UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA and STATE OF NEW HAMPSHIRE, Plaintiffs, vs. HARVARD PILGRIM HEALTH CARE, INC. and HEALTH PLAN HOLDINGS, INC., Defendants.	Civil Action No.:1:20-cv-01183-JL

COMPETITIVE IMPACT STATEMENT

The United States of America, under Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "APPA" or "Tunney Act"), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On August 9, 2019, Defendants Harvard Pilgrim and Health Plan Holdings (f/k/a Tufts Health Plan) agreed to a "merger of equals" (the "Transaction"). The United States, along with the State of New Hampshire, filed a civil antitrust complaint on December 14, 2020, seeking to enjoin the proposed Transaction. The Complaint alleges that the likely effect of the Transaction would be to substantially lessen competition in (1) the sale of commercial group health insurance to private employers with up to 50 full-time eligible employees ("small groups") in all seven

New Hampshire Core Based Statistical Areas ("CBSAs"), and (2) the sale of commercial group health insurance to private employers with between 51 and 99 full-time eligible employees ("CRC groups") in six New Hampshire CBSAs, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, the United States filed an Asset Preservation Stipulation and Order ("Stipulation and Order") and proposed Final Judgment, which are designed to remedy the loss of competition alleged in the Complaint. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest Health Plan Holdings' New Hampshire subsidiary, Tufts Health Freedom Plans, Inc. ("Tufts Freedom"). The United States has approved UnitedHealth Group, Inc. ("United") as the acquirer of Tufts Freedom. Under the terms of the Stipulation and Order, Defendants will take certain steps to ensure that Tufts Freedom is operated as a competitively independent, economically viable, and ongoing business concern, which will remain independent and uninfluenced by Defendants, and that competition is maintained during the pendency of the required divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DECRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Defendants and the Proposed Transaction

Harvard Pilgrim is a nonprofit corporation organized and existing under the laws of the Commonwealth of Massachusetts with its headquarters in Wellesley, Massachusetts. Harvard Pilgrim sells commercial group health insurance plans to small and large employer groups in

New Hampshire, Massachusetts, Connecticut, and Maine. Harvard Pilgrim's annual revenue in 2019 was approximately $3 billion, with the vast majority of this revenue coming from commercial insurance products, and it has over one million members across all its insurance products.

Health Plan Holdings is a nonprofit corporation organized and existing under the laws of the Commonwealth of Massachusetts with its headquarters in Watertown, Massachusetts. Prior to October 7, 2020, Health Plan Holdings was known as Tufts Health Plan, Inc. Health Plan Holdings sells commercial group health insurance plans to small and large employer groups in New Hampshire, Massachusetts, and Rhode Island. In New Hampshire, Health Plan Holdings sells health insurance through Tufts Freedom. Tufts Freedom was a joint venture with Granite Healthcare, a consortium of New Hampshire hospitals, until September 2020, when Health Plan Holdings purchased the hospitals' interests and became the sole owner. Health Plan Holdings' annual revenue in 2019 was over $5.5 billion, with roughly one-third of this revenue coming from commercial insurance products, and it has over one million members across all its insurance products.

On August 9, 2019, Defendants entered into an agreement entitled "Combination Agreement" pursuant to which Health Plan Holdings will acquire Harvard Pilgrim. No money is exchanging hands and Defendants have described the transaction as a "merger of equals."

B. The Competitive Effects of the Transaction

Health insurance companies sell commercial group health insurance to employers so employers can provide their employees and their employees' families with health insurance coverage. Harvard Pilgrim and Health Plan Holdings are two of the largest suppliers of commercial health insurance in New Hampshire to employers with less than 100 employees. Harvard Pilgrim and Health Plan Holdings compete vigorously with one another in the sale of

commercial health insurance to these employers. As alleged in the Complaint, combining Harvard Pilgrim and Health Plan Holdings into one firm would likely lead to higher prices, lower quality, and reduced choice in New Hampshire.

