**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA,<br><br>*Plaintiff*,<br><br>v.<br><br>S&P GLOBAL INC.,<br><br>IHS MARKIT LTD.,<br><br>and<br><br>OIL PRICE INFORMATION SERVICES, LLC,<br><br>*Defendants*. | Civil Action No.: 1:21-cv-3003-JEB |

**COMPETITIVE IMPACT STATEMENT**

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "APPA" or "Tunney Act"), the United States of America files this Competitive Impact Statement related to the proposed Final Judgment filed in this civil antitrust proceeding.

## I. NATURE AND PURPOSE OF THE PROCEEDING

On November 29, 2020, S&P Global Inc. ("S&P") and IHS Markit Ltd. ("IHSM") entered into a merger agreement to combine in an all-stock transaction that values IHSM at approximately $44 billion. Separately, in January 2016, IHSM's Oil Price and Information Services LLC ("OPIS LLC") division entered into a 20-year exclusive data license and non-compete agreement ("Data License") with GasBuddy LLC ("GasBuddy"), an operator of a popular crowd-sourced retail gas price information app that has long provided OPIS LLC with

pricing data for resale to commercial customers (e.g., retail gas station operators).

The United States filed a civil antitrust Complaint on November 12, 2021, seeking to enjoin both: (1) the consummation of the proposed merger; and (2) the enforcement of the exclusivity and non-compete provisions contained in the Data License. The Complaint alleges that the likely effect of this merger would be to substantially lessen competition for spot-level price reporting agency ("PRA") services for refined petroleum products, coal, and petrochemicals in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint also alleges that the Data License unreasonably restrains trade in the market for the sale of retail gas price data in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment and an Asset Preservation and Hold Separate Stipulation and Order ("Stipulation and Order"), which are designed to remedy the loss of competition and the unreasonable restraint on trade alleged in the Complaint.

Under the proposed Final Judgment, which is explained more fully below, S&P and IHSM are required to divest three IHSM PRA businesses: (1) OPIS LLC, which focuses on refined petroleum products; (2) Coal, Metals, and Mining ("CMM"), which focuses predominately on coal; and (3) PetrochemWire ("PCW"), which focuses on petrochemicals. S&P and IHSM have agreed to divest OPIS LLC, CMM, and PCW to News Corporation ("News Corp."), a global media conglomerate that operates a financial data company, Dow Jones & Company, Inc. ("Dow Jones").

In addition, under the proposed Final Judgment, S&P and IHSM must waive the exclusivity and non-compete provisions of the Data License between OPIS LLC and GasBuddy. S&P, IHSM, and OPIS LLC are also prohibited, without the prior written consent of the United

States, from entering into, enforcing, renewing, or extending the term of any similar exclusive or non-compete provisions.

Under the terms of the Stipulation and Order, until the divestiture is completed, S&P and IHSM must take certain steps to ensure that OPIS LLC, CMM, and PCW remain independent, economically viable, competitive, and saleable. In addition, the management, sales, and operations of these businesses must be held entirely separate, distinct, and apart from S&P's and IHSM's other operations. The purpose of these terms in the Stipulation and Order is to ensure that competition is maintained during the pendency of the required divestiture.

The Stipulation and Order also requires Defendants to abide by and comply with the provisions of the proposed Final Judgment until the proposed Final Judgment is entered by the Court or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment. On November 16, 2021, the Court entered the Stipulation and Order.

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. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS

### A. The Defendants and the Proposed Merger

S&P is a global financial data conglomerate headquartered in New York, New York and is comprised of four divisions: S&P Global Ratings, S&P Global Market Intelligence, S&P Dow Jones Indices, and S&P Platts. It reported global 2020 revenues of $7.44 billion. It provides PRA services through its S&P Platts division, which reported global 2020 revenues of $878 million and accounts for roughly 12% of S&P's revenue.

IHSM is a global financial data conglomerate headquartered in London, England and is comprised of four divisions: Financial Services, Transportation, Consolidated Markets & Solutions, and Resources. It reported global 2020 revenues of $4.29 billion. It provides PRA services primarily through its OPIS LLC, CMM, and PCW businesses, which are housed within IHSM's Resources division. OPIS LLC, CMM, and PCW reported global 2020 revenues of approximately $140 million and accounts for roughly 3% of IHSM's revenue.

OPIS LLC, currently an IHSM subsidiary, provides PRA services primarily related to refined petroleum products. OPIS LLC will be acquired by News Corp. pursuant to the divestiture required by the proposed Final Judgment.

Pursuant to a merger agreement dated November 29, 2020, S&P intends to merge with IHSM in an all-stock transaction that values IHSM at approximately $44 billion.

### B. The Competitive Effects of the Proposed Merger

The Complaint alleges that the likely effect of this merger would be to substantially lessen competition for spot-level PRA services for refined petroleum products, coal, and petrochemicals in the United States.

