

Complaint

IN THE MATTER OF

**NORTHROP GRUMMAN CORPORATION
AND
ORBITAL ATK, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

*Docket No. C-4652; File No. 181 0005
Complaint, June 5, 2018 – Decision, June 5, 2018*

This consent order addresses the \$7.8 billion acquisition by Northrop Grumman Corporation of certain assets of Orbital ATK, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening the competition in the United States market for missile systems. The consent order requires Northrop to (1) continue to act as a non-discriminatory merchant supplier of Orbital ATK's solid rocket motors ("SRMs") rather than favor its now-vertically integrated missile system business, and (2) protect SRM and missile system competitors' competitively sensitive information from improper use or disclosure.

Participants

For the *Commission*: James E. Southworth.

For the *Respondents*: Thomas O. Barnett and Deborah A. Garza, Covington & Burling LLP; Joseph Krauss, Hogan Lovells US LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Northrop Grumman Corporation ("Northrop"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Orbital ATK, Inc. ("Orbital"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of

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the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Northrop Grumman Corporation, is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 2980 Fairview Park Drive, Falls Church, Virginia 22042.

2. Respondent Orbital ATK, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 45101 Warp Drive, Dulles, Virginia 20166.

3. Respondents, among other things, are engaged in the research, development, manufacture, and sale of missile systems. Respondent Orbital ATK is also engaged in the research, development, and manufacture of solid rocket motors (“SRMs”) for missile systems, as well as for commercial and scientific applications.

4. Each Respondent is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

5. Pursuant to an Agreement and Plan of Merger dated September 17, 2017, Northrop agreed to acquire 100 percent of the issued and outstanding voting securities of Orbital ATK for approximately \$7.8 billion (the “Acquisition”).

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6. The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

7. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are (1) SRMs and (2) missile systems.

- a. SRMs provide the thrust to propel tactical, missile defense, and strategic missiles to their intended targets. SRMs are used for virtually all missile systems purchased by the United States Government because they offer numerous advantages over all other existing propulsion technologies.
- b. Missile systems provide essential national defense capabilities for the United States Government. The United States armed services use multiple types of missile systems, including short-range tactical missiles, longer-range strategic missiles, and missile defense systems to intercept enemy missiles, each of which has unique capabilities and is designed to perform specific mission(s).

8. For the purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Acquisition is the United States. The missile systems that are the subject of this complaint are purchased by the United States Government, which also typically funds their development. Federal law, national security, and other considerations also usually dictate that missile system prime contractors procure the required SRMs from domestic suppliers.

IV. THE STRUCTURE OF THE MARKETS

9. The United States markets for SRMs and missile systems are highly concentrated. Orbital ATK is the world's largest producer of SRMs and is one of only two United States companies with the capability to develop and produce SRMs for most United States Government missile systems. Northrop is one

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of only a few companies capable of competing as a prime contractor in the highly concentrated missile system market. Northrop has demonstrated its technical, financial, and organizational ability to compete for complex United States Government missile systems by, among other things, being one of two suppliers awarded Technology Maturation and Risk Reduction phase contracts to develop preliminary designs for the Ground Based Strategic Deterrent program, the nation's next intercontinental ballistic missile system.

V. ENTRY CONDITIONS

10. New entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. There are significant barriers to entry into the development, manufacture, and sale of both SRMs and missile systems in the United States. It would be extremely difficult and costly for a new entrant to establish the technological expertise and specialized facilities necessary to compete successfully in either of these markets.

VI. EFFECTS OF THE ACQUISITION

11. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant market for missile systems in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. The Acquisition would provide Northrop with the ability and incentive to foreclose missile system prime contractor competitors by denying them access to Northrop's SRMs or by making pricing, personnel, schedule, investment, design, and other decisions that disadvantage those competitors. If Northrop were to withhold effective access to its SRMs, or increase the price of those SRMs, to its prime contractor competitors, competition would be lessened because the foreclosed prime contractors would be forced to raise the prices of their missile systems, decide not to compete, or invest less aggressively to win missile programs, which, in turn, would decrease competitive pressure on Northrop.

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12. If Northrop were to foreclose its missile system prime contractor competitors in any of these ways, the United States Government would be harmed because cost of missile systems may increase, innovation may be lessened, and/or quality would be reduced because the United States Government would be less likely to obtain the best possible combination of missile system prime contractor and SRM supplier.

VII. VIOLATIONS CHARGED

13. The Agreement described in Paragraph 5 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

14. The Acquisition described in Paragraph 5, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this fifth day of June, 2018, issues its Complaint against said Respondents.

By the Commission.

DECISION

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent Northrop Grumman Corporation, (“Northrop”) of the voting securities of Respondent Orbital ATK, Inc., (“Orbital”), collectively “Respondents.” The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the

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Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Order” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepts the executed Consent Agreement and places it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order (“Order”):

1. Respondent Northrop Grumman Corporation is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 2980 Fairview Park Drive, Falls Church, Virginia 22042.
2. Respondent Orbital ATK, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 45101 Warp Drive, Dulles, Virginia 20166.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over

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Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED THAT, as used in this Order, the following definitions shall apply:

- A. “Northrop” means Northrop Grumman Corporation, its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Northrop Grumman Corporation, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. After the Acquisition, Northrop will include Orbital.
- B. “Orbital” means Orbital ATK, Inc., its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Orbital ATK, Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each.
- C. “Respondent(s)” means Northrop and Orbital, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquisition” means Northrop’s acquisition of Orbital pursuant to the Agreement and Plan of Merger dated September 17, 2017, among Northrop and Orbital that was submitted by the Respondents to the Commission.
- F. “Acquisition Date” means the date on which the Acquisition is consummated.

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- G. “Collaborative Agreement” means any written agreement to collaborate on a proposal or other competitive efforts for the supply of SRMs and Related Services for a Missile Competition.
- H. “Compliance Officer” means the Person appointed pursuant to Paragraph V. of this Order, as well as his or her designees.
- I. “Compliance Program” means a program (including, but not limited to, an effective in-person or web-based training program) designed to ensure compliance with the requirements and prohibitions of this Order.
- J. “Discriminate” or “Discriminating” means to advantage Northrop relative to a Third Party Prime Contractor or to disadvantage a Third Party Prime Contractor relative to Northrop for any reason or in any way that is likely to or would limit, impair, hinder, delay, reduce or degrade, directly or indirectly, a Third Party Prime Contractor’s proposal or performance, where the Third Party Prime Contractor and Northrop are competitors with respect to a specific Missile Competition, in connection with: an Offer or the negotiations of an Offer by the Northrop SRM Business; providing SRM Information by the Northrop SRM Business; staffing, resource allocation, or design decisions in connection with SRM Products and Services offered by the Northrop SRM Business; entering into or negotiating Collaborative Agreements by the Northrop SRM Business; or making available technologies for SRMs and Related Services developed by the Northrop SRM Business, including Discriminating in price, schedule, quality, data, personnel, investment, technology, innovation, design, and risk; *provided, however*, that the determination of compliance or non-compliance with the non-discrimination provisions of this Order shall take into account that different Prime Contractors may choose to take different competitive approaches that may result in differences, individually and collectively, in

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the provision of SRMs and Related Services, including in terms of cost, schedule, design, performance, and the other parameters listed above, and that such differences do not reflect discrimination; and *provided further*, that nothing in this Order shall be interpreted to require Northrop to invest its own funds in support of a Third Party Prime Contractor (other than costs normally incurred by Northrop to prepare a proposal or otherwise respond to a Request for Information, Request for Proposal or similar request), and nothing in this Order shall be interpreted to preclude Northrop from charging a Third Party Prime Contractor a fee on the sale of SRMs and Related Services.

