UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *Plaintiff*, v. TRANSDIGM GROUP INCORPORATED *Defendant*.	Civil Action No.:

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 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 February 22, 2017, Defendant TransDigm Group Incorporated ("TransDigm") acquired SCHROTH Safety Products GmbH and substantially all the assets of Takata Protection Systems, Inc. (collectively, "SCHROTH") from Takata Corporation ("Takata") for approximately $90 million. Due to the structure of the transaction, it was not required to be reported under the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a.

The United States filed a civil antitrust Complaint on December 21, 2017, seeking the divestiture of SCHROTH and such other relief as necessary to restore the market to the competitive position that existed prior to the acquisition. The Complaint alleges that the likely

effect of this acquisition would be to lessen competition substantially for the development, manufacture, and sale of restraint systems used on commercial airplanes worldwide in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would result in higher prices for several types of restraint systems used on commercial airplanes and diminished innovation in the development of new airplane restraints.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, TransDigm is expected to divest all SCHROTH shares and assets acquired from Takata (the "Divestiture Assets") to Perusa Partners Fund 2, L.P. and SSP MEP Beteiligungs GmbH & Co. KG, a management buyout group composed of former SCHROTH executives. Under the terms of the Hold Separate, TransDigm will take steps to ensure that the Divestiture Assets are operated as a competitively independent, economically viable, and ongoing business concern that will remain independent and uninfluenced by TransDigm, and that competition is maintained during the pendency of the ordered divestiture.

The United States and TransDigm have stipulated that the proposed Final Judgment may be entered 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 the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendant and the Transaction

TransDigm is a Delaware corporation headquartered in Cleveland, Ohio. TransDigm operates as a holding company and owns over 100 subsidiaries. Through its subsidiaries, TransDigm is a leading global designer, manufacturer, and supplier of highly engineered airplane components. TransDigm's fiscal year 2016 revenues were approximately $3.1 billion. TransDigm is the ultimate parent company of AmSafe Inc. ("AmSafe"), a Delaware corporation headquartered in Phoenix, Arizona. AmSafe develops, manufactures, and sells a wide range of restraint systems used on commercial airplanes. AmSafe had global revenues of approximately $198 million in fiscal year 2016.

Takata is a global automotive and aerospace parts manufacturer based in Japan.[1] Prior to the acquisition, Takata was the ultimate parent entity of SCHROTH Safety Products GmbH and Takata Protection Systems, Inc. SCHROTH Safety Products is a German limited liability corporation based in Arnsberg, Germany. Takata Protection Systems was a Colorado corporation based in Pompano Beach, Florida.[2] SCHROTH Safety Products and Takata Protection Systems develop, manufacture, and sell a wide range of restraint systems used on commercial airplanes. SCHROTH Safety Products and Takata Protection Systems collectively had approximately $37 million in revenue in fiscal year 2016.

On February 22, 2017, TransDigm acquired SCHROTH Safety Products and

[1] Takata filed for bankruptcy protection on June 25, 2017.

[2] After the acquisition was completed, the Takata Protection Systems assets were incorporated as SCHROTH Safety Products LLC.

substantially all the assets of Takata Protection Systems for approximately $90 million. The transaction combined the two leading suppliers of restraint systems used on commercial airplanes worldwide. AmSafe is the dominant supplier of airplane restraint systems used on commercial airplanes; SCHROTH was its closest competitor and, indeed, its only meaningful competitor for certain types of restraint systems. As a result, the acquisition would lessen competition substantially in the development, manufacture, and sale of several types of restraint systems used on commercial airplanes. This acquisition is the subject of the Complaint and proposed Final Judgment filed today by the United States.

B. Industry Overview

Commercial airplanes are fixed-wing aircraft used for scheduled passenger transport. Restraint systems used on commercial airplanes are critical safety devices that secure the occupant of a seat to prevent injury in the event of turbulence, collision, and impact.