#### 1. Relevant Product Markets

PRAs provide commodity price assessments, news, and analysis that are critical to the proper functioning of numerous commodity markets. Some commodities, like corn or wheat, are traded on exchanges, which make price information readily accessible. But for many commodities—including many energy commodities like refined petroleum products (e.g., gasoline and jet fuel), coal, and petrochemicals—trading is done off-exchange in private transactions with no reporting obligations. It is in these opaque markets where PRA price assessments are used as a proxy for the prevailing market price.

To produce these price assessments, PRAs collect information from commodity suppliers and participants in commodities transactions and then apply proprietary methodologies and editorial judgment. PRAs focus on providing daily price assessments, and often make the assessments available to subscribers via a data feed.

In most cases, PRAs assess prices at a given time for a specific commodity at a specific geographic location (e.g., jet fuel in Los Angeles). In addition, most PRAs focus on assessing prices for spot (or bulk) transactions, which happen at the top of the supply chain (e.g., at the refinery gate where the commodity is created).

PRA customers are located worldwide and span a wide range of industries. While major oil and gas companies, commodities traders, and large energy consumers generate the majority of PRA revenues, there are many smaller customers that participate in, or are affected by, commodity markets.

S&P, through its Platts division, and IHSM, through its OPIS LLC, CMM, and PCW businesses, both provide PRA services for refined petroleum products (e.g., gasoline and jet fuel), coal, and petrochemicals. More specifically, both companies provide spot-level price assessments, and related news and analysis, for dozens of the same types of refined petroleum products, coal, and petrochemicals, across dozens of the same geographic locations across the United States and the world.

PRA services for any particular type of refined petroleum product, coal, or petrochemical are not a reasonable substitute for PRA services for any of other type of refined petroleum product, coal, or petrochemical. Similarly, PRA services for a particular commodity at one geographic location are not a reasonable substitute for PRA services for the same commodity at a different geographic location.

Despite the lack of substitutability between PRA services for different commodities within each category, or for the same commodity at different geographic locations, spot-level PRA services for U.S.-located (i) refined petroleum products, (ii) coal, and (iii) petrochemicals can be analyzed in the aggregate because each is offered under similar competitive conditions. Spot-level PRA services for U.S.-located refined petroleum products, coal, and petrochemicals are each lines of commerce, or relevant product markets, for the purposes of analyzing the effects of the proposed merger under Section 7 of the Clayton Act, 15 U.S.C. § 18.

**2. Relevant Geographic Market**

Commodity market participants looking for spot-level PRA services for U.S.-located refined petroleum products, coal, or petrochemicals cannot reasonably turn to a PRA without significant U.S. operations and an established reputation for accurately reporting commodity prices and developments. To provide customers with trustworthy trading details and market intelligence that reflect current trading conditions, PRAs must have a large number of U.S.-based analysts (referred to as "price reporters" in the industry) with close connections to the relevant players, and a detailed understanding of supply and demand dynamics, in the major U.S. trading hubs. In addition, PRA customers value established PRA providers that have a proven track record of accurately covering a given U.S. commodity market.

A hypothetical monopolist of spot-level PRA services for refined petroleum products, coal, or petrochemicals in the United States could profitably impose a small but significant non-transitory increase in price for its services without losing sufficient sales to render the price increase unprofitable. Accordingly, there are three relevant markets for the purposes of analyzing the effects of the proposed merger under Section 7 of the Clayton Act, 15 U.S.C. § 18: (1) spot-level PRA services for refined petroleum products in the United States; (2) spot-level PRA

services for coal in the United States; and (3) spot-level PRA services for petrochemicals in the United States.

**3. Competitive Effects**

Today, S&P and IHSM compete vigorously in each of the relevant markets, resulting in lower prices and increased quality and innovation for PRA customers. In each of the relevant markets, S&P and IHSM are two of a few companies providing PRA services. In spot-level PRA services for both refined petroleum products and coal in the United States, S&P and IHSM are two of the three companies that generate the vast majority of revenues in the two markets. In spot-level PRA services for petrochemicals in the United States, S&P and IHSM are two of the four companies that generate the vast majority of revenues.

For many price assessments (*e.g.*, the spot price for jet fuel in Los Angeles), one PRA will become the market standard, or benchmark, after an initial period where PRAs vie for market adoption. Once market adoption occurs, that PRA's price assessment becomes embedded in the market ecosystem, as it is frequently referenced in price indexation formulas in supply contracts and in the relevant derivative contracts traded on major derivatives exchanges that are used by market participants to hedge their positions.

