

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 sixty (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) (emphasis added). As the Court of Appeals for the District of Columbia 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 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,

absent 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.²

¹ 119 Cong. Rec. 24,598 (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 Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, those procedures are discretionary (15 U.S.C. 16(f)). 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.C.A.N. 6535, 6538.

² *United States v. Mid-America Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D.

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, 462–63 (9th Cir. 1988), quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also *Microsoft*, 56 F.3d at 1458. Precedent requires that

[t]he balancing of competing social and political interest 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.³

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.'"⁴

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States alleges in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on

Mo. 1977); see also *United States v. Loew's Inc.*, 783 F. Supp. 21, 214 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987).

³ *United States v. Bechtel Corp.*, 648 F.2d at 666 (citations omitted) (emphasis added); 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); *United States v. Gillette Co.*, 406 F. Supp. at 716. See also *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984).

⁴ *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (quoting *Gillette*, 406 F. Supp. at 716), aff'd sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1222 (N.D.N.Y. 1978).

the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that the court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. Id.

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.

Dated: September 4, 2001. Washington DC. Respectfully submitted,

Dando B. Cellini,

Stephen A. Harris,

U.S. Department of Justice, Antitrust Division, Litigation II Section, 1401 H Street, NW, Suite 3000, Washington, DC 20530, 202-307-0729.

Certificate of Service

I hereby certify that I caused a copy of the foregoing Competitive Impact Statement to be served on all parties to this proceeding, by facsimile transmission or by mail, on this 4th day of September 2001.

Stephen A. Harris,

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. NRTL1–88]

MET Laboratories, Inc., Expansion of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: This notice announces the Agency's final decision on the application of MET Laboratories, Inc., for expansion of its recognition as a Nationally Recognized Testing Laboratory (NRTL). MET's expansion covers the use of additional standards.

EFFECTIVE DATE: The expansion becomes effective on September 26, 2001 and continues in effect while OSHA recognizes MET as an NRTL under 29 CFR 1910.7.

FOR FURTHER INFORMATION CONTACT: Bernard Pasquet, Office of Technical Programs and Coordination Activities, NRTL Program, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue,

NW., Room N3653, Washington, DC 20210, or phone (202) 693-2110.

SUPPLEMENTARY INFORMATION:

Notice of Final Decision

The Occupational Safety and Health Administration (OSHA) hereby gives notice of the expansion of recognition of MET Laboratories, Inc., (MET) as a Nationally Recognized Testing Laboratory (NRTL). MET's expansion covers the use of additional test standards. The NRTL's current scope of recognition may be found in OSHA's informational web page for the NRTL (<http://www.osha-slc.gov/dts/otpca/nrtl/met.html>).

OSHA recognition of an NRTL signifies that the organization has met the legal requirements in § 1910.7 of Title 29, Code of Federal Regulations (29 CFR 1910.7). Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within its scope of recognition and is not a delegation or grant of government authority. As a result of recognition, employers may use products "properly certified" by the NRTL to meet OSHA standards that require testing and certification.

The Agency processes applications by an NRTL for initial recognition or for expansion or renewal of this recognition following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the Agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides its preliminary finding and, in the second notice, the Agency provides its final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope.

MET submitted a request, dated January 16, 2001 (see Exhibit 24), to expand its recognition as an NRTL to include 32 additional test standards. OSHA published the required notice in the **Federal Register** on July 11, 2001 (66 FR 36333), to announce MET's expansion request. This notice included a preliminary finding that MET could meet the requirements in 29 CFR 1910.7 for expansion of its recognition and invited public comment by July 26, 2001. OSHA received no comments concerning this notice.

In processing this request, OSHA did not perform an on-site review of MET's NRTL testing facilities. However, NRTL Program assessment staff reviewed information pertinent to the request and, in a memo dated February 28, 2001 (see Exhibit 25), recommended the expansion of MET's recognition to

include the additional test standards listed below.

The most recent notices published by OSHA for MET's recognition, prior to the July 11 preliminary notice, covered an expansion of recognition, which OSHA announced on November 10, 1998 (63 FR 63085), and granted on March 9, 1999 (64 FR 11502).

You may obtain or review copies of all public documents pertaining to the MET application by contacting the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N2625, Washington, DC 20210. You should refer to Docket No. NRTL1-88, the permanent record of public information on the MET recognition.

