

Windows APIs, so that vendors of other operating systems can avoid infringing Microsoft's patents accidentally and reassure users that those operating systems are not infringing.⁴⁴⁰ While avoiding infringement is a laudable goal, it is not the purpose of the RPFJ to reduce the legal and technical efforts necessary for competitors to build products that they may lawfully market.

468. Several commentators complain that the RPFJ does not eliminate license terms that prohibit open source and other developers from finding ways to make Windows applications run on non-Windows operating systems. The issues these commentators raise appear to concern both terms in the licenses for Microsoft Office and terms in the licenses for Windows APIs and tools.⁴⁴¹ The Litigating States' Provision 6.b addresses the same point; it would prohibit agreements that "restrict Microsoft redistributable code from use with non-Microsoft Platform Software." Such provisions are far outside the scope of this case, and in any event are unlikely to benefit consumers. If Microsoft could not prevent people from expropriating and modifying its applications or middleware products—that is, its "redistributable code"—to turn them into complements to non-Microsoft operating systems, Microsoft would have a significantly reduced incentive to invest in developing and marketing attractive applications and middleware for Windows users.

469. One comment contends that Microsoft should be prohibited from retaliating against an OEM that ships computers loaded with only a non-Microsoft operating system, rather than (as in Section III.A.2) prohibited only from retaliating against an OEM that ships a computer with Microsoft and non-Microsoft operating systems or one that ships a computer that will "dual-boot" with more than one operating system.⁴⁴² Neither the District Court nor the Court of Appeals held Microsoft liable because it prevented OEMs from producing PCs with non-Microsoft operating systems; thus, there is no basis for redressing such conduct. The absence of such a provision, however, is not problematic. If the OEM ships no machines with Windows, then presumably it ships no machines with Windows applications, either; thus, Microsoft would have few ways to

"retaliate" against that OEM for its decision not to ship Windows.

F. "Reasonableness" Standard

470. A handful of comments express concerns about the use of a "reasonableness" standard in various provisions of the RPFJ.⁴⁴³ The commentators assert that use of a reasonableness standard for measuring certain of Microsoft's conduct offers little practical guidance, and injects ambiguity into the decree, rendering it virtually unenforceable.⁴⁴⁴ Commentors also assert that the adoption of a reasonableness standard turns the RPFJ into nothing more than an admonition to Microsoft to comply with the law.⁴⁴⁵

471. Contrary to these comments' assertions, measuring a defendant's conduct against a reasonableness standard does not render the RPFJ impermissibly vague. Inclusion of the term "reasonable" is common in antitrust decrees. *See, e.g., United States v. Enova Corp.*, 107 F. Supp.2d 10, 21, 27 (D.D.C. 2000) (defendant required to use "reasonable best efforts" to obtain approvals and "all reasonable efforts" to maintain assets in a decree entered by the Court); *United States v. 3D Sys. Corp.*, 66 FR 49200-01 (D.D.C. 2001) (defendant to provide "reasonable access to personnel," "reasonable efforts" by trustee to sell assets); *United States v. Premdor, Inc.*, 66 FR 45326-01 (D.D.C. 2001) (defendant to use "reasonable efforts" to maintain assets, provide "reasonable levels of transitional support," provide "reasonable access" to personnel, trustee to receive "reasonable compensation"); *United States v. Electronic Payment Servs., Inc.*, 1994-2 Trade Cas. (CCH) ¶ 70,796, 1994 WL 730003 at *4 (D. Del. 1994) (third-party processor is qualified if it meets "reasonable and nondiscriminatory technical, financial and operating criteria"; defendant may charge "reasonable set-up fees"); *United States v. Pilkington PLC*, 1994-2 Trade Cas. (CCH) ¶ 70,842 1994, WL 750645 at *4 (D. Ariz. 1994) (permitting charges of "commercially reasonable and non-discriminatory Fees for the use or

sublicensing of Float Technology . . .").⁴⁴⁶

472. Certain commentators urge that the RPFJ reject the reasonableness standard and, instead, adopt bright-line prohibitions against Microsoft engaging in various activities.⁴⁴⁷ Such absolute prohibitions might benefit Microsoft's rivals, but they also would reduce choice and thus not be in the interest of competition and consumers overall.⁴⁴⁸ Moreover, bright-line rules tend to require elaborate definitions that can render an agreement unduly complex. The inclusion of the reasonableness standard represents a recognition of the necessity for terms to be sufficiently flexible to allow for a multitude of future possibilities without requiring excess verbiage.⁴⁴⁹

473. Commentors are also incorrect in their insistence that including a reasonableness standard simply engrafts the rule of reason into the RPFJ,⁴⁵⁰ turning it into an instruction to Microsoft to comply with the law—effectively to "go forth and sin no more." In fact, the RPFJ goes beyond eliminating illegal practices and preventing recurrence of the same or similar practices in the future. The RPFJ also takes affirmative steps to restore the competitive threat that middleware posed prior to Microsoft's unlawful undertakings. So, for example, Microsoft is required to disclose and license its proprietary technology—although the Court of Appeals did not sustain any allegation that a failure to do so constituted monopoly maintenance.

⁴⁴⁶ Thus, for example, the defendant in *United States v. First Multiple Listing Service, Inc.*, 1998 WL 417, at *1-2 (N.D. Ga. 1984), was enjoined from refusing to provide services to any person who agrees to pay "reasonable set-up costs," a "reasonable security deposit," and "reasonable and non-discriminatory fees . . . reflecting reasonable expenses . . . provid[ing] for a reasonable minimum annual fee . . . [and] reflecting a reasonable approximation of the cost[s]." The final judgment there further provided that "[n]othing in this final judgment shall prohibit Defendant from (i) imposing delivery or service charges . . . reflecting reasonable approximations of actual costs, including reasonable deposits for keys or books" *Id.* at *2.

⁴⁴⁷ *See, e.g., Litan 47-49; CCIA 41-42.*

⁴⁴⁸ *See, e.g., Response to Comments on Sections III.B.2, III.F.2, III.G.2.*

⁴⁴⁹ An order need not list the components of a term which is understood by common parlance, particularly when considering the persons to whom the order is directed. *United States v. PATCO*, 678 F.2d 1, 3 (1st Cir. 1982), citing *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 495 n.7 (1982) ("[t]he rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all'" (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)).

⁴⁵⁰ *Litan 47-49.*

⁴⁴⁰ Kegel 8-9.

⁴⁴¹ Kegel 11; Koppe 1; Tilwalli 1; Kasten 5; Carroll 3; Johnson 2.

⁴⁴² Kegel 9; CompTIA 5 (pro-settlement); Pantin 5-6.

⁴⁴³ *See CCIA 41-42; AOL 1, Klain 8-9; Litan 47-49; WLF 6; Waldman 4; ProComp 74-77; Sun 36-37.* The RPFJ measures Microsoft's conduct against this standard in, for example, Section III.B.2 ("reasonable volume discounts"), Section III.C.5 ("reasonable technical specifications"), Section III.E ("reasonable and non-discriminatory terms"), Section III.F.2 ("limitations reasonably necessary to and of reasonable scope and duration"), and Section III.G ("reasonable period of time").

⁴⁴⁴ *CCIA 41-42; ProComp 74-77; Litan 49; AOL, Klain 8-9.*

⁴⁴⁵ *AOL 1; Litan 47.*

Similarly, the RPFJ ensures access to, and use of, Microsoft's proprietary server-related protocols, even though the word "server" does not appear in the complaint and appears only in passing in the *Findings of Fact*. An instruction simply to obey the law would have taken the form of a decree saying only that Microsoft is enjoined "from future violations of the antitrust laws," in stark contrast to the detailed and specific prohibitions in the RPFJ.

474. Finally, commentators suggest that the inclusion of a reasonableness standard will require a court to interpret the RPFJ, with an attendant delay in enforcement. That a decree may require interpretation is not and cannot be a basis for rejection; otherwise, no decree would remain.

G. Computers for Schools

475. Many comments refer to or discuss the proposed settlement in the private, class actions against Microsoft, whereby Microsoft would donate \$1 billion worth of computer hardware and software to needy schools. *See In re Microsoft Corp. Antitrust Litig.*, 2002 WL 99709 (D. Md. Jan. 11, 2002) (proposed settlement in MDL No. 1332).

476. There is no relationship between the settlement of the United States' antitrust lawsuit against Microsoft and the settlement of the private, class action against the company. Because these comments relate to the settlement of an entirely different proceeding, in which the United States played no role, we do not believe these comments can be appropriately construed as comments on the RPFJ and therefore do not respond to them.

477. To the extent that comments mean that the RPFJ is deficient because it does not require Microsoft to make charitable donations, that cannot be a legal basis for rejecting a consent decree. Requiring charitable donations is not a proper remedy in a government civil antitrust case.

Respectfully submitted,

Charles A. James

Assistant Attorney General

Deborah P. Majoras

Deputy Assistant Attorney General

Phillip R. Malone

Renata B. Hesse

David Blake-Thomas

Paula L. Blizzard

Kenneth W. Gaul

Adam D. Hirsh

Jacqueline S. Kelley

Steven J. Mintz

Barbara Nelson

David Seidman

David P. Wales

Attorneys U.S. Department of Justice,
Antitrust Division, 601 D Street N.W., Suite
1200, Washington, D.C. 20530-0001, (202)
514-8276.

Philip S. Beck,
Special Trial Counsel.

February 27, 2002.

Appendix A

Comments Cited in the Response

1. Allen Akin ("Akin")—MTC-00002904
2. Mark Alexander ("Alexander")—MTC-00002572
3. America Online/Time Warner ("AOL")—MTC-00030615
4. The American Antitrust Institute ("AAI")—MTC-0030600
5. Declaration of Kenneth J. Arrow, submitted as Attachment to ProComp ("ProComp, Arrow")—MTC-00030608
6. Association for Competitive Technology ("ACT")—MTC-00027806
7. Joseph L. Bast ("Bast")—MTC-00013362
7. John Becker ("Becker")—MTC-00031674
8. Jim Bode ("Bode")—MTC-00003974
9. Kris Brinkerhoff ("Brinkerhoff")—MTC-00013542
9. Matthew M. Burke ("Burke")—MTC-00024360
10. John A. Carroll ("Carroll")—MTC-00008557
11. Catavault—MTC-00033650
12. Center for the Moral Defense of Capitalism ("CMDC")—MTC-00028833
13. Robert Cheetham ("Cheetham")—MTC-00004982
14. Jerry Clabaugh ("Clabaugh")—MTC-00004870
15. Tony Clapes ("Clapes")—MTC-00004159
16. Computer & Communications Industry Association ("CCIA")—MTC-00030610
17. Computing Technology Industry Association ("CompTIA")—MTC-00028726
18. Consumer Federation of America ("CFA")—MTC-00028565
19. Consumers for Computing Choice and Open Platform Working Group ("CCC")—MTC-00033613
20. Tim Daly ("Daly")—MTC-00000307
21. Jerry Davis ("Davis")—MTC-00004860
22. David Demland ("Demland")—MTC-00007735
23. Sean Drew ("Drew")—MTC-00014368
24. Nicholas S. Economides ("Economides")—MTC-00022465
25. Einer Elhauge ("Elhauge")—MTC-00027209
26. Scott Francis ("Francis")—MTC-00021847
27. Sean Gallagher ("Gallagher")—MTC-00012695
28. John Giannandrea ("Giannandrea")—MTC-00030193
29. Tom Giebel ("Giebel")—MTC-00018241
30. Jonathan Gifford ("Gifford")—MTC-00028546
31. David Godshall ("Godshall")—MTC-00002260
32. Eberhard Hafermalz ("Hafermalz")—MTC-00009260
33. Wayne Hammett ("Hammett")—MTC-00002009
34. Derek Harkess ("Harkess")—MTC-00022874
35. Norman Harman ("Harman")—MTC-00022721
36. Jeffrey E. Harris ("Harris")—MTC-00027387
37. Rebecca Henderson ("Henderson")—MTC-00030602
38. Jim Herrmann ("Herrmann")—MTC-00010686
39. Phillip Hofmeister ("Hofmeister")—MTC-00004548
40. Art Holland ("Holland")—MTC-00000643
41. Joe Huwaldt ("Huwaldt")—MTC-00004162
42. Paul Johnson ("Johnson")—MTC-00012543
43. KDE League, Inc. ("KDE")—MTC-00028788
44. Dan Kegel ("Kegel")—MTC-00028571
45. Ronald A. Klain, Benjamin G. Bradshaw, Jessica Davidson Miller, *A Detailed Critique of the Proposed Final Judgment in U.S. v. Microsoft*, submitted as Attachment B to AOL (AOL, Klain)—MTC-00030615
46. The Honorable Herb Kohl, U.S. Senator ("Sen. Kohl")—MTC-00030603
47. Brian Koppe ("Koppe")—MTC-00018682
48. Robert Levy ("Levy")—MTC-00004804
49. Scott Lewis ("Lewis")—MTC-00026511
50. Robert E. Litan, Roger D. Noll, and William D. Nordhaus ("Litan et al.")—MTC-00013366
51. Litigating States—MTC-00030607
52. Chris M. Lloyd ("Lloyd")—MTC-00011255
53. Mike Lococo ("Lococo")—MTC-00004717
54. Kevin Lowe ("Lowe")—MTC-00017163
55. Daniel Maddux ("Maddux")—MTC-00021587
56. Frank Mathewson and Ralph A. Winter, *Microsoft's Tying Strategies to Maintain Monopoly Power in its Operating System*, submitted as Attachment A to AOL ("AOL, Mathewson & Winter")—MTC-00030615
57. John McBride ("McBride")—MTC-00004731
58. Garrett McWilliams ("McWilliams")—MTC-00019950
59. Andrig T. Miller ("Miller")—MTC-00003096
60. David Mitchell ("Mitchell")—MTC-00017643
61. Eben Moglen ("Moglen")—MTC-00027626
62. David Morrissey ("Morrissey")—MTC-00004525
63. Ralph Nader and James Love ("Nader/Love")—MTC-00028313
64. NetAction and Computer Professionals for Social Responsibility ("NetAction")—MTC-00030604
65. The New York Times ("NYT")—MTC-00029783
66. Novell, Inc. ("Novell")—MTC-00029523
67. Palm, Inc. ("Palm")—MTC-0030613
68. Ramon G. Pantin ("Pantin")—MTC-00029685
69. Theresa Peterson ("Peterson")—MTC-00019410
70. Larry Poindexter ("Poindexter")—MTC-00000493
71. R.D. Porcher ("Porcher")—MTC-00015938
72. Vince Pratt ("Pratt")—MTC-00004691
73. The Progress & Freedom Foundation ("PFF")—MTC-00030606
74. Project to Promote Competition & Innovation in the Digital Age ("ProComp")—MTC-00030608
75. RealNetworks, Inc. ("RealNetworks")—MTC-00029305

