

Complaint

IN THE MATTER OF

**UPROMISE, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4351; File No. 102 3116*  
*Complaint, March 27, 2012 – Decision, March 27, 2012*

This consent order addresses Upromise, Inc.'s advertising, marketing, and operation of an optional feature of that Toolbar, the "personalized offers" feature. The complaint alleges that the Targeting Tool collected the names of all websites visited; all links clicked; information that consumers entered into some web pages such as usernames, passwords, and search terms; and, from July 2009 through mid-January 2010, consumers' interactions with forms on secure web pages. The complaint further alleges that Upromise engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for the personal information it collected and maintained. The consent order requires Upromise to disclose to consumers – before the download or installation of software that records or transmits information about any activity occurring on a computer involving the computer's interactions with websites, services, applications, or forms – the types of information collected and how the information will be used.

*Participants*

For the *Commission*: Katrina Blodgett and Ruth Yodaiken.

For the *Respondent*: J. Beckwith ("Becky") Burr, Wilmer Cutler Pickering Hale and Dorr LLP.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Upromise, Inc. ("Upromise" or "respondent"), a corporation, has violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Upromise is a Delaware corporation with its principal office at 95 Wells Avenue, Suite 160, Newton, Massachusetts 02459.

## Complaint

2. The acts and practices of respondent, as alleged herein, have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act.

**RESPONDENT’S BUSINESS PRACTICES AND  
REPRESENTATIONS TO CONSUMERS**

3. Upromise offers a membership service to consumers. A consumer who is a member of Upromise and purchases products and services from Upromise partner merchants can receive cash rebates. Upromise places these cash rebates into a college savings account for the consumer.

4. Since 2005, Upromise disseminated or caused to be disseminated through its website, [www.upromise.com](http://www.upromise.com), a software toolbar referred to as the Upromise TurboSaver Toolbar (the “Toolbar”) for consumers to download and install onto their computers. Among other things, the Toolbar highlighted Upromise partner companies in consumers’ search results, so that consumers could more easily determine which companies were Upromise partners. (*See* Exhibit 1).

5. The Toolbar incorporated a “personalized offers” feature that, when enabled, would collect and transmit information through the consumer’s browser. The personalized offers feature used consumer browsing information to provide targeted advertising to consumers through the browser. Upromise engaged a service provider to develop the Toolbar and the personalized offers feature.

6. During the download process for the Toolbar, where the personalized offers feature was offered users were presented with one of several versions of a pop-up window that contained a check-box next to text stating “Enable Personalized Offers,” (*See, e.g.,* Exhibits 2- 4). Until mid-January 2010, Upromise provided the following description of the personalized offers feature, either directly in the pop-up window or if the consumer clicked on a hyperlink labeled “Show”:

By enabling the Personalized Offers feature, information about the web sites you visit will be

## Complaint

collected. This information is used to provide college savings opportunities tailored to you.

*See, e.g.,* Exhibit 2, Exhibit 3 (operational from approximately July 2009 to January 2010), and Exhibit 4 (operational from approximately October 2008 to May 2009).

In some instances, the check-box to “Enable Personalized Offers” was pre-checked to enable the personalized offers feature by default. (*See, e.g.,* Exhibit 2, operational from approximately July 2009 to January 2010).

7. When the personalized offers feature was enabled, the feature modified the Toolbar to collect extensive information about consumers’ online activities and transmit it to the service provider for analysis. (Hereafter this modified version of the Toolbar with the personalized offers feature enabled is referred to as the “Targeting Tool.”) The Targeting Tool collected the names of all websites visited, all links clicked, and information that consumers entered into some web pages such as usernames, passwords, and search terms. The Targeting Tool’s data collection occurred in the background as a consumer used the Internet, and there was no way for consumers – without special software and technical expertise – to discover the extent of the data collection. Moreover, from July 2009 to mid-January 2010, the Targeting Tool was reconfigured to include consumers’ interactions with forms on secure web pages, which companies such as banks and online retailers provide to safeguard consumer data. The Targeting Tool was enabled on at least 150,000 consumers’ computers.

8. The Upromise TurboSaver™ Privacy Statement, which was available on the Upromise website and at times through a link during the download process, stated that the Toolbar might “infrequently” collect some personal information. It further stated that a filter, termed a “proprietary rules engine,” would “remove any personally identifiable information” prior to transmission. (*See, e.g.,* Exhibit 5, operational from approximately October 2008 to September 2009). The TurboSaver™ Privacy Statement also stated that “every commercially viable effort” would be made

## Complaint

“to purge their databases of any personally identifiable information.”

9. In fact, although a filter was used to instruct the Targeting Tool to avoid certain data, the filter was too narrow and improperly structured. For example, although the filter was intended to prevent the collection of financial account personal identification numbers and would have prevented collection of that data if a website used the field name “PIN,” the filter would not have prevented such collection if a website used field names such as “personal ID” or “security code.”

10. The Targeting Tool transmitted the information it gathered – including in some cases credit card and financial account numbers, security codes and expiration dates, and Social Security numbers entered into web pages, including secure web pages – over the Internet in clear text. Tools for capturing data in transit, for example over unsecured wireless networks such as those often provided in coffee shops and other public spaces, are commonly available, making such clear-text data vulnerable to interception. The misuse of such information – particularly financial account information and Social Security numbers – can facilitate identity theft and related consumer harms.

11. On approximately January 21, 2010, Upromise halted all data collection through the Targeting Tool after a security researcher disclosed the scope of the information collected and the fact that it was transmitted in clear text.

12. In addition to the representations made in the download process and in the Upromise TurboSaver™ Privacy Statement, respondent has disseminated or caused to be disseminated the Upromise Privacy Statement, which was available on the Upromise website and through a link in the TurboSaver™ Privacy Statement. The Upromise Privacy Statement stated:

Upromise is committed to earning and keeping your trust. We understand the need for our customers’ personal information to remain secure and private and we have implemented policies and procedures designed to safeguard your information.

## Complaint

Exhibit 6 (operational from approximately June 2008 to January 2010).

13. Similarly, the Upromise Security Statement, also available on the Upromise website, stated:

Our members' security and privacy are critically important issues for Upromise. We are proud of the innovations we have made to protect your data and personal identity throughout the Upromise service. Upromise protects your data by... SSL, Data, and Password encryption technology....

Using the Secure Sockets Layer protocol (SSL), Upromise automatically encrypts your sensitive information in transit from your computer to ours.

\* \* \*

Upromise security architecture and security procedures are audited and inspected by industry leaders specializing in security processes and technologies.

Exhibit 7 (operational from approximately January 2008 to January 2010).

14. Respondent engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for consumer information collected and transmitted by the Targeting Tool. Among other things, respondent:

- a. created unnecessary risks of unauthorized access to consumer information by the Targeting Tool transmitting sensitive information from secure web pages, such as financial account numbers and security codes, in clear readable text over the Internet;
- b. failed to use readily available, low-cost measures to assess and address the risk that the Targeting Tool would collect such sensitive consumer information it was not authorized to collect. For example,

### Complaint

respondent did not test the Targeting Tool before distributing it to consumers or monitor the Targeting Tool's operation thereafter to verify that the information it collected was consistent with respondent's policies;

- c. failed to ensure that employees responsible for the information collection program received adequate guidance and training about security risks and respondent's privacy and security policies; and
- d. failed to take adequate measures to ensure that its service provider employed reasonable and appropriate measures to protect consumer information and to implement the information collection program in a manner consistent with the respondent's privacy and security policies and contractual provisions designed to protect consumer information.

## **VIOLATIONS OF THE FTC ACT**

### **Count 1**

15. Through the means described in Paragraph 6, respondent has represented, expressly or by implication, that the Targeting Tool would collect and transmit information about the websites consumers visit. Respondent failed to disclose that the Targeting Tool would also collect and transmit much more extensive information about the Internet behavior that occurs on consumers' computers, and, for the period between July 2009 and January 2010, information consumers provided in secure sessions when interacting with third-party websites, shopping carts, and online accounts – such as credit card and financial account numbers, security codes and expiration dates, and Social Security numbers consumers entered into such web pages. These facts would be material to consumers. Respondent's failure to disclose these facts, in light of the representations made, was, and is, a deceptive practice.

## Complaint

**Count 2**

16. Through the means described in Paragraph 13, respondent has represented, expressly or by implication, that information transmitted by the Toolbar would be encrypted in transit.

17. In truth and in fact, as described in Paragraph 10, information transmitted by the Toolbar was not encrypted in transit. Therefore, the representation set forth in paragraph 13 was, and is, false or misleading and constitutes a deceptive act or practice.

**Count 3**

18. Through the means described in Paragraphs 12 and 13, respondent has represented, expressly or by implication, that it employs reasonable and appropriate measures to protect data obtained from consumers from unauthorized access.

19. In truth and in fact, as described in Paragraph 14, respondent did not implement reasonable and appropriate measures to protect data obtained from consumers from unauthorized access. Therefore, the representations set forth in Paragraphs 12 and 13 were, and are, false or misleading and constitutes a deceptive act or practice.

**Count 4**

20. As described in Paragraphs 9, 10, and 14, respondent's failure to employ reasonable and appropriate measures to protect consumer information – including credit card and financial account numbers, security codes and expiration dates, and Social Security numbers – caused or was likely to cause substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This practice was, and is, an unfair act or practice.

21. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Complaint

**THEREFORE**, the Federal Trade Commission this twenty-seventh day of March, 2012, has issued this complaint against respondent.

By the Commission.

**Exhibit 1**

Already a member? [Login now](#) | [What is Upromise?](#) | [Schools Program](#)

upromise | [earn](#) | [save](#) | [pay](#) | [family & friends](#) | [resource center](#)

**TURBO SAVER** save more. faster. **MAXIMIZE your Upromise savings with the power of TurboSaver™!**

**TurboSaver is your online savings reminder.**  
It alerts you of college savings opportunities when you book travel or shop online.

- Highlights Upromise partners in **Google** and **Yahoo!** search results
- Notifies you of Upromise savings opportunities when you visit partner sites

[DOWNLOAD TurboSaver NOW](#)

It's free and installs in seconds.  
Requires Microsoft Internet Explorer 6.x, 7.x or 8.x on Windows XP or Windows Vista

By installing the Upromise TurboSaver, you give Upromise permission to direct your visits to Upromise online retailers through your Upromise account and, if you are not logged in as a Upromise member, to request that you log in to your Upromise account before proceeding to the retailer's web site. This is done to ensure that you receive college savings when shopping online.

The following Upromise Online Shopping partners are not compatible with the Upromise TurboSaver. eBay.com, Express, InterContinental Hotels, and Overstock.com. This list is subject to change at any time without notice. To earn a Upromise contribution with these partners, shop directly through upromise.com.

You must install TurboSaver on each web browser you use. If you use both IE and Firefox you should install it on each browser (.exe for IE and .xpi for Firefox).

All Upromise Online Shopping Terms and Conditions apply when using TurboSaver. The [Terms & Conditions](#) and [FAQs](#) can be found in the [Program Details](#). Specific Terms & Conditions apply for each company's contributions and can be found in the Program Details or by clicking on the "store info" popup for that company. Participating companies, contribution levels, and terms and conditions are subject to change without notice.

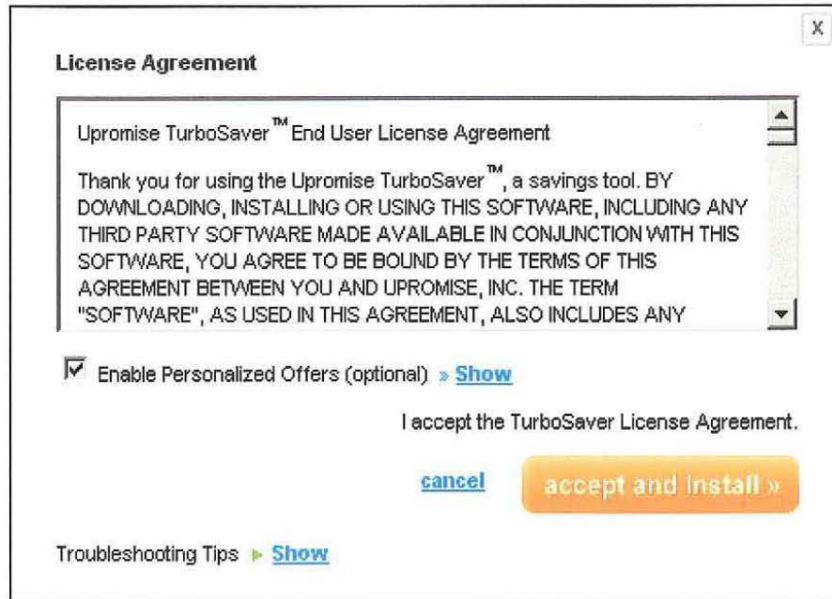
As part of its functionality, TurboSaver will place icons next to organic search results on Google and Yahoo that identify Upromise participating merchants.

[About Upromise](#) | [Privacy](#) | [Terms and Conditions](#) | [Site Security](#) | [Contact Us](#) | [Careers](#)  
[Partnership Opportunities](#) | [Affiliate Program](#) | [Upromise Credit Cards](#) | [Stores and Deals](#) | [Coupons and Offers](#)

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SLM Corporation and its subsidiaries, including Sallie Mae, Inc. and Upromise, Inc., are not sponsored by or agencies of the United States.  
§ Securities offered through Upromise Investments, Inc. (member FINRA)




## Complaint

**Exhibit 2**

Complaint

**Exhibit 3**

close X



## Install TurboSaver™

and get college savings when you shop online.

By pressing install now, I agree to the [TurboSaver license agreement](#) and to download TurboSaver on to my computer.

**License Agreement**

Upromise TurboSaver™ End User License Agreement

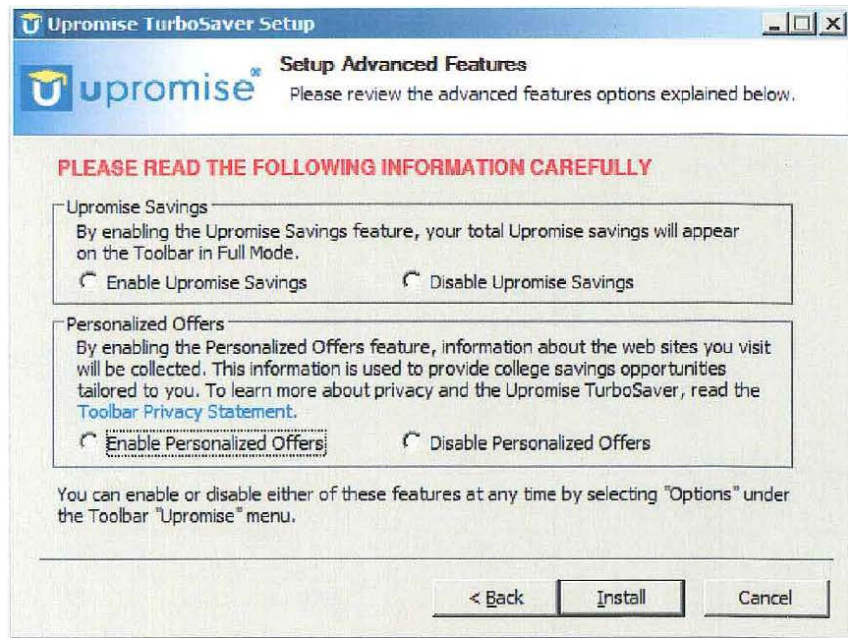
Thank you for using the Upromise TurboSaver™, a savings tool. BY DOWNLOADING, INSTALLING OR USING THIS SOFTWARE, INCLUDING ANY THIRD PARTY SOFTWARE MADE AVAILABLE IN CONJUNCTION WITH THIS SOFTWARE, YOU AGREE TO BE BOUND BY THE TERMS OF THIS AGREEMENT BETWEEN YOU AND UPROMISE, INC. THE TERM "SOFTWARE", AS USED IN THIS AGREEMENT, ALSO INCLUDES ANY

Enable Personalized Offers (optional)

By enabling the Personalized Offers feature, information about the web sites you visit will be collected. This information is used to provide college savings opportunities tailored to you.

**install now** »

## Complaint

**Exhibit 4**

## Complaint

### Exhibit 5

#### Upromise TurboSaver™ Privacy Statement

##### Introduction

We understand and respect that you are concerned about your privacy. Protecting your privacy is a top priority at Upromise. We want you to know that if you choose to enable the Personalized Offers feature of the Upromise TurboSaver, information about the web sites you visit will automatically be forwarded to Upromise or our service provider. This Upromise TurboSaver Privacy Statement is intended to explain to you the type of information being collected and the way that information may be used or shared.

