

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,
STATE OF FLORIDA,
STATE OF ILLINOIS,
STATE OF MINNESOTA,
COMMONWEALTH OF PENNSYLVANIA, and
STATE OF WISCONSIN,

Plaintiffs,

v.

WASTE MANAGEMENT, INC.,

and

ADVANCED DISPOSAL SERVICES, INC.,

Defendants.

Case No. 1:20-cv-03063 (JDB)

**RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENTS ON THE
PROPOSED FINAL JUDGMENT**

As required by the Antitrust Procedures and Penalties Act (the “APPA” or “Tunney Act”), 15 U.S.C. §§ 16(b)-(h), the United States hereby responds to the public comments received about the proposed Final Judgment in this case. After careful consideration of the two comments received, the United States continues to believe that the proposed remedy will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this Response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

On April 14, 2019, Waste Management, Inc. (“WMI”) agreed to acquire all of the outstanding common stock of Advanced Disposal Services, Inc. (“ADS”) for approximately \$4.9 billion. On June 24, 2020, WMI and ADS agreed to a revised purchase price of approximately \$4.6 billion. On October 23, 2020, the United States and the State of Florida, State of Illinois, State of Minnesota, Commonwealth of Pennsylvania, and State of Wisconsin (the “Plaintiff States”) filed a civil antitrust Complaint seeking to enjoin WMI from acquiring ADS because the proposed acquisition would substantially lessen competition for small container commercial waste (“SCCW”) collection and municipal solid waste (“MSW”) disposal in 57 local markets in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Simultaneously with the filing of the Complaint, the United States and the Plaintiff States filed a proposed Final Judgment, an Asset Preservation Stipulation and Order signed by the United States, the Plaintiff States, and Defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the APPA, and a Competitive Impact Statement describing the transaction and the proposed Final Judgment. The United States caused the Complaint, the proposed Final Judgment, and the Competitive Impact Statement to be published in the *Federal Register* on November 3, 2020, *see* 85 Fed. Reg. 70,004 (November 3, 2020), and caused notice regarding the same, together with directions for the submission of written comments relating to the proposed Final Judgment, to be published in *The Washington Post* for seven days, from November 2, 2020, through November 8, 2020. The 60-day period for public comment ended on January 7, 2021. During the public comment period, the United States received the two comments described below in Section IV and attached in Appendix A.

II. THE COMPLAINT AND THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is the culmination of a thorough, comprehensive investigation conducted by the Antitrust Division of the U.S. Department of Justice into WMI's proposed acquisition of ADS. As alleged in the Complaint, WMI is the largest solid waste hauling and disposal company in the United States and provides waste collection, recycling, and disposal services in 49 states. ADS is the fourth-largest solid waste hauling and disposal company in the United States and provides waste collection, recycling, and disposal services in 16 states.

Based on the evidence gathered during its investigation, the United States concluded that WMI's proposed acquisition of ADS would likely substantially lessen competition in the markets for SCCW collection and MSW disposal in 57 local markets in the United States, resulting in higher prices and a lower quality and level of service for customers in these markets. Accordingly, the United States and the Plaintiff States filed a civil antitrust lawsuit to block the acquisition as a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

The proposed Final Judgment is designed to preserve competition in each of the affected geographic markets that were alleged in the Complaint. It requires WMI and ADS to divest a total of 15 landfills, 37 transfer stations, 29 hauling locations, and over 200 waste and recycling collection routes, together with related ancillary assets. The required divestitures, together with the other requirements of the proposed Final Judgment, will address the anticompetitive effects of the acquisition in SCCW collection or MSW disposal service in the areas alleged in the Complaint. The divestiture of these assets to an independent, economically viable acquirer will ensure that customers of these services in the geographic markets alleged in the Complaint will

continue to receive the benefits of competition that otherwise would be lost as a result of the transaction.

Pursuant to Paragraph V(B) of the Asset Preservation Stipulation and Order, which the Court entered on October 27, 2020 (Dkt. No. 8), Defendants are required to comply with all of the terms and provisions of the proposed Final Judgment. Following the Court's entry of the Asset Preservation Stipulation and Order, and as required by Paragraph IV(A) of the proposed Final Judgment, Defendants completed the required divestiture to GFL Environmental Inc. ("GFL"), which took ownership of the assets and has begun incorporating them into its operations. GFL is now the fourth-largest SCCW collection and MSW disposal provider in North America.

III. STANDARD OF JUDICIAL REVIEW

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).

IV. SUMMARY OF PUBLIC COMMENTS AND THE RESPONSE OF THE UNITED STATES

During the 60-day public comment period, the United States received comments from: (1) Solid Waste Agency of Lake County, Illinois (“SWALCO”); and (2) Solid Waste Agency of Northern Cook County, Illinois (“SWANCC”). The comments are attached in the accompanying Appendix A and are summarized below. After reviewing these comments, the United States continues to believe that the proposed Final Judgment is in the public interest.

