

When the Case Is Over: A Tunney Act Primer for Defendants

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Finally, the day has come. You have worked long and hard for your client, responding to requests for information and perhaps even litigating your matter, and you have agreed on the terms of a consent decree with the Department of Justice.

It is easy to assume that your heavy lifting now is over (and for the most part, it is). But before you put down your pen, make sure that you've remembered to fulfill your obligations under the Tunney Act, or you will risk delaying the court's entry of your decree.

The Tunney Act (15 U.S.C. § 16) requires all parties to a consent decree to take certain actions to provide the public notice of the proposed decree and its terms. Most of these actions are the responsibility of the Department of Justice, and must be performed at least 60 days prior to the court's entry of the decree. These actions include:

- Drafting a competitive impact statement ("CIS") explaining the terms of the proposed decree;
- Filing the proposed decree and CIS with the court and publishing both in the Federal Register; and
- Filing any public comments on the proposed decree and the Department's responses thereto with the court (and then publishing both in the Federal Register).

Your two obligations, while not nearly as onerous, are no less important.

First, not later than 10 days after the proposed decree and CIS are filed with the court, you must file with the court a description of any and all written or oral communications, by or on behalf of your client, with any officer or employee of the United States relating to the proposed decree. This sounds like a major undertaking, but bear the following in mind:

- You do not have to describe communications between defense counsel alone and the Attorney General or the employees of the Department of Justice alone. In other words, you need only account for communications between your client itself and the Department of Justice.
- While you must certify that your filing is a true and complete description of communications known to your client, a complete description can be as brief as:

On [date], counsel for [your client] met with counsel for the United States and other employees of the Department of Justice in [location]. The following representatives of [your client] also attended the meeting: [list here].

Second, you must arrange and pay for newspaper publication of a summary of, among other things, the terms of the proposed consent decree and the CIS. The Department of Justice will provide you with a summary that meets the Tunney Act requirements. However, publication must begin at least 60 days before the court's entry of your decree, meaning that a delay on your end could result in a delay in entry. In addition:

- The newspaper notice must be published for seven days over a period of two weeks. This means that you may end up publishing, for example, Monday through Thursday of one week and Monday through Wednesday of the following week.
- You may need to publish in multiple newspapers. No matter what, you will be required to publish in a newspaper of general circulation in the District of Columbia (*i.e.*, The Washington Post). However, if your case was filed outside of D.C., you must also publish in a newspaper of general circulation in that district. It is also possible that you will be required to publish in other districts at the court's discretion, although this is rare.
- Your decree likely will require that you send the Department of Justice proof that your notices have been purchased. You normally can satisfy this requirement by scanning your order paperwork and e-mailing it to your lead attorney. You also will need to mail your original proofs of publication to the Department of Justice once the notices have run.

Staying on top of these small, but necessary, tasks directly after settlement will not only avoid last-minute rushes, but will ensure the speediest possible entry of your decree.