1. The Relevant Markets

a) Commercial Health Insurance Sold to Small Groups

As alleged in the Complaint, the sale of commercial health insurance to small groups is a relevant antitrust product market in which to analyze the effects of the Transaction. New Hampshire Insurance Department regulations define a "small group" as an employer with 50 or fewer full-time eligible employees. *See* N.H. REV. STAT. ANN. § 420-G:2, XVI. For small groups, health plans are typically fully insured, which means that the employer pays a premium to the insurance company and in return the company covers the employees' healthcare costs. Small groups tend to be local in nature, requiring a strong local provider network of doctors and hospitals that are contracted to provide medical care to the group's employees. The relevant market for small groups alleged in the Complaint does not include governmental employers (*e.g.*, municipalities, school districts) in New Hampshire with 50 or fewer employees, as historically almost all of these employers have purchased health insurance through a multi-employer trust instead of directly from an insurer.

The commercial health insurance plans offered to small groups are governed by the New Hampshire Insurance Department. The small group plans cannot be substituted with plans offered to New Hampshire employers with 51 or more full-time eligible employees, defined by statute in New Hampshire as "large group." Harvard Pilgrim and Health Plan Holdings also differentiate small group accounts separately from large group accounts internally and offer different pricing for small group products compared to large group products.

New Hampshire law does not require that an insurer offer a small group product statewide and instead permits an insurer to offer small group plans only in certain counties. Accordingly, despite the fact that state law does not allow insurers to charge different prices for the same small group plans based on location, insurers can offer a more expensive set of small group plans in one part of the state, and a less expensive set of different small group plans in another part of the state. This allows insurers to charge different prices for different products to small groups based on where employees live and work.

There are seven Core Based Statistical Areas (CBSA) in New Hampshire: (1) the Manchester-Nashua CBSA, (2) the Concord CBSA, (3) the Laconia CBSA, (4) the Keene CBSA, (5) the Berlin CBSA, (6) the New Hampshire counties (Grafton and Sullivan) of the Lebanon NH-VT CBSA, and (7) the New Hampshire counties (Rockingham and Strafford) of the Boston-Cambridge-Newton MA-NH CBSA. As alleged in the Complaint, the Transaction is likely to substantially lessen competition for the sale of commercial health insurance to small groups in all seven of New Hampshire's CBSAs.

Each of these seven CBSAs is a relevant geographic market. A hypothetical monopolist over the sale of commercial health insurance to small groups in each of these markets would impose a small but significant and non-transitory increase in price (*e.g.* five percent). A small group employer, faced with a significant price increase, cannot defeat the price increase by purchasing a large group product for which it is ineligible. This price increase also would not be defeated by substitution outside the relevant market or by a small group employer trying to repurchase insurance through another employer group (*i.e.* arbitrage).

b) Commercial Health Insurance Sold to CRC Groups

As alleged in the Complaint, the sale of commercial health insurance to CRC groups is a relevant antitrust product market. In New Hampshire, employers with between 51 and 99 full-

time eligible employees represent a distinct segment of large group and are referred to as CRC employers (or CRC groups). CRC groups have different needs and make different buying decisions than small groups or even larger employers. Harvard Pilgrim and Tufts Freedom employ different sales strategies for this segment than they do for other types of employers.

Similar to small groups, CRC group health plans are typically fully insured, which means that the employer pays a premium to the insurance company and in return the company covers the employees' healthcare costs. Insurers offering commercial health insurance in New Hampshire, including Harvard Pilgrim and Tufts Freedom, differentiate employers with 51 to 99 full-time eligible employees from other large group employers, and refer to these employers as the CRC segment. As with small groups, CRC groups also tend to be more local in nature than other large group employers, requiring a strong local provider network, as opposed to large group employers with 100 or more full-time eligible employees, which, due to a more geographically dispersed employee base, are more likely to require strong national provider networks. As with small groups, the relevant market for CRC groups alleged in the Complaint does not include governmental employers (*e.g.*, municipalities, school districts) in New Hampshire with 51-99 employees, as historically almost all of these employers have purchased health insurance through a multi-employer trust instead of directly from an insurer.