##### Your Choice

Information about the web sites you visit will only be collected if you make an explicit choice to enable the Personalized Offers feature of the Upromise TurboSaver. Enabling Personalized Offers mean that you'll occasionally see windows slide up your screen reminding you of relevant Upromise partners or programs. You are not signing up for any email or regular mail of any kind.

During the installation of the Upromise TurboSaver, you will be asked if you would like to enable or disable the Personalized Offers feature. After installation, you may choose to enable or disable the Personalized Offers feature at any time by selecting "Options" under the TurboSaver's "Upromise" menu.

##### Information Collected

When you enable the Personalized Offers feature, either we or our service provider collects what is known as "Click Stream Data." Click Stream Data is anonymous, and includes information such as your IP address URLs of web pages that you have viewed, and the date that you viewed the web pages.

Infrequently, the Click Stream Data collected may inadvertently contain personal information. Potentially, a name, address, email address, or similar information that you enter into a web page can become part of the Click Stream Data that is transmitted to and stored by our service provider. Our service provider makes every commercially viable effort to purge their databases of any personally identifiable information. Before the Click Stream Data is transmitted to and stored by our service provider a proprietary rules engine is used to search through the Click Stream Data and remove any personally identifiable information. Our service provider is contractually bound not to use the data collected through the Personalized Offers feature for any purpose other than to assist us in the operation of the Upromise Service or the limited use described below under "Sharing with Third Parties."

##### How Collected Information is Used

We may use the non-personally identifiable information collected through the Personalized Offers feature to help us better target college savings opportunities and other content to you in an effort to create a personally relevant experience. We may also use the non-personally identifiable information collected through the Personalized Offers feature to help us formulate and predict responses to various savings opportunities, and to deliver and help determine the effectiveness of various savings opportunities.

## Complaint

We may also combine the information collected through the Personalized Offers feature with personally identifiable data, such as your transaction information, to assist with targeting savings opportunities to your preferences and to help us formulate, predict responses to, deliver and determine the effectiveness of various savings opportunities.

### Sharing with Third Parties

We may share the non-personally identifiable data collected through the Personalized Offers feature on an anonymous and aggregate basis with third parties, including our contributing companies, to formulate, predict responses to, deliver and determine the effectiveness of various savings opportunities. In addition, our service provider may use the non-personally identifiable data collected through the Personalized Offers feature on an anonymous and aggregate basis to provide online consumer research services for others. For more information view our service provider's [Privacy Policy](#).

### More Information

The Upromise TurboSaver will periodically contact servers at Upromise to download updated configuration files. These files control the advanced features of the tool, including the "Specials" menu and the feature that allows you to receive college savings when shopping online at most Upromise partners, even if you forgot to start your online shopping at Upromise.com.

In addition, the Upromise TurboSaver will periodically contact servers at our service provider to see if you are running the most current version. If necessary, you will automatically be provided with the latest update to the Upromise TurboSaver.

We hope that you find this privacy statement helpful and understand the benefits associated with your use of the Upromise TurboSaver's Personalized Offers feature. If you feel that the benefits of using the Personalized Offers feature do not outweigh the information that we collect, you should choose not to enable the Personalized Offers feature.

For more information about Upromise's full privacy policy, click [here](#).

## Complaint

**Exhibit 6****Upromise Privacy Statement**

Protecting your privacy is a top priority at Upromise. We want you to understand how we handle the personal information about you that we may obtain, and how we may and may not share it. This statement covers all of our information handling practices for Upromise, Inc. and its subsidiaries, including Upromise Investments, Inc. and Upromise Investment Advisors, LLC, for the benefit of current and past customers. Please also see our separate statement, [Privacy of Upromise Rewards Service](#), for additional information about our practices relating to our Rewards service.

**Information We May Obtain.**

As part of providing you products or services, we may obtain personal information from the following sources:

- **Information you provide to us** on applications and other forms, that you otherwise enter on our web site, or that you provide to us in writing or by telephone, such as when you contact our customer service staff. This information may include items such as your name, address, telephone number and social security number. In addition, please see **Use of Cookies and other Technologies** below for information we receive automatically when you visit our web site.
- **Information from your transactions** with us, our affiliates or nonaffiliated third parties such as account activity and your purchase information in our Rewards service.
- **Information from third parties**, including public sources, such as verification services and consumer reporting agencies (to comply with regulatory requirements, ensure the accuracy of data and prevent fraud, for example), or from other sources (such as from other institutions like a bank or broker you use to transfer funds into a Upromise account, or public sources).

We use the information we obtain in order to develop, offer and deliver our products and services, to offer products and services of our affiliates, participating companies, marketing partners and other companies, to process transactions in your accounts, and to fulfill legal and regulatory requirements.

Please note that information you voluntarily include in bulletin boards, chat rooms and other online forums, such as the Upromise Community, may be viewed and used by anyone with access to those forums. Upromise is unable to control any use of such information.

**Sharing Information With Our Affiliates**

As a subsidiary of SLM Corporation, commonly known as Sallie Mae, our affiliates are the family of companies controlled by SLM Corporation. Our affiliates include, among others, Sallie Mae, Inc., Upromise Investments, Inc., Upromise Investment Advisors, LLC, Student Loan Funding Resources, Nellie Mae Corporation, Southwest Student Services Corporation, Student Loan Finance Association, Academic Management Services Corp., SLM Financial Corporation, and Sallie Mae Bank. Our affiliates offer a broad range of products and services including education loans, private loans, mortgage loans, 529 college savings plan administrative services and debt collection services. By sharing your personal information with our affiliates, we and our affiliates can better understand and meet your college savings and other needs by letting you know about products, services and promotional offers in which you are most likely to be interested. For example, if you have a Rewards account that has accumulated sufficient funds, you may be interested in opening an account with the Upromise College Fund, or if you have a high school student, you may be interested in learning more about Sallie Mae student loans.

Unless you tell us not to, we may share with our affiliates all of the information we obtain about

## Complaint

you. If you prefer that we not share with our affiliates consumer report information about you that we may receive from third parties, you may direct us not to do so by sending us an email at [customercare@upromise.com](mailto:customercare@upromise.com) containing your name, address, account number and request, or by calling the following toll free number: 1-800-877-6647. Please be aware that we may continue to share any other information as permitted by law.

**Sharing Information With Nonaffiliated Third Parties**

Information about our customers is an important part of our business. We do not share your personal information with nonaffiliated third parties except as permitted or required by law, including as provided below:

- **Agents and Service Providers.** In order to provide our products and services, we may share personal information about you with agents and service providers to perform functions on our behalf, such as to send email and postal mail, analyze data, provide marketing services, process applications and credit card payments, and service accounts. We contractually obligate these service providers to access and use personal information only as needed to perform their functions and for no other purposes.
- **Financial Services Providers.** In order to make certain financial products available to you (for example, credit cards, loans or insurance), we sometimes enter into marketing agreements with nonaffiliated financial institutions that offer those products. We select the financial institutions we work with very carefully. Generally, we provide these entities with only customer contact information. For some products, we might also provide them limited additional information. These entities are permitted to use the information we give them only for the specific products being offered under our contract. If you prefer that we do not share your information with nonaffiliated financial institutions so that they may market their products and services directly to you, you may opt-out of that information sharing by sending us an email at [customercare@upromise.com](mailto:customercare@upromise.com) containing your name, address, account number and request, or by calling the following toll free number: 1-800-877-6647. You may also opt-out of that information sharing by updating your Upromise account member profile opt-out preferences on our website to opt-out of receiving communications from our participating companies.
- **Protection of Upromise and Others.** We may disclose personal information about you to third parties when we believe such disclosure is appropriate to comply with a legal requirement, such as a law, regulation, court order, subpoena or search warrant, or in the course of a legal proceeding. We may also disclose personal information as we believe appropriate to enforce or apply our rights under our agreements with customers, to protect the rights, property or safety of Upromise, our customers and others, including exchanging information for fraud protection and credit risk reduction.
- **Business Transfers.** If there is a change of control in Upromise's business (whether by merger, sale, or otherwise), its customer information could be sold as part of that transaction and your personally identifying information potentially could be used by the purchaser. Notice will be posted on the website so that you are aware of this change of control.

Upromise does not share member information with nonaffiliated, non-financial institutions to enable them to market their products and services directly to you. Occasionally, we engage third party service providers in the business of facilitating communications to send you information from certain participating companies, but only subject to strict confidentiality provisions that prohibit those third parties from providing your personal information to the participating companies. If we ever make the decision to share member information with nonaffiliated third parties other than financial institutions as described above so that they may market their products and services directly to you, we will notify you ahead of time, and you will have the opportunity to opt-out of that information sharing.

**Use of Cookies and other Technologies**



## Complaint

Our web servers place and read "cookies" on our site's visitors' web browser for a variety of purposes. Cookies are small data files that are stored on an Internet user's web browser by a web server. One important use of cookies is to help identify you while you are logged in to the Upromise site. Consequently, if your browser does not accept session cookies, you will be unable to enroll or log in to our service using our site. You will, however, be able to browse our site as a visitor. The information Upromise collects from cookies and web server logs is used to administer the web service and customize information you receive when visiting our site. Upromise may also use and share aggregate information from cookies and web server logs to analyze and improve our web service offerings. This information does not identify individual visitors or customers.

As is true of most web sites, we gather certain information automatically and store it in log files. This information includes the internet protocol (IP) addresses, browser type, internet service provider (ISP), referring/exit pages, operating system, date/time stamp, and clickstream data. We use this information to analyze trends, to administer our web site, to track users' movements around the web site and to gather demographic information about our user base as a whole. We, certain third parties who host portions of our web site, and certain advertising affiliates or others employ cookies and/or small pieces of code known as "web beacons" or "clear gifs" that, on an anonymous basis, count users that have visited a page that contains these web beacons. We use web beacons to help us better manage content on our site and to determine which content is effective. In addition, third party advertising affiliates and others may use web beacons to help us track the effectiveness of our advertisements placed on third party web sites. Web beacons on our site are not used to collect personally identifiable information about our customers. Finally, we use web beacons in our HTML-based emails to let us know which emails have been opened by recipients so that we may gauge the effectiveness of our communications. If you would like to opt-out of these emails, please see "Choices Regarding the Receipt of Marketing Messages."

If you have not opted-out of receiving marketing messages from us about our products and services, we may use information from our log files, cookies or web beacons to help us make those communications more useful or interesting to you.

One of our third party service providers that uses these technologies to assist us in tracking site usage is Coremetrics. As a result of your accessing our site, Coremetrics may on our behalf collect information about you. This service allows us to better provide our product or service to you. Coremetrics does not have the right to use the information they receive beyond what is necessary to assist us. For further information, including how to opt out, consult Coremetrics' privacy policies at: [www.coremetrics.com/info\\_eluminate2.html](http://www.coremetrics.com/info_eluminate2.html).

### Choices Regarding the Receipt of Marketing Messages

You may choose whether and to what extent you receive marketing messages from Upromise about products and services offered by Upromise or third parties. You may also choose whether and to what extent you receive marketing messages from our participating companies based on our information. If you do not wish to receive any of these marketing messages, you may opt out. And we offer you choices, so that you may elect to receive offers that are of interest to you in the ways you wish. If you do not wish to receive marketing messages, you may opt out by sending us an email at [customercare@upromise.com](mailto:customercare@upromise.com) containing your name, address, account number and request, or by contacting a customer service representative at 1-800-877-6647. You may also opt-out of receiving marketing emails from Upromise and marketing messages from our participating companies, by updating your Upromise account member profile opt-out preferences on our web site. We reserve the right to send you specific administrative notices that are required by law, regulation, or as needed to service your account. In addition, our participating companies reserve the right to contact you using information from sources other than Upromise.

### Security of Your Personal Information

Upromise is committed to earning and keeping your trust. We understand the need for our customers' personal information to remain secure and private, and we have implemented policies and procedures designed to safeguard your information. The only Upromise employees who are authorized to see your personal information are those who need it as part of their jobs.



## Complaint

Please remember that you also play a valuable part in data security. You should never share your Upromise password with anyone. If you feel your password has been compromised, you should change it immediately. After you have finished using our site, you should log out of your Upromise account and exit your browser so that no unauthorized persons can use our site under your name and account information.

### Collection of Information from Children.

None of Upromise's products or services are intended for purchase by children. Accordingly, Upromise does not knowingly collect, either online or offline, personally identifiable information from children under the age of 13.

### State Laws

In addition to the rights described in this policy, please note that you may have additional rights under state law. For example, if your address on file with us is a California address, we will not share personal information about you with a financial institution with whom we have a joint marketing relationship unless we provide you the required notice under California law and you do not opt-out of that information sharing. In addition, if your address on file with us is a Vermont address, we will not share consumer report information about you with our affiliates unless you expressly consent to that information sharing.

### Changes to This Privacy Statement

If we materially change this statement or our information-handling practices as described in this statement, we will notify you by email and/or through a notice on our web site at least 30 days prior to their implementation.

## Privacy of Upromise Rewards Service

### What information does Upromise collect, and why?

**Enrollment Information.** To set up your membership with the Upromise Rewards service, you will need to provide certain contact information, such as your name, mailing address, email address, phone number, username, and password. This information will also allow us to contact you about new college savings opportunities, unless you opt out of receiving these messages.

**Purchase Information.** As a Rewards service member, you can save for college by shopping with our participating companies. We may require additional information in order to keep track of and collect your contributions. For example, if you use a credit card to make a purchase, we may use your credit card number to identify the transaction. A phone company might require your telephone number, while an airline might require your frequent flyer account number. To take part in our grocery service, you may need to provide a grocery loyalty card number. In order to keep track of and collect your contributions, Upromise collects from some participating companies, grocery retailers or third party processors details of your transactions such as the date and amount of your transaction.

**Rewards Account Information.** We will maintain records to keep track of the contributions you earn from your purchases with our participating companies. You can use our website to view your Rewards service account balances and recent account activities, update your account profile, establish college savings goals, add new future college students, or contact a customer service representative.

**Student Information.** In order to link an eligible investment account or student loan account to the Rewards service so that we may direct your savings from your Rewards service account to the investment or student loan account you will need to provide certain information about the students or future students for whom you are saving such as the name, date of birth and social security

## Complaint

number of the student and the account number of the investment or loan account. You can also personalize your Rewards service account to reflect your progress toward achieving your personal college savings goals by providing additional information about your future college students, such as when they anticipate starting college and whether they plan to attend a public or private institution. We may use this information to contact you about college savings opportunities, unless you opt out of receiving these messages.

**Investment Account Information.** When you open an investment account, the investment manager is required by law and by industry regulations to obtain certain personal information before creating your investment account. We and our investment manager partners will share certain personal information (such as your or your student's social security number or address) and demographic data with one another to facilitate the application process and monthly processing, and to comply with applicable law. This sharing of information is required to manage your account. Additionally, we may use this demographic information (such as your future college student's date of birth) to contact you about relevant college savings opportunities, unless you opt out of receiving such messages.

**Family and Friends Network Information.** You may use our Tell-a-Friend service to notify your family and friends about Upromise by providing their names and email addresses. You can also increase your college savings through Upromise by creating a savings network of family and friends that directs a portion of its Upromise savings to your future college students.

Upromise will automatically send a one-time email inviting your family and friends to visit Upromise. We store the information for the purpose of sending these emails and to measure overall response rates to these services. Your family and friends may [contact us](#) to request that their information be removed.

Family and friends who contribute to your future college students' investment accounts will receive confirmation of the name and age of each future college student for whom they are saving.

### How does Upromise use my information?

**Management of Your Account.** When you become a member, we use your contact and transaction data to manage your account.

**Use of Third Parties for Fulfillment Purposes.** We may use certain third parties to provide marketing and administrative services, such as keeping track of your purchases, analyzing data or delivering special college saving offers to you on our behalf or on behalf of our participating companies. Third parties may also be used to help us administer our grocery, dining, travel and other rewards programs. In order to obtain these services, we may need to share certain personally identifiable information about our members. However, these third parties will be bound by legal agreements to not use or disclose the information we provide them for any purpose other than to perform the requested service.

On occasion, contests, sweepstakes or surveys on our web site may be co-sponsored by Upromise and another company, or may be sponsored by companies other than Upromise. Some or all of the data collected through these contests, sweepstakes or surveys may be shared with the sponsor(s) or companies indicated on the entry form or in the applicable rules.

**Notification About Products and Services.** We offer you the chance to maximize your Upromise membership through opportunities made available to you on our site and, unless you opt out of receiving them, through email, mail, and telephone messages. We may use information about you to provide you offers tailored to your interests. Sometimes, we send offers to selected groups of members on behalf of our participating companies and/or affiliates. Occasionally, we engage third parties in the business of facilitating communications to send you information from certain participating companies, but only subject to strict confidentiality provisions that prohibit those third parties from providing your personal information to the participating companies. In addition, unless you opt-out, we may share your information with nonaffiliated financial institutions with whom we have a marketing relationship so that those participating companies may market to you the specific products being offered under our contract with them. If you do not want to receive any of these marketing communications, you may opt out of receiving them.