The current address of the MET testing facilities already recognized by OSHA is: MET Laboratories, Inc., 914 West Patapsco Avenue, Baltimore, Maryland 21230.

Final Decision and Order

The NRTL Program staff has examined the application, the assessor's memo, and other pertinent information. Based upon this examination and the assessor's recommendation, OSHA finds that MET Laboratories, Inc., has met the requirements of 29 CFR 1910.7 for expansion of its NRTL recognition. The expansion covers the test standards listed below, and it is subject to the limitations and conditions, also listed below. Pursuant to the authority in 29 CFR 1910.7, OSHA hereby expands the recognition of MET, subject to these limitations and conditions.

Limitations

OSHA limits the expansion of recognition of MET to testing and certification of products for demonstration of conformance to the following 32 additional test standards. OSHA has determined that each standard meets the requirements for an appropriate test standard, within the meaning of 29 CFR 1910.7(c). The NRTL Program staff makes such determinations in processing applications from any NRTL.

- UL 45 Portable Electric Tools
- UL 506 Specialty Transformers
- UL 745-1 Portable Electric Tools
- UL 745-2-1 Particular Requirements of Drills
- UL 745-2-2 Particular Requirements for Screwdrivers and Impact Wrenches
- UL 745-2-3 Particular Requirements for Grinders, Polishers, and Disk-Type Sanders
- UL 745-2-4 Particular Requirements for Sanders

- UL 745-2-5 Particular Requirements for Circular Saws and Circular Knives
- UL 745-2-6 Particular Requirements for Hammers
- UL 745-2-8 Particular Requirements for Shears and Nibblers
- UL 745-2-9 Particular Requirements for Tappers
- UL 745-2-11 Particular Requirements for Reciprocating Saws
- UL 745-2-12 Particular Requirements for Concrete Vibrators
- UL 745-2-14 Particular Requirements for Planers
- UL 745-2-17 Particular Requirements for Routers and Trimmers
- UL 745-2-30 Particular Requirements for Staplers
- UL 745-2-31 Particular Requirements for Diamond Core Drills
- UL 745-2-32 Particular Requirements for Magnetic Drill Presses
- UL 745-2-33 Particular Requirements for Portable Bandsaws
- UL 745-2-34 Particular Requirements for Strapping Tools
- UL 745-2-35 Particular Requirements for Drain Cleaners
- UL 745-2-36 Particular Requirements for Hand Motor Tools
- UL 745-2-37 Particular Requirements for Plate Jointers
- UL 935 Fluorescent-Lamp Ballasts
- UL 1026 Electric Household Cooking and Food Serving Appliances
- UL 1028 Hair Clipping and Shaving Appliances
- UL 1083 Household Electric Skillet and Frying-Type Appliances
- UL 1236 Battery Chargers for Charging Engine-Starter Batteries
- UL 1431 Personal Hygiene and Health Care Appliances
- UL 1585 Class 2 and Class 3 Transformers
- UL 1786 Nightlights
- UL 1993 Self-Ballasted Lamps and Lamp Adapters

The designations and titles of the above test standards were current at the time of the preparation of the notice of the preliminary finding.

Many of the test standards listed above are approved as American National Standards by the American National Standards Institute (ANSI). However, for convenience in compiling the list, we show the designation of the standards developing organization (e.g., UL 1028) for the standard, as opposed to the ANSI designation (e.g., ANSI/UL 1028). Under our procedures, an

NRTL recognized for an ANSI-approved test standard may use either the latest proprietary version of the test standard or the latest ANSI version of that standard, regardless of which version appears in the list of test

standards found in OSHA's informational web page for the NRTL. Contact ANSI or the ANSI web site (www.ansi.org) and click "NSSL" to find out whether or not a standard is currently ANSI-approved.

Conditions

MET Laboratories, Inc., must also abide by the following conditions of the recognition, in addition to those already required by 29 CFR 1910.7:

OSHA must be allowed access to the MET facility and records for purposes of ascertaining continuing compliance with the terms of its recognition and to investigate as OSHA deems necessary;

If MET has reason to doubt the efficacy of any test standard it is using under this program, it must promptly inform the organization that developed the test standard of this fact and provide that organization with appropriate relevant information upon which its concerns are based;

MET must not engage in or permit others to engage in any misrepresentation of the scope or conditions of its recognition. As part of this condition, MET agrees that it will allow no representation that it is either a recognized or an accredited Nationally Recognized Testing Laboratory (NRTL) without clearly indicating the specific equipment or material to which this recognition is tied, or that its recognition is limited to certain products;

MET must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major changes in its operations as an NRTL, including details;

MET will continue to meet all the terms of its recognition and will always comply with all OSHA policies pertaining to this recognition; and

MET will continue to meet the requirements for recognition in all areas where it has been recognized.