Group health plans for CRC groups, in contrast to larger group employers, are typically (although not exclusively) community rated by class, meaning that, when setting rates for CRC groups, the insurer first establishes a base rate determined by the medical costs of a class of similar groups, rather than upon the medical costs of the individual group seeking the plan. The insurer then uses this base rate, along with the individual employer's medical costs, to negotiate rates with the specific CRC group.

Defendants target CRC groups directly through their sales efforts. For example, Tufts Freedom has focused its large group sales efforts on CRC groups since it began selling commercial health insurance in New Hampshire, while Harvard Pilgrim tracks CRC groups separately from other large group accounts. In addition, both Harvard Pilgrim and Tufts Freedom utilize specific pricing strategies for CRC groups. Defendants have formulated these specific pricing strategies because CRC groups in New Hampshire are generally more price sensitive than large group employers with 100 or more full-time eligible employees.

Unlike commercial health insurance sold to small groups, insurers offering commercial health insurance to CRC groups in New Hampshire can charge different prices to different employers. Thus, insurers may charge different prices to CRC groups based on where employees live and work. The Transaction is likely to substantially lessen competition for the sale of commercial health insurance to CRC groups in six separate CBSAs in New Hampshire: (1) the Manchester-Nashua CBSA, (2) the Concord CBSA, (3) the Laconia CBSA, (4) the Keene CBSA, (5) the New Hampshire counties (Grafton and Sullivan) of the Lebanon NH-VT CBSA, and (6) the New Hampshire counties (Rockingham and Strafford) of the Boston-Cambridge-Newton MA-NH CBSA.

As alleged in the Complaint, each of these six CBSAs is a relevant geographic market. A hypothetical monopolist over the sale of commercial health insurance to CRC groups in each of these markets would impose a small but significant (*e.g.*, five percent) and non-transitory increase in price. This price increase would not be defeated by substitution outside the relevant market or by arbitrage.

2. The Transaction Would Result in Large Combined Market Shares

Harvard Pilgrim and Tufts Freedom are two of the largest providers of small group and CRC group insurance in New Hampshire. The Transaction would result in a substantial increase

in concentration of insurers that compete to offer commercial health insurance to small groups and CRC groups in New Hampshire.

The Supreme Court has held that mergers that significantly increase concentration in already concentrated markets are presumptively anticompetitive and therefore presumptively unlawful. To measure market concentration, courts often use the Herfindahl-Hirschman Index ("HHI") as described in the *Horizontal Merger Guidelines*. HHIs range from 0 in markets with no concentration to 10,000 in markets where one firm has a 100% market share. According to the *Horizontal Merger Guidelines*, mergers that increase the HHI by more than 200 and result in an HHI above 2,500 in any market are presumed to be anticompetitive and, therefore, unlawful.

The Complaint alleges that the Transaction is presumptively unlawful in the small group market. Based upon 2018 data, the combined market shares for Harvard Pilgrim and Tufts Freedom range from over 45% to over 60% in each of the seven CBSAs. As alleged in the Complaint, the Transaction would reduce the number of small group health insurers from four to three, with the two largest insurers – Anthem Blue Cross and Blue Shield ("Anthem") and the merged Harvard Pilgrim/Tufts Freedom – possessing over 95% share in each of the seven CBSAs. The result is highly concentrated markets with HHIs of between 4,500 and 7,500 and increases in HHIs from over 350 to over 1,600.