Restraint systems used in the economy and premium cabins in commercial airplanes vary based on the airplane type, seat type, and seating configuration of the airplane. Restraint systems used on commercial airplanes come in two primary forms: (i) conventional belt systems with two or more belts or "points" that are connected to a central buckle; or (ii) inflatable systems with one or more airbags that may be installed in combination with a conventional belt system. The airbags can be installed either within the belt itself (called an "inflatable lapbelt") or in a structural monument (such as a seat back or wall) within the airplane (called a "structural mounted airbag").

Economy cabin seats typically require two-point lapbelts, though other restraint systems such as inflatable restraint systems may be necessary in limited circumstances to comply with

Federal Aviation Administration ("FAA") safety requirements. Premium cabin seats come in many different seating configurations, and passenger restraint systems used in premium cabin seats vary as well. Premium cabin restraint systems include two-point lapbelts, three-point shoulder belts, and inflatable restraint systems. While two-point lapbelts and three-point shoulder belts are used widely throughout the premium cabins, the use of inflatable restraint systems is more common in first-class and other ultra-premium cabins. Flight crew seats on commercial airplanes require special restraint systems called "technical" restraints. Technical restraints are multipoint restraints with four or more belts that provide additional protection to the flight crew.

Restraint systems typically are purchased by commercial airlines and airplane seat manufacturers. Because certification of a restraint system is expensive and time consuming, once a restraint system is certified for a particular seat and airplane type, it is rarely substituted in the aftermarket for a different restraint system or supplier. Accordingly, competition between suppliers of restraint systems generally only occurs when a customer is designing a new seat or purchasing a new seat design, either when retrofitting existing airplanes or purchasing new airplanes.

C. Industry Regulation and Certification Requirements

All commercial airplanes must contain FAA-certified restraint systems on every seat installed on the airplane. The process for obtaining FAA certification is complex and involves several distinct stages.

Before selling a restraint system, a supplier of airplane restraint systems must first obtain a technical standard order authorization ("TSOA"). A TSOA certifies that the supplier's restraint

system meets the minimum design requirements of the codified FAA Technical Standard Order ("TSO") for that object, and that the manufacturer has a quality system necessary to produce the object in conformance with the TSO. To obtain a TSOA for a restraint system, a supplier must test its restraint system for durability and other characteristics. Once a TSOA is issued for the restraint system, the supplier must then obtain a TSOA for the entire seat system—*i.e.*, the seat and belt combination. To obtain a TSOA for the seat system, the seat system must successfully complete dynamic crash testing to demonstrate that the seat system meets the FAA required g-force and head-injury-criteria safety requirements. Dynamic crash-testing is expensive and can be cost prohibitive to potential suppliers. Once a supplier obtains a TSOA for the seat system, it must then obtain a supplemental type certificate, which certifies that the seat system meets the applicable airworthiness requirements for the particular airplane type on which it is to be installed.

Certain restraint system types such as inflatable restraint systems do not have a codified TSO and must instead satisfy a "special condition" from the FAA prior to manufacture and installation of the restraint system. In those circumstances, the FAA must first determine and then publish the terms of the special condition. Once the special condition is published, the supplier must then satisfy the terms of the special condition to install the object on an airplane.

D. Relevant Markets Affected by the Proposed Acquisition

AmSafe and SCHROTH compete across the full range of restraint systems used on commercial airplanes. As alleged in the Complaint, restraint systems are not generally interchangeable or substitutable for different restraint systems; restraint systems are designed for specific aircraft configurations and seat types. FAA regulations dictate which restraint system

may be used for a particular aircraft configuration and seat type. In the event of a small but significant price increase for a given type of restraint system, commercial customers would not substitute another restraint system in sufficient numbers so as to render the price increase unprofitable. For these reasons, the Complaint alleges that each restraint system identified in the Complaint is a separate line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

As alleged in the Complaint, the relevant geographic market for the development, manufacture, and sale of restraint systems used on commercial airplanes is worldwide. Restraint systems are marketed internationally and may be sourced economically from suppliers globally.

The Complaint alleges likely harm in four distinct product markets for restraint systems used on commercial airplanes worldwide: (1) two-point lapbelts; (2) three-point shoulder belts; (3) technical restraints; and (4) inflatable restraint systems.