## Complaint

**Use of Information from Third Parties.** We may obtain information about you from our participating companies and other third parties in order to provide you with college savings opportunities tailored to your interests. You may opt out of receiving these offers by updating your account profile at any time on our website, or by contacting a customer service representative at 1-800-877-6647. We may also use information obtained from our participating companies and other third parties in conjunction with member account and enrollment information for analytical and audit purposes.

**Use of Non-Personally Identifiable Information.** We may also provide aggregated, non-personally identifiable information about our members and their future college students to third parties for audit, marketing and other purposes. Because aggregated data is not associated with any particular person, these third parties will not have access to any personally identifiable information about you or your future college students.

**What are my choices regarding the receipt of marketing messages?**

We reserve the right to send you specific administrative notices that are required by law, regulation, or as needed to service your account. You may choose whether or not to receive messages from Upromise and our participating companies that may better suit your interests based on your preferences and transaction history. If you do not wish to receive these messages from Upromise and/or our participating companies, you may opt out by sending us an email at [customercare@upromise.com](mailto:customercare@upromise.com) containing your name, address, account number and request, or by calling the following toll free number: 1-800-877-6647. You may also opt-out of receiving marketing emails from Upromise and marketing messages from our participating companies by updating your Upromise account member profile opt-out preferences on our web site. Our participating companies reserve the right to contact you using information from sources other than Upromise.

**How can I access and update my Upromise data?**

You may access and update information stored in your account profile by visiting the Upromise site. Please keep your contact, account, and preference information up-to-date. Doing so ensures that your contributions are properly tracked and received. It also helps us inform you of new participating companies who may help you boost your college savings.

**What about links to other sites and participating companies' use of information?**

Through our various online offerings, we may provide links to third-party websites, such as those of our participating companies or your investment manager. Each of these sites may have separate privacy and different data-collection practices from Upromise, and we are not responsible for the actions or practices of these third parties, nor for the content on these sites. We encourage you to review the privacy policies of their sites. In addition, our remindU service and the Personalized Offers feature of the Upromise Toolbar are provided by third parties, which also have separate privacy policies and data-collection practices which can be accessed when you down-load the remindU and Upromise Toolbar software. To learn more about privacy and the Upromise Toolbar, please read the Toolbar Privacy Statement. Finally, please remember that when you shop or do any other business with any of our participating companies, any information you provide to them is subject to their own privacy and data collection practices, for which Upromise is not responsible.

**What is TRUSTe and why is it so important?**

Upromise, a wholly-owned subsidiary of Sallie Mae, is a licensee of the TRUSTe Privacy Program. TRUSTe is an independent, non-profit organization whose mission is to build users' trust and confidence in the Internet by promoting the use of fair information practices. TRUSTe has agreed to review the practices of [www.upromise.com](http://www.upromise.com) because this website wants to demonstrate its commitment to your privacy. Please note that the TRUSTe program does not cover the privacy practices of Upromise, Inc. affiliates. Please also note that the TRUSTe program covers only information that is collected through this website, and does not cover information that may be collected through software downloaded from the site.

If you have questions or concerns regarding this statement, you should first contact Upromise (see below). If you do not receive acknowledgment of your inquiry or your inquiry has not been satisfactorily addressed, you should then contact TRUSTe. TRUSTe will then serve as a liaison with Upromise to resolve your concerns.

## Complaint

### **How do I contact Upromise about this Privacy Statement?**

If you have any questions about this privacy statement, our information-handling practices, or other aspects of privacy at Upromise, please [contact us](#) by email or at Upromise, Inc., Customer Care - Privacy Policy Issues, 95 Wells Avenue, Suite 160, Newton, MA 02459.

*Last Updated 6-12-08*

## Complaint

**Exhibit 7****Upromise Security Statement**

Our members' security and privacy are critically important issues for Upromise. We are proud of the innovations we have made to protect your data and personal identity throughout the Upromise service.

Upromise protects your data by:

- Monitoring for intrusion attempts - 24 hours a day, 7 days a week;
- SSL, Data, and Password encryption technology;
- Firewalls and systems monitoring;
- Security audits and inspections by leading security firms.

**How Does Upromise Protect Your Security?**

The security of your personal information, transactions and savings is our priority at Upromise. Using the Secure Sockets Layer protocol (SSL), Upromise automatically encrypts your sensitive information in transit from your computer to ours. Once your information reaches us, it resides on servers that are configured for maximum security and are continuously monitored for unauthorized changes. Upromise security architecture and security procedures are audited and inspected by industry leaders specializing in security processes and technologies.

**How Can You Help Upromise Protect Your Security?****Username and Password**

Choose a password that will be difficult for others to guess. Do not use obvious or easily accessed data such as your name, initials, Social Security number, mother's maiden name, phone number, address, family birthdays, family names, pets, or any combination of the previous. We emphasize the importance of choosing a unique and secure password to help ensure your protection. Upromise will never contact you to solicit your username or password. Never provide them to anyone.

**Close Your Browser When Finished**

After you have finished your session with Upromise, log out and close your browser to erase information that may have been stored on your computer during your session. Any information you entered during your session may be temporarily stored in the memory storage area of your computer until you close the browser. Logging off and closing your browser will clear this temporary storage area from your computer.

**Verify authenticity of emails**

Never click on a link in an email if you are unsure of its origins, especially if the email asks for personal or financial information. If you have any doubt about the authenticity of an email from Upromise, simply open a new Web browser, type in <http://www.upromise.com>, log in to your Upromise account safely and securely and then perform the requested activity.

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the Respondent with violation of the Federal Trade Commission Act; and

The Respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Upromise, Inc., is a Delaware corporation with its principal office at 95 Wells Avenue, Suite 160, Newton, Massachusetts 02459.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

## Decision and Order

Respondent, and the proceeding is in the public interest.

**ORDER****DEFINITIONS**

For purposes of this order, the following definitions shall apply:

- A. “Affected Consumers” shall mean persons who, prior to the date of issuance of this order, downloaded and installed the TurboSaver Toolbar and had the Personalized Offers feature enabled.
- B. “Clearly and prominently” shall mean as follows:
  - 1. In textual communications (*e.g.*, printed publications or words displayed on the screen of a computer or a mobile device), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts highly with the background on which they appear;
  - 2. In communications disseminated orally or through audible means (*e.g.*, radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;
  - 3. In communications disseminated through video means (*e.g.*, television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (A) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the predominant language that is used in the communication;

## Decision and Order

4. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (A) of this definition, in addition to any audio or video presentation of them; and
  5. In all instances, the required disclosures are presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.
- C. “Collected Information” shall mean any information or data transmitted from a computer by the TurboSaver Toolbar as a result of the Personalized Offers feature being enabled prior to the date of issuance of this order to any computer server owned by, operated by, or operated for the benefit of respondent.
- D. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- E. “Computer” shall mean any desktop or laptop computer, handheld device, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content and to play any digital audio, visual, or audiovisual content.
- F. “Covered Online Service” shall mean any product or service using or incorporating a Targeting Tool. Covered Online Service includes, but is not limited to, the TurboSaver Toolbar with the Personalized Offers feature enabled.
- G. “Personal information” shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an



## Decision and Order

email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license number or other government-issued identification number; (g) prescription information, such as medication and dosage, and prescribing physician name, address, and telephone number, health insurer name, insurance account number, or insurance policy number; (h) a bank account, debit card, or credit card account number; (i) a persistent identifier, such as a customer number held in a "cookie" or processor serial number, that is combined with other available data that identifies an individual consumer; (j) a biometric record; or (k) any information that is combined with any of (a) through (j) above.

- H. "Personalized Offers feature" shall mean the component of the TurboSaver Toolbar that Upromise has offered under the name of "Personalized Offers."
- I. "Respondent" shall mean Upromise, Inc., and its successors and assigns, and its officers, agents, representatives, and employees.
- J. "Targeting Tool" shall mean any software program or application distributed by or on behalf of respondent that is installed on a consumer's computer, whether as a standalone product or as a feature of another product, and used by or on behalf of respondent to record or transmit information about any activity occurring on that computer involving the computer's interactions with websites, services, applications, or forms, unless (a) the activity involves transmission of information related to the configuration of the software program or application itself; (b) the activity involves a consumer's interactions with respondent's websites, services, applications, and/or forms; or (c) the activity involves a consumer's interactions with respondent's member merchants and that information is collected, retained, or used only as necessary for the purpose of

## Decision and Order

providing the consumer's reward service benefits for transactions involving those merchants.

The TurboSaver Toolbar when configured to collect consumer data, for example, with the Personalized Offers feature enabled, is a Targeting Tool.

- K. "Third party" shall mean any individual or entity other than respondent, except that a third party shall not include a service provider of respondent that:
1. only uses or receives personal information collected by or on behalf of respondent for and at the direction of the respondent and no other individual or entity,
  2. does not disclose the data, or any individually identifiable information derived from such data, to any individual or entity other than respondent, and
  3. does not use the data for any other purpose.

**I.**

**IT IS ORDERED** that respondent, directly or through any corporation, subsidiary, division, website, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Targeting Tool, in or affecting commerce, shall,

- A. Prior to the consumer enabling (by downloading, installing, or otherwise activating) any Targeting Tool:
1. Clearly and prominently, and prior to the display of and on a separate screen from, any "end user license agreement," "privacy policy," "terms of use" page, or similar document, disclose:
    - a. all the types of data that the Targeting Tool will collect, including but not limited to, if applicable, a statement that the data includes transactions or communications between the

## Decision and Order

consumer and third parties in secure sessions, interactions with shopping baskets, application forms, online accounts, web-based email accounts, or search engine pages, and if the information includes personal, financial or health information.

- b. how the data is used, including if the data is shared with a third party, other than as reasonably necessary: (i) to comply with applicable law, regulation, or legal process, (ii) to enforce respondent's terms of use, or (iii) to detect, prevent, or mitigate fraud or security vulnerabilities.
2. Obtain express affirmative consent from the consumer to the enabling (by downloading, installing, or otherwise activating) and to the collection of data.
- B. For those TurboSaver Toolbars installed by consumers before the date of issuance of this order, prior to (1) enabling data collection through any Targeting Tool or (2) otherwise making any material change from stated practices about collection or sharing of personal information through the TurboSaverToolbar, provide the notice and obtain the express consent described in subparts A(1) and (2) of this Part.

**II.**

**IT IS FURTHER ORDERED** that respondent shall:

- A. Notify Affected Consumers: a) that they have or had the Personalized Offers feature enabled, and that from 2005 through January 2010 use of this feature resulted in collection and transmission of data to or on behalf of respondent, listing the categories of personal information that were, or could have been, transmitted; and b) how to permanently disable the Personalized Offers feature and uninstall the TurboSaver Toolbar. Notification shall be by each of the following means:

## Decision and Order

1. Beginning within thirty (30) days after the date of service of this order and for two (2) years after the date of service of this order, posting of a clear and prominent notice on its website.
  2. Beginning within thirty (30) days after the date of service of this order and for three (3) years after the date of service of this order, informing Affected Consumers who complain or inquire about the privacy or security of the TurboSaver Toolbar.
  3. Within sixty (60) days after the date of service of this order, providing direct, clear and prominent notice to Affected Consumers who have the Personalized Offers feature enabled.
- B. Provide prompt, toll-free, telephonic and electronic mail support to help Affected Consumers disable the Personalized Offers feature and, if requested, uninstall the TurboSaver Toolbar.

**III.**

**IT IS FURTHER ORDERED** that respondent shall, within five (5) days after the date of service of this order, delete or destroy, or cause to be deleted or destroyed, all Collected Information in respondent's custody or control, unless otherwise directed by a representative of the Commission.

**IV.**

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, subsidiary, division, website, or other device, in connection with its advertising, marketing, promotion, or offering of any service or product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the extent to which respondent maintains and protects the security, privacy, confidentiality, or integrity of any personal information collected from or about consumers, unless the representation is true, and non-misleading.

## Decision and Order

## V.

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, subsidiary, division, website, or other device, in connection with its advertising, marketing, promotion, or offering of any product or service, in or affecting commerce, shall maintain a comprehensive information security program that is reasonably designed to protect the security, privacy, confidentiality, and integrity of personal information collected from or about consumers. This section may be satisfied through the review and maintenance of an existing program so long as that program fulfills the requirements set forth herein. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity and the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers, including:

- A. The designation of an employee or employees to coordinate and be accountable for the information security program;
- B. The identification of material internal and external risks that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of personal information and an assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, account takeovers, or other systems failures;
- C. The design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the

## Decision and Order

effectiveness of the safeguards' key controls, systems, and procedures;

- D. The development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding personal information such service providers receive from respondent or obtain on respondent's behalf, and the requirement, by contract, that such service providers implement and maintain appropriate safeguards; and
- E. The evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by subpart C, any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of its information security program.

**VI.**

**IT IS FURTHER ORDERED** that, in connection with its compliance with Part V of this order, for any Covered Online Service respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. Professionals qualified to prepare such Assessments shall be: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

## Decision and Order

- A. Set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;
- B. Explain how such safeguards are appropriate to respondent's size and complexity, and the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers;
- C. Explain how the safeguards that have been implemented meet or exceed the protections required by Part V of this order; and
- D. Certify that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.

**VII.**

**IT IS FURTHER ORDERED** that respondent shall, for a period of five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Commission for inspection and copying:

- A. All advertisements, labeling, packaging and promotional material containing the representation;

## Decision and Order

- B. All materials relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
- D. All acknowledgments of receipt of this order, obtained pursuant to Part IX.

Moreover, for a period of three (3) years after the date of preparation of each Assessment required under Part VI of this order, respondent shall maintain and upon request make available to the Commission for inspection and copying all materials relied upon to prepare the Assessment, whether prepared by or on behalf of the respondent, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, for the compliance period covered by such Assessment.

**VIII.**

**IT IS FURTHER ORDERED** that respondent shall, in connection with this action or any subsequent investigations related to or associated with the transactions or the occurrences that are the subject of the Commission's complaint, cooperate in good faith with the Commission and appear at such places and times as the Commission shall reasonably request, after written notice, for interviews, conferences, pretrial discovery, review of documents, and for such other matters as may be reasonably requested by the Commission. If requested in writing by the Commission, respondent shall appear and provide truthful testimony in any trial, deposition, or other proceeding related to or associated with the transactions or the occurrences that are the subject of the complaint, without the service of a subpoena.



## Decision and Order

**IX.**

**IT IS FURTHER ORDERED** that respondent shall deliver a copy of this order to: (1) all current and future principals, officers, and directors; and (2) all current and future managers who have responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of the order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

**X.**

**IT IS FURTHER ORDERED** that respondent shall notify the Commission at least thirty (30) days prior to any change in respondent that may affect compliance obligations arising under this order, including but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary (including an LLC), parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in respondent's name or address. *Provided, however,* that with respect to any proposed change about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line FTC v. Upromise. *Provided, however,* that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at [Debrief@ftc.gov](mailto:Debrief@ftc.gov).

## Decision and Order

**XI.**

**IT IS FURTHER ORDERED** that respondent shall, within sixty (60) days after service of this order, and at such other times as the FTC may require, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

**XII.**

This order will terminate on December 31, 2031, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part of this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that this order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis to Aid Public Comment

## **ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order applicable to Upromise, Inc.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

Upromise offers, among other things, a membership service through which consumers who join can receive cash rebates for making online purchases from merchants who participate in the Upromise program. To take part in the program, consumers download and install software, the Upromise TurboSaver Toolbar ("Toolbar"), from Upromise that modifies the consumers' Internet browser to highlight Upromise member merchants.

The Commission's complaint involves the advertising, marketing, and operation of an optional feature of that Toolbar, the "personalized offers" feature. That feature modified the Toolbar to provide targeted advertising to the consumer based upon the consumers' online behavior (the modified version is referred to here as the "Targeting Tool"). Upromise engaged a service provider to develop the Toolbar and the personalized offers feature.

According to the FTC complaint, while Upromise represented to consumers that the Targeting Tool collected information about the web sites consumers visited, its failure to disclose the full extent of data collected through the software was deceptive. The complaint alleges that the Targeting Tool collected the names of all websites visited; all links clicked; information that consumers entered into some web pages such as usernames, passwords, and search terms; and, from July 2009 through mid-January 2010, consumers' interactions with forms on secure web pages. The complaint further alleges that Upromise misrepresented its

## Analysis to Aid Public Comment

privacy and security practices, including misrepresenting that consumers' data would be encrypted. The complaint alleges that these claims were false and thus violate Section 5 of the FTC Act.