76. Red Hat, Inc. ("Red Hat")—MTC—00030616
77. Ray Reid ("Reid")—MTC—00022393
78. Relpromax Antitrust, Inc. ("Relpromax")—MTC—00030631
79. Declaration of Edward Roeder, submitted as Attachment to CCIA ("CCIA, Roeder")—MTC—00030610
80. P.J. Rovero ("Rovero")—MTC—00002180
81. SBC Communications, Inc. ("SBC")—MTC—00029411
82. Robert L. Scala ("Scala")—MTC—00016177
83. Joel Schneider ("Schneider")—MTC—00022882
84. Bion Schulken ("Schulken")—MTC—00002254
85. Bob Schulze ("Schulze")—MTC—00018164
86. David Skinn ("Skinn")—MTC—00031409
87. Software and Information Industry Association ("SIIA")—MTC—00030614
88. Sony Corporation ("Sony")—MTC—00030605
89. Robert Spotswood ("Spotswood")—MTC—00000604
90. Declaration of Joseph E. Stiglitz and Jason Furman, submitted as Attachment to CCIA ("CCIA, Stiglitz & Furman")—MTC—00030610
91. Sun Microsystems, Inc. ("Sun")—MTC—00030609
92. The Telecommunications Research and Action Center, National Black Chamber of Commerce, and National Native Americans Chamber of Commerce ("TRAC")—MTC—00028893
93. Stuart Thiel ("Thiel")—MTC—00012095
94. Mason Thomas ("Thomas")—MTC—00030468
95. Nikkil Tilwalli ("Tilwalli")—MTC—00016984
96. Robert Timlin ("Timlin")—MTC—00011156
97. The Honorable John V. Tunney, Former U.S. Senator ("Sen. Tunney")—MTC—00032065
98. Nicholas Turk ("Turk")—MTC—00016312
99. U.S. Senate—MTC—00033734
100. Lee Wagstaff ("Wagstaff")—MTC—00014376
101. Steven Waldman ("Waldman")—MTC—00025808
102. Michael Wang ("Wang")—MTC—00003256
103. Washington Legal Foundation ("WLF")—MTC—00030601
104. Robert Weiler ("Weiler")—MTC—00017967
105. Tim Williams ("Williams")—MTC—00000491
106. Chris Young ("Young")—MTC—00014037
107. Anthony W. Youngman ("Youngman")—MTC—00010202

Stipulation and Second Revised Proposed Final Judgment

In the United States District Court for the District of Columbia

United States of America, Plaintiff, v. Microsoft Corporation, Defendant; Stipulation.

[Civil Action No. 98–1232 (CKK)]

Next Court Deadline: March 6, 2002; Tunney Act Hearing
Plaintiff United States of America ("United States"), the States of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina and Wisconsin (collectively, the "Settling States") and Defendant Microsoft Corporation ("Microsoft"), by and through their respective attorneys, having agreed to the entry of this Stipulation, it is hereby stipulated and agreed that:

1. A Final Judgment in the form attached hereto ("second revised proposed Final Judgment") may be filed and entered by the Court in this action and as to the Settling States only in *State of New York, et al. v. Microsoft* (Civil Action No. 98–1233(CKK)), upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent, which it may do at any time before the entry of the second revised proposed Final Judgment by serving notice thereof on Microsoft and by filing that notice with the Court.

2. Microsoft's prior obligations to comply with the revised proposed Final Judgment, submitted to the Court on November 6, 2001, shall continue uninterrupted under this Stipulation and the second revised proposed Final Judgment (except as modified by the second revised proposed Final Judgment) as if the second revised proposed Final Judgment was in full force and effect. Unless otherwise provided in the second revised proposed Final Judgment, Microsoft shall immediately begin complying with the second revised proposed Final Judgment as if it was in full force and effect. Where the second revised proposed Final Judgment provides that the timing of Microsoft's obligations are calculated from the date of submission to the Court of the second revised proposed Final Judgment, the time shall be calculated from November 6, 2001, the date of submission to the Court of the revised proposed Final Judgment. Subject to the foregoing, Microsoft agrees to be bound by the provisions of the second revised proposed Final Judgment pending its entry by the Court. If the United States withdraws its consent, or if (a) the second revised proposed Final Judgment is not entered pursuant to the terms of the Stipulation, (b) the time has expired for all appeals of any Court ruling declining to enter

the second revised proposed Final Judgment, and (c) the Court has not otherwise ordered continued compliance with the terms and provisions of the second revised proposed Final Judgment, then all of the parties shall be released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

3. Once the requirements for compliance with 15 U.S.C. 16, as set forth in the Stipulation filed by the parties on November 6, 2001, have been satisfied, the United States will file with the Court a certificate of compliance and a Motion for Entry of Second Revised Proposed Final Judgment, unless it withdraws its consent to entry of the second revised proposed Final Judgment pursuant to paragraph 2, above. At any time thereafter, and at the conclusion of any further proceedings ordered by the Court pursuant to 15 U.S.C. 16(f), the Court may then enter the second revised proposed Final Judgment, provided that the Court determines that entry of the second revised proposed Final Judgment will serve the public interest.

Dated this 27th day of February, 2002.

For Plaintiff the United States of America:

Deborah P. Majoras,

Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice, 901 Pennsylvania Avenue, NW., Washington, DC 20530, (202) 514–2401.

For Plaintiffs the States of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina and Wisconsin:

Jay L. Himes,

Chief, Antitrust Bureau, Office of the Attorney General of New York, 120 Broadway, New York, New York 10271, (212) 416–8282.

For Defendant Microsoft Corporation:

Charles F. Rule,

Fried, Frank, Harris, Shriver & Jacobson, 1001 Pennsylvania Avenue, NW., Suite 800, Washington, DC 20004, (202) 639–7300.

Second Revised Proposed Final Judgment

WHEREAS, plaintiffs United States of America ("United States") and the States of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina and Wisconsin and defendant Microsoft Corporation ("Microsoft"), by their respective attorneys, have consented to the entry of this Final Judgment;

And whereas, this Final Judgment does not constitute any admission by any party regarding any issue of fact or law;

And whereas, Microsoft agrees to be bound by the provisions of this Final

Judgment pending its approval by the Court;

Now Therefore, upon remand from the United States Court of Appeals for the District of Columbia Circuit, and upon the consent of the aforementioned parties, it is hereby ordered, adjudged, and decreed:

I. Jurisdiction

This Court has jurisdiction of the subject matter of this action and of the person of Microsoft.

II. Applicability

This Final Judgment applies to Microsoft and to each of its officers, directors, agents, employees, subsidiaries, successors and assigns; and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

III. Prohibited Conduct

A. Microsoft shall not retaliate against an OEM by altering Microsoft's commercial relations with that OEM, or by withholding newly introduced forms of non-monetary Consideration (including but not limited to new versions of existing forms of non-monetary Consideration) from that OEM, because it is known to Microsoft that the OEM is or is contemplating:

1. developing, distributing, promoting, using, selling, or licensing any software that competes with Microsoft Platform Software or any product or service that distributes or promotes any Non-Microsoft Middleware;
2. shipping a Personal Computer that (a) includes both a Windows Operating System Product and a non-Microsoft Operating System, or (b) will boot with more than one Operating System; or
3. exercising any of the options or alternatives provided for under this Final Judgment.

Nothing in this provision shall prohibit Microsoft from enforcing any provision of any license with any OEM or any intellectual property right that is not inconsistent with this Final Judgment. Microsoft shall not terminate a Covered OEM's license for a Windows Operating System Product without having first given the Covered OEM written notice of the reasons for the proposed termination and not less than thirty days' opportunity to cure. Notwithstanding the foregoing, Microsoft shall have no obligation to provide such a termination notice and opportunity to cure to any Covered OEM that has received two or more such

notices during the term of its Windows Operating System Product license.

Nothing in this provision shall prohibit Microsoft from providing Consideration to any OEM with respect to any Microsoft product or service where that Consideration is commensurate with the absolute level or amount of that OEM's development, distribution, promotion, or licensing of that Microsoft product or service.

B. Microsoft's provision of Windows Operating System Products to Covered OEMs shall be pursuant to uniform license agreements with uniform terms and conditions.

Without limiting the foregoing, Microsoft shall charge each Covered OEM the applicable royalty for Windows Operating System Products as set forth on a schedule, to be established by Microsoft and published on a Web site accessible to the Plaintiffs and all Covered OEMs, that provides for uniform royalties for Windows Operating System Products, except that:

1. the schedule may specify different royalties for different language versions;
2. the schedule may specify reasonable volume discounts based upon the actual volume of licenses of any Windows Operating System Product or any group of such products; and
3. the schedule may include market development allowances, programs, or other discounts in connection with Windows Operating System Products, provided that:
 - a. such discounts are offered and available uniformly to all Covered OEMs, except that Microsoft may establish one uniform discount schedule for the ten largest Covered OEMs and a second uniform discount schedule for the eleventh through twentieth largest Covered OEMs, where the size of the OEM is measured by volume of licenses;
 - b. such discounts are based on objective, verifiable criteria that shall be applied and enforced on a uniform basis for all Covered OEMs; and
 - c. such discounts or their award shall not be based on or impose any criterion or requirement that is otherwise inconsistent with any portion of this Final Judgment.

C. Microsoft shall not restrict by agreement any OEM licensee from exercising any of the following options or alternatives:

1. Installing, and displaying icons, shortcuts, or menu entries for, any Non-Microsoft Middleware or any product or service (including but not limited to IAP products or services) that distributes, uses, promotes, or supports any Non-Microsoft Middleware, on the desktop or Start menu, or anywhere else in a Windows Operating System Product

where a list of icons, shortcuts, or menu entries for applications are generally displayed, except that Microsoft may restrict an OEM from displaying icons, shortcuts and menu entries for any product in any list of such icons, shortcuts, or menu entries specified in the Windows documentation as being limited to products that provide particular types of functionality, provided that the restrictions are non-discriminatory with respect to non-Microsoft and Microsoft products.

2. Distributing or promoting Non-Microsoft Middleware by installing and displaying on the desktop shortcuts of any size or shape so long as such shortcuts do not impair the functionality of the user interface.

3. Launching automatically, at the conclusion of the initial boot sequence or subsequent boot sequences, or upon connections to or disconnections from the Internet, any Non-Microsoft Middleware if a Microsoft Middleware Product that provides similar functionality would otherwise be launched automatically at that time, provided that any such Non-Microsoft Middleware displays on the desktop no user interface or a user interface of similar size and shape to the user interface displayed by the corresponding Microsoft Middleware Product.

4. Offering users the option of launching other Operating Systems from the Basic Input/Output System or a non-Microsoft boot-loader or similar program that launches prior to the start of the Windows Operating System Product.

5. Presenting in the initial boot sequence its own IAP offer provided that the OEM complies with reasonable technical specifications established by Microsoft, including a requirement that the end user be returned to the initial boot sequence upon the conclusion of any such offer.

6. Exercising any of the options provided in Section III.H of this Final Judgment.

D. Starting at the earlier of the release of Service Pack 1 for Windows XP or 12 months after the submission of this Final Judgment to the Court, Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, for the sole purpose of interoperating with a Windows Operating System Product, via the Microsoft Developer Network ("MSDN") or similar mechanisms, the APIs and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product. For purposes of this Section III.D, the term APIs means the interfaces, including any associated

callback interfaces, that Microsoft Middleware running on a Windows Operating System Product uses to call upon that Windows Operating System Product in order to obtain any services from that Windows Operating System Product. In the case of a new major version of Microsoft Middleware, the disclosures required by this Section III.D shall occur no later than the last major beta test release of that Microsoft Middleware. In the case of a new version of a Windows Operating System Product, the obligations imposed by this Section III.D shall occur in a Timely Manner.

E. Starting nine months after the submission of this proposed Final Judgment to the Court, Microsoft shall make available for use by third parties, for the sole purpose of inter operating or communicating with a Windows Operating System Product, on reasonable and non-discriminatory terms (consistent with Section III.I), any Communications Protocol that is, on or after the date this Final Judgment is submitted to the Court, (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to interoperate, or communicate, natively (i.e., without the addition of software code to the client operating system product) with a Microsoft server operating system product.

F. 1. Microsoft shall not retaliate against any ISV or IHV because of that ISV's or IHV's:

a. developing, using, distributing, promoting or supporting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software, or

b. exercising any of the options or alternatives provided for under this Final Judgment.

2. Microsoft shall not enter into any agreement relating to a Windows Operating System Product that conditions the grant of any Consideration on an ISV's refraining from developing, using, distributing, or promoting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software, except that Microsoft may enter into agreements that place limitations on an ISV's development, use, distribution or promotion of any such software if those limitations are reasonably necessary to and of reasonable scope and duration in relation to a bona fide contractual obligation of the ISV to use, distribute or promote any Microsoft software or to

develop software for, or in conjunction with, Microsoft.

3. Nothing in this section shall prohibit Microsoft from enforcing any provision of any agreement with any ISV or IHV, or any intellectual property right, that is not inconsistent with this Final Judgment.

