally contract with a single company to provide these services. A computer-based testing vendor attempting to enter the market for delivery and administration services therefore must wait until a contract is near its expiration before the company has an opportunity to bid for it. Second, because there are significant costs involved in switching computer-based test providers, an incumbent provider has a substantial advantage in bidding for such contracts. Third, it is expensive and time-consuming to convert an examination from paper-and-pencil to computer-based format, thus making it difficult for a new entrant to enter the market through conversion of sponsors currently using paper-and-pencil testing. Finally, many test sponsors will contract only with a provider whose testing centers are currently operational, and who has demonstrated an ability to successfully administer high stakes examinations.

The complaint alleges that the transaction likely will have the following effects:

i. actual and future competition between Thomson and Harcourt will be eliminated;

ii. competition generally in the market for nationwide computer-based testing delivery and administration services will be substantially lessened;

iii. prices for nationwide computer-based testing delivery and administration services will increase or the value of services will decline; and

iv. competition in the development and improvement of nationwide computer-based testing delivery and administration services will be substantially lessened.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment is designed to eliminate the anticompetitive effects of the proposed acquisition by Thomson of Harcourt's college textbook publishing and computer-based testing businesses from Reed Elsevier and to ensure that adequate competition is maintained in each of the relevant product markets identified in the Complaint.

The proposed Final Judgment requires the defendants to divest the sixty-eight (68) college textbooks identified on Exhibit A to the proposed Final Judgment to an acquirer(s) acceptable to the United States within one hundred and twenty (120) calendar days after the filing of the Complaint in this matter, or within five (5) days after the expiration of the sixty-day (60) statutory notice-and-comment period that commenced with the publication of this Competitive Impact Statement in the Federal Register, whichever is later, so as to ensure competition in the market for the development, marketing, and sale of college textbooks and other ancillary educational materials. The United States, in its sole discretion, may agree to an extension of time for one additional thirty (30) day period, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the college textbook assets as expedititiously as possible.

Exhibit A to the proposed Final Judgment specifies the one or more textbooks in each course that must be divested to ensure that there is no reduction in competition in each such course. The college textbook divestitures include all textbooks and ancillary educational materials

offered for sale or under development by any subsidiary or division of the defendants that are designed to be specific to a textbook product listed in Exhibit A of the proposed Final Judgment, including all the tangible and intangible assets that constitute the college textbook products identified in the Complaint including, but not limited to, teacher editions, workbooks, notebooks, charts, audio, video, software, any CD-ROM, DVD-ROM, Internet and broadcast components, teacher support and staff development materials, and any other materials in any form, format or media.

The proposed Final Judgment also requires the defendants to divest all of Assessment Systems, Inc. (as previously defined, the "Complete ASI Assets") or that entity excluding Harcourt's Agency Information Management Services and State Testing Businesses (as previously defined, "ASI") to an acquirer or acquirers acceptable to the United States within one hundred and twenty (120) days after the filing of the Complaint in this matter, or within five (5) days after the expiration of the sixty-day (60) statutory notice-and-comment period that commenced with the publication of this Competitive Impact Statement in the Federal Register, whichever is later, so as to ensure competition in the market for the nationwide delivery and administration of high stakes computer-based tests. The United States, in its sole discretion, may agree to an extension of time for two additional thirty (30) day periods, not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants shall offer for sale to an Acquirer or Acquirers both: (1) ASI, as well as (2) the Complete ASI Assets. The proposed acquirers may then make an offer to purchase either ASI or the Complete ASI Assets, or both. The United States shall decide which, if any, of the proposed divestitures of the

computer-based testing business adequately resolve the competitive harms identified in the Complaint. Defendants agree to use their best efforts to divest either ASI or the Complete ASI Assets as expeditiously as possible.

In the event that ASI alone is divested, at the acquirer's or acquirers' option and on commercially reasonable terms, defendant Thomson shall contract with the acquirer(s) to allow the acquirer(s) to provide the delivery and administration of the State Testing Business. Any such contractual arrangement shall continue for the duration of the terms of each currently existing state contract, agreement, or other understanding included in the State Testing Business.

Divestiture of ASI alone shall include all tangible and intangible assets of ASI including, but not limited to, all research and development activities, all fixed, mobile, and other testing centers listed in Exhibit B of the proposed Final Judgment, any accompanying property rights in real estate or equipment used in any of those testing centers, all networking equipment, licenses, permits and authorizations issued by any governmental organization relating to ASI, all patents, intellectual property, copyrights, trademarks, trade names, service marks, service names, but no corporate trademarks or trade names of Thomson or Harcourt, technical information, computer software and related documentation including, but not limited to, test drivers, scheduling software, and the OMEGA, EXPro, and REG2000 software platforms, all test item banks, psychometric data, statistical reports of test results, designs of computer-based examinations and testing centers, and all security measures used in the development, administration, and assessment of computer-based tests and the reporting of exam results. Divestiture of the Complete ASI

Assets shall include the foregoing list of tangible and intangible assets, as well as the Agency Information Management Systems and State Testing Businesses.