A two-point lapbelt is a restraint harness that connects two fixed belts to a single buckle and restrains an occupant at his or her waist. Two-point lapbelts are used on nearly every seat in the economy cabins of commercial airplanes; they also are regularly used in the premium cabins. A three-point shoulder belt is a restraint harness that restrains an occupant at his or her waist and shoulder. It consists of both a lapbelt component and shoulder belt (or sash) component. Three-point shoulder belts are widely used in the premium cabins of commercial airplanes where the seating configurations often necessitate the additional protection provided by three-point shoulder belts. Technical restraints are multipoint restraint harnesses (usually four or five points) that restrain an occupant at his or her waist and shoulders. Technical restraints consist of multiple belts that connect to a single fixed buckle—typically a rotary-style buckle. Technical

restraints are used by the flight crew in commercial airplanes. The critical nature of the flight crew's responsibilities and the design of their seats necessitate the additional protections provided by technical restraints. Inflatable restraint systems, which include both inflatable lapbelts and structural mounted airbags, are restraint systems that utilize one or more airbags to restrain an airplane seat occupant. Inflatable restraint systems are most commonly used in the premium cabin of commercial airplanes, particularly in first-class and other ultra-premium cabins that have "lie-flat" or oblique-facing seats. Inflatable restraint systems also are used in the economy cabin in certain circumstances. When required by FAA regulations, inflatable restraint systems provide airplane passengers with additional safety.

E. Anticompetitive Effects

According to the Complaint, the acquisition reduced the number of competitors in already highly concentrated markets. Before TransDigm's acquisition of SCHROTH, the markets for all four restraint system types alleged in the Complaint were highly concentrated. In each of these markets, SCHROTH and at most one other smaller firm competed with AmSafe prior to the acquisition and AmSafe had at least a substantial—and often a dominant—share of the market. The Complaint alleges that TransDigm's acquisition of SCHROTH therefore significantly increased concentration in already highly concentrated markets and is likely to enhance market power.

In addition to increasing concentration, the Complaint alleges that TransDigm's acquisition of SCHROTH would eliminate head-to-head competition between AmSafe and SCHROTH in the development, manufacture, and sale of restraint systems used on commercial airplanes worldwide. According to the Complaint, prior to the acquisition, SCHROTH was a

growing competitive threat to AmSafe and was challenging AmSafe on pricing and innovation. In 2012, Takata acquired SCHROTH with the intention of challenging AmSafe in the markets for restraint systems used on commercial airplanes. SCHROTH began to compete with AmSafe on price and to invest heavily in research and development to create new restraint technologies. Customers were already beginning to see the benefits of increased competition in these markets. Between 2012 and 2017, SCHROTH introduced several new innovative restraint products, challenging older products from AmSafe. Prior to the acquisition, SCHROTH had already found customers—including major U.S. commercial airlines—for its new products. With the introduction of these new products, potential customers also had begun qualifying SCHROTH as an alternative supplier to AmSafe and leveraging SCHROTH against AmSafe to obtain more favorable pricing. As new commercial airplanes were expected to be ordered, SCHROTH believed that its market share would continue to grow. For all of these reasons, the Complaint alleges that the loss of SCHROTH as an independent competitor to AmSafe is likely to result in higher prices for several types of restraints used on commercial airplanes and diminished innovation worldwide in violation of Section 7 of the Clayton Act.

F. Barriers to Entry

As alleged in the Complaint, new entry and expansion by existing competitors are unlikely to prevent or remedy the acquisition's likely anticompetitive effects. Entry into the development, manufacture, and sale of restraint systems used on commercial airplanes is costly, and unlikely to be timely or sufficient to prevent the harm to competition caused by the elimination of SCHROTH as an independent supplier.

Barriers to entry and expansion include certification requirements. Before a supplier may sell restraint systems, it must first obtain several authorizations, including a TSOA for the restraint system, a TSOA for the seat system, a supplemental type certificate, and, in certain cases, a special condition. These certification requirements discourage entry by imposing substantial sunk costs on potential suppliers with no guarantee that their restraint systems will be successful in the market. They also take substantial time—in some cases, years—to complete.