In addition, the FTC complaint alleges that Upromise engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for the personal information it collected and maintained. Among other things, Upromise: (1) transmitted sensitive information from secure web pages, such as financial account numbers and security codes, in clear readable text; (2) did not use readily available, low-cost measures to assess and address the risks to consumer information; (3) failed to ensure that employees responsible for the information collection program received adequate guidance and training; (4) failed to take adequate measures to ensure that its service provider employed reasonable and appropriate measures to protect consumer information.

The complaint alleges that Upromise's failure to employ reasonable and appropriate measures to protect consumer information – including credit card and financial account numbers, security codes and expiration dates, and Social Security numbers – was unfair. Tools for capturing data in transit, for example over unsecured wireless networks such as those often provided in coffee shops and other public spaces, are commonly available, making such clear-text data vulnerable to interception. The misuse of such information – particularly financial account information and Social Security numbers – can facilitate identity theft and related consumer harms.

The proposed order contains provisions designed to prevent Upromise from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order requires Upromise to disclose to consumers – before the download or installation of software that records or transmits information about any activity occurring on a computer involving the computer's interactions with websites, services, applications, or forms – the types of information collected and how the information will be used. The disclosure must be clear and prominent and separate from other notices. The company must also obtain consumers' express affirmative consent

## Analysis to Aid Public Comment

before the consumer downloads, installs, or otherwise activates such software. In addition, the company must provide this clear and prominent notice, and obtain express affirmative consent, before enabling data collection through any previously installed TurboSaver Toolbar and before making any material change from stated practices about collection or sharing of personal information through the Toolbar.

Part II of the proposed order requires Upromise to provide notice to consumers who, prior to the issuance of the order, had the Personalized Offers feature enabled. The notice must inform consumers about the categories of personal information that were, or could have been, transmitted by the feature, and how to disable the Personalized Offers feature and uninstall the Toolbar. Part III of the proposed order requires the company to destroy data it collected during the years covered by the complaint unless otherwise directed by the Commission.

Part IV of the proposed order prohibits the company from making any misrepresentations about the extent to which it maintains and protects the security, privacy, confidentiality, or integrity of any information collected from or about consumers. Part V of the proposed complaint requires Upromise to maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of such information (whether in paper or electronic format) about consumers. The security program must contain administrative, technical, and physical safeguards appropriate to Upromise's size and complexity, the nature and scope of its activities, and the sensitivity of the information collected from or about consumers and employees. Specifically, the proposed order requires Upromise to:

- designate an employee or employees to coordinate and be accountable for the information security program;
- identify material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the

## Analysis to Aid Public Comment

sufficiency of any safeguards in place to control these risks;

- design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures;
- develop and use reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from Upromise or obtain on behalf of Upromise, and require service providers by contract to implement and maintain appropriate safeguards; and
- evaluate and adjust its information security programs in light of the results of testing and monitoring, any material changes to operations or business arrangements, or any other circumstances that it knows or has reason to know may have a material impact on its information security program.

Part VI of the proposed order requires Upromise to obtain within the first one hundred eighty (180) days after service of the order, and on a biennial basis thereafter for a period of twenty (20) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: (1) it has in place a security program that provides protections that meet or exceed the protections required by the proposed order; and (2) its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of sensitive consumer, employee, and job applicant information has been protected.

Parts VII, VIII, IX, X, XI, and XII of the proposed order are reporting and compliance provisions. Part VII requires Upromise to retain documents relating to its compliance with the order. For most records, the order requires that the documents be retained for a five-year period. For the third-party assessments and supporting documents, Upromise must retain the documents for a period of three years after the date that each assessment is prepared. Part VIII requires the company to cooperate with the FTC in

## Analysis to Aid Public Comment

connection with this action or any subsequent investigations related to or associated with the transactions or the occurrences that are the subject of the FTC complaint. Part IX requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part X ensures notification to the FTC of changes in corporate status. Part XI mandates that Upromise submit a compliance report to the FTC within 60 days, and periodically thereafter as requested. Part XII provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

## Complaint

## IN THE MATTER OF

**LONG FENCE & HOME, LLLP**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4352; File No. 112 3005  
Complaint, April 5, 2012 – Decision, April 5, 2012*

This consent order addresses Long Fence & Home, LLLP's marketing and sale of replacement windows for use in residences. The complaint alleges that respondent did not possess and rely upon a reasonable basis substantiating the representations that consumers who replace their windows with Long Windows' Quantum2 replacement windows with SuperPak Glass are likely to achieve residential energy savings of 50% or save 50% on residential heating and cooling costs. The consent order prohibits respondent from making any representation that: (A) consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or (B) respondent guarantees or pledges that consumers who replace their windows with respondent's windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction.

*Participants*

For the *Commission: Robert Frisby, Zachary Hunter, Joshua Millard, and Sarah Waldrop.*

For the *Respondent: D.S. Berenson, Johanson Berenson LLP.*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Long Fence & Home, LLLP ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Long Fence is a Maryland limited liability limited partnership with its principal office or place of business at 10236 Southard Drive, Beltsville, Maryland 20705. Respondent



## Complaint

does business under its own name and various trade names bearing the “Long” mark, including “Long Windows.”

2. Respondent advertises, offers for sale, sells, and/or distributes windows, including its “Long Windows” replacement window lines manufactured by Serious Energy, Inc., which formerly did business under the name Serious Materials, Inc. Respondent sells these windows through its own salespersons to consumers for residential use.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused the dissemination of advertising and promotional materials, including print advertising, advertising on its website, and brochures and other promotional materials provided to its salespersons, including but not necessarily limited to the attached Exhibits A through F. Respondent disseminated or caused the dissemination of these advertisements and promotional materials to consumers. The advertisements and promotional materials contain the following statements or depictions:

a. Long Windows Print Advertisement

**50%**  
**SAVINGS**  
**GUARANTEED**

**PLEASE READ!**

Our energy use dropped so much after installing your windows — Dominion Virginia Power thought our meter was broken! We look forward to using Long Fence and Home for many years to come!

Derek and Jennifer H.  
Springfield, Virginia

Exhibit A (Jan. 2010) (Washington Post, Red Plum).

Complaint

b. Long Windows Print Advertisement

**50%  
ENERGY  
SAVINGS  
GUARANTEED\***

**AMAZING RESULTS!**

Our energy use dropped so much after installing your windows — Dominion Virginia Power thought our meter was broken! We look forward to using Long Fence and Home for many years to come!

Derek and Jennifer H.  
Springfield, Virginia

....

\* 50% Energy Savings based on manufacturer’s one year savings guarantee. Many factors determine actual savings and results may vary. Call for further details on our written savings guarantee.

Exhibit B (Jan.-Nov. 2010)  
(Washington Post, Red Plum, Examiner).

c. Long Windows Print Advertisement

— **Save 50% on  
Energy Bills – or  
LONG® PAYS YOU!**

Exhibit C (Mar.-June 2009) (Washington Post, Red Plum, Examiner, Merchandiser).

## Complaint

## d. Long Windows Print Advertisement

**will save you more than other replacement windows.**

**Save More Money and Energy**

....

- 50% energy savings guarantee

Exhibit D (Sept. 2009) (Washington Post, Red Plum, Examiner, Merchandiser).

## e. Long Windows Internet Promotional Material

<p>50%</p> <p>SAVINGS</p> <p>GUARANTEE</p>	<p>We guarantee you'll save 50% on your heating and cooling costs - and cut your energy bills in half - when you install Long Windows throughout your home or we'll reimburse you the difference.[ ] Speak to your Long Windows consultant for full details.</p>
--	--

Exhibit E (Sept. 2010)

(<http://www.longwindows.com>).

## f. Long Windows Energy Saving Pledge:

*50% Energy Savings*

*Guarantee*

This pledges a savings of at least 50% of energy consumption for heating and cooling the residence listed below during the 12 month period beginning with the date of this pledge. In the event energy saving[s] are less than 50% of the previous 12 months['] energy consumption, the homeowner should

## Complaint

notify Long Fence and Home who will provide the homeowner with the necessary forms to file for benefits under this pledge. If energy savings are less than 50% of the previous 12 month[s'] energy consumption, the homeowner will be reimbursed the difference between the actual savings and 50% of the energy costs for the previous 12 months.

Notwithstanding anything herein to the contrary, it is hereby agreed and understood that this pledge only be effective if the homeowner, located at the address shown hereon, has purchased a complete installation of Quantum2 replacement windows with SuperPak Glass™ glazing, and is effective on the dates shown.

....

## Exhibit F.

5. Many factors determine the savings homeowners can realize by replacing their windows, including the home's geographic location, size, insulation package, and existing windows. Consumers who replace single or double-paned wood or vinyl-framed windows – common residential window types in the United States – with Long Windows replacement windows are not likely to achieve a 50% reduction in residential energy consumption or heating and cooling costs.

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

- a. Consumers who replace windows with Quantum2 replacement windows with SuperPak Glass are likely to achieve residential energy savings of 50%; or
- b. Consumers who replace windows with Quantum2 replacement windows with SuperPak Glass are likely to save 50% on residential heating and cooling costs.

7. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the

## Complaint

representation(s) set forth in Paragraph 6 at the time that the representation(s) were made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation(s) set forth in Paragraph 6 at the time that the representation(s) were made. Therefore, the representation set forth in Paragraph 7 was false or misleading.

9. Respondent's practices, as alleged in this complaint, constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

**THEREFORE**, the Federal Trade Commission, this fifth day of April 2012, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A

**LONG KITCHENS**  
YOU CAN AFFORD YOUR DREAM KITCHEN!

**LONG SIDING**  
MAKE YOUR HOME LOOK LIKE NEW!

**LONG ATTIC MIRROR**  
NEW! ENERGY SAVING PRODUCT FOR 2010  
SAVE 20% ON UTILITY BILLS GUARANTEED!

**50% SAVINGS GUARANTEED**  
**PLEASE READ!**  
Our energy use dropped so much after installing your windows - Dominion Virginia Power thought our meter was broken! We look forward to using Long Fence and Home for many years to come!  
Derek and Jennifer H.  
Springfield, Virginia

**LONG WINDOWS**  
THE ULTIMATE WINDOW  
**LIFETIME WARRANTY**

**OVER 3X DOUBLE PANE PERFORMANCE**  
• Q-Foam® Insulation  
• Heat Mirror™ Technology  
• 5 Coats Low-e\*  
UP TO **\$1500 TAX CREDIT**

**LONG GUTTERS**  
Gutter Jacket™  
BEFORE NO CLOG GUARANTEE! AFTER

**LONG DOORS**  
BEAUTIFUL & ENERGY-EFFICIENT!

**CALL NOW!**  
**1-800-637-9014**  
**FREE ESTIMATES**  
www.longfenceandhome.com  
Improve your home. Improve your life.  
Affordable Financing

Licensed • Bonded • Insured  
MHIC# 51346 • DC# 6700678 • VM# 2705048183A

Complaint

Exhibit B

# LONG WINDOWS

## THE RESPONSIBLE & Beautiful SOLUTION

**LAST CHANCE! FEDERAL TAX CREDIT ENDING! HURRY!**

Engineered for maximum efficiency – Long Windows will help you burn less fuel, reduce carbon dioxide emissions and become more earth-friendly all while you save money and beautify your home!

**50% ENERGY SAVINGS GUARANTEED\***

**AMAZING RESULTS!**

*Our energy use dropped so much after installing your windows – Dominion Virginia Tower thought our meter was broken! We look forward to using Long Fence and Home for many years to come!*

*Deck and Jennifer H.  
Springfield, Virginia*

**1 DAY INSTALL!**

**LIFETIME WARRANTY**

**UP TO \$1500 TAX CREDIT**

- Clear Heat Mirror™ Technology dramatically reduces solar heat gain in summer and allows solar heat gain in winter
- Up to 5 layers of Low E Coating reflects damaging UV rays and increases R-value
- Patented Q Foam insulation stops air convection making frame/sash an incredible R-13!

*All above features are exclusive to Long Windows and allow for a 50% energy saving guarantee.*

**COUPON + FREE REPORT**

**UP TO \$3000 TAX CREDIT MATCH COUPON**

GO TO [LONGWINDOWS.COM](http://LONGWINDOWS.COM) TO DOWNLOAD

**Long® Windows Outperform All Major Brands**  
Fullframe R-value windows from R1.2 - R 6.25

Brand	R-Value
Anderson*	4.55 (U 0.22)
Pella*	3.85 (U 0.26)
Warner**	3.5 (U 0.28)
Millgard**	3.3 (U 0.3)
Double Pass	3.0 (U 0.49)
Singlo Pass	1.2 (U 0.84)

**Over 3x** the performance of Double Pass!

**FREE ESTIMATES CALL NOW!**

**1-800-637-9014**

[longwindows.com](http://longwindows.com)

Improve your home. Improve your life.

\* 50% Energy Savings based on manufacturer's one year savings guarantee. Many factors determine actual savings and results may vary. Call for further details on our written savings guarantee. † One day installation on most homes. See representative for details.

Licensed • Bonded • Insured  
MHIC# 51346 • DC# 6700678 • VA# 2705048183A

Complaint

**Exhibit C**

**Receive \$1500 Tax Credit from the Federal Government!**

**Save 50% on Energy Bills – or LONG® PAYS YOU!**

**BREAKING NEWS!!!**  
**Long® Windows will MATCH YOUR TAX CREDIT!\***

**FREE Estimates! Call Now!**  
**1-800-637-9014**  
**www.longwindows.com**

Licensed • Bonded • Insured • FINANCING AVAILABLE  
MHIC #51346 • DC# 6700678 • VA# 2705048183A

\* Minimum purchase 6 windows. Cannot be combined with other offers.

The advertisement features a blue background with a white window frame in the center. In the top left, there is a circular seal with the text 'LONG WINDOWS', 'MIDWEST HOMEOWNERS FUND', and '\$1500 FEDERAL TAX CREDIT'. To the right of the seal are two red checkmarks. The 'LONG WINDOWS' logo is prominently displayed above the window frame. A red starburst graphic contains the 'BREAKING NEWS!!!' text. At the bottom left, there are logos for 'Energy Star' and 'Energy Efficient Windows Alliance'. At the bottom right, there are logos for 'EXCELLENCE SINCE 1943' and various payment methods including Visa, MasterCard, American Express, and Discover.



Complaint

**Exhibit D**





## LONG<sup>®</sup> WINDOWS will save you more than other replacement windows.

**Save More Money and Energy**

- Up to \$3,000 in savings and tax credits
- 400% more energy-efficient than Energy Star-rated windows
- 50% energy savings guarantee
- Energy saving Heat Mirror™, recognized by *Popular Science* as a top 100 invention
- Lifetime warranty covering parts and labor

**Long<sup>®</sup> Windows provides some of the best guaranteed, most durable and energy-efficient replacement windows.**

**Long<sup>®</sup> Windows Outperform All Major Brands**  
Full frame double windows from R 2.0 - R 11.0

Brand	U-Factor	SHGC
Long Windows	0.18	0.25
Brand A	0.25	0.35
Brand B	0.30	0.40
Brand C	0.35	0.45
Brand D	0.40	0.50
Brand E	0.45	0.55
Brand F	0.50	0.60

4x  
ENERGY  
STAR

**Limited Time Only. Save Up to \$3,000!**

**\$1,500 Federal Tax Credit**  
**+ \$1,500 match from Long<sup>®</sup> Windows**

*Call or log on for a FREE report "Is your home safe and energy-efficient?" Includes 10-point energy-efficiency test.*

1-800-637-9014

www.longwindows.com

Affordable Financing & FREE In-Home Estimates  
Licensed • Bonded • Insured  
MHIC# 51346 • DC# 6700678 • VA# 2705048183A

**LONG<sup>®</sup> WINDOWS**

Improve your home. Improve your life.

**Here's What They're Saying...**

"A month after we installed Long Windows, we received a call from Dominion Virginia Power about the sudden drop in our energy use. When we said we purchased Long Windows, the representative replied, 'That explains it!'"

*Derek & Jennifer H.*  
Derek and Jennifer H.  
Springfield, VA



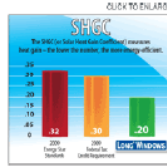
Complaint

- Jim Craig, Severna Park, MD

Yet another factor in energy-efficiency is the SHGC, which measures how well the window blocks solar heat coming inside the house. Again, the lower the value the greater the energy-efficiency of your window.

Long Windows have an industry-leading SHGC of 0.20. This surpasses the 2009 Energy Star Standards, which recognize a SHGC of 0.32 as acceptable.