- K. “DoD” means the United States Department of Defense or any component thereof, *provided, however*, that where this Order requires that any information be provided to DoD, such information shall be provided to: (i) the Office of the Under Secretary of Defense for Acquisition and Sustainment, and (ii) the Office of the General Counsel of the Department of Defense.
- L. “Firewalled SRM Customer Team” means a specified group of Northrop Personnel that is dedicated to supporting a Prime Contractor (including Northrop where Northrop is a Prime Contractor) by providing SRMs and Related Services in pursuit of a particular Missile Competition.
- M. “Government Customer” means a United States government agency procuring Missiles or Missile Systems.
- N. “Management Oversight Group” means a specified group of Northrop Personnel selected from the Respondents’ corporate, sector or division (or their equivalents) leadership teams who require access to specified Third Party Non-Public Information in order to make enterprise decisions to fulfill their oversight and fiduciary responsibilities, including to ensure (i) that an Offer is consistent with Northrop’s financial

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guidelines and risk management constructs, accounting requirements, SEC disclosure and reporting obligations, and responsible management of a public company; and (ii) Northrop can effectively execute the Offer as expected, if it is accepted. The Management Oversight Group may also include specified Northrop Personnel who perform appropriate support functions, such as audit and legal functions. Specifically, the Management Oversight Group shall consist of Northrop Personnel in roles of the nature identified in Non-Public Appendix A who perform the oversight and fiduciary functions described above.

- O. “Missile(s)” means any air, sea, and/or land-based missile propelled by one or more SRM(s), including tactical missiles, missile defense interceptors, and strategic missiles; *provided, however*, Missile(s) does not include launch vehicles for satellites and other space systems.
- P. “Missile Competition” means a pending or future competition for one or more Missiles or Missile Systems to be procured by a Government Customer from the initiation of the DoD procurement and acquisition process through the award of the applicable full-rate production contract or, if a determination is made by the Government Customer not to award the applicable contract, through the time such a determination is made, including, but not limited to, any and all activities related to formulating, finalizing, and submitting proposals, whether or not accepted by the Government Customer and/or Prime Contractor, and negotiations with the Government Customer and/or Prime Contractor.
- Q. “Missile Information” means all information (such as, but not limited to, prime contract proposal cost or pricing, proposed designs, business pursuit strategies, and technical data) regarding a specific offer, or possible offer, for a Missile Competition that a Prime Contractor provides to, requests from, or otherwise

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exchanges with a supplier or potential supplier of SRMs to enable the SRM supplier to fully support the efforts of the Prime Contractor in connection with the research, development, manufacture, and delivery of Missiles and/or Missile Systems for the Missile Competition.

- R. “Missile System” means any system or series of systems comprised primarily of a Missile or Missiles, including all corresponding subsystems and ground systems components, software, and technical data procured with the Missile or Missiles.
- S. “Non-Public Information” means all confidential and proprietary non-public information (*i.e.*, information that is not generally known or otherwise publicly available), including, but not limited to, all intellectual property, know-how, designs, drawings, sketches, creative materials, specifications, models, samples, studies, analyses, analytical models, data, databases, records, simulations, tests, test results, assessments, evaluations, reports, documentation, computer programs, practices, processes, plans, estimates, proposals, and other technical, financial, economic, business strategy, or other documents, information, data, computer files (including files stored on a computer’s hard drive or other storage media), electronic files, books, records, papers, instruments, and all other materials and information, whether located, stored, or maintained in paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, and by whatever means, form, or format received or transmitted (*e.g.*, physically, orally, visually, by document, email, computer disks, magnetic tape, photograph, handwritten notes, draft, drawings, or any other type of media).
- T. “Non-Public Missile Information” means all Missile Information owned or licensed by a Third Party Prime Contractor that is furnished or otherwise submitted by

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the Third Party Prime Contractor to Respondents, is Non-Public Information, and has been, and continues to be, maintained in confidence by the Third Party Prime Contractor:

1. *Provided, however*, that (i) all written information must be designated by the Third Party Prime Contractor as proprietary information on the face thereof; and (ii) all oral, visual, or other non-written information must be identified as proprietary information by the Third Party Prime Contractor at the time of disclosure and confirmed in writing within 30 days of its disclosure;
 2. *Provided further* that Non-Public Missile Information shall not include information:
 - a. that becomes known or publicly available through no violation of this Order or any other existing agreement with Northrop intended to protect confidentiality;
 - b. that becomes known from a Third Party not known by Northrop to be in breach of a confidentiality or non-disclosure agreement with respect to such information;
 - c. independently known or developed by the recipient without reference to Non-Public Missile Information; or
 - d. after five years from the end of the period for disclosing information under the relevant Collaborative Agreement;
 3. In the event of a dispute, Missile Information shall be treated presumptively as Non-Public Information pending confirmation of its status.
- U. “Non-Public SRM Information” means all SRM Information owned or licensed by a Third Party SRM

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supplier that is furnished or otherwise submitted by the Third Party SRM supplier to Northrop, is Non-Public Information and has been, and continues to be, maintained in confidence by the Third Party SRM supplier:

1. *Provided, however*, that (i) all written information must be designated by the Third Party SRM supplier as proprietary information on the face thereof; and (ii) all oral, visual, or other non-written information must be identified as proprietary information at the time of disclosure and confirmed in writing within 30 days of its disclosure;
2. *Provided further* that Non-Public SRM Information shall not include information:
 - a. that becomes known or publicly available through no violation of this Order or any other existing agreement with Northrop intended to protect confidentiality;
 - b. that becomes known from a third party not known by Northrop to be in breach of a confidentiality or non-disclosure agreement with respect to such information;
 - c. independently known or developed by the recipient without reference to Non-Public SRM Information; or
 - d. after five years from the end of the period for disclosing information under the relevant Collaborative Agreement;
3. In the event of a dispute, SRM Information shall be treated presumptively as Non-Public Information pending confirmation of its status.

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- V. “Northrop Missile Business” means that portion of Northrop, or the Orbital entities acquired by Northrop, that is engaged in the research, development, manufacture, or sale of Missiles or Missile Systems as a Prime Contractor.
- W. “Northrop Personnel” means any directors, officers, employees, agents, representatives, consultants, or other Persons designated, hired, retained, or otherwise representing Respondents.
- X. “Northrop SRM Business” means the research, development, manufacture, or sale of SRMs as conducted by Orbital immediately prior to the Acquisition and as that Orbital business may subsequently be conducted by Northrop after the Acquisition.
- Y. “Offer” means and includes any proposal by Northrop, on specified terms and conditions, including specified pricing and costs, in response to a Request for Proposal, Request for Information, or other similar written request from a Prime Contractor to provide SRMs and Related Services for a Missile Competition.
- Z. “Person” means any individual, partnership, joint venture, firm, corporation, limited liability company or partnership, association, trust, unincorporated organization, or other business or government entity.
- AA. “Prime Contractor” means any Person engaged in the research, development, manufacture, sale and/or integration of Missiles or Missile Systems that sells or competes to sell Missiles or Missile Systems directly to a Government Customer.
- BB. “Remedial Costs” means those costs, incurred by Respondents, relating directly to the administration of measures to remedy conduct of Respondents in violation of this Order.