Barriers to entry and expansion also include the significant technical expertise required to design a restraint system that satisfies the certification requirements. The technical expertise required to design a restraint system is proportionate to the complexity of the restraint system design. However, while more advanced restraint systems such as inflatable restraint systems require more expertise than simpler belt-type restraint systems, even belt-type restraint systems require significant expertise to design the belt to be strong, lightweight, and functional.

Additional barriers to entry and expansion include economies of scale and reputation. Customers of restraint systems used on commercial airplanes require large volumes of restraint systems at low prices. Companies that cannot manufacture restraint systems at these volumes efficiently cannot compete effectively. Furthermore, customers of restraint systems used on commercial airplanes prefer established suppliers with known reputations.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by establishing a new, independent, and economically viable competitor in the development, manufacture, and sale of commercial airplane restraint systems worldwide.

A. Divestiture

Pursuant to the proposed Final Judgment, TransDigm must divest all of the SCHROTH assets it acquired from Takata pursuant to the February 2017 transaction. Specifically, Paragraph II(J) defines the Divestiture Assets to include all of the assets TransDigm acquired pursuant to the parties' Share and Asset Purchase Agreement and Share Transfer Agreement, including SCHROTH's owned real property and leases in Arnsberg, Germany, and Pompano Beach, Florida, and all other tangible and intangible assets that comprise SCHROTH.

Paragraph IV(A) of the proposed Final Judgment provides that TransDigm must divest the Divestiture Assets to Perusa Partners Fund 2, L.P. ("Perusa") and SSP MEP Beteiligungs GmbH & Co. KG ("MEP KG"), or to an alternative acquirer acceptable to the United States, within 30 days after all necessary regulatory approvals have been obtained from the Committee on Foreign Investment in the United States ("CFIUS") and the German Federal Ministry of Economic Affairs and Energy (the "*Bundesministerium für Wirtschaft und Energie*"), or 30 days after the Court's signing of the Hold Separate, whichever is later. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the assets can and will be operated by Perusa and MEP KG as a viable, ongoing business that can compete effectively in the relevant markets. TransDigm must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with Perusa and MEP KG, or any other prospective purchaser.

The proposed Acquirer is a consortium between Perusa and certain members of the current management team of SCHROTH. Perusa is a diversified German private equity firm that invests in mid-sized companies. The SCHROTH management buyout group, which is acquiring

an equity stake in SCHROTH through an investment entity (MEP KG), consists of 11 current SCHROTH executives, including several individuals who have had significant responsibilities related to SCHROTH's engineering, manufacture, and sale of airplane restraints. Under the terms of the divestiture agreement, Perusa will own a majority stake of SCHROTH.

In order to facilitate the Acquirer's immediate use of the Divestiture Assets, Paragraph IV(J) of the proposed Final Judgment provides the Acquirer with the option to enter into a transition services agreement with TransDigm, for a period of up to 12 months, to obtain information technology services and other such transition services that are reasonably necessary for the Acquirer to operate the Divestiture Assets. The United States, in its sole discretion, may approve one or more extensions of this agreement for a total of up to an additional 6 months.

The proposed Final Judgment also contains provisions intended to facilitate the Acquirer's efforts to hire the employees involved with the SCHROTH business. Paragraph IV(D) of the proposed Final Judgment requires TransDigm to provide the Acquirer with information relating to the personnel involved in the operation of the Divestiture Assets to enable the Acquirer to make offers of employment, and provides that TransDigm will not interfere with any negotiations by the Acquirer to hire them. In addition, Paragraph IV(E) provides that for employees that elect employment with the Acquirer, TransDigm shall waive all noncompete and nondisclosure agreements, vest all unvested pension and other equity rights, and provide all benefits to which the employees would generally be provided if transferred to a buyer of an ongoing business. The Paragraph further provides, that for a period of two years from filing of the Complaint, TransDigm may not solicit to hire, or hire any such person who was hired by the Acquirer, unless such individual is terminated or laid off by the Acquirer or the Acquirer agrees

in writing that TransDigm may solicit to hire that individual.