A. Public Comments from Solid Waste Agency of Lake County, Illinois and Solid Waste Agency of Northern Cook County, Illinois

SWALCO and SWANCC are both intergovernmental organizations that advise and assist member communities with solid waste management issues and provide them with a variety of waste reduction and recycling programs and resource materials. SWALCO is composed of members from 43 municipalities in Lake County, Illinois, and SWANCC has 23 member communities in Northern Cook County, Illinois. In their comments, SWALCO and SWANCC assert that the proposed Final Judgment should be revised to include the sale of collection routes and assets in the Chicago, Illinois area (“Chicago area”). In the alternative, SWALCO proposes that WMI be required to commit to take waste to the divested MSW disposal assets in Chicago or to sell those MSW disposal assets to Lakeshore Recycling Systems, Inc. instead of GFL, which, after approval by the United States, acquired the Divestiture Assets.

SWALCO and SWANCC both assert that such modifications are necessary to make the divested disposal facilities “economically viable” and to create a “strong fourth vertically integrated competitor.” SWALCO further asserts that because the United States required the divestiture of vertically integrated operations in other markets, it should do so in the Chicago area as well. Finally, SWALCO and SWANCC state that the approved acquirer, GFL, has not shown a commitment to the Chicago area since the close of the divestiture transaction because it has not bid for certain hauling contracts. SWANCC further suggests that GFL will not be able to attract sufficient independent collection providers to the divested MSW disposal assets, and thus, GFL will eventually sell the assets to a larger market participant.

B. Response of the United States

Entry of the proposed Final Judgment is in the public interest, and SWALCO’s and SWANCC’s recommendations—to revise the proposed Final Judgment to require the sale of additional collection routes and assets, to require WMI to commit to take waste to the divested MSW disposal assets, or to require that the divested MSW disposal assets be sold to Lakeshore Recycling Systems instead of GFL—are unnecessary. As explained in more detail below, the United States continues to believe that the proposed Final Judgment presents an adequate remedy for four primary reasons. First, the divestiture of collection routes and assets in the Chicago area is not necessary to ensure the success of the MSW disposal divestiture assets. Second, to the extent SWALCO and SWANCC assert that the sale of additional collection routes and assets is necessary to remedy a competitive concern in collection in the Chicago area, they seek a remedy for harm not alleged by the United States in its Complaint. Third, GFL’s decision not to bid on certain collection contracts is not evidence of a lack of commitment to the Chicago area MSW disposal markets. Fourth, the alternative proposals – to require WMI to commit to take waste to

the divested MSW disposal assets in the Chicago area or to require that these divested MSW disposal assets be sold to Lakeshore Recycling Systems instead of GFL – are unnecessary to ensure the viability of the MSW divestitures and to remedy the harm alleged in the Complaint.

1. The MSW disposal assets in the Chicago area do not need to be operated with collection routes and assets to be viable.

SWALCO's and SWANCC's recommendation to revise the proposed Final Judgment to require the sale of collection routes and assets is unnecessary to ensure the viability of the MSW disposal divestiture assets in the Chicago area. The MSW disposal divestiture assets in the Chicago area are viable without also requiring divestiture of collection routes and assets.

As part of a thorough vetting process of the required divestitures and GFL as the approved acquirer, the United States specifically examined the viability of the assets to be divested. As part of this process, the United States conducted interviews with GFL, examined the GFL's business plans, financial plans, and additional related documents, and interviewed other market participants. Through this process, the United States determined that divestiture of collection routes and assets in the Chicago area is not necessary to ensure the viability and competitiveness of the divested MSW disposal assets in the Chicago area. In significant part, this is because a number of independent collection providers in the Chicago area (including Flood Brothers Disposal and, as SWALCO notes, Lakeshore Recycling Services) need MSW disposal options for the waste they collect. GFL will be motivated and able to compete to provide MSW disposal services for these firms, which will provide GFL with the waste flow to make the MSW disposal divestiture assets viable. By partnering with independent collection providers, GFL will be able to compete with vertically-integrated waste management companies to serve communities such as SWALCO and SWANCC. In short, GFL does not itself need to

collect waste in order to run a successful waste disposal business in the Chicago area, as it can contract with others that collect that waste.

Furthermore, the fact that the United States required the divestiture of both collection and disposal assets in other markets does not mean that the United States should have done the same in the Chicago area. The United States examines each market individually and on its own merits. In some markets in which the United States alleged harm resulting from the transaction, the United States determined that divestiture of both collection and MSW disposal assets was necessary, primarily because there were not sufficient independent collection firms in the area to provide waste volume to support the MSW disposal divestiture assets. In other markets, the United States determined that the merger would significantly reduce competition in SCCW collection, and thus, the divestiture of collection assets was necessary to remedy the alleged harm in SCCW collection. As noted above, in the Chicago area, the United States determined that there were a sufficient number of independent collection firms that would provide waste volume to the MSW disposal divestiture assets acquired by GFL. For this reason, and as discussed below, the United States did not allege harm in waste collection in the Chicago area. The divestiture of collection routes and assets in the Chicago area is therefore not required to remedy any competitive harm alleged in the Complaint.