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- CC. “SRM” means any solid rocket motor used to propel a Missile.
- DD. “SRM Information” means all information (such as, but not limited to, technical data) that a Prime Contractor requests from, provides to, or otherwise exchanges with a supplier or potential supplier of SRMs to compete in a Missile Competition. SRM Information includes all related technical data and information that the Northrop SRM Business normally provides to a Prime Contractor prior to entering into, or in the course of working pursuant to, an Offer, a Collaborative Agreement, or otherwise supporting the Prime Contractor’s efforts in connection with a Missile Competition. Data and information provided include, but are not limited to, the types of data and information provided by the Northrop SRM Business to the Northrop Missile Business in connection with a Missile Competition.
- EE. “SRMs and Related Services” means one or more SRMs and services related to the research, development, manufacture, delivery, and support of the SRMs reasonably required to support a Prime Contractor’s proposal for a Missile Competition.
- FF. “TAS Group” means Technical and Administrative Support Group and refers to Northrop Personnel who may provide support services to more than one Firewalled SRM Customer Team on a particular Missile Competition. The TAS Group may include personnel providing engineering and technical support or general administrative and/or management support services.
- GG. “Third Party” means any Person other than Respondents.

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II.**IT IS FURTHER ORDERED THAT:**

- A. Respondents shall not Discriminate in any Missile Competition where Northrop: (i) is currently competing to be the Prime Contractor; or (ii) has the capability to compete and has taken the steps identified in Paragraph IV. and continues to take steps to compete as a Prime Contractor. By way of example, Respondents shall:
1. Not Discriminate in developing or providing an Offer requested by or made to a Third Party Prime Contractor, or in supporting the proposal of the Third Party Prime Contractor in connection with the Offer;
 2. Not Discriminate in providing SRM Information;
 3. Not Discriminate regarding staffing, resource allocation, or design decisions in connection with SRM Products and Services to be provided to any Third Party Prime Contractor;
 4. Not Discriminate in making any Offers to, or entering into Collaborative Agreements or other similar arrangements with, any Third Party Prime Contractor, or in the negotiation of such Offers, agreements, or other arrangements with Third Party Prime Contractors;

Provided, however, that no provision of this Order shall require Respondents to provide products, services or technologies, including SRMs and Related Services, to any Third Party without commercially reasonable terms or if it is commercially unreasonable because (i) the Northrop SRM Business does not have the technical capability to supply the Third Party Prime Contractor or (ii) the Northrop SRM

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Business does not have the capacity (and it is not commercially reasonable to expand its capacity) to provide SRMs or a Firewalled SRM Customer Team to one or more Prime Contractors that have requested such services or team because the number or burden of Prime Contractors seeking the benefit of Paragraph II.A. of this Order becomes unreasonably large, so long as Respondents are providing SRMs and Related Services to at least one Third Party Prime Contractor in the applicable Missile Competition;

5. Not Discriminate in making available for use in Missile Competitions any technologies for SRMs and Related Services developed by the Northrop SRM Business under independent research and development funding, government-funded research and development activities or other funds expended by the Northrop SRM Business; *provided, however*, that Respondents shall be under no obligation to disclose or offer the products or other results of any joint investment or development activity engaged in with one Prime Contractor (including Northrop) to any other Prime Contractor in the applicable Missile Competition;
6. Establish and maintain separate Firewalled SRM Customer Teams as required by Paragraph III. of this Order to support each Third Party Prime Contractor; and
7. As to each separate Firewalled SRM Customer Team, take all steps reasonably necessary to ensure that a Prime Contractor's Non-Public Missile Information is kept confidential and protected from unauthorized disclosure and use, including such steps as Respondents would take to protect their own Non-Public Information and as required pursuant to Paragraph III.

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- B. The provision of any protected information, technology, or product to the Respondents by any Third Party, or to any Third Party by the Respondents, pursuant to this Order shall be subject to appropriate customary confidentiality agreements on the treatment of competitively-sensitive, national security-sensitive, ITAR-controlled, and/or proprietary information. Notwithstanding any other provision of this Order, Respondents shall not be required to provide any information to any Persons, including at the DoD or a Third Party Prime Contractor, if they do not have the security clearance required to be eligible to receive such information.
- C. As to each Missile Competition, Respondents' obligations under the provisions of Paragraphs II.A.-B. of this Order shall cease to apply upon the occurrence of any of the following events: (i) the award of the applicable contract or, if a determination is made by the Government Customer not to award the applicable contract, the date such a determination is made; (ii) Respondent Northrop has been eliminated from consideration of being the Prime Contractor; (iii) Respondent Northrop has provided notice that it has withdrawn from consideration of being the Prime Contractor; (iv) Respondent Northrop's SRM Business has been eliminated from consideration of being the SRM supplier to all Third Party Prime Contractors (*provided*, that such obligations shall cease to apply with respect to a particular Third Party Prime Contractor's proposal if and when Northrop's SRM Business has been eliminated from consideration by that Prime Contractor); or (v) Respondent Northrop becomes the sole remaining Prime Contractor being considered in the Missile Competition, whichever occurs first.
- D. The purpose of the provisions of Paragraph II. of this Order is to assure that the Northrop SRM Business continues to provide its services to Third Party Prime Contractors in any Missile Competition after the

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Acquisition on a non-discriminatory basis and in the same manner and of the same performance level and quality as before the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED THAT Respondents shall protect a Third Party Prime Contractor's Non-Public Missile Information and Non-Public SRM Information in any Missile Competition where Northrop (i) is currently competing to be the Prime Contractor or (ii) has the capability to compete and has taken the steps identified in Paragraph IV. and continues to take steps to compete as a Prime Contractor. Specifically, Respondents shall take all actions as are reasonably necessary and appropriate to prevent access to, or the disclosure or use of, any Non-Public Missile Information or Non-Public SRM Information by or to any Person(s) not authorized to access, receive, or use such Non-Public Information pursuant to the terms of this Order, and shall develop and implement procedures and requirements to protect such Non-Public Information and to comply with the prohibitions and requirements of this Order, including, but not limited to, taking the following actions in any such Missile Competition covered by Paragraph II. of this Order to protect such Non-Public Information:

- A. Northrop Firewalled SRM Customer Teams shall maintain firewalls and confidentiality protections, consistent with company practices and industry standards, and in compliance with the following requirements and prohibitions:
 - 1. Northrop Personnel assigned to the Firewalled SRM Customer Teams shall receive training on the restrictions on the disclosure, use, and dissemination of Non-Public Information and, following completion of the relevant Missile Competition, will be reminded of their ongoing