G. Microsoft shall not enter into any agreement with:

1. any IAP, ICP, ISV, IHV or OEM that grants Consideration on the condition that such entity distributes, promotes, uses, or supports, exclusively or in a fixed percentage, any Microsoft Platform Software, except that Microsoft may enter into agreements in which such an entity agrees to distribute, promote, use or support Microsoft Platform Software in a fixed percentage whenever Microsoft in good faith obtains a representation that it is commercially practicable for the entity to provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software, or

2. any IAP or ICP that grants placement on the desktop or elsewhere in any Windows Operating System Product to that IAP or ICP on the condition that the IAP or ICP refrain from distributing, promoting or using any software that competes with Microsoft Middleware.

Nothing in this section shall prohibit Microsoft from entering into (a) any bona fide joint venture or (b) any joint development or joint services arrangement with any ISV, IHV, IAP, ICP, or OEM for a new product, technology or service, or any material value-add to an existing product, technology or service, in which both Microsoft and the ISV, IHV, IAP, ICP, or OEM contribute significant developer or other resources, that prohibits such entity from competing with the object of the joint venture or other arrangement for a reasonable period of time.

This Section does not apply to any agreements in which Microsoft licenses intellectual property in from a third party.

H. Starting at the earlier of the release of Service Pack 1 for Windows XP or 12 months after the submission of this Final Judgment to the Court, Microsoft shall:

1. Allow end users (via a mechanism readily accessible from the desktop or Start menu such as an Add/Remove icon) and OEMs (via standard preinstallation kits) to enable or remove access to each Microsoft Middleware Product or Non-Microsoft Middleware Product by (a) displaying or removing icons, shortcuts, or menu entries on the desktop or Start menu, or anywhere else

in a Windows Operating System Product where a list of icons, shortcuts, or menu entries for applications are generally displayed, except that Microsoft may restrict the display of icons, shortcuts, or menu entries for any product in any list of such icons, shortcuts, or menu entries specified in the Windows documentation as being limited to products that provide particular types of functionality, provided that the restrictions are non-discriminatory with respect to non-Microsoft and Microsoft products; and (b) enabling or disabling automatic invocations pursuant to Section III.C.3 of this Final Judgment that are used to launch Non-Microsoft Middleware Products or Microsoft Middleware Products. The mechanism shall offer the end user a separate and unbiased choice with respect to enabling or removing access (as described in this subsection III.H.1) and altering default invocations (as described in the following subsection III.H.2) with regard to each such Microsoft Middleware Product or Non-Microsoft Middleware Product and may offer the end-user a separate and unbiased choice of enabling or removing access and altering default configurations as to all Microsoft Middleware Products as a group or all Non-Microsoft Middleware Products as a group.

2. Allow end users (via an unbiased mechanism readily available from the desktop or Start menu), OEMs (via standard OEM preinstallation kits), and Non-Microsoft Middleware Products (via a mechanism which may, at Microsoft's option, require confirmation from the end user in an unbiased manner) to designate a Non-Microsoft Middleware Product to be invoked in place of that Microsoft Middleware Product (or vice versa) in any case where the Windows Operating System Product would otherwise launch the Microsoft Middleware Product in a separate Top-Level Window and display either (i) all of the user interface elements or (ii) the Trademark of the Microsoft Middleware Product.

Notwithstanding the foregoing Section III.H.2, the Windows Operating System Product may invoke a Microsoft Middleware Product in any instance in which:

(a) that Microsoft Middleware Product would be invoked solely for use in interoperating with a server maintained by Microsoft (outside the context of general Web browsing), or

(b) that designated Non-Microsoft Middleware Product fails to implement a reasonable technical requirement (e.g., a requirement to be able to host a particular ActiveX control) that is

necessary for valid technical reasons to supply the end user with functionality consistent with a Windows Operating System Product, provided that the technical reasons are described in a reasonably prompt manner to any ISV that requests them.

3. Ensure that a Windows Operating System Product does not (a) automatically alter an OEM's configuration of icons, shortcuts or menu entries installed or displayed by the OEM pursuant to Section III.C of this Final Judgment without first seeking confirmation from the user and (b) seek such confirmation from the end user for an automatic (as opposed to user-initiated) alteration of the OEM's configuration until 14 days after the initial boot up of a new Personal Computer. Any such automatic alteration and confirmation shall be unbiased with respect to Microsoft Middleware Products and Non-Microsoft Middleware. Microsoft shall not alter the manner in which a Windows Operating System Product automatically alters an OEM's configuration of icons, shortcuts or menu entries other than in a new version of a Windows Operating System Product.

Microsoft's obligations under this Section III.H as to any new Windows Operating System Product shall be determined based on the Microsoft Middleware Products which exist seven months prior to the last beta test version (i.e., the one immediately preceding the first release candidate) of that Windows Operating System Product.

I. Microsoft shall offer to license to ISVs, IHVs, IAPs, ICPs, and OEMs any intellectual property rights owned or licensable by Microsoft that are required to exercise any of the options or alternatives expressly provided to them under this Final Judgment, provided that

1. all terms, including royalties or other payment of monetary consideration, are reasonable and non-discriminatory;

2. the scope of any such license (and the intellectual property rights licensed thereunder) need be no broader than is necessary to ensure that an ISV, IHV, IAP, ICP or OEM is able to exercise the options or alternatives expressly provided under this Final Judgment (e.g., an ISV's, IHV's, IAP's, ICP's and OEM's option to promote Non-Microsoft Middleware shall not confer any rights to any Microsoft intellectual property rights infringed by that Non-Microsoft Middleware);

3. an ISV's, IHV's, IAP's, ICP's, or OEM's rights may be conditioned on its not assigning, transferring or

sublicensing its rights under any license granted under this provision; and

4. the terms of any license granted under this section are in all respects consistent with the express terms of this Final Judgment.

Beyond the express terms of any license granted by Microsoft pursuant to this section, this Final Judgment does not, directly or by implication, estoppel or otherwise, confer any rights, licenses, covenants or immunities with regard to any Microsoft intellectual property to anyone.

J. No provision of this Final Judgment shall:

1. Require Microsoft to document, disclose or license to third parties: (a) portions of APIs or Documentation or portions or layers of Communications Protocols the disclosure of which would compromise the security of a particular installation or group of installations of anti-piracy, anti-virus, software licensing, digital rights management, encryption or authentication systems, including without limitation, keys, authorization tokens or enforcement criteria; or (b) any API, interface or other information related to any Microsoft product if lawfully directed not to do so by a governmental agency of competent jurisdiction.

2. Prevent Microsoft from conditioning any license of any API, Documentation or Communications Protocol related to anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, or third party intellectual property protection mechanisms of any Microsoft product to any person or entity on the requirement that the licensee: (a) Has no history of software counterfeiting or piracy or willful violation of intellectual property rights, (b) has a reasonable business need for the API, Documentation or Communications Protocol for a planned or shipping product, (c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business, (d) agrees to submit, at its own expense, any computer program using such APIs, Documentation or Communication Protocols to third-party verification, approved by Microsoft, to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph.

IV. Compliance and Enforcement Procedures

A. Enforcement Authority

1. The Plaintiffs shall have exclusive responsibility for enforcing this Final Judgment. Without in any way limiting the sovereign enforcement authority of each of the plaintiff States, the plaintiff States shall form a committee to coordinate their enforcement of this Final Judgment. A plaintiff State shall take no action to enforce this Final Judgment without first consulting with the United States and with the plaintiff States' enforcement committee.

2. To determine and enforce compliance with this Final Judgment, duly authorized representatives of the United States and the plaintiff States, on reasonable notice to Microsoft and subject to any lawful privilege, shall be permitted the following:

a. Access during normal office hours to inspect any and all source code, books, ledgers, accounts, correspondence, memoranda and other documents and records in the possession, custody, or control of Microsoft, which may have counsel present, regarding any matters contained in this Final Judgment.

b. Subject to the reasonable convenience of Microsoft and without restraint or interference from it, to interview, informally or on the record, officers, employees, or agents of Microsoft, who may have counsel present, regarding any matters contained in this Final Judgment.

c. Upon written request of the United States or a duly designated representative of a plaintiff State, on reasonable notice given to Microsoft, Microsoft shall submit such written reports under oath as requested regarding any matters contained in this Final Judgment.

Individual plaintiff States will consult with the plaintiff States' enforcement committee to minimize the duplication and burden of the exercise of the foregoing powers, where practicable.

3. The Plaintiffs shall not disclose any information or documents obtained from Microsoft under this Final Judgment except for the purpose of securing compliance with this Final Judgment, in a legal proceeding to which one or more of the Plaintiffs is a party, or as otherwise required by law; provided that the relevant Plaintiff(s) must provide ten days' advance notice to Microsoft before disclosing in any legal proceeding (other than a grand jury proceeding) to which Microsoft is not a party any information or documents provided by Microsoft pursuant to this Final Judgment which Microsoft has

identified in writing as material as to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure.

4. The Plaintiffs shall have the authority to seek such orders as are necessary from the Court to enforce this Final Judgment, provided, however, that the Plaintiffs shall afford Microsoft a reasonable opportunity to cure alleged violations of Sections III.C, III.D, III.E and III.H, provided further that any action by Microsoft to cure any such violation shall not be a defense to enforcement with respect to any knowing, willful or systematic violations.

B. Appointment of a Technical Committee

1. Within 30 days of entry of this Final Judgment, the parties shall create and recommend to the Court for its appointment a three-person Technical Committee ("TC") to assist in enforcement of and compliance with this Final Judgment.

2. The TC members shall be experts in software design and programming. No TC member shall have a conflict of interest that could prevent him or her from performing his or her duties under this Final Judgment in a fair and unbiased manner. Without limitation to the foregoing, no TC member (absent the agreement of both parties):

a. shall have been employed in any capacity by Microsoft or any competitor to Microsoft within the past year, nor shall she or he be so employed during his or her term on the TC;

b. shall have been retained as a consulting or testifying expert by any person in this action or in any other action adverse to or on behalf of Microsoft; or

c. shall perform any other work for Microsoft or any competitor of Microsoft for two years after the expiration of the term of his or her service on the TC.

3. Within 7 days of entry of this Final Judgment, the Plaintiffs as a group and Microsoft shall each select one member of the TC, and those two members shall then select the third member. The selection and approval process shall proceed as follows.

a. As soon as practicable after submission of this Final Judgment to the Court, the Plaintiffs as a group and Microsoft shall each identify to the other the individual it proposes to select as its designee to the TC. The Plaintiffs and Microsoft shall not object to each other's selection on any ground other than failure to satisfy the requirements of Section IV.B.2 above. Any such objection shall be made within ten

business days of the receipt of notification of selection.

b. The Plaintiffs shall apply to the Court for appointment of the persons selected by the Plaintiffs and Microsoft pursuant to Section IV.B.3.a above. Any objections to the eligibility of a selected person that the parties have failed to resolve between themselves shall be decided by the Court based solely on the requirements stated in Section IV.B.2 above.

c. As soon as practical after their appointment by the Court, the two members of the TC selected by the Plaintiffs and Microsoft (the "Standing Committee Members") shall identify to the Plaintiffs and Microsoft the person that they in turn propose to select as the third member of the TC. The Plaintiffs and Microsoft shall not object to this selection on any grounds other than failure to satisfy the requirements of Section IV.B.2 above. Any such objection shall be made within ten business days of the receipt of notification of the selection and shall be served on the other party as well as on the Standing Committee Members.

d. The Plaintiffs shall apply to the Court for appointment of the person selected by the Standing Committee Members. If the Standing Committee Members cannot agree on a third member of the TC, the third member shall be appointed by the Court. Any objection by Microsoft or the Plaintiffs to the eligibility of the person selected by the Standing Committee Members which the parties have failed to resolve among themselves shall also be decided by the Court based on the requirements stated in Section IV.B.2 above.

4. Each TC member shall serve for an initial term of 30 months. At the end of a TC member's initial 30-month term, the party that originally selected him or her may, in its sole discretion, either request re-appointment by the Court to a second 30-month term or replace the TC member in the same manner as provided for in Section IV.B.3.a above. In the case of the third member of the TC, that member shall be re-appointed or replaced in the manner provided in Section IV.B.3.c above.

5. If the United States determines that a member of the TC has failed to act diligently and consistently with the purposes of this Final Judgment, or if a member of the TC resigns, or for any other reason ceases to serve in his or her capacity as a member of the TC, the person or persons that originally selected the TC member shall select a replacement member in the same manner as provided for in Section IV.B.3.

6. Promptly after appointment of the TC by the Court, the United States shall enter into a Technical Committee services agreement ("TC Services Agreement") with each TC member that grants the rights, powers and authorities necessary to permit the TC to perform its duties under this Final Judgment. Microsoft shall indemnify each TC member and hold him or her harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the TC's duties, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the TC member. The TC Services Agreements shall include the following.

a. The TC members shall serve, without bond or other security, at the cost and expense of Microsoft on such terms and conditions as the Plaintiffs approve, including the payment of reasonable fees and expenses.

b. The TC Services Agreement shall provide that each member of the TC shall comply with the limitations provided for in Section IV.B.2 above.

7. Microsoft shall provide the TC with a permanent office, telephone, and other office support facilities at Microsoft's corporate campus in Redmond, Washington. Microsoft shall also, upon reasonable advance notice from the TC, provide the TC with reasonable access to available office space, telephone, and other office support facilities at any other Microsoft facility identified by the TC.