2. The Complaint does not allege harm in the Chicago area's collection markets.

SWALCO's and SWANCC's recommendations to revise the proposed Final Judgment to require the sale of collection routes and assets in the Chicago area is unnecessary and beyond the scope of the allegations in the Complaint. The United States conducted a thorough investigation of the effects of the transaction in the Chicago area (including Lake County and Northern Cook County, Illinois). Based on this investigation, the United States did not find a basis to allege

harm in any collection market in the Chicago area and, therefore, did not require the divestiture of collection routes or assets in the Chicago area. Rather, the Complaint alleged competitive harm in multiple MSW disposal markets in the Chicago area.

Because the additional relief sought by SWALCO and SWANCC is not required to remedy any harm alleged in the Complaint, consideration of whether to amend the proposed Final Judgment to include this relief falls outside the scope of the Tunney Act's public interest inquiry. As the D.C. Circuit explained in *Microsoft*, 56 F.3d at 1459-60, 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." Because the United States did not allege harm in any collection market in the Chicago area, the modifications proposed by SWALCO and SWANCC fall outside the scope of this Tunney Act review. Expanding the public interest review to encompass relief related to an uncharged allegation would amount to "effectively redraft[ing] the complaint" to inquire into matters the United States did not pursue. *Microsoft*, 56 F.3d at 1459.

3. *GFL is committed to operating the Chicago area MSW disposal assets.*

SWALCO and SWANCC assert that GFL has not shown a commitment to the Chicago-area market because GFL did not bid on two recent municipal collection opportunities in SWALCO's area and has not yet pursued such collection opportunities in SWANCC's area.¹ SWANCC argues that this suggests GFL might sell the Divestiture Assets in the Chicago area at a later date. But the divestiture to GFL in the Chicago area is aimed at preventing harm in MSW disposal, not waste collection. As noted above, the United States did not allege harm in any

¹ While SWALCO's and SWANCC's comments refer to both residential waste collection and SCCW collection bids in the Chicago area, the primary focus of the relevant bids is residential collection. As explained in the Complaint, residential waste collection is a distinct service from SCCW collection. The United States did not allege harm in any residential waste collection market and comments related to residential collection are outside the scope of the Court's Tunney Act review. See *Microsoft*, 56 F.3d at 1459-60.

waste collection market in the Chicago area. The absence of bidding activity by GFL for specific collection opportunities does not warrant modification of the proposed Final Judgment. GFL's commitment to compete in the Chicago area should be judged by its activities and plans for competing in the market in which the United States alleged harm: the MSW disposal market. Thus, GFL's decision not to bid on particular contracts to provide collection services is not evidence of a lack of commitment to the MSW disposal market and does not impact the evaluation of whether the remedy for the Chicago-area MSW disposal market alleged in the Complaint is in the public interest.

The United States has reviewed GFL's financial and operational plans for the relevant MSW disposal divestiture assets as a part of its vetting process. The United States determined that GFL has both the intent and capability to serve the Chicago area with the MSW disposal divestiture assets, thus meeting the standard established by the United States in the proposed Final Judgment for approval of the acquirer of the Chicago-area MSW disposal divestiture assets.

4. SWALCO's alternative proposals are also unnecessary.

For the same reasons that there is no need to divest collection assets to GFL in the Chicago area, there is no need to revise the proposed Final Judgment to require WMI to guarantee that it will take waste to the MSW disposal divestiture assets in the Chicago area, as SWALCO proposes. As described above, the MSW disposal divestiture assets are viable without a commitment of this sort from WMI. MSW volumes from independent collection firms will be sufficient to support the successful operation of the MSW disposal divestiture assets in the Chicago area. Moreover, a commitment of this sort would create an ongoing entanglement between competitors and could have the effect of disincentivizing GFL from competing

vigorously in the marketplace. Such a commitment is therefore not only unnecessary, but also potentially harmful to competition in the Chicago area.

Further, in accordance with Paragraph IV(A) of the proposed Final Judgment, the United States has found GFL to be an appropriate acquirer for the MSW disposal assets, and the proposed Final Judgment should not be modified to require the sale of the MSW disposal divestiture assets in the Chicago area to Lakeshore Recycling Services, as SWALCO proposes. Paragraph IV(D) of the proposed Final Judgment requires Defendants to sell the MSW disposal divestiture assets in the Chicago-area to a purchaser who “has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively” in the MSW disposal business. The goal of a divestiture is to “ensure that the purchaser possesses both the means and the incentive to maintain the level of premerger competition in the market of concern.” U.S. Dep’t of Justice, Merger Remedies Manual (2020), *available at* <https://www.justice.gov/atr/page/file/1312416/download>, at 4-6 (internal citations omitted). Accordingly, in vetting a divestiture buyer, the “appropriate remedial goal [of the United States] is to ensure that the selected purchaser will effectively preserve competition according to the requirements in the consent decree.” *Id.* at 24. The United States has done so here.

The buyer here, GFL, is a significant waste management company in North America. In addition to other non-hazardous waste services, it provides MSW disposal and SCCW collection services across Canada and the United States. The United States extensively vetted GFL’s ability to operate the Divestiture Assets, including the MSW disposal divestiture assets in the Chicago area, and, as described above, determined that GFL has both the capability and intent to