Until the divestitures occur, the defendants are required to develop and maintain all assets to be divested as independent, ongoing, economically viable, and active competitors, and to continue to fund their development, operations, promotional advertising, sales, marketing, merchandising, and support at existing or already approved levels. If defendant Thomson fails to make the required divestitures within the applicable time periods, the Court will appoint a trustee selected by the United States to effect the remaining divestitures. With regard to the computer-based testing business, should defendant Thomson fail to divest either ASI or the Complete ASI Assets within the requisite time periods, the trustee will effect the divestiture of the Complete ASI Assets. The proposed Final Judgment provides that defendant Thomson will pay all costs and expenses of the trustee. After the trustee's appointment becomes effective, the trustee will file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish the divestitures. At the end of six (6) months, if the divestitures have not been accomplished, the trustee and the parties will have the opportunity to make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the trust, including extending the trust and the term of the trustee's appointment.

The proposed Final Judgment takes steps to ensure that the acquirer(s) of the college textbook assets will be viable and effective competitors in the college textbook publishing. The United States must be satisfied that the acquiring parties of each of the college textbook products have the ability and intention (including the necessary managerial, operational, technical and

financial capability) to operate and market the divestiture assets as viable, ongoing businesses, as appropriate. The proposed Final Judgment requires defendants to provide the acquirer(s) and the United States with information relating to the personnel responsible for the editorial content of the college textbooks to be divested, including employees, agents, consultants, and independent contractors, to enable the acquirer(s) to make offers of employment. The proposed Final Judgment forbids the defendants from interfering with any acquirer's employment negotiations with those employees, and from transferring those employees to new positions prior to the divestitures.

Further, the proposed Final Judgment takes steps to ensure that the acquirer(s) of the computer-based testing assets will be viable and effective competitors in the computer-based testing business. The United States must be satisfied that the acquiring parties of the computer-based testing business have the ability and intention (including the necessary managerial, operational, technical and financial capability) to operate and market the divestiture assets as viable, ongoing businesses. The proposed Final Judgment requires defendants to provide the acquirer(s) and the United States with information relating to all personnel of either ASI or Complete ASI Assets, as appropriate, including employees, agents, consultants, and independent contractors, to enable the acquirer(s) to make offers of employment. The proposed Final Judgment forbids the defendants from interfering with any acquirer's employment negotiations with those employees, and from transferring those employees to new positions prior to the divestitures.

The proposed Final Judgment is designed to maintain the present level of competition in the college textbook publishing market identified in the Complaint in this matter by replacing the competitor eliminated as a result of the merger with one or more that is equally effective. It accomplishes this goal by: (1) requiring prompt divestitures of the college textbook products so that the acquirer(s) has adequate time to participate in the significant upcoming sales opportunities in colleges and universities; (2) providing the acquirer(s) with an opportunity to employ the personnel that are critical to the success of the divestiture assets; and (3) requiring divestiture of all tangible and intangible assets that make up each of those assets.

Further, the proposed Final Judgment is designed to maintain the present level of competition in the computer-based testing market identified in the Complaint in this matter by replacing the competitor eliminated as a result of the merger with one or more that is equally effective. It accomplishes this goal by: (1) affording the acquirer(s) an opportunity to purchase either ASI or the Complete ASI Assets, thus ensuring a viable competitor in the computer-based testing market; (2) in the event that ASI alone is divested, and should the acquirer(s) so choose, requiring that defendant Thomson contract with the acquirer of ASI for the delivery and administration of the State Testing Business for the duration of all existing state contracts; (3) providing the acquirer(s) with an opportunity to employ the personnel that are critical to the success of the divestiture assets; and (4) requiring divestiture of all tangible and intangible assets that make up each of those assets.

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 attorneys' 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 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, provided that the United States has not withdrawn its consent. The APPA conditions entry of the proposed Final Judgment upon the Court's determination that it 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 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 the comments. All comments will be given due consideration by the 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 response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

James R. Wade
Chief, Civil Task Force
Antitrust Division
United States Department of Justice
325 Seventh Street, N.W., Suite 300
Washington, D.C. 20530.

The proposed Final Judgment provides that the Court retains 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 the defendants. The United States is satisfied that the divestitures required by the proposed Final Judgment will facilitate continued viable competition in the college textbook publishing and computer-based testing markets identified in the Complaint and will effectively prevent the anticompetitive effects that the Complaint alleges would result from the proposed acquisition.

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

The APPA requires that consent judgments in antitrust cases brought by the United States be subject to a sixty-day (60) 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 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, 56 F.3d 1448 (D.C. Cir. 1995). The courts have recognized that the term "'public interest'... take[s] meaning from the purposes of the regulatory legislation." NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to preserve "free and unfettered competition as the rule of trade," Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the APPA is whether the proposed Final Judgment would serve the public interest in free and unfettered competition. United States v. American Cyanamid 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. ¶ 66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, "the 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."[1/] Rather,

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[1] 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

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its 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 reasonable under the circumstances.

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

Accordingly, 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.), cert. denied, 454 U.S. 1083 (1981)). Precedent requires 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 a particular decree is the one that will best serve society, but whether the settlement is '*within the reaches of the public interest.*' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2/]

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. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S.C.C.A.N. 6535, 6538.

[2] United States v. Bechtel, 648 F.2d at 666 (emphasis added) (internal citations omitted). See United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983).

A proposed consent decree is an agreement between the parties that 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.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice 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 falls within the range of acceptability or is 'within the reaches of public interest.'"[3/]

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.

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[3] United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (quoting Gillette, 406 F. Supp. at 716, other citations omitted); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

FOR PLAINTIFF UNITED STATES OF AMERICA:

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Respectfully submitted,

/s/

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