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obligations with respect to such Non-Public Information;

2. Northrop Personnel assigned to the Firewalled SRM Customer Teams shall sign appropriate non-disclosure or equivalent agreements providing written acknowledgement of their responsibilities regarding the restrictions on the use and dissemination of Non-Public Information;
3. Northrop shall keep separate and limit access to Non-Public Missile Information and Non-Public SRM Information of the respective Firewalled SRM Customer Teams, *e.g.*, by separating data in information systems; physically separating, securing, and/or shielding prototypes, models, and hard copies of such Non-Public Information; utilizing identification badge hangers to identify members of Firewalled SRM Customer Teams; and employing other processes designed to confine the flow of such Non-Public Information to personnel who have permission to see it in connection with the Missile Competition;
4. No member of a Firewalled SRM Customer Team supporting a Third Party Prime Contractor in a Missile Competition where Northrop is currently competing to be the Prime Contractor or has the capability to compete and has taken the steps identified in Paragraph IV. and continues to take steps to compete as a Prime Contractor (i) may participate in any way, directly or indirectly, in support of Respondents' efforts to participate as a Prime Contractor in the Missile Competition, including the preparation or review of a proposal or other response to a Request for Information, Request for Proposal or similar inquiry from the Government Customer or (ii) disclose any Non-Public Missile Information to any Northrop Personnel outside the Firewalled SRM Customer

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Team, except as permitted in Paragraph III.A.5. or Paragraph III.D. of this Order;

5. The Management Oversight Group shall not receive or be provided the Non-Public Missile Information of a Third Party Prime Contractor by members of a Firewalled SRM Customer Team, and members of a Firewalled SRM Customer Team shall not directly or indirectly disclose Non-Public Missile Information of a Third Party Prime Contractor to the Management Oversight Group, unless and solely to the extent necessary for the Management Oversight Group to perform the functions described in Paragraph I.N. of this Order and permitted under any applicable confidentiality agreement between Respondents and the Third Party Prime Contractor. In this regard, the Management Oversight Group:
 - a. Shall not be provided Non-Public Missile Information that does not relate directly to the Offer they are evaluating and does not relate directly to the provision of SRMs and Related Services;
 - b. May be informed of (i) the requirements of a Third Party Prime Contractor for SRMs and Related Services, including technical, interface and performance specifications, subcontract deliverables, evaluation criteria, schedule and terms; and (ii) the Firewalled SRM Customer Team's proposed approach to design, development and production, test, supply chain, cost and pricing, risks, schedule, quantity, terms and conditions; in each case, to enable the Management Oversight Group to evaluate and approve an Offer:
 - i. if and solely to the extent necessary for the Management Oversight Group to perform the functions described in Paragraph I.N. of

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this Order and permitted under any applicable confidentiality agreement between Respondents and the Third Party Prime Contractor;

- ii. only after Northrop's chief legal officer, or designee (who shall sign appropriate non-disclosure or equivalent agreements providing written acknowledgement of their responsibilities regarding the restrictions on the use and dissemination of Non-Public Missile Information and Non-Public SRM Information) has reviewed any such Non-Public Information and verified that its disclosure to the Management Oversight Group is in compliance with this Order; and
- iii. where any such communication to the Management Oversight Group containing a Third Party Prime Contractor's Non-Public Missile Information or Non-Public SRM Information shall be made available for review by the Compliance Officer;
- c. Shall under no circumstances have access to Non-Public Missile Information of the Third Party Prime Contractor's overall bid price or bid strategy or to Non-Public Missile Information unrelated to the SRMs and Related Services; and
- d. To the extent a member of a Firewalled SRM Customer Team supporting a Third Party Prime Contractor in a Missile Competition is permitted to disclose and discloses Non-Public Missile Information to the Management Oversight Group, the Management Oversight Group shall not disclose such information to a different Firewalled SRM Customer Team and shall not use the information in any way,

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directly or indirectly, in support of Respondents' efforts to participate as a Prime Contractor in the Missile Competition; and

6. Northrop shall:

- a. Not move members of a Firewalled SRM Customer Team from one Third Party Prime Contractor's team to any other Firewalled SRM Customer Team, for the same Missile Competition, so long as that Third Party Prime Contractor remains in the Missile Competition, without prior written consent of the affected Third Party Prime Contractor(s);
- b. Maintain records of such transfers referenced in Paragraph III.A.6.a. during the term of this Order and make them available for inspection by the Commission and the Compliance Officer; and
- c. Notify the Commission and the Compliance Officer of any such transfers within 15 days of the transfer;

Provided, however, that other than the limitations described in Paragraphs III.A.1-6. of this Order, the Order shall not limit the movement or reassignment of any Northrop Personnel to different roles or teams within the company.

B. The Firewalled SRM Customer Teams shall protect all Non-Public Missile Information and Non-Public SRM Information, such that, absent a Third Party Prime Contractor's prior written consent or otherwise as provided below, the Firewalled SRM Customer Teams shall not:

1. Disclose any of that Third Party Prime Contractor's Non-Public Missile Information or Non-Public SRM Information to Northrop

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Personnel in a Firewalled SRM Customer Team supporting Northrop or another Third Party Prime Contractor, or

2. Use that Third Party Prime Contractor's Non-Public Missile Information or Non-Public SRM Information for any purpose other than developing or providing an Offer requested by or made to that Third Party Prime Contractor, or in supporting the proposal of that Third Party Prime Contractor in connection with the Offer.
- C. The Northrop Missile Business shall take all reasonable steps to protect any Non-Public SRM Information, and shall not provide, disclose, or otherwise make any Non-Public SRM Information available to the Northrop SRM Business. Northrop shall use Non-Public SRM Information only in Northrop's capacity as a Prime Contractor absent the prior written consent of the proprietor of the Non-Public SRM Information.
- D. Notwithstanding the provisions of Paragraphs III.A.-C. of this Order:
1. A Firewalled SRM Customer Team on a particular Missile Competition may disclose the Non-Public Missile Information or Non-Public SRM Information of a Third Party Prime Contractor to specified Northrop Personnel providing (i) support services to Firewalled SRM Customer Teams as members of a TAS Group, or (ii) management functions as part of the Management Oversight Group, in each case, only to the extent those persons have a need to know such Non-Public Information to fulfill their responsibilities and in support of the proposals as described herein;
 2. Members of a TAS Group or Management Oversight Group who receive Non-Public Missile

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Information or Non-Public SRM Information from more than one Prime Contractor shall:

- a. not be members of any Firewalled SRM Customer Team;
 - b. use such Non-Public Information only as needed to perform their functions and not for any purpose other than related to developing or providing an Offer requested by or made to that Third Party Prime Contractor, or in supporting the proposal of that Third Party Prime Contractor in connection with the Offer;
 - c. protect the confidentiality of such Non-Public Information; and
 - d. not share such Non-Public Information of one Third Party Prime Contractor with any other competing Prime Contractor's Firewalled SRM Customer Team;
3. The Northrop Missile Business on a particular Missile Competition may disclose the Non-Public Missile Information or Non-Public SRM Information of a Third Party supplier of SRMs to specified Northrop Personnel providing (i) support services to the Northrop Missile Business as members of a TAS Group, or (ii) management functions as part of the Management Oversight Group, in each case, to the extent those persons have a need to know the Non-Public Information to fulfill their responsibilities and in support of the proposals as described herein;
 4. Members of a TAS Group or Management Oversight Group who receive Non-Public Missile Information or Non-Public SRM Information from any Third Party supplier of SRMs shall:

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- a. not be members of any Firewalled SRM Customer Team;
 - b. use such Non-Public Information only as needed to perform their functions and not for any purpose other than related to Northrop's potential purchase, directly or indirectly, of that Third Party's SRMs and Related Services for a Missile Competition;
 - c. protect the confidentiality of such Non-Public Information; and
 - d. not share such Non-Public Information of any Third Party supplier of SRMs with the Northrop SRM Business;
5. Members of a TAS Group or Management Oversight Group who receive Non-Public Missile Information or Non-Public SRM Information from a Third Party Prime Contractor or a Third Party supplier of SRMs shall receive training and shall sign appropriate non-disclosure or equivalent agreements providing written acknowledgment of their responsibilities regarding the restrictions on the use and dissemination of such Third Party Non-Public Information, pursuant to the Compliance Program developed and provided to the Commission and the Compliance Officer.
- E. No later than 15 days after the Acquisition Date, Northrop shall submit a detailed plan for complying with the provisions of Paragraph III. of this Order with respect to all current Missile Competition(s) to the Commission and the Compliance Officer.
- F. The purpose of the provisions of Paragraph III. of this Order is to assure that the Northrop SRM Business maintains the confidentiality of all Non-Public Missile Information and the Northrop Missile Business maintains the confidentiality of all Non-Public SRM

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Information in a Missile Competition where Northrop is competing as a Prime Contractor, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED THAT within 10 days of the earliest date on which Northrop takes steps to compete or potentially compete as a Prime Contractor for a specific Missile Competition, including, but not limited to, setting up a capture or similar team to pursue the Missile Competition, committing funds to compete, responding to a Government Customer's Request for Information, Request for Proposal, or similar request for the Missile Competition, or other action by Northrop corporate management evidencing a decision to compete, Northrop shall notify the Commission and the Compliance Officer of this decision. The notice shall include the identity of the specific Missile Competition and a list of the members of the Management Oversight Group related to such Missile Competition.

V.**IT IS FURTHER ORDERED THAT:**

- A. The Under Secretary of Defense for Acquisition and Sustainment shall appoint a Compliance Officer, who shall be an employee of the United States government not otherwise involved in Missile Competitions or in setting the requirements for or the procurement of SRMs, Missiles or Missile Systems. The Compliance Officer shall have the power and authority to oversee compliance by the Respondents with the terms of this Order.
- B. To the extent reasonably necessary to perform his or her duties and responsibilities pursuant to this Order, and subject to any legally recognized privilege or other forms of protection of information, the Compliance

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Officer shall be authorized to and may, in the presence of counsel for Northrop:

1. during normal business hours, interview any of Respondents' personnel, upon three days' notice to that Respondent and without restraint or interference by Respondents, relating to any matters contained in this Order;
 2. during normal business hours, inspect and copy any document in the possession, custody, or control of Respondents relating to any matters contained in this Order;
 3. during normal business hours, obtain access to and inspect any systems or equipment, relating to any matters contained in this Order, to which Respondents' personnel have access;
 4. during normal business hours, obtain access to and inspect any physical facility, building, or other premises, relating to any matters contained in this Order, to which Respondents' personnel have access; and
 5. require Respondents to provide access to documents, data, and other information, relating to any matters contained in this Order, to the Compliance Officer in such form as the Compliance Officer may reasonably direct and within such time periods as the Compliance Officer may reasonably require.
- C. Respondents shall timely comply with the Compliance Officer's reasonable requests relating to Respondents' compliance with their obligations pursuant to this Order, and the Compliance Officer shall not unreasonably withhold approval of any request for additional time.

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- D. The Compliance Officer may:
1. investigate any complaint or representation made to the Compliance Officer, or made available to him or her with respect to any matter arising in relation to or connected with compliance by Respondents with this Order;
 2. solicit and accept comments from Third Parties regarding Respondents' compliance with this Order as the Compliance Officer deems necessary and appropriate;
 3. use other DoD employees as appropriate;
 4. retain, at the reasonable cost and expense of Northrop, such consultants, accountants, and other advisors (collectively, "Third Party Advisors") as are reasonably necessary to carry out the duties and responsibilities under this Paragraph V. of the Order, who shall be solely accountable to the Compliance Officer, and shall have the same access as the Compliance Officer pursuant to Paragraph V.B. of this Order; *provided, however*, that such Third Party Advisors shall maintain the confidentiality of all Non-Public Information and documents of (i) Respondents, subject to terms agreed with Northrop, or (ii) any other Person; and
 5. require Northrop, at its reasonable cost and expense and upon reasonable terms and conditions, to contract with such Third Party Advisors identified by the Compliance Officer for the provisions of such services of the Third Party Advisors to the Compliance Officer pursuant to this Order. In such contract, the DoD shall be named as a third party beneficiary under the terms of the contract, with the right of the Compliance Officer to direct the Third Party Advisors in performing the Compliance Officer's duties under this Paragraph V. of the Order; and the Third Party

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Advisors shall have the same access as the Compliance Officer pursuant to Paragraph V.B. of this Order; *provided, however*, Northrop may require the Third Party Advisors to sign a customary confidentiality agreement; *provided further, however*, that such agreement shall not restrict the Third Party Advisors from providing any information provided by Northrop under the contract to the Compliance Officer or the Commission.

The Compliance Officer (and any persons working with the Compliance Officer) shall not use or disclose any information obtained in the course of performing his or her duties under this Order other than for the purpose of overseeing compliance with this Order. The Compliance Officer (and any persons working with the Compliance Officer) shall fully protect any proprietary, source-selection sensitive or other Non-Public Information.

- E. The Compliance Officer shall consult with the Office of the General Counsel of the DoD to ensure that in performing the duties set forth in this Paragraph, the Compliance Officer does not interfere with the integrity of any DoD procurement.
- F. Respondents shall use their reasonable best efforts to assist the Compliance Officer in satisfaction of his or her responsibilities pursuant to this Order.
- G. Subject to Paragraphs V.B. and V.C. of this Order, Respondents shall cooperate with the Compliance Officer and shall take no action to interfere with or to impede the performance of the Compliance Officer in satisfaction of his or her responsibilities.
- H. Nothing in this Order shall alter or limit the rights or responsibilities of the parties under any contracts between DoD and one or more of the Respondents.