8. The TC shall have the following powers and duties:

a. The TC shall have the power and authority to monitor Microsoft's compliance with its obligations under this final judgment.

b. The TC may, on reasonable notice to Microsoft:

(i) interview, either informally or on the record, any Microsoft personnel, who may have counsel present; any such interview to be subject to the reasonable convenience of such personnel and without restraint or interference by Microsoft;

(ii) inspect and copy any document in the possession, custody or control of Microsoft personnel;

(iii) obtain reasonable access to any systems or equipment to which Microsoft personnel have access;

(iv) obtain access to, and inspect, any physical facility, building or other premises to which Microsoft personnel have access; and

(v) require Microsoft personnel to provide compilations of documents, data and other information, and to

submit reports to the TC containing such material, in such form as the TC may reasonably direct.

c. The TC shall have access to Microsoft's source code, subject to the terms of Microsoft's standard source code Confidentiality Agreement, as approved by the Plaintiffs and to be agreed to by the TC members pursuant to Section IV.B.9 below, and by any staff or consultants who may have access to the source code. The TC may study, interrogate and interact with the source code in order to perform its functions and duties, including the handling of complaints and other inquiries from non-parties.

d. The TC shall receive complaints from the Compliance Officer, third parties or the Plaintiffs and handle them in the manner specified in Section IV.D below.

e. The TC shall report in writing to the Plaintiffs every six months until expiration of this Final Judgment the actions it has undertaken in performing its duties pursuant to this Final Judgment, including the identification of each business practice reviewed and any recommendations made by the TC.

f. Regardless of when reports are due, when the TC has reason to believe that there may have been a failure by Microsoft to comply with any term of this Final Judgment, the TC shall immediately notify the Plaintiffs in writing setting forth the relevant details.

g. TC members may communicate with non-parties about how their complaints or inquiries might be resolved with Microsoft, so long as the confidentiality of information obtained from Microsoft is maintained.

h. The TC may hire at the cost and expense of Microsoft, with prior notice to Microsoft and subject to approval by the Plaintiffs, such staff or consultants (all of whom must meet the qualifications of Section IV.B.2) as are reasonably necessary for the TC to carry out its duties and responsibilities under this Final Judgment. The compensation of any person retained by the TC shall be based on reasonable and customary terms commensurate with the individual's experience and responsibilities.

i. The TC shall account for all reasonable expenses incurred, including agreed upon fees for the TC members' services, subject to the approval of the Plaintiffs. Microsoft may, on application to the Court, object to the reasonableness of any such fees or other expenses. On any such application: (a) the burden shall be on Microsoft to demonstrate unreasonableness; and (b) the TC member(s) shall be entitled to recover all costs incurred on such

application (including reasonable attorneys' fees and costs), regardless of the Court's disposition of such application, unless the Court shall expressly find that the TC's opposition to the application was without substantial justification.

9. Each TC member, and any consultants or staff hired by the TC, shall sign a confidentiality agreement prohibiting disclosure of any information obtained in the course of performing his or her duties as a member of the TC or as a person assisting the TC to anyone other than Microsoft, the Plaintiffs, or the Court. All information gathered by the TC in connection with this Final Judgment and any report and recommendations prepared by the TC shall be treated as Highly Confidential under the Protective Order in this case, and shall not be disclosed to any person other than Microsoft and the Plaintiffs except as allowed by the Protective Order entered in the Action or by further order of this Court.

10. No member of the TC shall make any public statements relating to the TC's activities.

C. Appointment of a Microsoft Internal Compliance Officer

1. Microsoft shall designate, within 30 days of entry of this Final Judgment, an internal Compliance Officer who shall be an employee of Microsoft with responsibility for administering Microsoft's antitrust compliance program and helping to ensure compliance with this Final Judgment.

2. The Compliance Officer shall supervise the review of Microsoft's activities to ensure that they comply with this Final Judgment. He or she may be assisted by other employees of Microsoft.

3. The Compliance Officer shall be responsible for performing the following activities:

a. within 30 days after entry of this Final Judgment, distributing a copy of the Final Judgment to all officers and directors of Microsoft;

b. promptly distributing a copy of this Final Judgment to any person who succeeds to a position described in Section IV.C.3.a above;

c. ensuring that those persons designated in Section IV.C.3.a above are annually briefed on the meaning and requirements of this Final Judgment and the U.S. antitrust laws and advising them that Microsoft's legal advisors are available to confer with them regarding any question concerning compliance with this Final Judgment or under the U.S. antitrust laws;

d. obtaining from each person designated in Section IV.C.3.a above an annual written certification that he or she: (i) has read and agrees to abide by the terms of this Final Judgment; and (ii) has been advised and understands that his or her failure to comply with this Final Judgment may result in a finding of contempt of court;

e. maintaining a record of all persons to whom a copy of this Final Judgment has been distributed and from whom the certification described in Section IV.C.3.d above has been obtained;

f. establishing and maintaining the website provided for in Section IV.D.3.b below.

g. receiving complaints from third parties, the TC and the Plaintiffs concerning Microsoft's compliance with this Final Judgment and following the appropriate procedures set forth in Section IV.D below; and

h. maintaining a record of all complaints received and action taken by Microsoft with respect to each such complaint.

D. Voluntary Dispute Resolution

1. Third parties may submit complaints concerning Microsoft's compliance with this Final Judgment to the Plaintiffs, the TC or the Compliance Officer.

2. In order to enhance the ability of the Plaintiffs to enforce compliance with this Final Judgment, and to advance the parties' joint interest and the public interest in prompt resolution of issues and disputes, the parties have agreed that the TC and the Compliance Officer shall have the following additional responsibilities.

3. Submissions to the Compliance Officer.

a. Third parties, the TC, or the Plaintiffs in their discretion may submit to the Compliance Officer any complaints concerning Microsoft's compliance with this Final Judgment. Without in any way limiting its authority to take any other action to enforce this Final Judgment, the Plaintiffs may submit complaints related to Sections III.C, III.D, III.E and III.H to the Compliance Officer whenever doing so would be consistent with the public interest.

b. To facilitate the communication of complaints and inquiries by third parties, the Compliance Officer shall place on Microsoft's Internet website, in a manner acceptable to the Plaintiffs, the procedures for submitting complaints. To encourage whenever possible the informal resolution of complaints and inquiries, the website shall provide a mechanism for

communicating complaints and inquiries to the Compliance Officer.

c. Microsoft shall have 30 days after receiving a complaint to attempt to resolve it or reject it, and will then promptly advise the TC of the nature of the complaint and its disposition.

4. Submissions to the TC.

a. The Compliance Officer, third parties or the Plaintiffs in their discretion may submit to the TC any complaints concerning Microsoft's compliance with this Final Judgment.

b. The TC shall investigate complaints received and will consult with the Plaintiffs regarding its investigation. At least once during its investigation, and more often when it may help resolve complaints informally, the TC shall meet with the Compliance Officer to allow Microsoft to respond to the substance of the complaint and to determine whether the complaint can be resolved without further proceedings.

c. If the TC concludes that a complaint is meritorious, it shall advise Microsoft and the Plaintiffs of its conclusion and its proposal for cure.

d. No work product, findings or recommendations by the TC may be admitted in any enforcement proceeding before the Court for any purpose, and no member of the TC shall testify by deposition, in court or before any other tribunal regarding any matter related to this Final Judgment.

e. The TC may preserve the anonymity of any third party complainant where it deems it appropriate to do so upon the request of the Plaintiffs or the third party, or in its discretion.

V. Termination

A. Unless this Court grants an extension, this Final Judgment will expire on the fifth anniversary of the date it is entered by the Court.

B. In any enforcement proceeding in which the Court has found that Microsoft has engaged in a pattern of willful and systematic violations, the Plaintiffs may apply to the Court for a one-time extension of this Final Judgment of up to two years, together with such other relief as the Court may deem appropriate.

VI. Definitions

A. "API" means application programming interface, including any interface that Microsoft is obligated to disclose pursuant to III.D.

B. "Communications Protocol" means the set of rules for information exchange to accomplish predefined tasks between a Windows Operating System Product and a server operating system product connected via a network, including, but

not limited to, a local area network, a wide area network or the Internet. These rules govern the format, semantics, timing, sequencing, and error control of messages exchanged over a network.

C. "Consideration" means any monetary payment or the provision of preferential licensing terms; technical, marketing, and sales support; enabling programs; product information; information about future plans; developer support; hardware or software certification or approval; or permission to display trademarks, icons or logos.

D. "Covered OEMs" means the 20 OEMs with the highest worldwide volume of licenses of Windows Operating System Products reported to Microsoft in Microsoft's fiscal year preceding the effective date of the Final Judgment. The OEMs that fall within this definition of Covered OEMs shall be recomputed by Microsoft as soon as practicable after the close of each of Microsoft's fiscal years.

E. "Documentation" means all information regarding the identification and means of using APIs that a person of ordinary skill in the art requires to make effective use of those APIs. Such information shall be of the sort and to the level of specificity, precision and detail that Microsoft customarily provides for APIs it documents in the Microsoft Developer Network ("MSDN").

F. "IAP" means an Internet access provider that provides consumers with a connection to the Internet, with or without its own proprietary content.

G. "ICP" means an Internet content provider that provides content to users of the Internet by maintaining Web sites.

H. "IHV" means an independent hardware vendor that develops hardware to be included in or used with a Personal Computer running a Windows Operating System Product.

I. "ISV" means an entity other than Microsoft that is engaged in the development or marketing of software products.

J. "Microsoft Middleware" means software code that:

1. Microsoft distributes separately from a Windows Operating System Product to update that Windows Operating System Product;

2. is Trademarked or is marketed by Microsoft as a major version of any Microsoft Middleware Product defined in section VI.K.1; and

3. provides the same or substantially similar functionality as a Microsoft Middleware Product.

Microsoft Middleware shall include at least the software code that controls most or all of the user interface elements of that Microsoft Middleware.

Software code described as part of, and distributed separately to update, a Microsoft Middleware Product shall not be deemed Microsoft Middleware unless identified as a new major version of that Microsoft Middleware Product. A major version shall be identified by a whole number or by a number with just a single digit to the right of the decimal point.

K. "Microsoft Middleware Product" means:

1. the functionality provided by Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express and their successors in a Windows Operating System Product, and

2. for any functionality that is first licensed, distributed or sold by Microsoft after the entry of this Final Judgment and that is part of any Windows Operating System Product:

a. Internet browsers, email client software, networked audio/video client software, instant messaging software or

b. functionality provided by Microsoft software that—

i. is, or in the year preceding the commercial release of any new Windows Operating System Product was, distributed separately by Microsoft (or by an entity acquired by Microsoft) from a Windows Operating System Product;

ii. is similar to the functionality provided by a Non-Microsoft Middleware Product; and

iii. is Trademarked.

Functionality that Microsoft describes or markets as being part of a Microsoft Middleware Product (such as a service pack, upgrade, or bug fix for Internet Explorer), or that is a version of a Microsoft Middleware Product (such as Internet Explorer 5.5), shall be considered to be part of that Microsoft Middleware Product.

L. "Microsoft Platform Software" means (i) a Windows Operating System Product and/or (ii) a Microsoft Middleware Product.

M. "Non-Microsoft Middleware" means a non-Microsoft software product running on a Windows Operating System Product that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft Operating System.

N. "Non-Microsoft Middleware Product" means a non-Microsoft software product running on a Windows

Operating System Product (i) that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft Operating System, and (ii) of which at least one million copies were distributed in the United States within the previous year.

O. "OEM" means an original equipment manufacturer of Personal Computers that is a licensee of a Windows Operating System Product.

P. "Operating System" means the software code that, *inter alia*, (i) controls the allocation and usage of hardware resources (such as the microprocessor and various peripheral devices) of a Personal Computer, (ii) provides a platform for developing applications by exposing functionality to ISVs through APIs, and (iii) supplies a user interface that enables users to access functionality of the operating system and in which they can run applications.

Q. "Personal Computer" means any computer configured so that its primary purpose is for use by one person at a time, that uses a video display and keyboard (whether or not that video display and keyboard is included) and that contains an Intel x86 compatible (or successor) microprocessor. Servers, television set top boxes, handheld computers, game consoles, telephones, pagers, and personal digital assistants are examples of products that are not Personal Computers within the meaning of this definition.

R. "Timely Manner" means at the time Microsoft first releases a beta test version of a Windows Operating System Product that is made available via an MSDN subscription offering or of which 150,000 or more beta copies are distributed.

S. "Top-Level Window" means a window displayed by a Windows Operating System Product that (a) has its own window controls, such as move, resize, close, minimize, and maximize, (b) can contain sub-windows, and (c) contains user interface elements under the control of at least one independent process.

T. "Trademarked" means distributed in commerce and identified as distributed by a name other than Microsoft® or Windows® that Microsoft has claimed as a trademark or service mark by (i) marking the name with trademark notices, such as ® or TM, in connection with a product distributed in the United States; (ii) filing an application for trademark protection for

the name in the United States Patent and Trademark Office; or (iii) asserting the name as a trademark in the United States in a demand letter or lawsuit. Any product distributed under descriptive or generic terms or a name comprised of the Microsoft® or Windows® trademarks together with descriptive or generic terms shall not be Trademarked as that term is used in this Final Judgment. Microsoft hereby disclaims any trademark rights in such descriptive or generic terms apart from the Microsoft® or Windows® trademarks, and hereby abandons any such rights that it may acquire in the future.

U. "Windows Operating System Product" means the software code (as opposed to source code) distributed commercially by Microsoft for use with Personal Computers as Windows 2000 Professional, Windows XP Home, Windows XP Professional, and successors to the foregoing, including the Personal Computer versions of the products currently code named "Longhorn" and "Blackcomb" and their successors, including upgrades, bug fixes, service packs, etc. The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion.

VII. Further Elements

Jurisdiction is retained by this Court over this action and the parties thereto for the purpose of enabling either of the parties thereto to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

VIII. Third Party Rights

Nothing in this Final Judgment is intended to confer upon any other persons any rights or remedies of any nature whatsoever hereunder or by reason of this Final Judgment.

United States Memorandum Regarding Modifications Contained in Second Revised Proposed Final Judgment

In the United States District Court for the District of Columbia

United States of America, Plaintiff, v. Microsoft Corporation, Defendant;

United States' Memorandum Regarding Modifications Contained in Second Revised Proposed Final Judgment

[Civil Action No. 98–1232 (CKK)]

Next Court Deadline: March 6, 2002;

Tunney Act Hearing.