The guidelines for the Federal Tax Credit require that your windows carry a SHGC of 0.30 or less. All Long Windows qualify; many Energy Star windows do not.

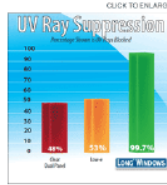


**UV Transmission**

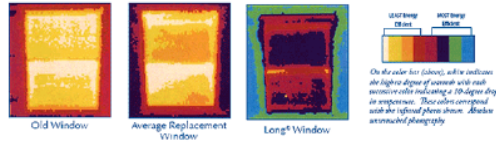
A final factor in energy-efficiency is the transmission of UV light. Long Windows utilize Heat Mirror™ Technology, recognized in Popular Science magazine as one of the top 100 inventions of the last 1,000 years.

Long Windows with Heat Mirror™ Technology only allow 0.3% of damaging UV rays into your home. Other windows on the market today allow roughly 50% of damaging UV rays into your home.

The difference is clear if you look at heat mapping photos of Long Windows versus competitors.



CLICK TO ENLARGE



**Request a free, no obligation in-home consultation and estimate today or call us at 1-800-417-LONG (5664).**

WINDOWS   KITCHENS   SIDING   GUTTERS   DOORS   ATTIC   MIRROR   INSULATION   ENERGY SOLUTIONS   ABOUT   CONTACT   PRIVACY   ESTIMATE

REQUEST   SITE MAP

Long Fence and Home is a home improvement and remodeling company serving clients in Maryland, Virginia and Washington, DC. Contact us for a free estimate on your home improvement or remodeling project. Other areas we service

Long Fence and Home • 10236 Southard Drive • Beltsville, MD 20705 • 1-800-417-LONG (5664)  
© 2010 Long Fence and Home

Complaint

Exhibit F



50% Energy Savings Guarantee

This pledges a savings of at least 50% of energy consumption for heating and cooling the residence listed below during the 12 month period beginning with the date of this pledge. In the event energy saving are less than 50% of the previous 12 months energy consumption, the homeowner should notify Long Fence and Home who will provide the homeowner with the necessary forms to file for benefits under this pledge. If energy savings are less than 50% of the previous 12 month energy consumption, the homeowner will be reimbursed the difference between the actual savings and 50% of the energy costs for the previous 12 months.

Notwithstanding anything herein to the contrary, it is hereby agreed and understood that this pledge only be effective if the homeowner, located at the address shown hereon, has purchased a complete installation of Quantum2 replacement windows with SuperPak Glass™ glazing, and is effective on the dates shown.

THIS PLEDGE IS BASED UPON CONSUMPTION, NOT COST. IT IS SUBJECT TO THE FOLLOWING PROVISIONS:

- 1. This pledge only covers Quantum2 replacement windows with SuperPak Glass™ glazing.
2. Complete installation of Quantum2 replacement windows with SuperPak Glass™ glazing is defined as all windows in this residence except attic, basement, and porches.
3. This pledge covers only single family dwellings and townhomes.
4. Maximum payment under this pledge is \$500.00
5. Claims under this pledge must be filed in writing with supporting evidence within 30 days of 1st anniversary.
6. Homeowners must properly maintain heating and cooling systems.
7. Proper allowance shall be made for cost of operation of any utilities included in energy bill in adjusting a claim.
8. Proper allowance for abnormal weather conditions shall be made in adjusting a claim.

Homeowner Name: \_\_\_\_\_
Homeowner Address: \_\_\_\_\_
City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_
Date of Installation: \_\_\_\_\_

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of a Complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Long Fence & Home, LLLP ("LF&H") is a Maryland limited liability limited partnership with its principal office or place of business at 10236 Southard Drive, Beltsville, Maryland 20705.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## Decision and Order

**ORDER****DEFINITIONS**

For purposes of this order, the following definitions shall apply:

- A. “Clearly and prominently” means
1. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;
  2. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read and comprehend it; and
  3. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language

## Decision and Order

and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.

- B. “Close proximity” means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.
- C. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- D. “Competent and reliable scientific evidence” shall mean tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true.
- E. “Covered product or service” means any fenestration product, any component thereof, and any product or any service for which respondent makes any claim about energy savings, energy costs, energy consumption, U-factor, SHGC, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy.
- F. “Fenestration product” means any window, sliding glass door, or skylight.
- G. “K-value” is a measure of a material’s thermal conductivity.
- H. Unless otherwise specified, “respondent” shall mean Long Fence & Home, LLLP, its successors and assigns, and its officers, agents, representatives, and employees.

## Decision and Order

- I. “R-value” is a measure of a material’s resistance to heat flow.
- J. “SHGC” means solar heat gain coefficient, which is the fraction of incident solar radiation admitted through a window, both directly transmitted and absorbed and subsequently released inward.
- K. “U-factor” is a measure of the rate of heat loss.

**I.**

**IT IS ORDERED** that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not make any representation, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names that:

- A. Consumers who replace their windows with respondent’s windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or
- B. Respondent guarantees or pledges that consumers who replace their windows with respondent’s windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs;

unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction.

*Provided, however,* that if respondent represents that consumers who replace their windows with respondent’s windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs under specified circumstances, or if respondent guarantees or pledges up to or a



## Decision and Order

specified amount or percentage of energy savings or reduction in heating and cooling costs under specified circumstances, it must disclose those circumstances clearly and prominently in close proximity to such representation, guarantee, or pledge and it must substantiate that all or almost all consumers are likely to receive the maximum represented, guaranteed, or pledged savings or reduction under those circumstances (*e.g.*, when replacing a window of a specific composition in a building having a specific level of insulation in a specific region).

**II.**

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not make any representation, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names:

- A. That any specific number or percentage of consumers who replace their windows with respondent's windows achieve energy savings or reduction in heating and cooling costs; or
- B. About energy consumption, energy savings, energy costs, heating and cooling costs, U-factor, SHGC, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy of any covered product or service;

unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that such representation is true.

**III.**

**IT IS FURTHER ORDERED** that respondent LF&H, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order,

## Decision and Order

maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

**IV.**

**IT IS FURTHER ORDERED** that respondent LF&H, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments of receipt of this order obtained pursuant to this Part.

**V.**

**IT IS FURTHER ORDERED** that respondent LF&H, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the partnership that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor; the creation or

## Decision and Order

dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the partnership name or address. *Provided, however*, that, with respect to any proposed change in the partnership about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: “Long Fence & Home, File No. 112 3005, Docket No. C-4352.”

**VI.**

**IT IS FURTHER ORDERED** that respondent LF&H, and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.

**VII.**

This order will terminate on April 5, 2032, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order’s application to any respondent that is not named as a defendant in such complaint; and

## Analysis to Aid Public Comment

- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further,* that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Rosch and Commissioner Ohlhausen not participating.

### **ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT**

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Long Fence & Home, LLLP, a partnership (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter involves respondent’s marketing and sale of replacement windows for use in residences. According to the FTC complaint, respondent represented that consumers who replace their windows with Long Windows’ Quantum2 replacement windows with SuperPak Glass are likely to achieve residential energy savings of 50% or save 50% on residential

## Analysis to Aid Public Comment

heating and cooling costs. The complaint alleges that respondent did not possess and rely upon a reasonable basis substantiating these representations when it made them. Many factors determine the savings homeowners can realize by replacing their windows, including the home's geographic location, size, insulation package, and existing windows. Consumers who replace single or double-paned wood or vinyl-framed windows – common residential window types in the United States – with LongWindows replacement windows are not likely to achieve a 50% reduction in residential energy consumption or heating and cooling costs. Thus, the complaint alleges that respondent engaged in unfair or deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains two provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I addresses the marketing of windows. It prohibits respondent from making any representation that: (A) consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or (B) respondent guarantees or pledges that consumers who replace their windows with respondent's windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction. Further, if respondent represents, guarantees, or pledges that consumers achieve such energy savings or heating and cooling cost reductions under specified circumstances, it must: disclose those circumstances clearly and prominently in close proximity to such representation, guarantee, or pledge; and substantiate that all or almost all consumers are likely to receive the maximum represented, guaranteed, or pledged savings or reduction under those circumstances (*e.g.*, when replacing a window of a specific composition in a building having a specific level of insulation in a specific region). The performance standard imposed under this Part constitutes fencing-in relief

## Analysis to Aid Public Comment

reasonably necessary to ensure that any future energy savings or reduction claims are not deceptive.

Part I of the order requires substantiation for representations including the words “up to” because the respondent may elect to make such representations in the future. The words “up to” do not effectively qualify representations regarding the energy savings or cost reductions likely to be achieved through replacement windows. Therefore, Part I requires the same level of substantiation regardless of whether the covered representation includes the words “up to.” The FTC’s proposed consent order should not be interpreted as a general statement of how the Commission may interpret or take other action concerning representations including the words “up to” for other products or services in the future.

Part II addresses any product or service for which respondent makes any energy-related efficacy representation. It prohibits respondent from making any representation: (A) that any specific number or percentage of consumers who replace their windows with respondent’s windows achieve energy savings or reduction in heating and cooling costs; or (B) about energy consumption, energy savings, energy costs, heating and cooling costs, U-factor, solar heat gain coefficient, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy; unless the representation is non-misleading and substantiated by competent and reliable scientific evidence.

Parts III through VI require respondent to: keep copies of advertisements and materials relied upon in disseminating any representation covered by the order; provide copies of the order to certain personnel, agents, and representatives having responsibilities with respect to the subject matter of the order; notify the Commission of changes in its structure that might affect compliance obligations under the order; and file a compliance report with the Commission and respond to other requests from FTC staff. Part VII provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official

*Analysis to Aid Public Comment*

interpretation of the complaint or the proposed order, or to modify the proposed order's terms in any way.

## Complaint

## IN THE MATTER OF

**CARPENTER TECHNOLOGY CORPORATION  
AND  
LATROBE SPECIALTY METALS, 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-4349; File No. 111 0207  
Complaint, February 28, 2012 – Decision, April 12, 2012*

This consent order addresses the \$410 million acquisition by Carpenter Technology Corporation of certain assets of Latrobe Specialty Metals, 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 in the markets for each of the specialty alloys: (1) MP159 and (2) MP35N used in aerospace applications. The consent order requires Carpenter to divest assets related to the manufacture and sale of the MP Alloys to Eramet S.A.

*Participants*

For the *Commission: Marc Alvarez, Monica Castillo, Janet Kim, David Morris, Scott Reiter, Kristian Rogers, Danielle Sims, and David Von Nirschl.*

For the *Respondents: Barbara Sicalides, Pepper Hamilton LLPTom D. Smith, Jones Day.*

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Carpenter Technology Corporation (“Carpenter”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Latrobe Specialty Metals, Inc. (“Latrobe”), a corporation subject to the jurisdiction of the Commission (collectively, “Respondents”), in violation of Section 7 of the 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, and it appearing to the Commission that a proceeding in



## Complaint

respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**I. RESPONDENTS**

1. Respondent Carpenter is a Delaware corporation, headquartered at 2 Meridian Boulevard, Wyomissing, Pennsylvania 19610-3202.

2. Respondent Latrobe is a Delaware Corporation, headquartered at 2626 Ligonier Street, Latrobe, Pennsylvania 15650. HHEP-Latrobe, L.P., the ultimate parent entity of Latrobe Specialty Metals, Inc., has its headquarters at 100 Crescent Court, Suite 1200, Dallas, Texas 75201.

3. Respondents are corporations who are engaged in, among other activities, the production and sale of specialty alloys, including, but not limited to, multiphase nickel-cobalt alloys MP159, and MP35N used in aerospace applications (“Aerospace MP35N”).

4. Respondents are corporations and at all times relevant herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose business is in, or affects commerce, as “commerce” is defined under Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

**II. THE PROPOSED ACQUISITION**

5. Pursuant to the June 20, 2011 Agreement and Plan of Merger (“Merger Agreement”), Carpenter announced its intention to purchase all of Latrobe’s approximately 8.1 million voting securities for approximately \$410 million (“Acquisition”).

**III. THE RELEVANT MARKET**

6. For purposes of this Complaint, the relevant lines of commerce in which to analyze the Acquisition are: (1) MP159; and (2) Aerospace MP35N.

7. For purposes of this Complaint, the relevant geographic area in which to analyze the effects of the Acquisition on the

### Complaint

MP159 and Aerospace MP35N markets, respectively, is the United States plus foreign countries approved by the United States Congress to supply materials for military purposes under the Defense Federal Acquisition Regulation System (“DFARS”), as amended, 48 C.F.R. § 225-7012.

8. Foreign countries approved under DFARS are: Australia, Belgium, Canada, Denmark, Egypt, Federal Republic of Germany, France, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom of Great Britain and Northern Ireland. Under DFARS, companies manufacturing products in Austria and Finland may also supply materials for military purposes, provided that they receive waivers exempting their sale of materials from the Buy American Act and Balance of Payments programs.

### IV. MARKET STRUCTURE

9. The market for MP159 is highly concentrated, as measured by the Herfindahl-Hirschman Index (“HHI”). The Acquisition would consolidate the only MP159 manufacturers. Post-Acquisition, Respondents will have 100 percent market share. The post-Acquisition HHI will be 10,000, with a 4,668 HHI increase. This market concentration level far exceeds the *Horizontal Merger Guidelines* thresholds, and thus, supports the presumption that the Acquisition will create or enhance market power.

10. The market for Aerospace MP35N is highly concentrated, as measured by the HHI. The Acquisition would consolidate the only Aerospace MP35N manufacturers. Post-Acquisition, Respondents will have 100 percent market share. The post-Acquisition HHI will be 10,000, with a 4,928 HHI increase. This market concentration level far exceeds the *Horizontal Merger Guidelines* thresholds, and thus, supports the presumption that the Acquisition will create or enhance market power.

### V. ENTRY CONDITIONS

11. Entry into the market for MP159 or Aerospace MP35N, respectively, would not be timely, likely, or sufficient to deter the likely anticompetitive effects of the Acquisition. The time and

## Complaint

costs required to obtain the physical assets and expertise necessary for the manufacture of MP159 and Aerospace MP35N are substantial. Before supplying the alloys to customers, MP159 and Aerospace MP35N manufacturers must also invest significant amounts of time and money to receive customer and end-user qualifications. Finally, these two markets are small, which further deters firms from making the investments required to compete effectively in these markets.

**VI. EFFECTS OF THE ACQUISITION**

12. The effects of the Acquisition, if consummated, may be to substantially lessen competition, and to tend to create a monopoly, in the markets for MP159 and Aerospace MP35N, respectively, in violation of Section 7 of the 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, in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between Respondents Carpenter and Latrobe; and
- b. by increasing the likelihood that Respondent Carpenter would unilaterally exercise market power in the MP159 and Aerospace MP35N markets.

**VII. VIOLATIONS CHARGED**

13. The allegations contained in Paragraphs 1 through 12 above are hereby incorporated by reference as though fully set forth here.

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.

15. The Acquisition described in Paragraph 5, if consummated, would constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

## Order to Maintain Assets

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

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-eighth day of February, 2012, issues its complaint against said Respondents.

By the Commission.

**ORDER TO MAINTAIN ASSETS**

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Carpenter Technology Corporation (“Carpenter”) of 100 percent of the outstanding voting securities of Respondent Latrobe Specialty Metals, Inc. (“Latrobe”) from HHEP-Latrobe, L.P., and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the 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; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

## Order to Maintain Assets

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (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 hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Carpenter Technology Corporation is a corporation organized, existing and doing business under and by virtue of the laws of State of Delaware, with its headquarters address located at 101 West Bern Street, Reading, Pennsylvania 19601.
2. Respondent Latrobe Specialty Metals, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 2626 Ligonier Street, Latrobe, Pennsylvania 15650. HHEP-Latrobe, L.P., the ultimate parent entity of Latrobe Specialty Metals, Inc., has its headquarters address at 100 Crescent Court, Suite 1200, Dallas, Texas 75201. "Latrobe" also includes HHEP-Latrobe, L.P., the ultimate parent entity of Latrobe Specialty Metals, Inc.
3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

**ORDER****I.**

**IT IS ORDERED** that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final and effective, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

## Order to Maintain Assets

- A. “Carpenter” means Carpenter Technology Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Carpenter (including, but not limited to, Hawke Acquisition Corp.) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Carpenter shall include Latrobe.
- B. “Latrobe” means Latrobe Specialty Metals, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Latrobe, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” mean Carpenter and Latrobe, individually and collectively.
- D. “Decision and Order” means the:
1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
  2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission.
- E. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.
- F. “Orders” means the Decision and Order and this Order to Maintain Assets.
- G. “Commission” means the Federal Trade Commission.