Competition among PRAs plays out in various forms. As referenced above, PRAs initially vie to become the benchmark price assessment for many commodities. Because benchmark price assessments can generate substantial subscription revenues, PRAs compete fiercely on price, quality, and innovation dimensions to gain benchmark status. The ongoing energy transition to more renewable energy sources like biofuels will likely create many new benchmark opportunities in the near future. Established PRAs (*e.g.*, those operated by S&P and IHSM) are often best placed to compete for new benchmark opportunities.

Even after one PRA has been chosen as the benchmark, substantial competition remains between the PRAs covering that commodity, including competition (i) among the non-benchmark PRAs to serve as a secondary source for many customers, who use the secondary source as a "second look" to check the accuracy of the benchmark provider, and (ii) between the secondary source and the benchmark provider along both price and quality dimensions, resulting from the disciplining effect of this second-look, accuracy check.

While it is rare, some commodity markets have switched their benchmark from one PRA to another because of price and/or quality concerns. So, as one industry observer put it, "[d]espite the enormous difficulties of displacing an incumbent and the extreme rarity of switches, rival PRAs have to nonetheless invest heavily in marketing and in business development staff in order to be considered as a credible alternative during those rare moments when the incumbent stumbles."[1]

By eliminating the substantial head-to-head competition that exists today between S&P and IHSM, the proposed merger would result in higher prices and decreased quality and innovation for PRA customers. Accordingly, the proposed merger likely would substantially lessen competition in spot-level PRA services for refined petroleum products, coal, and petrochemicals in the United States.

**4. Entry and Expansion**

Entry into spot-level PRA services for refined petroleum products, coal, or petrochemicals in the United States is unlikely to be timely, likely, or sufficient to prevent the proposed merger's anticompetitive effects. As S&P and IHSM executives have recognized,

[1] Owain Johnson, The Price Reporters: A Guide to PRAs and Commodity Benchmarks (Routledge 2018) at 34.

barriers to entry into spot-level PRA services for refined petroleum products, coal, or petrochemicals in the United States are high. These barriers to entry include (i) the large sunk costs and significant other expenditures necessary to begin providing commodity price assessments, news, and analysis; (ii) significant time and expense to build a reputation for accurately covering commodity markets; and (iii) the difficulty of displacing a benchmark PRA provider once that PRA's price assessment becomes the benchmark and gets embedded in supply and derivative contracts. Unsurprisingly, given all of these barriers, no significant PRA has entered in over 20 years.

**C. Competitive Effects of the Exclusive Data License and Non-Compete Agreement**

The Complaint alleges that the Data License unreasonably restrains trade in the sale of retail gas price data.

In addition to offering spot-level PRA services, OPIS LLC also collects and resells information related to retail gas prices, largely in the United States. Since 2009, GasBuddy has been one of OPIS LLC's two main sources of retail gas price data. OPIS LLC resells these data to customers like retail gas station operators or oil refiners, that use the data for competitive benchmarking and to inform supply and demand decisions.

In 2012, OPIS LLC learned that "GasBuddy [saw] a big opportunity in pursuing data sales," and GasBuddy notified OPIS LLC in "October [2012] that they [would] cease providing retail prices to [OPIS LLC] effective Jan. 1 [2013]." OPIS LLC saw GasBuddy's plan as a significant threat to its retail gas price information business because it would greatly reduce the number of real-time gas prices that OPIS LLC could provide, and it would also "greatly intensify competition in the retail pricing space." In response, OPIS LLC made a "tactical plan" to "buy[]

GasBuddy" to thwart this potential competition.

In March 2013, UCG Holdings LP ("UCG")—OPIS LLC's then-owner—followed through with this plan and bought GasBuddy in a transaction that was below the reportability thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

In 2016, UCG sold OPIS LLC to IHSM, but retained its ownership of GasBuddy. In order to maximize the value of OPIS LLC and prevent GasBuddy from competing with OPIS LLC under IHSM's ownership, UCG had OPIS LLC and GasBuddy enter into the Data License, which (1) gave OPIS LLC exclusive, worldwide rights to GasBuddy's data for 20 years; (2) required OPIS LLC to pay no licensing fees for the data; and (3) subjected GasBuddy to a non-compete provision that restrained it from competing with OPIS LLC or any other firm in the sale of retail gas price data to commercial customers. OPIS LLC summarized the Data License simply as a "long-term agreement where we are the sole distributor of GasBuddy data and they can't even sell it themselves."

Retail gas price data providers compete to serve commercial customers on both price and quality, and the Data License has prevented—and continues to prevent—GasBuddy from launching a competing retail gas price data service. But for the non-compete agreement, GasBuddy would be free to enter the retail gas price data market and compete with OPIS LLC. The non-compete provision imposed on GasBuddy is a horizontal restraint that stifles competition. The Data License, therefore, has resulted, and continues to result, in higher prices and lower quality in the retail gas price data market.