Plaintiff United States of America submits the following memorandum regarding modifications to the Revised Proposed Final Judgment ("RPFJ"). These modifications are reflected in the new, Second Revised Proposed Final Judgment ("SRPFJ"), which is being filed concurrently with this memorandum,¹ along with a new stipulation signed by representatives of the United States, the States of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina and Wisconsin (collectively the "Settling States") and Microsoft Corporation ("Microsoft").²

Introduction

On November 6, 2001, the United States, the Settling States and Microsoft submitted the RPFJ to the Court. Pursuant to §§ 16(b) and (d) of the Tunney Act, 15 U.S.C. §§ 16(b)–(h), the United States received public comments submitted on the RPFJ between November 5, 2001, and January 28, 2002.³ The United States received over 30,000 comments during that period, which it has reviewed and considered as required by 15 U.S.C. § 16(d). Concurrently with this Memorandum, the United States is filing the Response of the United States to Public Comments on the Revised Proposed Final Judgment and a Memorandum in Support of Entry of the Proposed Final Judgment. The United States will also file the public comments themselves (on CD-ROM only).

Discussion

The Tunney Act contemplates that the United States should evaluate the public comments that it receives and, if appropriate, consider modifications of the proposed consent decree in response to the issues raised by those comments. See 15 U.S.C. 16(b) and (d).⁴ On a

¹ For the Court's convenience, the United States also submits a red-lined version of the SRPFJ, attached hereto as Exhibit A, which compares the SRPFJ to the RPFJ.

² The Settling States also agreed to the RPFJ. Following the submission of the RPFJ to the Court on November 6, 2001, the Court deconsolidated *United States v. Microsoft Corp.* from *New York, et al. v. Microsoft Corp.*, in which the Settling States, nine other states and the District of Columbia are parties.

³ The public comment period officially ran from November 28, 2001, the date that the RPFJ and the United States' Competitive Impact Statement ("CIS") were published in the *Federal Register*. 66 F.R. 59,452 (Nov. 28, 2001). Out of an abundance of caution, the United States also chose to accept and treat as Tunney Act comments various communications from members of the public commenting on the proposed settlement that were received by the DOJ beginning on November 5, 2001, the first business day following submission of the initial Proposed Final Judgment to the Court.

⁴ Of course, the United States retains the right to withdraw its consent to the proposed decree at any

number of past occasions, the United States has modified proposed consent decrees as a result of public comments.⁵ In response to the Court's Order dated January 30, 2002,⁶ the parties reported in their Joint Status Report ("JSR") filed February 7, 2002, that they were "considering whether, in response to the public comments, to submit to the Court proposed modifications to the RPFJ." JSR at 7.

I. In Response to Public Comments, the Parties Have Agreed on Certain Modifications to the Terms of the RPFJ

Having fully reviewed and considered all public comments it received regarding the RPFJ, the United States proposed several modifications to the RPFJ. Microsoft and the Settling States have agreed to the modifications that are reflected in the SRPFJ. While the United States believes that the RPFJ as originally filed with the Court effectively remedied the violations sustained by the Court of Appeals and would be in the public interest, it believes that the modifications contained in the SRPFJ effectively respond to specific concerns raised in the public comments and that entry of the SRPFJ is in the public interest.

Each modification clarifies the language of the RPFJ in provisions about which public commentators have indicated concerns regarding the precise meaning of the language. Each modification is an outgrowth of specific concerns raised in the public comments and does not fundamentally change the RPFJ. With one exception,⁷ these modifications refine the language in the RPFJ, and are intended to clarify the parties' shared intentions in drafting the RPFJ. The following sections explain the

modifications, as well as the rationale for making these refinements.

A. Section III.D and Definition VI.A—API

Section III.D. requires the disclosure of APIs (application programming interfaces) and other documentation for the purpose of ensuring interoperability between competing middleware and Windows Operating System Products. At least one commentator noted that in the RPFJ, the definition of API (Definition VI.A) includes only Microsoft APIs, thus rendering the other definitions that use the term API in the context of Non-Microsoft software potentially meaningless. Specifically, the definitions of Non-Microsoft Middleware, Non-Microsoft Middleware Product and Operating System arguably fail to function as intended if the definition of APIs is limited solely to Microsoft APIs. This definition of API, as originally drafted, was intended to apply only to Section III.D, but this limitation was not reflected in the text of the RPFJ. To correct this problem, the original definition of API has, in the SRPFJ, been inserted directly into Section III.D, so that Section III.D of the SRPFJ now reads:

Starting at the earlier of the release of Service Pack 1 for Windows XP or 12 months after the submission of this Final Judgment to the Court, Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, for the sole purpose of interoperating with a Windows Operating System Product, via the Microsoft Developer Network ("MSDN") or similar mechanisms, the APIs and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product. For purposes of this Section III.D, the term APIs means the interfaces, including any associated callback interfaces, that Microsoft Middleware running on a Windows Operating System Product uses to call upon that Windows Operating System Product in order to obtain any services from that Windows Operating System Product. In the case of a new major version of Microsoft Middleware, the disclosures required by this Section III.D shall occur no later than the last major beta test release of that Microsoft Middleware. In the case of a new version of a Windows Operating System Product, the obligations imposed by this Section III.D shall occur in a Timely Manner. (New language in bold).

A generic definition of API that is not tied to Microsoft products has been inserted as Definition VI.A to apply throughout the SRPFJ except in Section III.D:

"API" means application programming interface, including any interface that Microsoft is obligated to disclose pursuant to III.D.

The meaning of API in the definitions of Non-Microsoft Middleware, Non-

Microsoft Middleware Product and Operating System is now defined, as intended, according to this generic definition, thereby resolving any potential concerns regarding their reliance on a definition of API that is specifically tied to Microsoft products. The modification does not change Microsoft's obligations under Section III.D.

B. Section III.E

Section III.E requires Microsoft to disclose all Communications Protocols that a Windows Operating System Product uses to interoperate natively with a Microsoft server operating system product. It ensures that non-Microsoft servers will be able to interoperate with a Windows Operating System Product using the same protocols the Microsoft server operating system product uses. Several commentators argued, however, that because the word "interoperate" in Section III.E is not defined, its meaning is unclear, potentially making it possible for Microsoft to evade this provision. The United States believes that, as interoperate is used in this Section III.E, its meaning clearly reflects the parties' intention that this provision presents the opportunity for seamless interoperability between Windows Operating System Products and non-Microsoft servers. Although the United States believes that the meaning of interoperate as included in Section III.E of the RPFJ is clear, in response to the public comments, the United States proposed, and Microsoft and the Settling States agreed, to supplement the term "interoperate" with "or communicate," so that Section III.E of the SRPFJ now reads:

Starting nine months after the submission of this proposed Final Judgment to the Court, Microsoft shall make available for use by third parties, for the sole purpose of interoperating or communicating with a Windows Operating System Product, on reasonable and non-discriminatory terms (consistent with Section III.I), any Communications Protocol that is, on or after the date this Final Judgment is submitted to the Court, (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to interoperate, or communicate, natively (i.e., without the addition of software code to the client operating system product) with a Microsoft server operating system product. (New language in bold).

The addition of the phrase "or communicate" after "interoperate" brings further clarity to this provision. This revision clarifies the parties' intent in drafting Section III.E and thus removes any potential for confusion or ambiguity regarding the scope of the

time prior to entry, based on the public comments or otherwise. Stipulation, November 6, 2001, at 1; Stipulation, February 27, 2002, at 1.

⁵ See, e.g., *United States v. Allied Waste Indus., Response to Public Comments on Antitrust Consent Decree and Joint Motion for Entry of a Modified Judgment*, 65 F.R. 36,224 (June 7, 2000) (parties modified divestiture requirements as a result of objections raised in comments); *United States v. Thomson Corp.*, 949 F. Supp. 907, 915 (D.D.C. 1996) (parties proposed modifications to final judgment in response to public comment, among other things); see also *Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. 146 (1973) (Testimony of the Hon. J. Skelly Wright) ("The Department itself has modified consent decrees on a number of occasions as a result of public comment").

⁶ The Order stated, *inter alia*, that "the parties shall address . . . whether, in response to the comments received by the Department of Justice in accordance with 15 U.S.C. section 16(b), the United States and Microsoft are considering any modifications" to the RPFJ. Order at 1.

⁷ See Section II.E., *infra* at 8–9, discussing Section III.I.5. of the RPFJ.

provision based on the meaning of interoperate.

C. Section III.H.2

Section III.H.2 requires Microsoft to provide points in its Windows Operating System Products for automatically launching competing middleware, commonly referred to as default settings, in certain circumstances. Although Section III.H.1 states that Microsoft must give end users "a separate and unbiased choice" with respect to altering default invocations in Section III.H.2, there was a concern that the requirement that Microsoft implement Section III.H.2 in a wholly unbiased manner was not entirely clear. To clarify that Microsoft must be unbiased with respect to Microsoft and Non-Microsoft products under Section III.H.2, this provision was revised to expressly state that such mechanisms and confirmation messages must be unbiased. The revised language of Section III.H.2 in the SRPFJ provides:

Allow end users (via an unbiased mechanism readily available from the desktop or Start menu), OEMs (via standard OEM preinstallation kits), and Non-Microsoft Middleware Products (via a mechanism which may, at Microsoft's option, require confirmation from the end user in an unbiased manner) to designate a Non-Microsoft Middleware Product to be invoked in place of that Microsoft Middleware Product (or vice versa) . . . (New language in bold).

This modification makes clear the parties' intention that the mechanism available to end users, as well as any confirmation messages to the end user, must be unbiased with respect to Microsoft and Non-Microsoft products.

This modification also addresses any concern that the phrase "at Microsoft's option" in Section III.H.2 could be read to allow Microsoft to take biased action against competing products. It also addresses concerns that Microsoft's presentation of the confirmation message could include derogatory comments about competing products.

In addition, the two exceptions (Sections III.H.2(a) and (b)) that previously followed Section III.H.3, but by their plain language modified III.H.2 ("Notwithstanding the foregoing Section III.H.2 . . ."), have been moved, so that they now follow Section III.H.2, and renumbered accordingly for clarification.

D. Section III.H.3

Section III.H.3 prohibits Microsoft from designing its Windows Operating System Products to alter automatically an OEM's configuration choices without seeking user confirmation and without

waiting 14 days from the initial boot. In response to concerns raised regarding Microsoft's ability to change configurations pursuant to Section III.H.3, the following sentence has been added:

Any such automatic alteration and confirmation shall be unbiased with respect to Microsoft Middleware Products and Non-Microsoft Middleware.

This sentence clarifies the parties' intention in drafting the RPFJ that Microsoft may not alter a configuration based on whether the middleware products are Microsoft or Non-Microsoft products. Similarly, Microsoft may not present a biased confirmation message (such as a message that is derogatory with respect to Non-Microsoft products). Nor may automatic alterations take actions based on a trigger or rule that is biased against Non-Microsoft Middleware or in favor of Microsoft Middleware Products. This modification makes clear, as intended by the parties in the RPFJ, that any action taken under Section III.H.3 must therefore be independent of whether the affected products are Microsoft or Non-Microsoft products.

E. Section III.I.5

Several commentors raised concerns regarding Section III.I.5, under which an ISV, IHV, IAP, ICP, or OEM could be required to grant Microsoft a license, on reasonable and nondiscriminatory terms, to any intellectual property relating to that ISV's, IHV's, IAP's, ICP's or OEM's exercise of the options or alternatives provided by the RPFJ, if such a cross-license were necessary for Microsoft to provide the options or alternatives set forth in the RPFJ and exercised by the particular ISV, IHV, IAP, ICP or OEM. These concerns ranged from the general concern that the imposition of a cross-licensing requirement was inappropriate to more specific concerns, such as hypothesizing that the cross-licensing provision would reduce the likelihood that persons or entities would take advantage of the RPFJ's disclosure provisions.

As the United States pointed out in its CIS, Section III.I.5 was an extremely narrow provision designed to ensure that Microsoft would be able fully to comply with the terms of the RPFJ without creating greater indirect infringement liability for itself than it would otherwise have. See CIS at 50. In response to the concerns about this provision raised in the public comments, however, the United States proposed, and Microsoft and the Settling States agreed, that the provision

should be deleted. Accordingly, Section III.I.5 does not appear in the SRPFJ. This modification does not alter Microsoft's existing obligations to comply fully with the terms of the SRPFJ.

F. Definition VI.J—Microsoft Middleware

Many commentors suggested that Definition VI.J, Microsoft Middleware, which required that software code be Trademarked, as that term is defined, could potentially exclude current products such as Internet Explorer, Windows Media Player, Microsoft's Java Virtual Machine, and Window Messenger because at least some such products, the commentors claimed, did not satisfy the definition of Trademarked. To clarify any issues surrounding the status of the software code associated with these products, the Microsoft Middleware definition has been modified to include explicitly the software code that is marketed by Microsoft as a major version of any of the named Microsoft Middleware Products listed in Section VI.K.1. With this change, software code can qualify as Microsoft Middleware in part by being either (1) Trademarked or (2) marketed as a major version of any of the named Microsoft Middleware Products (i.e., Internet Explorer, etc.), even if it does not satisfy the definition for Trademarked. The limitation to a major version of a Microsoft Middleware Product is simply a restatement of the limitation in the last paragraph of the Microsoft Middleware definition, which limits the covered software code to that identified as a major version of a Microsoft Middleware Product.

In addition, the previous subsection (4) now modifies the entire definition and has been revised to read:

Microsoft Middleware shall include at least the software code that controls most or all of the user interface elements of the Microsoft Middleware.

This change is intended to clarify that this provision of the definition is not a required element and therefore somehow intended to narrow or limit the definition; rather, the first three requirements are sufficient to define Microsoft Middleware. The purpose of this last provision is essentially to specify a minimum size or "floor" as to the collection of software code that is included in a particular piece of Microsoft Middleware, preventing the situation in which Microsoft could arbitrarily break up into separate pieces the software code of what would otherwise be Microsoft Middleware, thereby omitting from the Microsoft

Middleware definition certain critical or significant pieces of code that constitute that Microsoft Middleware. This modification does not substantively change this definition but instead makes clear that this provision governs the scope of what code must be included in Microsoft Middleware.