## Order to Maintain Assets

- H. “Specialty Metals Product Business(es)” means Respondent Latrobe’s business throughout the United States of America related to all of the Specialty Metals Products, including the research, Development, manufacture, distribution, marketing, and sale of each Specialty Metals Product and the assets related to such business, including, but not limited to, the Specialty Metals Product Assets.
- I. “Pre-Acquisition Marketing Plan” means any marketing or sales plan that was planned or implemented within the period immediately prior to the Acquisition and without consideration of the influence of the pending Acquisition for the Specialty Metals Product Business.

**II.**

**IT IS FURTHER ORDERED** that from the date this Order to Maintain Assets becomes final and effective:

- A. Until Respondents fully deliver the Specialty Metals Product Assets to the Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Specialty Metals Product Business, to minimize any risk of loss of competitive potential for the Specialty Metals Product Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Specialty Metals Product Business except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Specialty Metals Product Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the Specialty Metals Product Business.
- B. Prior to the Acquisition Date and as a condition precedent to the consummation of the Acquisition, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit

## Order to Maintain Assets

Respondents to divest the Specialty Metals Product Assets required to be divested pursuant to the Decision and Order to the Acquirer, and/or to permit such Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Specialty Metals Products;

*provided, however,* Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

- C. Until Respondents fully deliver the Specialty Metals Product Assets to the Acquirer, Respondents shall maintain the operations of the Specialty Metals Product Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such Business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Specialty Metals Product Business and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors, including, but not limited to, the High Volume Accounts; customers; Agencies; employees; and others having business relations with the Specialty Metals Product Business. Respondents' responsibilities shall include, but are not limited to, the following:
1. Respondents shall provide the Specialty Metals Product Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such Business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Specialty Metals Product Business;
  2. Respondents shall continue, at least at their scheduled pace, any additional expenditures for the Specialty Metals Product Business authorized prior



## Order to Maintain Assets

to the date the Consent Agreement was signed by Respondents including, but not limited to, all research, Development, manufacture, distribution, marketing and sales expenditures;

3. Respondents shall provide such resources as may be necessary to respond to competition against the Specialty Metals Products and/or to prevent any diminution in sales of the Specialty Metals Products during and after the Acquisition process and prior to divestiture of the related Specialty Metals Product Assets;
  4. Respondents shall provide such resources as may be necessary to maintain the competitive strength and positioning of the Specialty Metals Products at the High Volume Accounts;
  5. Respondents shall make available for use by the Specialty Metals Product Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business, including the Specialty Metals Product Assets;
  6. Respondents shall provide the Specialty Metals Product Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Specialty Metals Product Business; and
  7. Respondents shall provide such support services to the Specialty Metals Product Business as were being provided to these Business by Respondents as of the date the Consent Agreement was signed by Respondents.
- D. Until Respondents fully deliver the Specialty Metals Product Assets to the Acquirer, Respondents shall maintain a work force at least as equivalent in size, training, and expertise to what has been associated

## Order to Maintain Assets

with the Specialty Metals Products for the relevant Specialty Metals Product's most recent Pre-Acquisition Marketing Plan.

- E. Respondents shall, during the Specialty Metals Product Employee Access Period, not interfere with the hiring or employing by the Acquirer of Specialty Metals Product Core Employees, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any non-compete or non-disclosure provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Specialty Metals Product Core Employee who receives a written offer of employment from the Acquirer;

*provided, however,* subject to the conditions of continued employment prescribed in this Order, this Paragraph II.E. shall not prohibit Respondents from continuing to employ any Specialty Metals Product Core Employee under the terms of such employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer to such employee.

- F. Respondents shall adhere to and abide by the Remedial Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondents under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.
- G. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Specialty Metals Product Business through its full and complete delivery to the

## Order to Maintain Assets

Acquirer, to minimize any risk of loss of competitive potential for the Specialty Metals Product Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Specialty Metals Product Assets except for ordinary wear and tear.

**III.****IT IS FURTHER ORDERED** that:

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint an Interim Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements. The Commission may appoint one or more Interim Monitors to assure Respondents' compliance with the requirements of the Orders, and the related Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Carpenter, which consent shall not be unreasonably withheld. If Respondent Carpenter has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Carpenter of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

## Order to Maintain Assets

- D. If one or more Interim Monitors are appointed pursuant to this Paragraph or pursuant to the relevant provisions of the Decision and Order in this matter, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Interim Monitor:
1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;
  2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission; and
  3. The Interim Monitor shall serve until, the latter of:
    - a. the date of completion by Respondents of the divestiture of all Specialty Metal Product Assets and the delivery of the Manufacturing Technology and Product Intellectual Property in a manner that fully satisfies the requirements of this Order; and
    - b. with respect to each Specialty Metal Product, the date the Acquirer has obtained or achieved all Product Approvals and Specifications necessary to manufacture, market, import, export, and sell such Specialty Metal Product for use for aerospace applications and is able to manufacture such Specialty Metal Product in commercial quantities independently of Respondents;
- provided, however,* that the Interim Monitor's service shall not exceed five (5) years from the date the Decision and Order is issued;

## Order to Maintain Assets

*provided further*, that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.

- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.
- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of the Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
- G. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

## Order to Maintain Assets

- H. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order to Maintain Assets and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Orders; *provided, however*, beginning ninety (90) days after Respondent has filed its final report pursuant to Paragraph VI.B. of the Decision and Order, and every ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward:
1. obtaining all of the relevant Product Approvals and Specifications necessary to manufacture in commercial quantities, the Specialty Metals Products independently of Respondents and;
  2. to secure sources of supply of the raw materials, inputs and components for the Specialty Metals Products from entities other than Respondents.
- I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement;
- provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate

## Order to Maintain Assets

confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

- K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph or the relevant provisions of the Decision and Order in this matter.
- L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- M. The Interim Monitor appointed pursuant to this Order to Maintain Assets or the relevant provisions of the Decision and Order in this matter may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

**IV.**

**IT IS FURTHER ORDERED** that within thirty (30) days after the date this Order to Maintain Assets is issued, and every thirty (30) days thereafter until Respondents have fully complied with their obligations under Paragraphs II.A., II.B., II.C. II.D., II.E., II.F. and II.H. of the Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order to Maintain Assets and the Decision and Order; *provided, however*, that, after the Decision and Order becomes final and effective, the reports due under this Order to Maintain Assets shall be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondents pursuant to Paragraph V of the Decision and Order.

## Order to Maintain Assets

**V.**

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

- A. any proposed dissolution of any Respondent;
- B. any proposed acquisition, merger or consolidation of any Respondent; or
- C. any other change in any Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order to Maintain Assets.

**VI.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of such Respondent related to compliance with this Order to Maintain Assets, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.



## Decision and Order

**VII.**

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The latter of:
  - 1. the day after the divestiture of all of the Specialty Metals Product Assets, as required by and described in the Decision and Order, has been completed and each Interim Monitor, in consultation with Commission staff and the Acquirer, notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated; or
  - 2. the day after the day the Decision and Order becomes final and effective.

By the Commission.

**DECISION AND ORDER**  
**[Redacted Public Version]**

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Carpenter Technology Corporation (“Carpenter”) of 100 percent of the outstanding voting securities of Respondent Latrobe Specialty Metals, Inc. (“Latrobe”) from HHEP-Latrobe,

## Decision and Order

L.P., and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the 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; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having 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, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (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 hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Carpenter Technology Corporation is a corporation organized, existing and doing business under and by virtue of the laws of State of Delaware, with its headquarters address located at 101 West Bern Street, Reading, Pennsylvania 19601.
2. Respondent Latrobe Specialty Metals, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 2626

## Decision and Order

Ligonier Street, Latrobe, Pennsylvania 15650. HHEP-Latrobe, L.P., the ultimate parent entity of Latrobe Specialty Metals, Inc., has its headquarters address at 100 Crescent Court, Suite 1200, Dallas, Texas 75201.

3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

**ORDER****I.**

**IT IS ORDERED** that, as used in the Order, the following definitions shall apply:

- A. “Carpenter” means Carpenter Technology Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Carpenter (including, but not limited to, Hawke Acquisition Corp.) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Carpenter shall include Latrobe.
- B. “Latrobe” means Latrobe Specialty Metals, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Latrobe, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. “Latrobe” also includes HHEP-Latrobe, L.P., the ultimate parent entity of Latrobe Specialty Metals, Inc.
- C. “Respondents” mean Carpenter and Latrobe, individually and collectively.
- D. “Commission” means the Federal Trade Commission.

## Decision and Order

- E. “Acquirer” means the following:
1. a Person specified by name in this Order to acquire particular assets or rights that Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final and effective; or
  2. a Person approved by the Commission to acquire particular assets or rights that Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- F. “Acquisition” means Respondent Carpenter’s acquisition of fifty percent (50%) or more of the voting securities of Respondent Latrobe. The Acquisition is contemplated by the Agreement and Plan of Merger, as amended, by and among Latrobe Specialty Metals, Inc., Carpenter Technology Corporation, Hawke Acquisition Corp., HHEP-Latrobe, L.P., and Watermill-Toolrock Partners, L.P. dated as of June 20, 2011, submitted to the Commission, pursuant to which Carpenter plans to acquire 100% of the outstanding voting securities of Latrobe from HHEP-Latrobe, L.P., with the transaction to be structured as the merger of Hawke Acquisition Corp., a wholly-owned subsidiary of Carpenter, with and into Latrobe, with Latrobe as the surviving entity.
- G. “Acquisition Date” means the day on which the Acquisition occurs.
- H. “Agency(ies)” means any government regulatory authority or authorities in the world responsible for granting approval(s), specifications(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing,

## Decision and Order

distribution, or sale of a Specialty Metals Product. The term “Agency” includes, with out limitation, the United States Department of Defense.

- I. “Closing Date” means the date on which Respondent(s) (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Specialty Metal Product Assets and grants the Specialty Metal Product License to an Acquirer pursuant to this Order.
- J. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondent Latrobe that is not in the public domain and that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Specialty Metal Product(s). The term “Confidential Business Information” *excludes* (i) information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws and (ii) information relating to Respondent Latrobe’s general business strategies or practices relating to research, Development, manufacture, marketing or sales of products that does not discuss with particularity the Specialty Metal Product(s).
- K. “Contract Manufacture” means:
1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer; and/or
  2. to provide, or to cause to be provided, any part of the manufacturing process of a Contract Manufacture Product on behalf of an Acquirer.
- L. “Contract Manufacture Product(s)” means all raw materials, inputs, and components of a Specialty Metal

## Decision and Order

Product, and/or any finished goods that are provided for resale as Specialty Metal Products.

- M. “Copyrights” means rights to all original works of authorship of any kind directly related to the Specialty Metal Product(s) and any registrations and applications for registrations thereof, including, but not limited to, the following: all such rights with respect to all promotional, marketing and advertising materials, educational and training materials for the sales force, and sales forecasting models; copyrights in all process development data and reports relating to the research and Development of the Specialty Metal Product(s) or of any materials used in the research, Development, manufacture, marketing or sale of the Specialty Metal Product(s), including copyrights in all raw data, statistical programs developed (or modified in a manner material to the use or function thereof (other than through user preferences)) to analyze research data, market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information; all records relating to employees who accept employment with the Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to the Specialty Metal Product(s); all copyrights in analytical and quality control data; and all correspondence with Agencies.
- N. “Current Operating Condition” means that, as of the date of delivery to the Acquirer, the equipment meets or exceeds all current operational, functional, productive and manufacturing capabilities required to manufacture the Specialty Metals Product and meets or exceeds all current U.S. Agency-approved

## Decision and Order

protective workplace safety standards for the operation of such equipment by workers.

- O. “Development” means all research and development activities, including, without limitation, the following: test method development; formulation, including without limitation, customized formulation for a particular customer(s); mechanical properties testing; performance testing; safety testing; composition measurements; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; and conducting experiments and other activities for the purpose of obtaining or achieving any and all Product Approvals and Specifications. “Develop” means to engage in Development.
- P. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. “Direct Cost” to the Acquirer for its use of any of Respondents’ employees’ labor shall not exceed the average hourly wage rate for such employee; *provided, however*, in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Specialty Metal Product, “Direct Cost” means such cost as is provided in such Remedial Agreement for that Specialty Metal Product.
- Q. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- R. “Employee Information” means the following, for each Specialty Metal Product Core Employee, as and to the extent permitted by the Law:
1. a complete and accurate list containing the name of each relevant employee (including former

## Decision and Order

employees who were employed by Respondent Latrobe within ninety (90) days of the execution date of any Remedial Agreement); and

2. with respect to each such employee, the following information:
  - a. the date of hire and effective service date;
  - b. job title or position held;
  - c. a specific description of the employee's responsibilities related to the relevant Specialty Metal Product;
  - d. the base salary or current wages;
  - e. the most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year and current target or guaranteed bonus, if any;
  - f. employment status (*i.e.*, active or on leave or disability; full-time or part-time); and
  - g. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees.
- S. "Eramet" means Eramet, S.A., a corporation organized, existing, and doing business under and by virtue of the laws of the French Republic, with its offices and principal place of business located at 33 avenue du Maine, 75015 Paris France. Eramet is a group of companies that includes Aubert & Duval, Erasteel Company, and Brown Europe.
- T. "Government Entity" means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.



## Decision and Order

- U. “High Volume Account(s)” means any customer of Respondent Latrobe whose annual and/or projected annual aggregate purchase amounts (on a company-wide level), in units or in dollars, of a Specialty Metal Product from Respondent Latrobe was, is, or is projected to be, among the top ten highest of such purchase amounts by Respondent Latrobe’s customers on each of the following dates: (1) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition, *i.e.*, June 20, 2011; (2) the end of the last year that immediately preceded the Acquisition Date; (3) the end of the last quarter that immediately preceded the Closing Date for the Specialty Metal Product Assets; or 4) the end of the last quarter following the Acquisition and/or the Closing Date.
- V. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.
- W. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- X. “Manufacturing Employees” means all salaried or skilled-labor employees of Respondent Latrobe who have directly participated in the planning, design, implementation, use, or operational management of the Manufacturing Technology (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the five (5) year period immediately prior to the Closing Date; *provided, however*, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for the Specialty Metal Products, “Manufacturing Employees” means the specific individuals identified as “Manufacturing Employees” in such Remedial Agreement.

## Decision and Order

- Y. “Manufacturing Technology” means all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) used at any time within the five (5) year period immediately preceding the Closing Date by Respondent Latrobe to manufacture each Specialty Metal Product, including, but not limited to, the following:
1. product specifications, including without limitation, the exact combination and proportion of metals, other agents, reactive diluents and other components that achieves a particular set of application and end-use characteristics (*e.g.*, shear strength, tensile strength, yield strength) in a final Specialty Metals Product;
  2. processes, including without limitation, aging, annealing, bump pressing, cold drawing, cutting, grinding, pickling, quenching, shot blasting, solutionizing, and swaging;
  3. standard operating procedures;
  4. product designs and design protocols;
  5. plans, ideas, and concepts;
  6. repair and performance records related to the Specialty Metal Product Equipment for the two (2) year period immediately preceding the Closing Date;
  7. records related to the protective workplace safety standards related to the Specialty Metal Product Equipment for the two (2) year period immediately preceding the Closing Date;
  8. safety procedures for handling of materials and substances;
  9. flow diagrams;
  10. quality assurance and control procedures;

## Decision and Order

11. research records;
12. annual product reviews;
13. manuals and technical information provided to employees, customers, suppliers, agents or licensees including, without limitation, manufacturing, equipment, and engineering manuals and drawings;
14. audits of manufacturing methods for Specialty Metal Products conducted by all of the following:
  - a. applicable United States' Agencies;
  - b. non-governmental Persons that provide audits and certifications of management systems and/or manufacturing processes and product assessments and certifications related to the use of metals or metal alloys for applications in the aerospace industry (*e.g.*, National Aerospace and Defense Contractors Accreditation Program, Performance Review Institute, and American Society for Testing Materials);
  - c. direct purchasers of Specialty Metal Products that use the Specialty Metal Products to manufacture products (*e.g.*, aerospace fasteners) for aerospace applications; and
  - d. end-users of products for aerospace applications that are made from Specialty Metal Products (*e.g.*, manufacturers of United States' military aircraft and components, jet aircraft, jet aircraft landing gear, or jet engines);
15. control history;
16. labeling;
17. supplier lists;

## Decision and Order

18. chemical descriptions and specifications of, all raw materials inputs, components, and ingredients related to the Specialty Metal Products; and
  19. all other information related to the manufacturing process.
- Z. “Marketing and Business Development Employees” means all management-level employees of Respondent Latrobe who directly have participated (irrespective of the portion of working time involved) in the marketing, contracting, pricing or promotion of the Specialty Metal Products to customers within the two (2) year period immediately prior to the Closing Date. These employees include, without limitation, all management-level employees having any responsibilities in the areas of sales management, brand management, sales training, market research, business development, and specialty metal alloy markets for use in Aerospace applications, but *excludes* administrative assistants; *provided, however*, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for the Specialty Metal Products, “Marketing and Business Development Employees” means the specific individuals identified as “Marketing and Business Development Employees” in such Remedial Agreement.
- AA. “Marketing Materials” means all marketing materials used specifically in the marketing or sale of a Specialty Metal Product(s) prior to and as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, sales call reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchases information to be provided on the basis of either

## Decision and Order

dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, video masters and other similar materials related to the Specialty Metal Product(s). The term “Marketing Materials” *excludes* documents relating to the Respondents’ general business strategies or practices relating to the marketing or sales of specialty metal alloys, where such documents do not discuss with particularity the Specialty Metal Products.