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VI.**IT IS FURTHER ORDERED THAT:**

- A. Respondents shall develop and implement written procedures and protocols and maintain a system of access and data controls, with the advice and assistance of the Compliance Officer, to comply with the requirements of this Order, which shall include, but not be limited to, procedures for:
 - 1. Monitoring compliance;
 - 2. Requiring and enforcing compliance with appropriate remedial action in the event of non-compliance;
 - 3. Notifying the Compliance Officer and any Third Party Advisor of any non-compliance of the requirements of Paragraph III. of the Order.
- B. Respondents shall design, maintain, and operate a Compliance Program to assure compliance with the requirements and prohibitions of this Order, which shall include, but not be limited to:
 - 1. Designating an officer or other individual to supervise personally the design, maintenance, and operation of the Compliance Program, and to be available on an ongoing basis to respond to any questions by employees of Respondents;
 - 2. Distributing a copy of the Order to all members of (i) a Firewalled SRM Customer Team; (ii) the TAS Group; (iii) the Management Oversight Group; or (iv) the Northrop Personnel who are developing a proposal or otherwise preparing for Northrop to compete as Prime Contractor in a Missile Competition:

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- a. Within thirty (30) days of the date this Order becomes final; and
 - b. Annually within thirty (30) days of the anniversary of the date this Order becomes final until the Order terminates;
 3. Training on the requirements of this Order for all members of (i) a Firewalled SRM Customer Team; (ii) the TAS Group; (iii) the Management Oversight Group; or (iv) the Northrop Personnel who are developing a proposal or otherwise preparing for Northrop to compete as a Prime Contractor in a Missile Competition;
 4. The retention of documents and records sufficient to record Respondents' compliance with its obligations under this Paragraph VI. of this Order.
- C. Respondents shall bear all of their costs of monitoring, complying with, and enforcing this Order, excluding the salaries and benefits of United States government employees.
- D. Respondents shall not charge to the DoD, either directly or indirectly, any of Respondents' costs, referred to in Paragraph VI.C. of this Order, including any Remedial Costs; *provided, however*, that costs referred to in Paragraph VI.C. of this Order, incurred by Respondents, other than Remedial Costs, associated with normal business activities that could reasonably have been undertaken by Respondents in the absence of this Order are not subject to the restrictions of Paragraphs VI.C. and VI.D. of this Order, whether or not such activities are affected by this Order.

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VII.**IT IS FURTHER ORDERED THAT:**

- A. Respondent Northrop shall notify the Commission and its staff, the DoD, and the Compliance Officer of the Acquisition Date no later than five days after the Acquisition Date. Respondent Northrop shall notify the Commission via email to the Secretary of the Commission with electronic copies to the Secretary at ElectronicFilings@ftc.gov, and shall provide notice to staff of the Compliance Division via email to bccompliance@ftc.gov.
- B. Respondents shall submit verified written reports (“compliance reports”) in accordance with the following:
 - 1. Respondents shall submit:
 - a. interim compliance reports 30 days after the Order is issued, and every 90 days thereafter until, for each Missile Competition existing at the time the Order is issued, (i) the award of the applicable contract or, if a determination is made by the Government Customer not to award the applicable contract, the date such a determination is made; (ii) Respondent Northrop has been eliminated from consideration of being the Prime Contractor; (iii) Respondent Northrop has provided notice that it has withdrawn from consideration of being the Prime Contractor; (iv) Respondent Northrop’s SRM Business has been eliminated from consideration of being the SRM supplier to all Third Party Prime Contractors; or (v) Respondent Northrop is the sole remaining Prime Contractor, whichever occurs first;
 - b. interim compliance reports 30 days after the event which gives rise to an obligation to notify

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pursuant to Paragraph IV. of this Order, and every 90 days thereafter until (i) the award of the applicable contract or, if a determination is made by the Government Customer not to award the applicable contract, the date such a determination is made; (ii) Respondent Northrop has been eliminated from consideration of being the Prime Contractor; (iii) Respondent Northrop has provided notice that it has withdrawn from consideration of being the Prime Contractor; (iv) Respondent Northrop's SRM Business has been eliminated from consideration of being the SRM supplier to all Third Party Prime Contractors; or (v) Respondent Northrop is the sole remaining Prime Contractor, whichever occurs first, *provided, however*, that if Respondents are filing reports under Paragraph VII.B.1.a. of this Order, then the reports under this provision may be included in such reports;

- c. annual compliance reports one year after the date this Order is issued, and annually for the term of the Order on the anniversary of that date; and
 - d. additional compliance reports as the Commission or its staff may request;
2. Each compliance report shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with this Order, including, as applicable:
- a. the name and status of all Missile Competitions where Northrop is a competitor (or, for potential future Missile Competitions, when Northrop has the capability to compete and has taken steps in anticipation of potentially competing pursuant to Paragraph IV.) to be the Prime Contractor;

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- b. the identity of all Third Party Prime Contractors seeking SRMs from Northrop for any such Missile Competition and the status of such request for each Third Party Prime Contractor; and
 - c. such other information as the Compliance Officer may request.
- C. Respondents shall verify each compliance report with a notarized signature or sworn statement of the Chief Executive Officer or other officer or employee specifically authorized to perform this function, or self-verified in the manner set forth in 28 U.S.C. § 1746. Respondents shall submit an original and 2 copies of each compliance report to the Commission as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each compliance report to the DoD and the Compliance Officer.
- D. The Compliance Officer and DoD shall keep all reports and other information received in connection with this Order confidential.

VIII.

IT IS FURTHER ORDERED THAT Respondents shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Northrop Grumman Corporation or Orbital ATK, Inc.;
- B. Any proposed acquisition, merger, or consolidation of Northrop Grumman Corporation or Orbital ATK, Inc. (other than the Acquisition); or

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- C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

IX.

IT IS FURTHER ORDERED THAT, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege or other form of protection of information, upon written request and at least five days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED THAT this Order shall terminate on June 5, 2038.

By the Commission.

Concurring Statement

**NON-PUBLIC APPENDIX A – MANAGEMENT
OVERSIGHT GROUP****[Redacted From the Public Record Version, But Incorporated
By Reference]****Statement of Bureau of Competition Deputy Director
Ian Conner**

Today, the Commission voted to accept a consent agreement imposing remedies in the matter of Northrop Grumman Corporation's (Northrop) acquisition of Orbital ATK, Inc. (Orbital ATK). Without this remedy, the merger would have given Northrop the incentive and ability to discriminate against competitors for United States Department of Defense (DOD) missile systems and potentially dampened Northrop's incentive to provide DOD with the most sophisticated systems at a competitive price. At the same time, DOD expects substantial benefits from the merger, including increased competition for future programs and lower costs. To understand such potential competitive effects and any potential benefits, Commission staff worked closely with the DOD in this matter.¹ Such cooperation between the DOD and the Commission and the Antitrust Division of the Department of Justice (the antitrust agencies) is the hallmark of the agencies' defense industry reviews.²

¹ See, e.g., Statement of Commissioner Kovacic, In the Matter of Lockheed Martin Corporation, The Boeing Company, and United Launch Alliance, L.L.C., FTC File No. 051 0165, Docket No. C-4188 (May 8, 2007) (citing William E. Kovacic, *Toward the Development of a Unified Trans-Atlantic Defense Procurement Market*, 2006 Fordham Comp. L. Inst. 179, 191–92 (B. Hawk ed. 2007)), available at <https://www.ftc.gov/sites/default/files/documents/cases/2007/05/0510165kovacicmajorasrosch.pdf> (hereinafter "Kovacic Statement").