B. Definition VI.R—Timely Manner

A number of commentors question Section VI.R's definition of Timely Manner, the term that defines when Microsoft must meet its disclosure obligations under Section III.D. Several commentors contend that 150,000 beta testers is too high a threshold to trigger Section III.D's disclosure requirement, arguing that for past Windows Operating System Products, Microsoft may have distributed 150,000 beta copies but may not have distributed them to 150,000 individual beta testers. These commentors are concerned that the threshold will never be reached, resulting in no required disclosure before a new Windows Operating System Product is released. Similarly, a number of commentors contend that Microsoft may in the future choose to distribute to fewer beta testers and thereby evade its disclosure obligations.

The parties' intention in drafting this definition was not to distinguish between beta copies and beta testers with respect to the 150,000 requirement. The parties originally chose the 150,000 beta tester distribution level based on the approximate current Microsoft Developer Network ("MSDN") subscription base. In response to the foregoing concerns about the definition of Timely Manner, however, the United States proposed, and Microsoft and the Settling States agreed, to modify the definition to read:

"Timely Manner" means at the time Microsoft first releases a beta test version of a Windows Operating System Product that is made available via an MSDN subscription offering or of which 150,000 or more beta copies are distributed.

This modification clarifies the parties' intention that Timely Manner should be triggered by the distribution of 150,000 or more beta copies, regardless of whether those copies are distributed to individuals who are considered to be "beta testers." The modification adds a provision such that Timely Manner can also be triggered by distribution via an MSDN subscription offering. The inclusion of distribution via an MSDN subscription offering as a trigger for this definition ensures that, even in the event that the level of MSDN subscribers decreases substantially, Microsoft's disclosure obligations under Section III.D will still be triggered.

Therefore, while this modification clarifies, and in fact may slightly broaden, Microsoft's disclosure obligations, it does not substantively differ from the original definition of Timely Manner in the RPFJ.

II. A New Round of Publication and Comment Is Not Warranted Because the Proposed Modifications Are a Logical Outgrowth of the RPFJ.

The foregoing modifications directly respond to concerns raised in the public comments and are the result of the United States' review and consideration, as part of its compliance with the Tunney Act, of the public comments submitted on the RPFJ. The Tunney Act does not require a new round of publication and comment as a result of the modifications contained in the SRPFJ. The publication and comment provisions of the Act serve "to enable the district court to make" its public interest determination. *HyperLaw, Inc. v. United States*, 1998 WL 388807, at *3, 159 F.3d 636 (D.C. Cir. 1998) (unpublished table decision). Accordingly, a "court should treat notice and comment under the Tunney Act as analogous to agency rulemaking notice and comment." *Id.* (quotation marks omitted). Applying that analogy, "there is no need for successive rounds of notice and comment on each revision," provided the final decree "is a 'logical outgrowth' of the proposed consent decree. . . . Further notice and comment should be required only if it 'would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its [proposal].'" *Id.* (quoting *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994)).

The proposed decree as modified is a logical outgrowth of the RPFJ and requires no further notice and comment. As explained above, each modification responds to public comments on the RPFJ and clarifies language based upon those comments. Without question, each is a natural and logical outgrowth of the notice and comment process. Taken separately or together, the modifications do not fundamentally change the RPFJ. All contribute to benefitting the public interest (and certainly have no adverse effect on the public interest). The purpose of the notice and comment has thus been well-satisfied, and further notice and comment would merely delay the Court's public interest determination without good cause.⁸

⁸ Entry of a decree following modification without a new round of notice and comment is conventional in Tunney Act practice. For example, After notice and comment in AT&T, the court said

Conclusion

For the reasons described herein, the United States hereby submits the SRPFJ to the Court. In our separate Memorandum in Support of Entry of the Proposed Final Judgment and Response of the United States to Public Comments on the Revised Proposed Final Judgment, both of which are also being filed today, we set forth the reasons why the SRPFJ is in the public interest. Upon completion of the Tunney Act requirements, we will respectfully move the Court to enter the judgment.

Dated: February 27, 2002.
Respectfully submitted,
Charles A. James
Assistant Attorney General
Deborah P. Majoras
Deputy Assistant Attorney General
Phillip R. Malone
Renata B. Hesse
David Blake-Thomas
Paula L. Blizzard
Kenneth W. Gaul
Adam D. Hirsh
Jacqueline S. Kelley
Steven J. Mintz
Barbara Nelson
David Seidman
David P. Wales
Attorneys

U.S. Department of Justice, Antitrust
Division, 601 D Street NW., Suite 1200,
Washington, DC 20530, (202) 514-8276.

Philip S. Beck,
Special Trial Counsel.

(**Editorial Note:** Certain conventions have been used by the Office of the **Federal Register** to highlight changes in the Second Revised Proposed Final Judgment. New language is shown in boldface, while language that was removed is set off with brackets.)

Exhibit A

Second Revised Proposed Final Judgment (Red-Lined Version)

Whereas, plaintiffs United States of America ("United States") and the States of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina and Wisconsin and defendant Microsoft Corporation ("Microsoft"), by their respective attorneys, have consented to the entry of this Final Judgment;

And whereas, this Final Judgment does not constitute any admission by any party regarding any issue of fact or law;

it would enter the decree as in the public interest if the parties agreed to a number of modifications, and the Court entered the modified decree without a new round of notice and comment once the parties did so. *United States v. AT&T*, 552 F. Supp. 131, 225-26 (D.D.C. 1982); see also *Mass. Sch. of Law v. United States*, 118 F.3d 776, 778 (D.C. Cir. 1997).

And whereas, Microsoft agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

Now therefore, upon remand from the United States Court of Appeals for the District of Columbia Circuit, and upon the consent of the aforementioned parties, it is hereby ordered, adjudged, and decreed:

I. Jurisdiction

This Court has jurisdiction of the subject matter of this action and of the person of Microsoft.

II. Applicability

This Final Judgment applies to Microsoft and to each of its officers, directors, agents, employees, subsidiaries, successors and assigns; and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

III. Prohibited Conduct

A. Microsoft shall not retaliate against an OEM by altering Microsoft's commercial relations with that OEM, or by withholding newly introduced forms of non-monetary Consideration (including but not limited to new versions of existing forms of non-monetary Consideration) from that OEM, because it is known to Microsoft that the OEM is or is contemplating:

1. developing, distributing, promoting, using, selling, or licensing any software that competes with Microsoft Platform Software or any product or service that distributes or promotes any Non-Microsoft Middleware;
2. shipping a Personal Computer that (a) includes both a Windows Operating System Product and a non-Microsoft Operating System, or (b) will boot with more than one Operating System; or
3. exercising any of the options or alternatives provided for under this Final Judgment.

Nothing in this provision shall prohibit Microsoft from enforcing any provision of any license with any OEM or any intellectual property right that is not inconsistent with this Final Judgment. Microsoft shall not terminate a Covered OEM's license for a Windows Operating System Product without having first given the Covered OEM written notice of the reasons for the proposed termination and not less than thirty days' opportunity to cure. Notwithstanding the foregoing, Microsoft shall have no obligation to provide such a termination notice and opportunity to cure to any Covered

OEM that has received two or more such notices during the term of its Windows Operating System Product license.

Nothing in this provision shall prohibit Microsoft from providing Consideration to any OEM with respect to any Microsoft product or service where that Consideration is commensurate with the absolute level or amount of that OEM's development, distribution, promotion, or licensing of that Microsoft product or service.

B. Microsoft's provision of Windows Operating System Products to Covered OEMs shall be pursuant to uniform license agreements with uniform terms and conditions. Without limiting the foregoing, Microsoft shall charge each Covered OEM the applicable royalty for Windows Operating System Products as set forth on a schedule, to be established by Microsoft and published on a web site accessible to the Plaintiffs and all Covered OEMs, that provides for uniform royalties for Windows Operating System Products, except that:

1. the schedule may specify different royalties for different language versions;
2. the schedule may specify reasonable volume discounts based upon the actual volume of licenses of any Windows Operating System Product or any group of such products; and
3. the schedule may include market development allowances, programs, or other discounts in connection with Windows Operating System Products, provided that:
 - a. such discounts are offered and available uniformly to all Covered OEMs, except that Microsoft may establish one uniform discount schedule for the ten largest Covered OEMs and a second uniform discount schedule for the eleventh through twentieth largest Covered OEMs, where the size of the OEM is measured by volume of licenses;
 - b. such discounts are based on objective, verifiable criteria that shall be applied and enforced on a uniform basis for all Covered OEMs; and
 - c. such discounts or their award shall not be based on or impose any criterion or requirement that is otherwise inconsistent with any portion of this Final Judgment.

C. Microsoft shall not restrict by agreement any OEM licensee from exercising any of the following options or alternatives:

1. Installing, and displaying icons, shortcuts, or menu entries for, any Non-Microsoft Middleware or any product or service (including but not limited to IAP products or services) that distributes, uses, promotes, or supports any Non-Microsoft Middleware, on the desktop or Start menu, or anywhere else in a Windows Operating System Product

where a list of icons, shortcuts, or menu entries for applications are generally displayed, except that Microsoft may restrict an OEM from displaying icons, shortcuts and menu entries for any product in any list of such icons, shortcuts, or menu entries specified in the Windows documentation as being limited to products that provide particular types of functionality, provided that the restrictions are non-discriminatory with respect to non-Microsoft and Microsoft products.

2. Distributing or promoting Non-Microsoft Middleware by installing and displaying on the desktop shortcuts of any size or shape so long as such shortcuts do not impair the functionality of the user interface.

3. Launching automatically, at the conclusion of the initial boot sequence or subsequent boot sequences, or upon connections to or disconnections from the Internet, any Non-Microsoft Middleware if a Microsoft Middleware Product that provides similar functionality would otherwise be launched automatically at that time, provided that any such Non-Microsoft Middleware displays on the desktop no user interface or a user interface of similar size and shape to the user interface displayed by the corresponding Microsoft Middleware Product.

4. Offering users the option of launching other Operating Systems from the Basic Input/Output System or a non-Microsoft boot-loader or similar program that launches prior to the start of the Windows Operating System Product.

5. Presenting in the initial boot sequence its own IAP offer provided that the OEM complies with reasonable technical specifications established by Microsoft, including a requirement that the end user be returned to the initial boot sequence upon the conclusion of any such offer.

6. Exercising any of the options provided in Section III.H of this Final Judgment.

D. Starting at the earlier of the release of Service Pack 1 for Windows XP or 12 months after the submission of this Final Judgment to the Court, Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, for the sole purpose of interoperating with a Windows Operating System Product, via the Microsoft Developer Network ("MSDN") or similar mechanisms, the APIs and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product. **For purposes of this Section III.D, the term APIs means the interfaces, including any associated**

callback interfaces, that Microsoft Middleware running on a Windows Operating System Product uses to call upon that Windows Operating System Product in order to obtain any services from that Windows Operating System Product. In the case of a new major version of Microsoft Middleware, the disclosures required by this Section III.D shall occur no later than the last major beta test release of that Microsoft Middleware. In the case of a new version of a Windows Operating System Product, the obligations imposed by this Section III.D shall occur in a Timely Manner.

E. Starting nine months after the submission of this proposed Final Judgment to the Court, Microsoft shall make available for use by third parties, for the sole purpose of interoperating **or communicating** with a Windows Operating System Product, on reasonable and non-discriminatory terms (consistent with Section III.I), any Communications Protocol that is, on or after the date this Final Judgment is submitted to the Court, (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to interoperate, **or communicate**, natively (i.e., without the addition of software code to the client operating system product) with a Microsoft server operating system product.

F. 1. Microsoft shall not retaliate against any ISV or IHV because of that ISV's or IHV's:

a. developing, using, distributing, promoting or supporting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software, or

b. exercising any of the options or alternatives provided for under this Final Judgment.

2. Microsoft shall not enter into any agreement relating to a Windows Operating System Product that conditions the grant of any Consideration on an ISV's refraining from developing, using, distributing, or promoting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software, except that Microsoft may enter into agreements that place limitations on an ISV's development, use, distribution or promotion of any such software if those limitations are reasonably necessary to and of reasonable scope and duration in relation to a bona fide contractual obligation of the ISV to use, distribute or promote any Microsoft software or to

develop software for, or in conjunction with, Microsoft.

3. Nothing in this section shall prohibit Microsoft from enforcing any provision of any agreement with any ISV or IHV, or any intellectual property right, that is not inconsistent with this Final Judgment.

G. Microsoft shall not enter into any agreement with:

1. any IAP, ICP, ISV, IHV or OEM that grants Consideration on the condition that such entity distributes, promotes, uses, or supports, exclusively or in a fixed percentage, any Microsoft Platform Software, except that Microsoft may enter into agreements in which such an entity agrees to distribute, promote, use or support Microsoft Platform Software in a fixed percentage whenever Microsoft in good faith obtains a representation that it is commercially practicable for the entity to provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software, or

2. any IAP or ICP that grants placement on the desktop or elsewhere in any Windows Operating System Product to that IAP or ICP on the condition that the IAP or ICP refrain from distributing, promoting or using any software that competes with Microsoft Middleware.

Nothing in this section shall prohibit Microsoft from entering into (a) any bona fide joint venture or (b) any joint development or joint services arrangement with any ISV, IHV, IAP, ICP, or OEM for a new product, technology or service, or any material value-add to an existing product, technology or service, in which both Microsoft and the ISV, IHV, IAP, ICP, or OEM contribute significant developer or other resources, that prohibits such entity from competing with the object of the joint venture or other arrangement for a reasonable period of time.

This Section does not apply to any agreements in which Microsoft licenses intellectual property in from a third party.