- BB. “MP35N Product(s)” means an alloy with a nominal chemical composition of 35 percent Nickel, 35 percent Cobalt, 20 percent Chromium, and 10 percent Molybdenum and that meets the following Aerospace Materials Specifications: AMS 5758 (solution heat treated and centerless ground bars); AMS 5844 (solution heat treated and cold drawn bars); AMS 5845 (solution heat treated, cold drawn and aged bars); and/or, AMS 7468 (bolts, screws, forged head, roll threaded after aging).
- CC. “MP 159 Product(s)” means an alloy with a nominal chemical composition of 25.5 percent Nickel, 35.7 percent Cobalt, 19.0 percent Chromium, 9.0 percent Iron, 7.0 percent Molybdenum, 3.0 percent Titanium, 0.6 percent Columbium (Niobium), and 0.2 percent Aluminum and that meets the following Aerospace Materials Specifications: AMS 5841, AMS 5842; and/or AMS 5843.
- DD. “Order Date” means the date on which this Decision and Order becomes final and effective.
- EE. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- FF. “Patents” means all patents, patent applications, including provisional patent applications, invention

## Decision and Order

disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related to any product of or owned by Respondents as of the Closing Date (*except* where this Order specifies a different time).

- GG. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.
- HH. “Product Approval(s) and Specification(s)” means the approvals, specifications, certifications, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of the Specialty Metals Products that have been adopted or required as of the Closing Date by the following:
1. applicable Agencies;
  2. non-governmental Persons that provide audits and certifications of management systems and/or manufacturing processes and product assessments and certifications related to the use of metals or metal alloys for applications in the aerospace industry (*e.g.*, National Aerospace and Defense Contractors Accreditation Program, Performance Review Institute, and American Society for Testing Materials);

## Decision and Order

3. direct purchasers of Specialty Metal Products that use the Specialty Metal Products to manufacture products (*e.g.*, aerospace fasteners) for aerospace applications; and
  4. end-users of products for aerospace applications that are made from Specialty Metal Products (*e.g.*, manufacturers of United States military aircraft and components, jet aircraft, jet aircraft landing gear, or jet engines).
- II. “Product Assumed Contracts” means all of the following contracts or agreements (copies of each such contract to be provided to the Acquirer on or before the Closing Date and segregated in a manner that clearly identifies the purpose(s) of each such contract):
1. that make specific reference to any Specialty Metal Product and pursuant to which any Third Party purchases, or has the option to purchase, any Specialty Metal Product from Respondent Latrobe;
  2. relating to any experiments, audits, or scientific studies involving any Specialty Metal Product;
  3. with universities or other research institutions for the use of any Specialty Metal Product in scientific research;
  4. relating to the particularized marketing of any Specialty Metal Product or educational matters relating solely to any Specialty Metal Product;
  5. pursuant to which a Third Party provides the Manufacturing Technology related to any Specialty Metal Product to Respondent Latrobe;
  6. pursuant to which a Third Party is licensed by Respondent Latrobe to use the Manufacturing Technology;

## Decision and Order

7. constituting confidentiality agreements involving any Specialty Metal Product;
8. involving any royalty, licensing, or similar arrangement involving any Specialty Metal Product;
9. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the Specialty Metal Products to Respondent Latrobe including, but not limited to, consultation arrangements;
10. pursuant to which any Third Party collaborates with Respondent Latrobe in the performance of research, Development, marketing, distribution or selling of any Specialty Metal Product or the business associated with the Specialty Metal Products; and/or

*provided, however,* that where any such contract or agreement also relates to a Retained Product(s), Respondent Latrobe shall assign the Acquirer all such rights under the contract or agreement as are related to the Specialty Metal Product(s), but concurrently may retain similar rights for the purposes of the Retained Product(s).

- JJ. “Product Intellectual Property” means all of the following related to each Specialty Metal Product:
1. Patents;
  2. Copyrights;
  3. Software;
  4. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process



## Decision and Order

and in final Specialty Metal Products, protocols, methods and other confidential or proprietary technical, business, research, Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;

5. rights to obtain and file for patents and copyrights and registrations thereof; and
6. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing;

*provided, however,* Product Intellectual Property expressly includes all customer specific product formulations for Specialty Metal Products that are owned, licensed, or in the possession of, Respondent Latrobe, licenses from customers related to the manufacture of products for that specific customer, and all proprietary and/or trade secret information related to a particular customer that are owned, licensed, or in the possession of, Respondent Latrobe;

*provided further, however,* “Product Intellectual Property” *excludes* Product Trademarks.

- KK. “Product Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Specialty Metal Product(s);

*provided, however,* “Product Trademark(s)” does not include the corporate names or corporate trade dress of “Carpenter” or “Latrobe” or the related corporate logos thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by the Respondents or the related

## Decision and Order

corporate logos thereof, or general registered images or symbols by which either Carpenter or Latrobe can be identified or defined.

- LL. “Proposed Acquirer” means an entity proposed by Respondents (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission to become the Acquirer of particular assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by Respondents pursuant to this Order.
- MM. “Remedial Agreement(s)” means the following:
1. any agreement between Respondents and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final and effective;
  2. any agreement between Respondents and a Third Party to effect the assignment of assets or rights of Respondents related to a Specialty Metal Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final and effective;
  3. any agreement between Respondents and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this

## Decision and Order

Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

4. any agreement between Respondents and a Third Party to effect the assignment of assets or rights of Respondents related to a Specialty Metal Product to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

NN. “Research and Development Employees” means all salaried or skilled-labor employees of Respondent Latrobe who directly have participated in the research, Development, or process to obtain or achieve Product Approvals and Specifications for the Specialty Metal Products (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the five (5) year period immediately prior to the Closing Date; *provided, however*, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for the Specialty Metal Products, “Research and Development Employees” means the specific individuals identified as “Research and Development Employees” in such Remedial Agreement.

OO. “Research and Development Records” means all research and development records relating to Specialty Metal Products including, but not limited to:

1. inventory of research and development records, research history, research efforts, research

## Decision and Order

notebooks, research reports, technical service reports, testing methods, invention disclosures, and know how related to the Specialty Metal Products;

2. all correspondence, submissions, notifications, communications, registrations or other filings made to, received from or otherwise conducted with (i) Agencies and (ii) non-governmental Persons that provide audits and certifications of management systems and/or manufacturing processes and product assessments and certifications (e.g., National Aerospace and Defense Contractors Accreditation Program, Performance Review Institute, and American Society for Testing Materials) relating to Product Approval(s) and Specification(s) submitted by, on behalf of, or acquired by, Respondent Latrobe related to the Specialty Metal Products;
3. designs of experiments, and the results of successful and unsuccessful designs and experiments;
4. annual and periodic reports (both internal and external) related to the above-described Product Approval(s) and Specification(s);
5. currently used product usage instructions related to the Specialty Metal Products;
6. reports relating to the protection of human safety and health related to the manufacture or use of the Specialty Metal Products;
7. reports relating to the protection of the environment related to the manufacture or use of the Specialty Metal Products;
8. summary of performance reports, safety reports, and product complaints from customers related to the Specialty Metal Products; and

## Decision and Order

9. product recall reports filed with any Agency related to the Specialty Metal Products.
- PP. “Retained Product(s)” means any product(s) that is not a Specialty Metals Product.
- QQ. “Sales Employee(s)” means all employees of Respondent Latrobe who directly have participated (irrespective of the portion of working time involved) in the marketing or promotion of the Specialty Metal Product(s) directly to customers within the three (3) year period immediately prior to the Closing Date. This includes employees trained to perform such sales activity for a Specialty Metal Product within the three (3) year period immediately prior to the Closing Date, *provided, however*, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for the Specialty Metal Products, “Sales Employees” means the specific individuals identified as “Sales Employees” in such Remedial Agreement.
- RR. “Software” means computer programs related to the Specialty Metal Product(s), including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing and the content and information contained on any Website; *provided, however*, that “Software” does not include software that is readily purchasable or licensable from sources other than the Respondents and which has not been modified in a manner material to the use or function thereof (other than through user preference settings).
- SS. “Specialty Metal Products” means the MP35N Products and the MP159 Products Developed, in Development, researched, manufactured, marketed or

## Decision and Order

sold by Respondent Latrobe for use in aerospace applications at any time prior to the Acquisition.

TT. “Specialty Metal Product Assets” means all of Respondent Latrobe’s rights, title and interest in and to all assets related to Respondent Latrobe’s business within the United States of America related to each of the Specialty Metal Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of each Specialty Metal Product, including, without limitation, the following:

1. copies of all Research and Development Records;
2. at the Acquirer’s option, all Product Assumed Contracts related to the Specialty Metal Product(s) (copies to be provided to the Acquirer on or before the Closing Date);
3. a list of all customers and/or targeted customers for the Specialty Metal Product(s) and the net sales (in either units or dollars) of the Specialty Metal Products to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the Specialty Metal Products on behalf of the High Volume Account and his or her business contact information;
4. at the Acquirer’s option and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date, including, but not limited to, raw materials, supplies, operating materials, work-in-process, and finished goods, and other items of inventory related to the Specialty Metal Product(s);

## Decision and Order

5. copies of all unfilled customer purchase orders for the Specialty Metal Product(s) as of the Closing Date, to be provided to the Acquirer not later than two (2) days after the Closing Date;
6. at the Acquirer's option, subject to any rights of the customer, all unfilled customer purchase orders for the Specialty Metal Products;
7. the Specialty Metal Product Equipment; and
8. copies of all of the Respondent Latrobe's books and records, customer files, customer lists and records, vendor files, vendor lists and records, cost files and records, credit information, distribution records, business records and plans, studies, surveys, and files related to the foregoing or to the Specialty Metal Product(s);

*provided however*, "Specialty Metal Product Assets" *excludes* (1) documents relating to the Respondent Latrobe's general business strategies or practices relating to research, Development, manufacture, marketing or sales of specialty metal alloys, where such documents do not discuss with particularity the Specialty Metal Products; (2) administrative, financial, and accounting records; (3) quality control records that are determined not to be material to the manufacture of the Specialty Metal Products by the Interim Monitor or the Acquirer of the Specialty Metal Products; and (4) any real estate and the buildings and other permanent structures located on such real estate.

- UU. "Specialty Metal Product Core Employees" means the Manufacturing Employees, Marketing and Business Development Employees, the Research and Development Employees, and the Sales Employees.
- VV. "Specialty Metal Product Divestiture Agreements" means the following agreements:

## Decision and Order

1. “Product Line Purchase Agreement” by and between Carpenter Technology Corporation, Latrobe Specialty Metals, and Eramet, S.A., dated as of February 16, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;
2. “Supply Agreement” by and between Carpenter Technology Corporation, Latrobe Specialty Metals, and Eramet, S.A., dated as of February 16, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto; and
3. “Consulting Agreement” by and between Carpenter Technology Corporation, Latrobe Specialty Metals, and Eramet, S.A., dated as of February 16, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;

each related to the Specialty Metal Product Assets that have been approved by the Commission to accomplish the requirements of this Order. The Specialty Metal Product Divestiture Agreements are attached to this Order and contained in non-public Appendix A.

- WW. “Specialty Metal Product Equipment” means all equipment listed as “Purchased Assets” in the “Specialty Metal Product Divestiture Agreements” in Non-Public Appendix A, including, without limitation, draw benches, dies and other ancillary finishing equipment.
- XX. “Specialty Metal Product License” means a perpetual, non-exclusive, fully paid-up and royalty-free license(s) with rights to sublicense to all of Respondent Latrobe’s rights, title and interest in, the following:
1. all Product Intellectual Property related to the Specialty Metal Product(s);
  2. all Product Approvals and Specifications related to the Specialty Metal Product(s);



## Decision and Order

3. all Manufacturing Technology related to the Specialty Metal Product(s);
4. all Marketing Materials related to the Specialty Metal Product(s); and
5. all Product Development Reports related to the Specialty Metal Product(s);

to the extent legally transferable by license, and, including, without limitation, rights to copies of all of the Respondent Latrobe's books and records related to the foregoing.

- YY. "Specialty Metal Product Releasee(s)" means the Acquirer or any entity controlled by or under common control with the Acquirer, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of the Acquirer, or of the Acquirer-affiliated entities.
- ZZ. "Supply Cost" means a cost not to exceed the manufacturer's average direct per unit cost in United States dollars of manufacturing the Specialty Metal Product, or raw material or ingredients related to a Specialty Metal Product, for the twelve (12) month period immediately preceding the Acquisition Date. "Supply Cost" shall expressly exclude any intracompany business transfer profit; *provided, however*, that in each instance where: (1) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Specialty Metal Product, "Supply Cost" means the cost as specified in such Remedial Agreement for that Specialty Metal Product.
- AAA. "Third Party(ies)" means any non-governmental Person other than the following: the Respondent; or, the Acquirer of particular assets or rights pursuant to this Order.

## Decision and Order

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

- A. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondents shall divest the Specialty Metal Product Assets and grant the Specialty Metal Product License, absolutely and in good faith, to Eramet pursuant to, and in accordance with, the Specialty Metal Product Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Eramet or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Specialty Metal Product Assets, is incorporated by reference into this Order and made a part hereof;

*provided, however,* that if Respondents have divested the Specialty Metal Product Assets and granted the Specialty Metal Product License to Eramet prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that Eramet is not an acceptable purchaser of the Specialty Metal Product Assets then Respondents shall immediately rescind the transaction with Eramet, in whole or in part, as directed by the Commission, and shall divest the Specialty Metal Product Assets and grant the Specialty Metal Product License, within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer and only in a manner that receives the prior approval of the Commission;

*provided further,* that if Respondents have divested the Specialty Metal Product Assets and granted the Specialty Metal Product License to Eramet prior to the Order Date, and if, at the time the Commission

## Decision and Order

determines to make this Order final and effective, the Commission notifies Respondents that the manner in which the divestiture or grant of license was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Specialty Metal Product Assets or grant of the Specialty Metal Product License to Eramet (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Prior to the Acquisition Date, and as a condition precedent to the consummation of the Acquisition, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Specialty Metal Product Assets and grant the Specialty Metals Product License to the Acquirer, and/or to permit the Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Specialty Metal Products;

*provided, however,* Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

- C. Respondents shall:
1. deliver the Specialty Metals Product Equipment to the Acquirer in Current Operating Condition; *provided however,* that, subject to the consent of the Acquirer on a piece-by-piece basis, Respondents, at Respondents' own expense, may substitute equipment in Current Operating Condition that:
    - a. is suitable for the same use as the particular piece of Specialty Metals Product Equipment

## Decision and Order

that is the subject of the proposed substitution;  
and

- b. meets or exceeds the operational, functional, productive and manufacturing capabilities of the particular piece of the Specialty Metals Product Equipment that is the subject of the proposed substitution; and
2. at the Acquirer's option, provide such technical assistance as is necessary to integrate the Specialty Metals Product Equipment (or any equipment substituted pursuant to Paragraph II.C.1) into the Acquirer's facility for use in the manufacture of Specialty Metals Products.
- D. Respondents shall provide the Manufacturing Technology to the Acquirer in an organized, comprehensive, complete, useful, timely, and meaningful manner. Respondents shall, *inter alia*:
1. designate employees of Respondents knowledgeable with respect to such Manufacturing Technology to a committee for the purposes of communicating directly with the Acquirer and the Interim Monitor (if any has been appointed) for the purposes of effecting such delivery;
  2. prepare technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the Specialty Metal Products, such protocols and acceptance criteria to be subject to the approval of the Acquirer;
  3. prepare and implement a detailed technological transfer plan that contains, *inter alia*, the delivery of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all Manufacturing Technology to the Acquirer; and