² See Joint Statement of U.S. Dep't of Justice & Federal Trade Comm'n on Preserving Competition in the Defense Industry (April 12, 2016), available at https://www.ftc.gov/system/files/documents/public_statements/944493/160412

Concurring Statement

The remedy approved by the Commission is a carefully tailored behavioral remedy that seeks to preserve the benefits of the transaction for DOD, while counteracting the incentive of Northrop/Orbital to engage in a vertical foreclosure strategy that would undermine its competitors and harm competition for present and future missile system programs. Significantly, DOD will appoint a Compliance Officer to ensure that the parties implement the required programs to prevent potential harms.

The Bureau of Competition typically disfavors behavioral remedies and will accept them only in rare cases based on special characteristics of an industry or particular transaction.³ This settlement does not depart from that policy. The special characteristics of the defense industry play an important role in considering appropriate remedies in many transactions. For instance, the defense industry is characterized by a single buyer—DOD—whose procurement processes are often distinct from other industries. That is the case here. In addition, the DOD depends on sophisticated products, such as the solid rocket motors at issue in this case, that are part of complex systems subject to winner-take-all competition for programs that can last decades.

Transactions in the defense industry can also implicate national security concerns. As Commission Chairman Robert Pitofsky testified nearly twenty years ago, “The Commission is sensitive to considerations of national security and in particular that a merger will enable the Defense Department to achieve its national security objectives in a more effective manner. The

[doj-ftp-defense-statement.pdf](#) (“The Agencies rely on DoD’s expertise, often as the only purchaser, to evaluate the potential competitive impact of mergers, teaming agreements, and other joint business arrangements between firms in the defense industry.”).

³ See D. Bruce Hoffman, “Vertical Merger Enforcement at the FTC,” Credit Suisse 2018 Washington Perspectives Conference (January 10, 2018), available at https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf (“First and foremost, it’s important to remember that the FTC prefers structural remedies to structural problems, even with vertical mergers.”); see also FTC Press Release, “FTC Seeks to Block Cytac Corp.’s Acquisition of Digene Corp.” (June 24, 2002), available at <https://www.ftc.gov/news-events/press-releases/2002/06/ftc-seeks-block-cytac-corps-acquisition-digene-corp>.

Concurring Statement

Commission strongly believes, however, that competition produces the best goods at the lowest prices and is also most conducive to innovation.”⁴

For these reasons, there is ample precedent for accepting appropriate behavioral remedies in the defense industry when they suffice to eliminate potential anticompetitive effects.⁵ The Commission’s order adapts the language and approach successfully used in the Commission’s most recent vertical defense merger consent⁶ and is consistent with prior consent decrees imposed by both of the antitrust agencies in defense mergers.⁷

As in other industries, the lengths of consent decrees vary to account for the characteristics of the market in which the consent is occurring and the characteristics of the consent decree itself.⁸ The Commission’s order will remain in place for a twenty-year term, an appropriate duration to protect competition in light of the long duration of the particular defense programs and the bidding processes at issue, the potential effects for future unidentified missile programs, and the high barriers to entry in this industry.

⁴ Mergers and Acquisitions in the Defense Industry: Hearing before the Subcommittee on Acquisition and Technology of the United States Senate Armed Services Committee (April 15, 1997) (statement of Robert Pitofsky, former Chairman, Federal Trade Comm’n), available at <https://www.ftc.gov/es/public-statements/1997/04/mergers-and-acquisitions-defense-industry>.

⁵ See *id.*; *In re Lockheed Martin Corp.*, Dkt. C-4188 (complaint filed Oct. 6, 2006); *United States v. Northrop Grumman*, No. 1:02CV02432 (D.D.C. Dec. 23, 2002).

⁶ *In re Lockheed Martin Corp.*, Dkt. C-4188 (complaint filed Oct. 6, 2006).

⁷ *In re Lockheed Martin Corp.*, Dkt. C-4188 (complaint filed Oct. 6, 2006); see also *United States v. Northrop Grumman*, No. 1:02CV02432 (D.D.C. Dec. 23, 2002); Kovacic Statement.

⁸ See, e.g., *In re Enbridge, Inc.*, Dkt. C-4604 (complaint filed Mar. 24, 2017); *In re PepsiCo, Inc.*, Dkt. C-4301 (complaint filed Feb. 26, 2010); *In re The Coca-Cola Co.*, Dkt. C-4305 (complaint filed Sept. 27, 2010); *In re Boeing/Rockwell*, Dkt. C-3723 (complaint filed Mar. 7, 1997).

Concurring Statement

As the Commission recognized two years ago: “Our mission, when reviewing defense industry mergers is to ensure that our military continues to receive the effective and innovative products at competitive prices over both the short- and long-term, thereby protecting both our troops and our nation’s taxpayers.”⁹ The remedy in this case does that by protecting competition and preserving procompetitive benefits for our nation’s critical missile systems for at least the next twenty years. Finally, the Commission retains jurisdiction in the event of a violation of its order and may modify the order to address such violations.

⁹ Joint Statement of the U.S. Dep’t of Justice & Federal Trade Comm’n on Preserving Competition in the Defense Industry (April 12, 2016), available at https://www.ftc.gov/system/files/documents/public_statements/944493/160412_doj-ftc-defense-statement.pdf.

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted an Agreement Containing Consent Order (“Consent Agreement”) designed to remedy the anticompetitive effects resulting from Northrop Grumman Corporation’s (“Northrop”) proposed acquisition of Orbital ATK, Inc. (“Orbital ATK”). Under the terms of the Consent Agreement, Northrop would be required to (1) continue to act as a non-discriminatory merchant supplier of Orbital ATK’s solid rocket motors (“SRMs”) rather than favor its now-vertically integrated missile system business, and (2) protect SRM and missile system competitors’ competitively sensitive information from improper use or disclosure.

The Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Given that the acquisition could impact a current ongoing missile system competition, the Commission issued the accompanying Decision and Order (“Order”) as final prior to seeking public comment, as provided in Section 2.34(c) of the Commission’s Rules. This will allow the Commission to enforce the Order if there are any violations of its provisions during the public comment period. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement or modify the accompanying Order.

Pursuant to an Agreement and Plan of Merger dated September 17, 2017, Northrop agreed to acquire 100 percent of the issued and outstanding voting securities of Orbital ATK for approximately \$7.8 billion (the “Acquisition”). The Commission’s Complaint alleges that the Acquisition is in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by

Analysis to Aid Public Comment

lessening the competition in the United States market for missile systems. The Acquisition would provide Northrop with the ability and incentive to withhold its SRMs from competing missile system prime contractors, or only offer its SRMs at disadvantageous terms, thereby raising rivals' costs or otherwise undermining their ability to compete on future missile system bids. The Consent Agreement will remedy the alleged violations by prohibiting Northrop from discriminating against competing missile prime customers in supplying SRMs.

II. The Parties

Northrop is a Delaware corporation with its principal place of business in Falls Church, Virginia. Northrop is a global aerospace and defense company that acts as a prime contractor or preferred supplier on many high-priority programs for the United States Department of Defense ("DOD") and other United States Government agencies. Northrop is one of only a few companies capable of acting as a prime contractor for tactical, missile defense, and strategic missile systems for DOD [the United States Government]. From 1997 to 2013, Northrop was the prime contractor responsible for maintaining, sustaining, and modernizing the Minuteman III strategic missile system. Northrop is currently competing to develop the nation's next intercontinental ballistic missile system, the Ground Based Strategic Deterrent. Northrop has also successfully competed for United States Government research and development contracts for tactical missiles and missile defense interceptors.