H. Starting at the earlier of the release of Service Pack 1 for Windows XP or 12 months after the submission of this Final Judgment to the Court, Microsoft shall:

1. Allow end users (via a mechanism readily accessible from the desktop or Start menu such as an Add/Remove icon) and OEMs (via standard preinstallation kits) to enable or remove access to each Microsoft Middleware Product or Non-Microsoft Middleware Product by (a) displaying or removing icons, shortcuts, or menu entries on the desktop or Start menu, or anywhere else

in a Windows Operating System Product where a list of icons, shortcuts, or menu entries for applications are generally displayed, except that Microsoft may restrict the display of icons, shortcuts, or menu entries for any product in any list of such icons, shortcuts, or menu entries specified in the Windows documentation as being limited to products that provide particular types of functionality, provided that the restrictions are non-discriminatory with respect to non-Microsoft and Microsoft products; and (b) enabling or disabling automatic invocations pursuant to Section III.C.3 of this Final Judgment that are used to launch Non-Microsoft Middleware Products or Microsoft Middleware Products. The mechanism shall offer the end user a separate and unbiased choice with respect to enabling or removing access (as described in this subsection III.H.1) and altering default invocations (as described in the following subsection III.H.2) with regard to each such Microsoft Middleware Product or Non-Microsoft Middleware Product and may offer the end-user a separate and unbiased choice of enabling or removing access and altering default configurations as to all Microsoft Middleware Products as a group or all Non-Microsoft Middleware Products as a group.

2. Allow end users (via [a] **an unbiased** mechanism readily available from the desktop or Start menu), OEMs (via standard OEM preinstallation kits), and Non-Microsoft Middleware Products (via a mechanism which may, at Microsoft's option, require confirmation from the end user **in an unbiased manner**) to designate a Non-Microsoft Middleware Product to be invoked in place of that Microsoft Middleware Product (or vice versa) in any case where the Windows Operating System Product would otherwise launch the Microsoft Middleware Product in a separate Top-Level Window and display either (i) all of the user interface elements or (ii) the Trademark of the Microsoft Middleware Product.

Notwithstanding the foregoing Section III.H.2, the Windows Operating System Product may invoke a Microsoft Middleware Product in any instance in which:

(a) that Microsoft Middleware Product would be invoked solely for use in interoperating with a server maintained by Microsoft (outside the context of general Web browsing), or

(b) that designated Non-Microsoft Middleware Product fails to implement a reasonable technical requirement (e.g., a requirement to be able to host a particular ActiveX control) that is

necessary for valid technical reasons to supply the end user with functionality consistent with a Windows Operating System Product, provided that the technical reasons are described in a reasonably prompt manner to any ISV that requests them.

3. Ensure that a Windows Operating System Product does not (a) automatically alter an OEM's configuration of icons, shortcuts or menu entries installed or displayed by the OEM pursuant to Section III.C of this Final Judgment without first seeking confirmation from the user and (b) seek such confirmation from the end user for an automatic (as opposed to user-initiated) alteration of the OEM's configuration until 14 days after the initial boot up of a new Personal Computer. **Any such automatic alteration and confirmation shall be unbiased with respect to Microsoft Middleware Products and Non-Microsoft Middleware.** Microsoft shall not alter the manner in which a Windows Operating System Product automatically alters an OEM's configuration of icons, shortcuts or menu entries other than in a new version of a Windows Operating System Product.

[Notwithstanding the foregoing Section III.H.2, the Windows Operating System Product may invoke a Microsoft Middleware Product in any instance in which:

1. that Microsoft Middleware Product would be invoked solely for use in interoperating with a server maintained by Microsoft (outside the context of general Web browsing), or

2. that designated Non-Microsoft Middleware Product fails to implement a reasonable technical requirement (e.g., a requirement to be able to host a particular ActiveX control) that is necessary for valid technical reasons to supply the end user with functionality consistent with a Windows Operating System Product, provided that the technical reasons are described in a reasonably prompt manner to any ISV that requests them.]

Microsoft's obligations under this Section III.H as to any new Windows Operating System Product shall be determined based on the Microsoft Middleware Products which exist seven months prior to the last beta test version (i.e., the one immediately preceding the first release candidate) of that Windows Operating System Product.

1. Microsoft shall offer to license to ISVs, IHVs, IAPs, ICPs, and OEMs any intellectual property rights owned or licensable by Microsoft that are required to exercise any of the options or alternatives expressly provided to them

under this Final Judgment, provided that

1. all terms, including royalties or other payment of monetary consideration, are reasonable and non-discriminatory;

2. the scope of any such license (and the intellectual property rights licensed thereunder) need be no broader than is necessary to ensure that an ISV, IHV, IAP, ICP or OEM is able to exercise the options or alternatives expressly provided under this Final Judgment (e.g., an ISV's, IHV's, IAP's, ICP's and OEM's option to promote Non-Microsoft Middleware shall not confer any rights to any Microsoft intellectual property rights infringed by that Non-Microsoft Middleware);

3. an ISV's, IHV's, IAP's, ICP's, or OEM's rights may be conditioned on its not assigning, transferring or sublicensing its rights under any license granted under this provision; **and**

4. the terms of any license granted under this section are in all respects consistent with the express terms of this Final Judgment[; and.]

[5. an ISV, IHV, IAP, ICP, or OEM may be required to grant to Microsoft on reasonable and nondiscriminatory terms a license to any intellectual property rights it may have relating to the exercise of their options or alternatives provided by this Final Judgment; the scope of such license shall be no broader than is necessary to insure that Microsoft can provide such options or alternatives.]

Beyond the express terms of any license granted by Microsoft pursuant to this section, this Final Judgment does not, directly or by implication, estoppel or otherwise, confer any rights, licenses, covenants or immunities with regard to any Microsoft intellectual property to anyone.

J. No provision of this Final Judgment shall:

1. Require Microsoft to document, disclose or license to third parties: (a) portions of APIs or Documentation or portions or layers of Communications Protocols the disclosure of which would compromise the security of a particular installation or group of installations of anti-piracy, anti-virus, software licensing, digital rights management, encryption or authentication systems, including without limitation, keys, authorization tokens or enforcement criteria; or (b) any API, interface or other information related to any Microsoft product if lawfully directed not to do so by a governmental agency of competent jurisdiction.

2. Prevent Microsoft from conditioning any license of any API, Documentation or Communications

Protocol related to anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, or third party intellectual property protection mechanisms of any Microsoft product to any person or entity on the requirement that the licensee: (a) Has no history of software counterfeiting or piracy or willful violation of intellectual property rights, (b) has a reasonable business need for the API, Documentation or Communications Protocol for a planned or shipping product, (c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business, (d) agrees to submit, at its own expense, any computer program using such APIs, Documentation or Communication Protocols to third-party verification, approved by Microsoft, to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph.

IV. Compliance and Enforcement Procedures

A. Enforcement Authority

1. The Plaintiffs shall have exclusive responsibility for enforcing this Final Judgment. Without in any way limiting the sovereign enforcement authority of each of the plaintiff States, the plaintiff States shall form a committee to coordinate their enforcement of this Final Judgment. A plaintiff State shall take no action to enforce this Final Judgment without first consulting with the United States and with the plaintiff States' enforcement committee.

2. To determine and enforce compliance with this Final Judgment, duly authorized representatives of the United States and the plaintiff States, on reasonable notice to Microsoft and subject to any lawful privilege, shall be permitted the following:

a. Access during normal office hours to inspect any and all source code, books, ledgers, accounts, correspondence, memoranda and other documents and records in the possession, custody, or control of Microsoft, which may have counsel present, regarding any matters contained in this Final Judgment.

b. Subject to the reasonable convenience of Microsoft and without restraint or interference from it, to interview, informally or on the record, officers, employees, or agents of Microsoft, who may have counsel

present, regarding any matters contained in this Final Judgment.

c. Upon written request of the United States or a duly designated representative of a plaintiff State, on reasonable notice given to Microsoft, Microsoft shall submit such written reports under oath as requested regarding any matters contained in this Final Judgment.

Individual plaintiff States will consult with the plaintiff States' enforcement committee to minimize the duplication and burden of the exercise of the foregoing powers, where practicable.

3. The Plaintiffs shall not disclose any information or documents obtained from Microsoft under this Final Judgment except for the purpose of securing compliance with this Final Judgment, in a legal proceeding to which one or more of the Plaintiffs is a party, or as otherwise required by law; provided that the relevant Plaintiff(s) must provide ten days' advance notice to Microsoft before disclosing in any legal proceeding (other than a grand jury proceeding) to which Microsoft is not a party any information or documents provided by Microsoft pursuant to this Final Judgment which Microsoft has identified in writing as material as to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure.

4. The Plaintiffs shall have the authority to seek such orders as are necessary from the Court to enforce this Final Judgment, provided, however, that the Plaintiffs shall afford Microsoft a reasonable opportunity to cure alleged violations of Sections III.C, III.D, III.E and III.H, provided further that any action by Microsoft to cure any such violation shall not be a defense to enforcement with respect to any knowing, willful or systematic violations.

B. Appointment of a Technical Committee

1. Within 30 days of entry of this Final Judgment, the parties shall create and recommend to the Court for its appointment a three-person Technical Committee ("TC") to assist in enforcement of and compliance with this Final Judgment.

2. The TC members shall be experts in software design and programming. No TC member shall have a conflict of interest that could prevent him or her from performing his or her duties under this Final Judgment in a fair and unbiased manner. Without limitation to the foregoing, no TC member (absent the agreement of both parties):

a. shall have been employed in any capacity by Microsoft or any competitor

to Microsoft within the past year, nor shall she or he be so employed during his or her term on the TC;

b. shall have been retained as a consulting or testifying expert by any person in this action or in any other action adverse to or on behalf of Microsoft; or

c. shall perform any other work for Microsoft or any competitor of Microsoft for two years after the expiration of the term of his or her service on the TC.

3. Within 7 days of entry of this Final Judgment, the Plaintiffs as a group and Microsoft shall each select one member of the TC, and those two members shall then select the third member. The selection and approval process shall proceed as follows.

a. As soon as practicable after submission of this Final Judgment to the Court, the Plaintiffs as a group and Microsoft shall each identify to the other the individual it proposes to select as its designee to the TC. The Plaintiffs and Microsoft shall not object to each other's selection on any ground other than failure to satisfy the requirements of Section IV.B.2 above. Any such objection shall be made within ten business days of the receipt of notification of selection.

b. The Plaintiffs shall apply to the Court for appointment of the persons selected by the Plaintiffs and Microsoft pursuant to Section IV.B.3.a above. Any objections to the eligibility of a selected person that the parties have failed to resolve between themselves shall be decided by the Court based solely on the requirements stated in Section IV.B.2 above.

c. As soon as practical after their appointment by the Court, the two members of the TC selected by the Plaintiffs and Microsoft (the "Standing Committee Members") shall identify to the Plaintiffs and Microsoft the person that they in turn propose to select as the third member of the TC. The Plaintiffs and Microsoft shall not object to this selection on any grounds other than failure to satisfy the requirements of Section IV.B.2 above. Any such objection shall be made within ten business days of the receipt of notification of the selection and shall be served on the other party as well as on the Standing Committee Members.

d. The Plaintiffs shall apply to the Court for appointment of the person selected by the Standing Committee Members. If the Standing Committee Members cannot agree on a third member of the TC, the third member shall be appointed by the Court. Any objection by Microsoft or the Plaintiffs to the eligibility of the person selected by the Standing Committee Members

which the parties have failed to resolve among themselves shall also be decided by the Court based on the requirements stated in Section IV.B.2 above.

4. Each TC member shall serve for an initial term of 30 months. At the end of a TC member's initial 30-month term, the party that originally selected him or her may, in its sole discretion, either request re-appointment by the Court to a second 30-month term or replace the TC member in the same manner as provided for in Section IV.B.3.a above. In the case of the third member of the TC, that member shall be re-appointed or replaced in the manner provided in Section IV.B.3.c above.

5. If the United States determines that a member of the TC has failed to act diligently and consistently with the purposes of this Final Judgment, or if a member of the TC resigns, or for any other reason ceases to serve in his or her capacity as a member of the TC, the person or persons that originally selected the TC member shall select a replacement member in the same manner as provided for in Section IV.B.3.

6. Promptly after appointment of the TC by the Court, the United States shall enter into a Technical Committee services agreement ("TC Services Agreement") with each TC member that grants the rights, powers and authorities necessary to permit the TC to perform its duties under this Final Judgment. Microsoft shall indemnify each TC member and hold him or her harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the TC's duties, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the TC member. The TC Services Agreements shall include the following.

a. The TC members shall serve, without bond or other security, at the cost and expense of Microsoft on such terms and conditions as the Plaintiffs approve, including the payment of reasonable fees and expenses.

b. The TC Services Agreement shall provide that each member of the TC shall comply with the limitations provided for in Section IV.B.2 above.

7. Microsoft shall provide the TC with a permanent office, telephone, and other office support facilities at Microsoft's corporate campus in Redmond, Washington. Microsoft shall also, upon reasonable advance notice from the TC, provide the TC with reasonable access to available office space, telephone, and other office support facilities at any

other Microsoft facility identified by the TC.

8. The TC shall have the following powers and duties:

a. The TC shall have the power and authority to monitor Microsoft's compliance with its obligations under this final judgment.

b. The TC may, on reasonable notice to Microsoft:

(i) interview, either informally or on the record, any Microsoft personnel, who may have counsel present; any such interview to be subject to the reasonable convenience of such personnel and without restraint or interference by Microsoft;

(ii) inspect and copy any document in the possession, custody or control of Microsoft personnel;

(iii) obtain reasonable access to any systems or equipment to which Microsoft personnel have access;

(iv) obtain access to, and inspect, any physical facility, building or other premises to which Microsoft personnel have access; and

(v) require Microsoft personnel to provide compilations of documents, data and other information, and to submit reports to the TC containing such material, in such form as the TC may reasonably direct.

c. The TC shall have access to Microsoft's source code, subject to the terms of Microsoft's standard source code Confidentiality Agreement, as approved by the Plaintiffs and to be agreed to by the TC members pursuant to Section IV.B.9 below, and by any staff or consultants who may have access to the source code. The TC may study, interrogate and interact with the source code in order to perform its functions and duties, including the handling of complaints and other inquiries from non-parties.

d. The TC shall receive complaints from the Compliance Officer, third parties or the Plaintiffs and handle them in the manner specified in Section IV.D below.

e. The TC shall report in writing to the Plaintiffs every six months until expiration of this Final Judgment the actions it has undertaken in performing its duties pursuant to this Final Judgment, including the identification of each business practice reviewed and any recommendations made by the TC.

f. Regardless of when reports are due, when the TC has reason to believe that there may have been a failure by Microsoft to comply with any term of this Final Judgment, the TC shall immediately notify the Plaintiffs in writing setting forth the relevant details.

g. TC members may communicate with non-parties about how their

complaints or inquiries might be resolved with Microsoft, so long as the confidentiality of information obtained from Microsoft is maintained.

h. The TC may hire at the cost and expense of Microsoft, with prior notice to Microsoft and subject to approval by the Plaintiffs, such staff or consultants (all of whom must meet the qualifications of Section IV.B.2) as are reasonably necessary for the TC to carry out its duties and responsibilities under this Final Judgment. The compensation of any person retained by the TC shall be based on reasonable and customary terms commensurate with the individual's experience and responsibilities.

i. The TC shall account for all reasonable expenses incurred, including agreed upon fees for the TC members' services, subject to the approval of the Plaintiffs. Microsoft may, on application to the Court, object to the reasonableness of any such fees or other expenses. On any such application: (a) the burden shall be on Microsoft to demonstrate unreasonableness; and (b) the TC member(s) shall be entitled to recover all costs incurred on such application (including reasonable attorneys' fees and costs), regardless of the Court's disposition of such application, unless the Court shall expressly find that the TC's opposition to the application was without substantial justification.