In the event that TransDigm does not accomplish the divestiture within the period provided in the proposed Final Judgment, Paragraph V(A) provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that TransDigm will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After its appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth its efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

B. Firewalls

The proposed Final Judgment also contains a firewall provision intended to ensure that TransDigm's AmSafe subsidiary does not obtain SCHROTH's competitively sensitive information. During the U.S. Department of Justice, Antitrust Division's ("Antitrust Division") investigation of the acquisition, TransDigm entered into an asset preservation agreement with the United States to ensure that the SCHROTH assets were preserved and operated independently during the pendency of the investigation. As part of that agreement, the United States agreed to allow three TransDigm executives to assist in the day-to-day management of SCHROTH on the condition that the executives would have no decision-making responsibility or participation in

the business of AmSafe while they served in this capacity.[3] Section IX of the proposed Final Judgment includes a firewall provision to ensure that for the duration of the Final Judgment these three TransDigm employees do not share competitively sensitive information regarding SCHROTH that they obtained during the pendency of the investigation with individuals with responsibilities relating to AmSafe.

C. Notification

Section XII of the proposed Final Judgment requires TransDigm to provide notification to the Antitrust Division of certain proposed acquisitions not otherwise subject to filing under the Hart-Scott-Rodino Act, 15 U.S.C 18a (the "HSR Act"), and in the same format as, and per the instructions relating to the notification required under that statute. The notification requirement applies in the case of any direct or indirect acquisitions of any assets of or interest in any entity engaged in the development, manufacture, or sale of airplane restraint systems. Section XII further provides for waiting periods and opportunities for the United States to obtain additional information similar to the provisions of the HSR Act before such acquisitions can be consummated.

D. Enforcement and Expiration of the Final Judgment

The proposed Final Judgment contains provisions designed to promote compliance and make the enforcement of Division consent decrees as effective as possible. Paragraph XV(A) provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including its rights to seek an order of contempt from the

[3] Under Section V(B) of the Hold Separate, those three TransDigm executives may continue to assist with the management of SCHROTH for the term of the Hold Separate.

Court. Under the terms of this paragraph, TransDigm has agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that TransDigm has waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph XV(B) of the proposed Final Judgment further provides that should the Court find in an enforcement proceeding that TransDigm has violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, in order to compensate American taxpayers for any costs associated with the investigation and enforcement of violations of the proposed Final Judgment, Paragraph XV(B) requires TransDigm to reimburse the United States for attorneys' fees, experts' fees, or costs incurred in connection with any enforcement effort.

Finally, Section XVI of the proposed Final Judgment provides that the Final Judgment shall expire ten (10) years from the date of its entry, except that after five (5) years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and TransDigm that the divestiture has been completed and that the continuation of the Final Judgment is no longer necessary or in the public interest.

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 proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against TransDigm.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and TransDigm 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 upon the Court's determination that the proposed Final Judgment 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*, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the Antitrust Division's internet website and, under certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

Maribeth Petrizzi
Chief
Defense, Industrials, and Aerospace Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8700
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 TransDigm. The United States could have continued the litigation and sought a divestiture of all SCHROTH assets acquired from Takata by TransDigm. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition in the development, manufacture, and sale of commercial airplane restraint systems worldwide. Indeed, the divestiture includes all SCHROTH assets acquired from Takata. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-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:

> (A) 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
>
> (B) 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); *United States v. US Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 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.").[4]

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. Alcoa, 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 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.

[4] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004) *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[5] 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 US 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 US Airways*, 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for

[5] *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'").

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 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 that case." *Microsoft*, 56 F.3d at 1459; *see also US Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on 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 did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC Communications*, 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); *see also US 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.[6] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *US Airways*, 38 F. Supp. 3d at 76

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that

[6] *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 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."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

were considered by the United States in formulating the proposed Final Judgment.

Dated: December 21, 2017

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, Jeremy Cline, hereby certify that on December 21, 2017, I caused a copy of the foregoing Complaint, Hold Separate Stipulation and Order, proposed Final Judgment, Competitive Impact Statement, and Explanation of Consent Decree Procedures to be served upon Defendant TransDigm Group Incorporated by mailing the documents electronically to their duly authorized legal representative as follows:

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