As alleged in the Complaint, the Transaction is also presumptively unlawful in the CRC group market. Based upon 2018 data, the combined market shares for Harvard Pilgrim and Tufts Freedom range from more than 40% to over 65% in each of the six CBSAs. Similar to the small group market, the Transaction would reduce the number of CRC group health insurers from four to three, with the two largest insurers – Anthem and the merged Harvard Pilgrim/Tufts Freedom – possessing over 95% share in each of the six CBSAs. The result is highly concentrated markets

with HHIs of between just under 5,000 to almost 7,000 and increases in HHIs from over 200 to over 2,000.

3. The Transaction Would Eliminate Head-to-Head Competition Between Two Close Competitors

As alleged in the Complaint, Harvard Pilgrim and Tufts Freedom are particularly close competitors for commercial health insurance sold to small groups and CRC groups in New Hampshire. The competition between the two insurers is more robust for certain types of groups than the market shares would predict. This is in part because Harvard Pilgrim and Tufts Freedom – two strong local health insurers that have not built national provider networks – are more attractive to small groups and CRC groups with higher percentages of employees residing in New Hampshire. Similarly, because Harvard Pilgrim and Tufts Freedom have priced aggressively, the two appeal to small groups and CRC groups that have greater price sensitivity.

Harvard Pilgrim and Tufts Freedom have engaged in head-to-head competition on price, plan features, and quality of service in the sale of commercial health insurance to small groups and to CRC groups in New Hampshire. For example, as the Complaint alleges, upon entering the New Hampshire market in 2016, Tufts Freedom priced aggressively, and gained significant market share, largely at the expense of Harvard Pilgrim. Additionally, in 2019, Harvard Pilgrim developed four new no-coinsurance plans, which limited out-of-pocket expenses to members and offered different features, with the express purpose of making them more attractive to members. Just this year, Tufts Freedom offered consumers a novel telehealth option that included zero copayment in fully insured plans in order to drive innovation around this emerging platform. Eliminating competition between Harvard Pilgrim and Tufts Freedom would likely result in higher prices, lower quality, less innovation, and less customer choice in the sale of commercial health insurance to small groups and to CRC groups in New Hampshire.

4. Difficulty of Entry or Expansion

As alleged in the Complaint, new entry and expansion by competitors will likely neither be timely nor sufficient in scope to prevent the likely anticompetitive effects of the proposed Transaction. Barriers to entry and expansion include state licensing and regulatory requirements, the cost of developing a comprehensive provider network where employees live and work, the inability of insurers without significant membership to obtain competitive discounts from providers, and the development of sufficient business to permit the spreading of risk.

The Complaint also alleges that the anticompetitive effects of the proposed Transaction are not likely to be eliminated by any efficiencies the proposed Transaction may achieve.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The relief required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor in the markets for the sale of commercial group health insurance to small groups and CRC groups in New Hampshire. Paragraph IV.A of the Proposed Final Judgment requires Defendants, within 30 days after entry of the Stipulation and Order by the Court, to divest Tufts Freedom, Health Plan Holdings' New Hampshire subsidiary, to United, or an alternative acquirer, acceptable to the United States, in its sole discretion, after consultation with the State of New Hampshire ("Acquirer"). Paragraph IV.B allows for this 30-day period to be extended until 5 calendar days after Harvard Pilgrim and Health Plan Holdings receive the required regulatory approvals from the Massachusetts Division of Insurance. Any extension for securing regulatory approvals shall be no longer than 60 calendar days after the 30-day time period provided in Paragraph IV.A, unless the United States, in its sole discretion, consents to an additional extension. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with Acquirer.

A. Divestiture Assets

The proposed Final Judgment requires Defendants to divest all assets and rights that an Acquirer needs to compete against Defendants and other commercial health insurers in New Hampshire for the sale of commercial group health insurance to small groups and CRC groups. The Divestiture Assets, which are defined in Paragraph II.F of the proposed Final Judgment, include all tangible and intangible assets of Tufts Freedom, including insurance licenses and real property interests, such as leases, membership, and customer contracts; all contracts with healthcare providers to which Tufts Freedom is a signatory; all current and historical member records for the health plans that Tufts Freedom offers or has offered, all underlying electronic data, and all files that contain any current or historical member records for those health plans; and all provider-furnished data related to members of health plans that Tufts Freedom offers or has offered and all files that contain any provider-furnished data related to those health plans.