9. Each TC member, and any consultants or staff hired by the TC, shall sign a confidentiality agreement prohibiting disclosure of any information obtained in the course of performing his or her duties as a member of the TC or as a person assisting the TC to anyone other than Microsoft, the Plaintiffs, or the Court. All information gathered by the TC in connection with this Final Judgment and any report and recommendations prepared by the TC shall be treated as Highly Confidential under the Protective Order in this case, and shall not be disclosed to any person other than Microsoft and the Plaintiffs except as allowed by the Protective Order entered in the Action or by further order of this Court.

10. No member of the TC shall make any public statements relating to the TC's activities.

C. Appointment of a Microsoft Internal Compliance Officer

1. Microsoft shall designate, within 30 days of entry of this Final Judgment, an internal Compliance Officer who shall be an employee of Microsoft with responsibility for administering Microsoft's antitrust compliance

program and helping to ensure compliance with this Final Judgment.

2. The Compliance Officer shall supervise the review of Microsoft's activities to ensure that they comply with this Final Judgment. He or she may be assisted by other employees of Microsoft.

3. The Compliance Officer shall be responsible for performing the following activities:

a. within 30 days after entry of this Final Judgment, distributing a copy of the Final Judgment to all officers and directors of Microsoft;

b. promptly distributing a copy of this Final Judgment to any person who succeeds to a position described in Section IV.C.3.a above;

c. ensuring that those persons designated in Section IV.C.3.a above are annually briefed on the meaning and requirements of this Final Judgment and the U.S. antitrust laws and advising them that Microsoft's legal advisors are available to confer with them regarding any question concerning compliance with this Final Judgment or under the U.S. antitrust laws;

d. obtaining from each person designated in Section IV.C.3.a above an annual written certification that he or she: (i) has read and agrees to abide by the terms of this Final Judgment; and (ii) has been advised and understands that his or her failure to comply with this Final Judgment may result in a finding of contempt of court;

e. maintaining a record of all persons to whom a copy of this Final Judgment has been distributed and from whom the certification described in Section IV.C.3.d above has been obtained;

f. establishing and maintaining the website provided for in Section IV.D.3.b below.

g. receiving complaints from third parties, the TC and the Plaintiffs concerning Microsoft's compliance with this Final Judgment and following the appropriate procedures set forth in Section IV.D below; and

h. maintaining a record of all complaints received and action taken by Microsoft with respect to each such complaint.

D. Voluntary Dispute Resolution

1. Third parties may submit complaints concerning Microsoft's compliance with this Final Judgment to the Plaintiffs, the TC or the Compliance Officer.

2. In order to enhance the ability of the Plaintiffs to enforce compliance with this Final Judgment, and to advance the parties' joint interest and the public interest in prompt resolution of issues and disputes, the parties have

agreed that the TC and the Compliance Officer shall have the following additional responsibilities.

3. Submissions to the Compliance Officer.

a. Third parties, the TC, or the Plaintiffs in their discretion may submit to the Compliance Officer any complaints concerning Microsoft's compliance with this Final Judgment. Without in any way limiting its authority to take any other action to enforce this Final Judgment, the Plaintiffs may submit complaints related to Sections III.C, III.D, III.E and III.H to the Compliance Officer whenever doing so would be consistent with the public interest.

b. To facilitate the communication of complaints and inquiries by third parties, the Compliance Officer shall place on Microsoft's Internet website, in a manner acceptable to the Plaintiffs, the procedures for submitting complaints. To encourage whenever possible the informal resolution of complaints and inquiries, the website shall provide a mechanism for communicating complaints and inquiries to the Compliance Officer.

c. Microsoft shall have 30 days after receiving a complaint to attempt to resolve it or reject it, and will then promptly advise the TC of the nature of the complaint and its disposition.

4. Submissions to the TC.

a. The Compliance Officer, third parties or the Plaintiffs in their discretion may submit to the TC any complaints concerning Microsoft's compliance with this Final Judgment.

b. The TC shall investigate complaints received and will consult with the Plaintiffs regarding its investigation. At least once during its investigation, and more often when it may help resolve complaints informally, the TC shall meet with the Compliance Officer to allow Microsoft to respond to the substance of the complaint and to determine whether the complaint can be resolved without further proceedings.

c. If the TC concludes that a complaint is meritorious, it shall advise Microsoft and the Plaintiffs of its conclusion and its proposal for cure.

d. No work product, findings or recommendations by the TC may be admitted in any enforcement proceeding before the Court for any purpose, and no member of the TC shall testify by deposition, in court or before any other tribunal regarding any matter related to this Final Judgment.

e. The TC may preserve the anonymity of any third party complainant where it deems it appropriate to do so upon the request of

the Plaintiffs or the third party, or in its discretion.

V. Termination

A. Unless this Court grants an extension, this Final Judgment will expire on the fifth anniversary of the date it is entered by the Court.

B. In any enforcement proceeding in which the Court has found that Microsoft has engaged in a pattern of willful and systematic violations, the Plaintiffs may apply to the Court for a one-time extension of this Final Judgment of up to two years, together with such other relief as the Court may deem appropriate.

VI. Definitions

A. ["Application Programming Interfaces (APIs)"] "**API**" means [the interfaces] **application programming interface**, including any [associated callback interfaces,] **interface** that Microsoft [Middleware running on a Windows Operating System Product uses to call upon that Windows Operating System Product in order to obtain any services from that Windows Operating System Product] **is obligated to disclose pursuant to III.D.**

B. "Communications Protocol" means the set of rules for information exchange to accomplish predefined tasks between a Windows Operating System Product and a server operating system product connected via a network, including, but not limited to, a local area network, a wide area network or the Internet. These rules govern the format, semantics, timing, sequencing, and error control of messages exchanged over a network.

C. "Consideration" means any monetary payment or the provision of preferential licensing terms; technical, marketing, and sales support; enabling programs; product information; information about future plans; developer support; hardware or software certification or approval; or permission to display trademarks, icons or logos.

D. "Covered OEMs" means the 20 OEMs with the highest worldwide volume of licenses of Windows Operating System Products reported to Microsoft in Microsoft's fiscal year preceding the effective date of the Final Judgment. The OEMs that fall within this definition of Covered OEMs shall be recomputed by Microsoft as soon as practicable after the close of each of Microsoft's fiscal years.

E. "Documentation" means all information regarding the identification and means of using APIs that a person of ordinary skill in the art requires to make effective use of those APIs. Such information shall be of the sort and to the level of specificity, precision and

detail that Microsoft customarily provides for APIs it documents in the Microsoft Developer Network ("MSDN").

F. "IAP" means an Internet access provider that provides consumers with a connection to the Internet, with or without its own proprietary content.

G. "ICP" means an Internet content provider that provides content to users of the Internet by maintaining Web sites.

H. "IHV" means an independent hardware vendor that develops hardware to be included in or used with a Personal Computer running a Windows Operating System Product.

I. "ISV" means an entity other than Microsoft that is engaged in the development or marketing of software products.

J. "Microsoft Middleware" means software code that

1. Microsoft distributes separately from a Windows Operating System Product to update that Windows Operating System Product;

2. is Trademarked; **or is marketed by Microsoft as a major version of any Microsoft Middleware Product defined in section VI.K.1; and**

3. provides the same or substantially similar functionality as a Microsoft Middleware Product; [and.]

[4. includes at least the software code that controls most or all of the user interface elements of that Microsoft Middleware.]

Microsoft Middleware shall include at least the software code that controls most or all of the user interface elements of that Microsoft Middleware.

Software code described as part of, and distributed separately to update, a Microsoft Middleware Product shall not be deemed Microsoft Middleware unless identified as a new major version of that Microsoft Middleware Product. A major version shall be identified by a whole number or by a number with just a single digit to the right of the decimal point.

K. "Microsoft Middleware Product" means

1. the functionality provided by Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express and their successors in a Windows Operating System Product, and

2. for any functionality that is first licensed, distributed or sold by Microsoft after the entry of this Final Judgment and that is part of any Windows Operating System Product

a. Internet browsers, email client software, networked audio/video client software, instant messaging software or

b. functionality provided by Microsoft software that—

i. is, or in the year preceding the commercial release of any new Windows Operating System Product was, distributed separately by Microsoft (or by an entity acquired by Microsoft) from a Windows Operating System Product;

ii. is similar to the functionality provided by a Non-Microsoft Middleware Product; and

iii. is Trademarked.

Functionality that Microsoft describes or markets as being part of a Microsoft Middleware Product (such as a service pack, upgrade, or bug fix for Internet Explorer), or that is a version of a Microsoft Middleware Product (such as Internet Explorer 5.5), shall be considered to be part of that Microsoft Middleware Product.

L. "Microsoft Platform Software" means (i) a Windows Operating System Product and/or (ii) a Microsoft Middleware Product.

M. "Non-Microsoft Middleware" means a non-Microsoft software product running on a Windows Operating System Product that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft Operating System.

N. "Non-Microsoft Middleware Product" means a non-Microsoft software product running on a Windows Operating System Product (i) that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft Operating System, and (ii) of which at least one million copies were distributed in the United States within the previous year.

O. "OEM" means an original equipment manufacturer of Personal Computers that is a licensee of a Windows Operating System Product.

P. "Operating System" means the software code that, inter alia, (i) controls the allocation and usage of hardware resources (such as the microprocessor and various peripheral devices) of a Personal Computer, (ii) provides a platform for developing applications by exposing functionality to ISVs through APIs, and (iii) supplies a user interface that enables users to access functionality of the operating system and in which they can run applications.

Q. "Personal Computer" means any computer configured so that its primary purpose is for use by one person at a time, that uses a video display and keyboard (whether or not that video display and keyboard is included) and that contains an Intel x86 compatible (or successor) microprocessor. Servers, television set top boxes, handheld computers, game consoles, telephones, pagers, and personal digital assistants are examples of products that are not Personal Computers within the meaning of this definition.

R. "Timely Manner" means at the time Microsoft first releases a beta test version of a Windows Operating System Product that is [distributed to] **made available via an MSDN subscription offering or of which 150,000 or more beta [testers] copies are distributed.**

S. "Top-Level Window" means a window displayed by a Windows Operating System Product that (a) has its own window controls, such as move, resize, close, minimize, and maximize, (b) can contain sub-windows, and (c) contains user interface elements under the control of at least one independent process.

T. "Trademarked" means distributed in commerce and identified as distributed by a name other than Microsoft® or Windows® that Microsoft has claimed as a trademark or service mark by (i) marking the name with trademark notices, such as ® or ™, in connection with a product distributed in the United States; (ii) filing an application for trademark protection for the name in the United States Patent and Trademark Office; or (iii) asserting the name as a trademark in the United States in a demand letter or lawsuit. Any product distributed under descriptive or generic terms or a name comprised of the Microsoft® or Windows® trademarks together with descriptive or generic terms shall not be Trademarked as that term is used in this Final Judgment. Microsoft hereby disclaims any trademark rights in such descriptive or generic terms apart from the Microsoft® or Windows® trademarks, and hereby abandons any such rights that it may acquire in the future.

U. "Windows Operating System Product" means the software code (as opposed to source code) distributed commercially by Microsoft for use with Personal Computers as Windows 2000 Professional, Windows XP Home, Windows XP Professional, and successors to the foregoing, including the Personal Computer versions of the products currently code named "Longhorn" and "Blackcomb" and their successors, including upgrades, bug

fixes, service packs, etc. The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion.

VII. Further Elements

Jurisdiction is retained by this Court over this action and the parties thereto for the purpose of enabling either of the parties thereto to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

VIII. Third Party Rights

Nothing in this Final Judgment is intended to confer upon any other persons any rights or remedies of any nature whatsoever hereunder or by reason of this Final Judgment.

Dorothy Fountain,

Deputy Director of Operations.

[FR Doc. 02-5354 Filed 3-15-02; 8:45 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

United States V. Microsoft Corporation

List of Individuals and Entities Submitting Public Comments

The United States hereby publishes a complete list of the names (as provided in the comment) of all individuals or entities submitting Tunney Act public comments on the Revised Proposed Final Judgment in the matter of United States v. Microsoft Corp., Civil Action No. 98-1232, pending in the United States District Court for the District of Columbia; the approximate number of pages of each comment; a unique tracking number assigned to each comment so that each comment may be located on the Department's website; and an index to the comments organized by six categories based primarily on the level of detail of the comment. The United States' response to the comments is being published concurrently with this list. To view the comments referenced herein and/or copies of the comments, please follow the instructions provided below.

Electronic copies of all comments identified herein are available on the Department of Justice's Web site at www.usdoj.gov/atr/cases/ms-comments.htm. Interested persons may also request CD-ROM(s) containing the