Orbital ATK is a Delaware corporation with its principal place of business in Dulles, Virginia. The company is a prime contractor and merchant supplier of space, defense, and aviation-related systems to customers around the world. Orbital ATK is the nation's leading producer of SRMs for both defense and commercial applications. For defense programs, Orbital ATK produces strategic-grade SRMs for the Trident II D-5 and Minuteman III and the Missile Defense Agency's Ground-based Midcourse Defense interceptor. In addition, Orbital ATK is a leading producer of SRMs for air-, sea- and land-based tactical missiles and missile defense interceptors. Orbital ATK supplies these SRMs to prime contractors for use in their missile systems.

Analysis to Aid Public Comment

III. The Products and Structure of the Markets

Northrop is one of only four companies capable of supplying missile systems to the United States Government. Missile systems provide essential national defense capabilities for the United States Government. The United States Armed Forces employ multiple types of missile systems, including short-range tactical missiles, longer-range strategic missiles, and missile defense interceptors designed to defeat ballistic missile threats. Each type of missile system purchased by DOD has unique capabilities and is designed specifically to perform its given mission(s).

Orbital ATK is one of only two viable suppliers of SRMs for U.S. Government missile systems and the dominant supplier of large SRMs used for long-range strategic missiles. SRMs are used to propel tactical, missile defense, and strategic missiles to their intended targets. SRMs are used for virtually all missile systems purchased by the United States Government because they offer numerous advantages over all other existing propulsion technologies.

The relevant geographic market in which to analyze the effects of the proposed transaction is the United States. The missile systems that are the subject of the Complaint are solely purchased by the United States Government, which also typically funds their development. National security considerations and other factors limit DOD's ability to procure its missile systems from foreign suppliers. Federal law, national security, and other considerations similarly drive missile system prime contractors to procure SRMs from domestic suppliers.

IV. Entry

Entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. There are significant barriers to entry into the development, manufacture, and sale of both SRMs and missile systems in the United States. The relevant products are high technology, defense-specific products that require specialized expertise and facilities to develop, test, and manufacture. It would be extremely

Analysis to Aid Public Comment

difficult and costly for a new entrant to establish the technological expertise and specialized facilities necessary to compete successfully in either of these markets.

V. Effects of the Acquisition

Following the Acquisition, Northrop, will be one of only two viable suppliers of SRMs for U.S. Government missile systems. The choice of SRM can have a significant impact on the final determination of a missile system prime competition because the propulsion system is a critical element of the overall missile design. SRMs comprise a large portion of the cost of the integrated missile and their performance affects the range, accuracy, and payload capacity of the missile. Absent the protections of the Consent Agreement, Northrop would have the ability to disadvantage competitors for future missile prime contracts by denying or limiting their access to Northrop's SRM products and technologies, which would lessen the ability of Northrop's missile system competitors to compete successfully for a given missile system prime contract. The Acquisition would also give Northrop access, through the former Orbital ATK SRM business, to the proprietary information that rival missile prime contractors must share with its SRM vendor. Similarly, the Acquisition creates a risk that the proprietary, competitively sensitive information of a rival SRM supplier supporting Northrop's missile system business could be transferred to Northrop's vertically integrated SRM business.

VI. The Consent Agreement

The Consent Agreement remedies the acquisition's likely anticompetitive effects by requiring, whenever Northrop competes for a missile system prime contract, that Northrop must make its SRM products and related services available on a non-discriminatory basis to all other third-party competing prime contractors that wish to purchase them. The non-discrimination prohibitions of the Consent Agreement are comprehensive and apply to any potential discriminatory conduct affecting price, schedule, quality, data, personnel, investment, technology, innovation, design, or risk.

Analysis to Aid Public Comment

The Consent Agreement requires Northrop to establish firewalls to ensure that Northrop does not transfer or use any proprietary information that it receives from competing missile prime contractors or SRM suppliers in a manner that harms competition. These firewall provisions require that Northrop maintain separate firewalled teams to support offers of SRMs to different third-party missile prime contractors and to maintain these firewalled teams separate from the team supporting Northrop's missile prime contractor activities. The firewall provisions also prohibit Northrop's missile business from sharing proprietary information it may receive from third-party SRM suppliers with Northrop's SRM business.

The Consent Agreement also provides that the DOD's Under Secretary of Defense for Acquisition and Sustainment shall appoint a compliance officer to oversee Northrop's compliance with the Order. The compliance officer will have all the necessary investigative powers to perform his or her duties, including the right to interview respondent's personnel, inspect respondent's facilities, and require respondents to provide documents, data, and other information. The compliance officer has the authority to retain third-party advisors, at the expense of Northrop, as appropriate to perform his or her duties. Access to these extensive resources will ensure that the compliance officer is fully capable of overseeing the implementation of, and compliance with, the Order.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

**AMNEAL HOLDINGS, LLC,
AMNEAL PHARMACEUTICALS LLC,
IMPAX LABORATORIES, INC.,
AND
IMPAX LABORATORIES, LLC**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

*Docket No. C-4650; File No. 181 0017
Complaint, April 27, 2018 – Decision, June 29, 2018*

This consent order addresses the \$1.45 billion acquisition by Amneal Holdings, LLC and Amneal Pharmaceuticals LLC of certain assets of Impax Laboratories, Inc. and Impax Laboratories, LLC. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening current competition in the markets for: (1) generic desipramine hydrochloride tablets; (2) generic ezetimibe and simvastatin IR tablets; and (3) generic felbamate tablets in the United States. The complaint also alleges that the acquisition would violate the aforementioned statutes by lessening future competition in the markets for: (1) generic aspirin and dipyridamole ER capsules; (2) generic azelastine nasal spray; (3) generic diclofenac sodium and misoprostol DR tablets; (4) generic erythromycin tablets; (5) generic fluocinonide-E cream; (6) generic methylphenidate hydrochloride ER tablets; and (7) generic olopatadine hydrochloride nasal spray in the United States. The consent order requires the parties to divest all of Impax's rights and assets related to 1) generic desipramine hydrochloride tablets; 2) generic felbamate tablets; 3) generic aspirin and dipyridamole extended release ("ER") capsules; 4) generic diclofenac sodium and misoprostol delayed release ("DR") tablets; 5) generic ezetimibe and simvastatin immediate release ("IR") tablets; 6) generic erythromycin tablets; and 7) generic methylphenidate hydrochloride ER tablets to ANI Pharmaceuticals, Inc. Under the consent order, the parties also are required to divest all of Impax's rights and assets related to generic azelastine nasal spray and generic olopatadine hydrochloride nasal spray to Perrigo Company plc, and to divest all of Impax's rights and assets related to generic fluocinonide-E cream to G&W Laboratories.

Participants

For the Commission: *Kenneth A. Libby, Vanessa Schlueter,
David von Nirschl and Kari A. Wallace.*