The Divestiture Assets also include an exclusive license for Acquirer to use the "Tufts Health Freedom," "Tufts Health Freedom Insurance Company," and "Tufts Health Freedom Plan(s)" brand names, and all associated trademarks, service marks, and service names, in New Hampshire from the date on which the Divestiture Assets are divested to Acquirer through December 31, 2021. This license will assist Acquirer in maintaining plan membership during the period immediately after the divestiture. Related to the license included in the Divestiture Assets, Paragraphs IV.R and IV.S of the proposed Final Judgment prohibit Defendants from selling commercial health insurance products in New Hampshire that use the "Tufts Health" or "Tufts Health Plan" brand(s) through December 31, 2021, and prohibit Defendants from using the terms "Health Freedom Plan(s)," "Freedom," or "Freedom Plan(s)" for any business name or to identify, market, or promote any products or services in New Hampshire. This prohibition will

protect against consumer confusion between Defendants' commercial health insurance plans and Tufts Freedom's commercial health insurance plans.

B. Hiring of Personnel

The proposed Final Judgment contains provisions intended to facilitate Acquirer's efforts to hire certain employees of Health Plan Holdings who have responsibilities for the Tufts Freedom business. These provisions will help ensure that Acquirer will be able to retain qualified employees to operate Tufts Freedom. Paragraph IV.I of the proposed Final Judgment requires Defendants to assist Acquirer in identifying and hiring employees based in New Hampshire or assigned to New Hampshire business and to make them available for interviews. It also provides that Defendants must not interfere with any negotiations by Acquirer to hire these employees. In addition, for employees who elect employment with Acquirer, Defendants must waive all non-compete and non-disclosure agreements; vest and pay (or provide to Acquirer for payment to the employee) on a prorated basis any bonuses, incentives, other salary, benefits, or other compensation fully or partially accrued at the time of the transfer of the employee to Acquirer; vest any unvested pension and other equity rights; and provide all other benefits that those employees otherwise would have been provided had they continued employment with Defendants, including any retention bonuses or payments. Paragraph IV.I further provides that Defendants may not solicit to rehire any employees who elect employment with Acquirer, unless an employee is terminated or laid off by Acquirer or Acquirer agrees in writing that Defendants may solicit to rehire that individual. The non-solicitation period runs for 12 months from the date of the divestiture.

C. Transition and Run-Out Services

The proposed Final Judgment also contains several provisions to facilitate the transition of the Divestiture Assets to Acquirer. These provisions will facilitate a smooth transition for

Tufts Freedom members from Health Plan Holdings to Acquirer so that Acquirer can compete effectively in the markets for health insurance sold to small groups and CRC groups in New Hampshire. For example, Paragraph IV.L of the proposed Final Judgment requires Defendants to make best efforts to transition customers from the Health Plan Holdings operating platform to Acquirer's operating platform beginning July 1, 2021, and ending by December 31, 2021. This transition will not begin until July 2021 in order to give Acquirer enough time to prepare its own operating platform for the Tufts Freedom business. In addition, Paragraph IV.M requires Defendants, at Acquirer's option, to enter into one or more agreements to provide transition services to Acquirer for a period running until December 31, 2021, or if Acquirer is not United, one year from the date of the divestiture. Transition services must encompass all services necessary for Acquirer to operate the Divestiture Assets. Among other things, the proposed Final Judgment allows Health Plan Holdings to provide the operational platform and systems infrastructure to run the Divestiture Assets, prepare regulatory filings, and handle member services for Acquirer for a time-limited period. Acquirer may terminate a transition services agreement, or any portion of it, without cost or penalty at any time upon commercially reasonable notice. Paragraph IV.M also provides that employees of Defendants tasked with supporting this agreement must not share any competitively sensitive information of Acquirer with any other employee of Defendants, unless such sharing is for the sole purpose of providing transition services to Acquirer.