## Decision and Order

4. upon reasonable written notice and request from the Acquirer to Respondents, provide in a timely manner, at no greater than Direct Cost, assistance and advice to enable the Acquirer to:
    - a. manufacture the Specialty Metal Products in the same quality achieved by Respondent Latrobe and in commercial quantities;
    - b. obtain or achieve any Product Approvals and Specifications necessary for the Acquirer to manufacture, sell, market or distribute the Specialty Metal Products; and
    - c. receive, integrate, and use such Manufacturing Technology.
- E. Respondents shall:
1. Contract Manufacture and deliver to the Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products at Respondents' Supply Cost, for a period of time sufficient to allow the Acquirer to:
    - a. obtain or achieve all of the relevant Product Approvals and Specifications necessary to manufacture and sell in commercial quantities, the Contract Manufacture Products independently of Respondents; and
    - b. to secure sources of supply of the raw materials, inputs and components for the Contract Manufacture Products from entities other than Respondents;
  2. make representations and warranties to the Acquirer that the Contract Manufacture Product(s) supplied through Contract Manufacture pursuant to a Remedial Agreement meets the relevant

## Decision and Order

Aerospace Material Specifications and the relevant customer specifications for Aerospace use;

3. for the Contract Manufacture Products supplied by Respondents, Respondents shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Contract Manufacture Products supplied by Respondents to the Acquirer to meet all relevant Product Approvals and Specifications. This obligation may be made contingent upon the Acquirer giving Respondents prompt, adequate notice of such claim and cooperating fully in the defense of such claim. The Remedial Agreement to Contract Manufacture shall be consistent with the obligations assumed by Respondents under this Order; *provided, however*, that Respondents may reserve the right to control the defense of any such litigation, including the right to settle the litigation, so long as such settlement is consistent with Respondents' responsibilities to supply the Contract Manufacture Products in the manner required by this Order; *provided further*, that this obligation shall not require Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondents to the Acquirer;
4. make representations and warranties to the Acquirer that Respondents shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to deliver the Contract Manufacture Products in a timely manner as required by the Remedial Agreement to Contract Manufacture unless Respondents can demonstrate that their failure was entirely beyond the control of Respondents and in

## Decision and Order

no part the result of negligence or willful misconduct by Respondents;

5. during the term of the Remedial Agreement to Contract Manufacture, upon request of the Acquirer or Interim Monitor (if any has been appointed), make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate to the manufacture, storage, or transport of the Contract Manufacture Products that are generated or created after the Closing Date;
6. during the term of the Remedial Agreement to Contract Manufacture, maintain manufacturing facilities necessary to manufacture each of the Contract Manufacture Products; and
7. during the term of the Remedial Agreement to Contract Manufacture, provide consultation with knowledgeable employees of Respondents and training, at the request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling the Acquirer to obtain or achieve all Product Approvals and Specifications to manufacture Specialty Metal Products in the same quality achieved by the Respondent Latrobe and in commercial quantities, and in a manner consistent with the relevant customer specifications for Aerospace use, independently of Respondents, and sufficient to satisfy management of the Acquirer that its personnel are adequately trained in the manufacture of Specialty Metal Products.

The foregoing provisions, II.E.1. - 7., shall remain in effect with respect to each Contract Manufacture Product until the earliest of the following dates: (i) the date eighteen (18) months from the date that the Respondent completes delivery of all pieces of the Specialty Metals Product Equipment to the Acquirer in a manner consistent with this Order; or (ii) the date three (3) years from the Order Date.

## Decision and Order

- F. Respondents shall:
1. submit to the Acquirer, at Respondents' expense, copies of all Confidential Business Information;
  2. deliver copies of the Confidential Business Information as follows:
    - a. in good faith;
    - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
    - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness; and
  3. pending complete delivery of copies of all Confidential Business Information to the Acquirer, provide the Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Specialty Metal Products that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order.
- G. Respondents shall not enforce any agreement against a Third Party or the Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Acquirer to acquire the Manufacturing Technology, Product Intellectual Property or Product Trademarks, related to the relevant Specialty Metal Product(s) from the Third Party. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Manufacturing Technology or Product Intellectual Property.



## Decision and Order

- H. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to an agreement as described in Paragraph II.G. that allows the Third Party to provide the relevant Manufacturing Technology or Product Intellectual Property to the Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to the Acquirer for the relevant assets.
- I. Respondents shall:
1. for each Specialty Metal Product, for a period of at least eighteen (18) months from the Closing Date, provide the Acquirer with the opportunity to enter into employment contracts with the Specialty Metal Product Core Employees. Each of these periods is hereinafter referred to as the “Specialty Metal Product Core Employee Access Period(s)”;
  2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (2) ten (10) days after the Closing Date, provide the Acquirer or the Proposed Acquirer with the Product Employee Information related to the Specialty Metal Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Specialty Metal Product Core Employee within the time provided herein shall extend the Specialty Metal Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay; and
  3. during the Specialty Metal Product Core Employee Access Period(s), not interfere with the hiring or employing by the Acquirer of the Specialty Metal Product Core Employees related to the particular Specialty Metal Products and assets acquired by the Acquirer, and remove any impediments within the control of Respondents that may deter these

## Decision and Order

employees from accepting employment with the Acquirer, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Specialty Metal Product or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Acquirer. In addition, Respondents shall not make any counteroffer to such a Specialty Metal Product Core Employee who has received a written offer of employment from the Acquirer;

*provided, however,* that, subject to the conditions of continued employment prescribed in this Order, this Paragraph II.I.3. shall not prohibit Respondents from continuing to employ any Specialty Metal Product Core Employee under the terms of such employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer to such employee.

- J. Until Respondents complete the divestiture and grant of license required by Paragraph II.A., deliver the Specialty Metals Product Equipment to the Acquirer and provide the Manufacturing Technology to the Acquirer,
1. Respondents shall take such actions as are necessary to:
    - a. maintain the full economic viability and marketability of the businesses associated with each Specialty Metal Product;
    - b. minimize any risk of loss of competitive potential for such business;
    - c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to each Specialty Metal Product;

## Decision and Order

- d. ensure the Specialty Metal Product Assets are delivered to the Acquirer in a manner without disruption, delay, or impairment of the Product Approval and Specification processes related to the business associated with each Specialty Metal Product;
  - e. ensure the completeness of the delivery of the Manufacturing Technology; and
2. Respondents shall not sell, transfer, encumber or otherwise impair the Specialty Metal Product Assets (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the businesses associated with each Specialty Metal Product.
- K. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer or the Specialty Metal Product Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of the Specialty Metal Product(s) under the following:
1. any Patent owned or licensed by Respondents as of the Acquisition Date that claims a method of making, using, or a composition of matter, relating to a Specialty Metal Product;
  2. any Patent owned or licensed at any time after the Acquisition Date by Respondents that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of a Specialty Metal Product, other than such Patents that claim inventions conceived by and reduced to practice after the Acquisition Date;

if such suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of a particular Specialty Metal Product; or (2) the use

## Decision and Order

within, import into, export from, or the supply, distribution, or sale within, the United States of a particular Specialty Metal Product. Respondents shall also covenant to the Acquirer that as a condition of any assignment, transfer, or license to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue the Acquirer or the related Specialty Metal Product Releasee(s) under such Patents, if the suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of a particular Specialty Metal Product; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of a particular Specialty Metal Product.

- L. Upon reasonable written notice and request from an Acquirer to Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondent to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property related to any of the Specialty Metal Products, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Specialty Metal Products; or (2) the use within, import into, export from, or the supply, distribution, or sale within the United States.
- M. Within eighteen (18) months of the Closing Date, Respondents shall either license or assign any and all intellectual property to the Acquirer that constitutes Product Intellectual Property that the Acquirer, with the concurrence of the Interim Monitor, identifies as being necessary to the conduct of the business associated with the Specialty Metal Product (as such business had been conducted by Respondent Latrobe prior to the Acquisition Date) and that was not listed

## Decision and Order

and/or included in the intellectual property that was licensed or assigned to the Acquirer pursuant to the Remedial Agreements previously submitted by Respondents to the Commission.

- N. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Specialty Metal Products a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.
- O. No provision of this Order shall be interpreted to restrict the Respondents' use of the Manufacturing Technology, Product Intellectual Property, or Confidential Business Information for the purposes of the research, Development, manufacture, marketing or sales of any of Respondents's own products, including MP 35N Products or MP 159 Products.
- P. The purpose of the divestiture of the Specialty Metal Product Assets, the grant of the Specialty Metals Product License, the provision of the Manufacturing Technology and the related obligations imposed on the Respondents by this Order is:
1. to ensure the continued use of the Specialty Metal Product Assets in the research, Development, manufacture, use, import, export, distribution, and sale of each of the respective Specialty Metal Products;
  2. to provide for the future use of the Specialty Metal Product Assets for the research, Development, manufacture, use, import, export, distribution, and sale of each of the respective Specialty Metal Products;
  3. to create a viable and effective competitor, who is independent of the Respondents in the research, Development, manufacture, use, import, export,

## Decision and Order

distribution, or sale of each of the respective Specialty Metal Products; and

4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

**III.****IT IS FURTHER ORDERED** that:

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Carpenter, which consent shall not be unreasonably withheld. If Respondent Carpenter has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Carpenter of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

## Decision and Order

- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
1. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission;
  2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission; and
  3. the Interim Monitor shall serve until, the latter of:
    - a. the date of completion by Respondents of the divestiture of all Specialty Metal Product Assets and the delivery of the Manufacturing Technology and Product Intellectual Property in a manner that fully satisfies the requirements of this Order; and
    - b. with respect to each Specialty Metal Product, the date the Acquirer has obtained or achieved all Product Approvals and Specifications necessary to manufacture, market, import, export, and sell such Specialty Metal Product for use for aerospace applications and able to manufacture such Specialty Metal Product in commercial quantities independently of Respondents;
- provided, however,* that the Interim Monitor's service shall not exceed five (5) years from the Order Date;

## Decision and Order

*provided further*, that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.

- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order.
- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
- G. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.



## Decision and Order

- H. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Order; *provided, however*, beginning ninety (90) days after Respondent has filed its final report pursuant to Paragraph V.B., and every ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward:
1. obtaining or achieved all of the relevant Product Approvals and Specifications necessary to manufacture in commercial quantities, the Specialty Metal Products independently of Respondents; and
  2. securing sources of supply of the raw materials, inputs and components for the Specialty Metal Products from entities other than Respondents.
- I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission

## Decision and Order

materials and information received in connection with the performance of the Interim Monitor's duties.

- K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- M. The Interim Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

**IV.****IT IS FURTHER ORDERED** that:

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Specialty Metal Product Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief

## Decision and Order

available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If the Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
  - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
  - 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust

## Decision and Order

agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than

## Decision and Order

one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the

## Decision and Order

preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.
  8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
  9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

## Decision and Order

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

- A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) days after the date this Order is issued, and every sixty (60) days thereafter until Respondents have fully complied with the following:
  - 1. Paragraphs II.A , II.B., II.C., II.D., II.E., II.F., and II.H.; and
  - 2. all of their responsibilities to render transitional services to the Acquirer as provided by this Order and the Remedial Agreement(s);

Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a full description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all Persons contacted, including copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning completing the obligations.

- C. One (1) year after the date this Order is issued, annually for the next four (4) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

## Decision and Order

**VI.**

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

- A. any proposed dissolution of Respondents;
- B. any proposed acquisition, merger or consolidation of Respondents; or
- C. any other change in Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

**VII.**

**IT IS FURTHER ORDERED** that:

- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by Respondents to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- C. Respondents shall include in each Remedial Agreement related to each of the Specialty Metal Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of Respondents' obligations to the Acquirer pursuant to this Order.
- D. Respondents shall also include in each Remedial Agreement a representation from the Acquirer that the Acquirer shall use commercially reasonable efforts to obtain or achieve the Product Approvals and Specifications necessary to manufacture and sell, in commercial quantities, each such Specialty Metal Product and to have any such manufacture and sale to be independent of Respondents, all as soon as reasonably practicable.



## Decision and Order

- E. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

**VIII.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

**IX.**

**IT IS FURTHER ORDERED** that this Order shall terminate on April 12, 2022.

By the Commission, Commissioner Ohlhausen not participating.

Analysis to Aid Public Comment

**NON-PUBLIC APPENDIX A**

**SPECIALTY METAL PRODUCT  
DIVESTITURE AGREEMENTS**

**[Redacted From the Public Record Version, But Incorporated  
By Reference]**

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC  
COMMENT**

**I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) with Carpenter Technology Corporation (“Carpenter”), Latrobe Specialty Metals, Inc. (“Latrobe”), and HHEP-Latrobe, L.P., which is designed to remedy the anticompetitive effects of Carpenter’s proposed acquisition of Latrobe.

Pursuant to an Agreement and Plan of Merger dated June 20, 2011, Carpenter intends to acquire all of Latrobe’s voting securities for approximately \$410 million. Carpenter and Latrobe compete in the sale of specialty alloys used in the aerospace, energy, and other industries. The proposed acquisition would result in a merger to monopoly in the market for two of these specialty alloys: (1) MP159 and (2) MP35N used in aerospace applications (“Aerospace MP35N,” and collectively, the “MP Alloys”). The Commission’s Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the 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, in the markets for each of the MP Alloys.

The proposed Consent Agreement remedies the alleged violations by replacing the lost competition in the relevant

## Analysis to Aid Public Comment

markets that would result from the acquisition. Under the terms of the Consent Agreement, Carpenter is required to divest assets related to the manufacture and sale of the MP Alloys to Eramet S.A. (“Eramet”). The Consent Agreement requires Carpenter to provide Eramet with all of the relevant equipment, licenses, and technical information necessary for Eramet to replace Latrobe as a competitor in the markets for the MP alloys. In addition, the Consent Agreement requires Carpenter to contract manufacture the MP Alloys for Eramet at cost until Eramet is able to produce and commercially sell these products on its own.

The proposed Consent Agreement has been placed on the public record for thirty days, and comments from interested persons have been requested. 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 proposed Consent Agreement, modify it, or make final the accompanying Decision and Order.

## **II. The Products and Structure of the Markets**

The MP Alloys have unique physical characteristics that make them well suited for use in aerospace applications, and especially in aerospace engine fasteners. Purchasers of the MP Alloys are generally willing to consider overseas suppliers, although to avoid the cost of dual inventories for commercial and military customers, they typically require that suppliers be located in countries approved by Congress to supply materials for military purposes. For these reasons, the relevant markets in which to analyze the competitive effects of the proposed acquisition are the markets for MP159 and Aerospace MP35N manufactured in the United States and in foreign countries approved to supply materials for military purposes under the Defense Federal Acquisition Regulation System (“DFARS”). In these markets, Carpenter and Latrobe are the only options for U.S. consumers, and the proposed transaction would create a monopoly in both relevant markets.

## Analysis to Aid Public Comment

**III. Entry**

Entry or expansion by other specialty alloy manufacturers is not likely to avert the anticompetitive impact of Carpenter's acquisition of Latrobe. The time and cost required to obtain the physical assets, expertise, and qualifications necessary to produce the MP Alloys are substantial, and far outweigh the potential profits from entry into these small markets.

**IV. Effects of the Acquisition**

The proposed acquisition likely would result in significant anticompetitive harm in the highly-concentrated relevant markets for each of the MP Alloys. Carpenter and Latrobe are the only competitors in these highly-concentrated markets. The acquisition will eliminate actual, direct, and substantial competition between Carpenter and Latrobe, and likely result in higher prices for both of the MP Alloys.

**V. The Consent Agreement**

The proposed Consent Agreement remedies the competitive concerns raised by the transaction by requiring the parties to divest assets related to the manufacture of the MP Alloys to Eramet. The terms required by the Consent Agreement will enable Eramet to effectively replace the competition in the MP Alloys markets lost as a result of the proposed acquisition.

Eramet is a global supplier of specialty alloys with an established sales and marketing network in the United States that will allow it to be immediately competitive in the relevant MP Alloys markets. Eramet is based in France, which is an approved foreign source country for U.S. military operations under DFARS. The proposed Consent Agreement requires Carpenter to provide Eramet with product licenses and the manufacturing technology necessary to manufacture the MP Alloys. This includes technical assistance from current Latrobe company designees, and confidential business information directly related to the manufacture of the MP Alloys. In addition, the Consent Agreement requires Carpenter to contract manufacture the MP Alloys for Eramet at cost until Eramet is able to produce and commercially sell these products on its own. The Commission

## Analysis to Aid Public Comment

has appointed James R. Bucci, who has over 35 years of experience in the specialty alloy industry, as the interim monitor to oversee the divestiture.

If after the public comment period the Commission determines that Eramet is not an acceptable acquirer of the assets to be divested, or that the manner of the divestitures is not acceptable, Carpenter must unwind the divestiture and divest the assets within 180 days of the date the Order becomes final to another Commission-approved acquirer. If Carpenter fails to divest the assets within the 180 days, the Commission may appoint a trustee to divest the relevant assets.

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.