DEPARTMENT OF JUSTICE

Antitrust Division

United States v. American Bar Association Civ. No. 95–1211 (CRR) (D.D.C.,); Response of the United States to Public Comments

Pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(d), the United States publishes below the written comments received on the proposed Final Judgment in *United States* v. *American Bar Association*, Civil Action No. 95–1211 (CRR), United States District Court for the District of Columbia, together with the response of the United States to the comments.

Copies of the written comments and the responses are available for inspection and copying in Room 207 of the U.S. Department of Justice, Antitrust Division, 325 7th Street, NW., Washington, DC 20530 (telephone: (202) 514–2481) and for inspection at the Office of the Clerk of the United States District Court for the District of Columbia, Room 1825A, United States Courthouse, Third Street and Constitution Avenue, NW., Washington, DC 20001.

Rebecca P. Dick,

Deputy Director of Operations.

In the United States District Court for the District of Columbia

United States of America, Plaintiff, v. American Bar Association, Defendant. Civil Action No. 95–1211 (CRR).

United States' Response to Public Comments

Pursuant to the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16 (b)–(h), the United States is filing this Response to public comments it has received relating to the proposed Final Judgment in this civil antitrust proceeding. The United States has carefully reviewed the public comments on the proposed Final Judgment. Entry of the proposed Final Judgment, with some limited modifications, will be in the public interest. After the comments and this Response have been published in the Federal Register, under 15 U.S.C. 16(d), the United States will move the Court to enter the proposed Final Judgment.

This action began on June 27, 1995 when the United States filed a Complaint charging that the American Bar Association (''ABA'') violated Section 1 of the Sherman Act, 15 U.S.C. 1, in its accreditation of law schools. The Complaint alleges that the ABA restrained competition among professional personnel at ABA-approved law schools by fixing their compensation levels and working conditions, and by limiting competition from non-ABA-approved schools. The Complaint also alleges that the ABA allowed its law school accreditation process to be captured by those with a direct interest in its outcome. Consequently, rather than setting minimum standards for law school quality and providing valuable information to consumers, the legitimate purposes of accreditation, the ABA acted as a guild that protected the interests of professional law school personnel.

Simultaneously with filing the Complaint, the United States filed a proposed Final Judgment and a Stipulation signed by the defendant consenting to the entry of the proposed Final Judgment, after compliance with the requirements of the APPA.

Pursuant to the APPA, the United States filed a Competitive Impact Statement (''CIS'') on July 14, 1995. The defendant filed a Statement Of Certain Communications on its behalf, as required by Section 16(g) of the APPA, on July 12, 1995, and amended its statement on October 16, 1995. A summary of the terms of the proposed Final Judgment and CIS, and directions for the submission of written comments relating to the proposal, were published in the The Washington Post for seven days from July 23, 1995 through July 29, 1995. The proposed Final Judgment and the CIS were published in the Federal Register on August 2, 1995. 60 Fed. Reg. 39421–39427 (1995). The 60-day period for public comments began on August 3, 1995 and expired on October 2, 1995.[1] The United States has received 41 comments, which are attached as Exhibits 1–41.

I. Background

The proposed Final Judgment is the culmination of a year-long investigation of the ABA. The Justice Department interviewed numerous law school deans, university and college presidents, and others affected by the ABA's accreditation process. Twenty-seven depositions were conducted pursuant to Civil Investigative Demands (''CIDs'') the Department issued. In addition, the Department reviewed over 500,000 pages of documents in connection with this investigation.

At the conclusion of its investigation, the Department determined that the ABA accreditation process and four specific rules arising from that process violated the Sherman Act. The Department challenged the four rules and, more importantly, the accreditation process itself, and it negotiated a proposed Final Judgment with the defendant that adequately resolves its competitive concerns. The ABA indicated its willingness to reform its accreditation process before the Complaint was filed. After preliminary discussions with the Department, the ABA began to implement the reforms. The Department, however, insisted that the elimination of anticompetitive behavior should be subject to the terms of a court-supervised consent decree.

The focus of this case was the capture of the ABA's law school accreditation process by those who used it to advance their self-interest by limiting competition among themselves and from others. The case was not based on any determination by the Department of Justice as to what, specifically, most individual accreditation rules should provide. The Department is not particularly qualified to make such an assessment and has not attempted to do so. The Department concluded that the process that had produced the present rules was tainted. The appropriate solution—and the relief imposed by the proposed decree—was to reform the process, removing the opportunity for taint, and then to have the cleansed process establish new rules.

II. The Legal Standard Governing the Court's Public Interest Determination

A. General Standard

When the United States proposes an antitrust consent decree, the Tunney Act requires the court to determine whether ''the entry of such judgment is in the public interest.'' 15 U.S.C. § 16(e) (1988). As the D.C. Circuit explained, the purpose of a Tunney Act proceeding ''is not to determine whether the resulting array of rights and liabilities 'is one that will *best* serve society,' but only to confirm that the resulting settlement is 'within the *reachs* of the public interest,' '' *U.S.* v. *Microsoft Corp.*, 56 F.3d 1448, 1460 (D.C. Cir. 1995) (emphasis in original); *accord*, *United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993); *see also United States* v. *Bechtel*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975.[2] Hence, a court should not reject a decree ''unless 'it has exceptional confidence

[1] The United States has treated as timely all comments that it received up to the time of the filing of this Response.

[2] The *Western Elec.* decision involved a consensual modification of an antitrust decree. The Court of Appeals assumed that the Tunney Act standards were applicable in that context.