Paragraph IV.N of the proposed Final Judgment further requires Defendants, at Acquirer's option, to provide Run-out Services to Acquirer to cover the period from the date of a customer's transition to Acquirer's operating platform, until June 30, 2022, and at Acquirer's option, for up to an additional 90 days. Run-out Services are services that are customarily

provided to an acquirer by a seller following an operational transfer of a health insurance plan. Run-out services include, among other things, claims processing, claims reporting, administrative support, and routine investigations necessary for claims processing. These services are provided by a seller of an insurance plan for a period of time after an operational transfer because the services relate to claims that were incurred prior to the transfer but have not been resolved. For example, a claim that occurred during the transition period might not be processed or investigated until after the transition period has ended. Requiring Defendants to provide these Run-out Services will help to smooth the transfer of the Divestiture Assets to Acquirer and ensure that Acquirer can immediately and successfully operate Tufts Freedom. The United States, in its sole discretion, may approve one or more extensions of Run-out Services. Acquirer may terminate a Run-out Services agreement, or any portion of it, without cost or penalty at any time upon commercially reasonable notice. Paragraph IV.N also provides that employees of Defendants tasked with supporting this agreement must not share any competitively sensitive information of Acquirer with any other employee of Defendants, unless such sharing is for the sole purpose of providing Run-out Services to Acquirer.

D. Healthcare Provider Contracts

An insurer's ability to compete on price depends largely on medical costs, which are impacted significantly by the discounts the insurer obtains from healthcare providers through its contracts with those providers. The proposed Final Judgment contains several provisions to help ensure that Tufts Freedom will maintain contracts with New Hampshire healthcare providers at competitive rates following the divestiture. Keeping contracts with local providers at competitive rates will better position Tufts Freedom to be competitive in the small group and CRC group markets in New Hampshire.

1. Contracts with Granite Healthcare Providers

Paragraph IV.P of the proposed Final Judgment requires that Defendants warrant that as of the date of divestiture, Tufts Freedom's contracts with Catholic Medical Center, Concord Hospital, Southern New Hampshire Health System, and Wentworth-Douglass Hospital, and any other hospitals that had an ownership interest in Granite Healthcare as of July 1, 2020, have not expired or terminated, will run through at least December 31, 2021, and will be on the same rates and terms that were in effect as of October 1, 2020, subject to certain permitted rate increases.

2. Contracts with other Healthcare Providers

Paragraph IV.Q of the proposed Final Judgment requires that Defendants make best efforts and cooperate with and assist Acquirer to ensure that, following the divestiture, Acquirer will retain Tufts Freedom's current contracts with healthcare providers in New Hampshire. Defendants' obligations under Paragraphs IV.Q.1–5 of the proposed Final Judgment vary depending upon whether a Healthcare Provider Contract includes change in control provisions, terminates, or expires.

a) Healthcare Provider Contracts without Change in Control Provisions

Some Healthcare Provider Contracts have no requirement that Tufts Freedom notify the provider of a change in ownership or control of Tufts Freedom and do not include provisions allowing the provider to terminate the contract in the event of a change in ownership or control. Under Paragraph IV.Q.1, Defendants must make best efforts to ensure that contracts with Tufts Freedom's fifteen largest providers in New Hampshire (as measured by 2019 claims volume) that do not require a notice of change in ownership or control (1) have not expired or terminated and (2) include the same rates and terms that were in effect as of October 1, 2020, subject to certain permitted rate increases.