Signed at Washington, DC this 18th day of September, 2001.

John L. Henshaw,

Assistant Secretary.

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MERIT SYSTEMS PROTECTION BOARD

Variation From Normal Procedures—Effects of Attacks on World Trade Center and Pentagon

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: Notice is hereby given of variations from the Board's normal case processing procedures as a result of the September 11, 2001, attacks on the World Trade Center in New York and the Pentagon.

DATES: September 26, 2001.

FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk of the Board, 1615 M Street, NW., Washington, DC 20419; telephone (202) 653-7200; facsimile (202) 653-7130; e-mail to mspb@mspb.gov.

SUPPLEMENTARY INFORMATION: The Merit Systems Protection Board is providing notice of the variations in its normal case processing procedures that have been placed into effect as a result of the September 11, 2001, attacks on the World Trade Center in New York and the Pentagon.

The Board's adjudicatory regulations contain numerous time limits for filing documents in Federal employee appeals of agency personnel actions and other matters within the Board's jurisdiction. In addition, MSPB judges issue various orders in the course of an adjudicatory proceeding that set a time limit for responses by the parties. The Board's regulations permit four methods of filing and serving documents—regular mail, commercial overnight delivery, facsimile, and personal delivery to the appropriate MSPB office. The date of filing by regular mail is determined by the postmark date. For filing by commercial overnight delivery, it is the date the document is delivered to the commercial overnight delivery service. For filing by facsimile, it is the date recorded on the facsimile transmission. For filing by personal delivery, it is the date the MSPB office receives the document.

At the time of the attacks on September 11, 2001, there were approximately 1,800 cases pending in MSPB regional and field offices and almost 800 cases pending at the Board's headquarters in Washington (data as of August 31, 2001). It is reasonable to assume, therefore, that a number of filings due to a MSPB office on September 11, 2001, could not be made on that date. An unknown number of filings of new cases subject to a filing deadline of September 11, 2001, also may have been affected by the events of that date.

The following circumstances may have affected filings due on September 11, 2001:

- The Board's New York Field Office, located in the vicinity of the World Trade Center, was evacuated following

the attack there and remains closed until further notice.

- The Board's Washington, DC, headquarters office and its Washington Regional Office in Alexandria, Virginia, closed shortly after the attack on the Pentagon.

- Other MSPB regional and field offices throughout the country closed early on September 11, 2001.

- U.S. post offices closed throughout the country following the attacks, and many scheduled mail pickups on September 11, 2001, were not made. Certain scheduled mail pickups on September 12, 2001, also may not have been made.

- Facsimile transmissions to the New York Field Office could not be received because of communications failures in the area.

- Facsimile transmissions to the Board's headquarters may have been unable to get through because of the overload of telephone circuits in the Washington, DC, area.

In addition to the effect of the attacks on the ability of parties to make timely filings that were due on September 11, 2001, MSPB case files of Federal agencies located in the World Trade Center were destroyed in the attacks. Case files in the Pentagon may have been destroyed as well.

Accordingly, the Board has placed into effect the following variations from its normal case processing procedures:

1. Until further notice, filings due to the New York Field Office are to be made with the Northeastern Regional Office. The address, telephone and facsimile numbers, and e-mail address of the Northeastern Regional Office are: U.S. Customhouse, Room 501, Second & Chestnut Streets, Philadelphia, PA 19106; telephone (215) 597-9960; facsimile (215) 597-3456; e-mail to philadelphia@mspb.gov. Questions regarding cases in the New York Field Office should be directed to the Northeastern Regional Office.

2. In MSPB regional and field offices, judges will exercise discretion in accepting filings due on September 11, 2001, that were made (by any filing method) after that date.

3. At Board headquarters, the Clerk of the Board will exercise discretion in accepting filings due on September 11, 2001, that were sent by regular mail and postmarked after that date. Normally, a show cause order is issued when a late filing is received, but the Clerk of the Board may accept certain filings, particularly from the New York City area, without issuing a show cause order.

4. At Board headquarters, the Clerk of the Board will accept as timely filings