b) Healthcare Provider Contracts with Change in Control Provisions

Other Healthcare Provider Contracts require the provider's consent to a change in Tufts Freedom's ownership or control, or allow the provider to terminate the contract upon notice of a change in ownership or control. Paragraph IV.Q.2 of the proposed Final Judgment requires Defendants to notify those providers of the change in ownership or control within 30 calendar days of entering into an agreement to divest the Divestiture Assets to Acquirer. Paragraph IV.Q.2 further requires Defendants to use best efforts to obtain consent to the change in ownership or control from these providers or written acknowledgement that the provider will not terminate its contract with Tufts Freedom because of the change in ownership or control. The preceding requirement does not apply in the event that a provider's deadline to exercise any termination rights has already expired without the provider terminating the contract or giving Defendants written notice of an intent to terminate.

c) Healthcare Provider Contracts that Terminate

The proposed Final Judgment places additional obligations on Defendants if a healthcare provider terminates or gives notice of an intent to terminate within 90 days from the date of the divestiture. Paragraph IV.Q.3 requires Defendants to assist Acquirer, at Acquirer's request, to secure new contracts with those terminating healthcare providers. The assistance required includes sharing information with Acquirer concerning the history of the provider's participation in Tufts Freedom and aiding Acquirer in developing strategies to retain or bring the provider in-network, on the same rates and terms that were in effect as of October 1, 2020, subject to certain permitted increases. Paragraph IV.Q.4 further requires that if the terminating provider is one of Tufts Freedom's fifteen largest healthcare providers in New Hampshire (as measured by 2019 claims volume), or the termination would result in Tufts Freedom not meeting provider network

adequacy standards required by applicable law or regulation, at Acquirer's request, Defendants must enter into a rental, lease, or similar contract to provide Acquirer with in-network access to the relevant healthcare provider(s) for a period of 12 months from the date of the divestiture.

d) Expiring Healthcare Provider Contracts

Finally, Paragraph IV.Q.5 of the proposed Final Judgment requires Defendants to use best efforts to renew all Healthcare Provider Contracts that will expire between the filing of the Complaint in this matter and 90 days after the date of the divestiture, on the same rates and terms that were in effect as of October 1, 2020, subject to certain permitted rate increases.

E. Divestiture Trustee

If Defendants do not accomplish the divestiture within the period prescribed in Paragraphs IV.A and IV.B of the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that Defendants will pay all costs and expenses of the trustee. The divestiture trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee will provide monthly reports to the United States and the state of New Hampshire setting forth his or her efforts to accomplish the divestiture. If the divestiture has not been accomplished within six months of the divestiture trustee's appointment, the United States may make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment.

F. Compliance

The proposed Final Judgment also contains provisions designed to promote compliance and make enforcement of the Final Judgment as effective as possible. Paragraph XIII.A provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph XIII.B of the proposed Final Judgment provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy the loss of competition the United States alleges would otherwise be harmed by the transaction. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIII.C of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that a Defendant has violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XIII.C provides that in any successful effort by the United States to enforce the Final Judgment against a

Defendant, whether litigated or resolved before litigation, that Defendant will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Paragraph XIII.D of the proposed Final Judgment states that the United States may file an action against a Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XIV of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and that continuation of the Final Judgment is no longer necessary or in the public interest.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15

U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the *Federal Register*, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, comments and the United States' response will be published in the *Federal Register* unless the Court agrees that the United States instead may publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted to:

Eric D. Welsh
Chief, Healthcare and Consumer Products Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 4100
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against the combination of Harvard Pilgrim and Health Plan Holdings. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the sale of commercial health insurance to small groups and CRC groups in each of the geographic markets alleged in the Complaint. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public

interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Id.* at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give

"due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case."). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co.*, 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first

place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 23, 2020

Respectfully submitted,

/s/ Catherine R. Reilly

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CERTIFICATE OF SERVICE

I, Catherine R. Reilly, hereby certify that on December 23, 2020, I caused a copy of the foregoing Competitive Impact Statement to be served on Harvard Pilgrim Health Care, Inc. and Health Plan Holdings, Inc by mailing the document electronically, to the duly authorized legal representatives of Defendants, as follows:

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