Furthermore, the non-compete provision imposed on GasBuddy was not reasonably necessary to a separate, legitimate transaction or collaboration. For example, the 20-year term of the non-compete was overbroad in its duration. That is, the noncompete was longer than

necessary to effectuate and transfer any intellectual property, goodwill, or customer relationships associated with UCG's 2016 sale of OPIS LLC. Nothing about IHSM's 2016 acquisition of OPIS LLC justified a ban on competition between GasBuddy and OPIS LLC until 2036. To the contrary, the non-compete simply inflated the value of OPIS LLC and now protects only IHSM's desire to be free from competition in the market for the sale of retail gas price data.

The Data License, therefore, unreasonably restrains trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

## III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment remedies the anticompetitive effects of the proposed merger by requiring S&P and IHSM to divest OPIS LLC, CMM, and PCW to preserve competition in the markets for spot-level PRA services for refined petroleum products, coal, and petrochemicals in the United States. The United States has evaluated News Corp. and deemed it a suitable acquirer of the businesses, with the incentive, acumen, experience, and financial ability to successfully operate and grow the businesses.

The proposed Final Judgment also addresses the anticompetitive effects of the Data License by requiring S&P and IHSM to waive the exclusivity and non-compete provisions in the agreement with GasBuddy. S&P, IHSM, and OPIS LLC are also prohibited, without the prior written consent of the United States, from entering into, enforcing, renewing, or extending the term of any similar provisions. The waiver of the exclusivity and non-compete provisions in the Data License will allow GasBuddy to compete in the market for sale of retail gas price data.

### A. Divestiture

Paragraph IV.A of the proposed Final Judgment requires S&P and IHSM to divest the OPIS LLC, CMM, and PCW businesses to News Corp. The divestiture must be completed

within 30 calendar days after the entry of the Stipulation and Order by the Court, unless (1) the United States, in its sole discretion, agrees to one or more extensions not to exceed 90 calendar days in total; or (2) S&P and IHSM have not received all of the regulatory approvals required for their proposed merger, in which case the deadline for completion of the divestiture will be within 30 calendar days of the receipt of all required approvals. The assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be operated by News Corp. as a viable, ongoing business that can compete effectively to provide spot-level PRA services for refined petroleum products, coal, and petrochemicals in the United States. S&P and IHSM must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with News Corp.

**B. Divestiture Assets**

The proposed Final Judgment requires S&P and IHSM to divest the OPIS, CMM, and PCW businesses. Specifically, defendants must divest all of S&P's and IHSM's rights, titles, and interests in and to all property and assets, tangible and intangible, wherever located, (1) owned by OPIS LLC, CMM, and PCW, or (2) primarily related to or used in connection with, or necessary to the operation of, OPIS LLC, CMM, and PCW (collectively, the "Divestiture Assets"). The United States, in its sole discretion, will resolve any disagreement regarding which property and assets, tangible and intangible, are Divestiture Assets.

**C. Personnel**

The proposed Final Judgment contains provisions intended to facilitate News Corp.'s efforts to hire certain employees. Specifically, Paragraph IV.F of the proposed Final Judgment requires S&P and IHSM to provide News Corp. and the United States with organization charts and information relating to these employees and to make them available for interviews. It also

provides that S&P and IHSM must not interfere with any negotiations by News Corp. to hire these employees.

In addition, for employees who elect employment with News Corp., S&P and IHSM must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, provide any pay pro rata, provide all compensation and benefits that those employees have fully or partially accrued, and provide all other benefits that the employees would generally be provided had those employees continued employment with S&P and IHSM, including but not limited to any retention bonuses or payments.

Paragraph IV.F further provides that S&P and IHSM may not solicit to rehire any of those employees who were hired by News Corp. within 180 days of the date of the divestiture, unless an employee is terminated or laid off by News Corp. or News Corp. agrees in writing that S&P and IHSM may solicit to rehire that individual. The non-solicitation period runs for 12 months from the date of divestiture for employees hired within 180 days of the date of the divestiture. A 12-month non-solicitation period is necessary in this matter because many OPIS LLC, CMM, and PCW executives, price reporters, and data analysts are integral to the successful operation of the Divestiture Assets. The ability of PRAs to gather trustworthy trading details and market intelligence is dependent largely on the close industry connections, and the detailed understanding of industry supply and demand dynamics, of its employees. Ensuring that News Corp. will have a full complement of experienced PRA employees during its first year operating the to-be-divested businesses will position News Corp. to compete effectively against its PRA competitors. Notably, this non-solicitation provision does not prohibit S&P and IHSM from advertising employment openings using general solicitations or advertisements and re-hiring anyone who applies for an opening through a general solicitation or advertisement.

### D. Customer Contracts, Licensing, and Transition Services Agreements

The proposed Final Judgment will facilitate the transfer to News Corp. of customers and other contractual relationships that are included within the Divestiture Assets. Paragraph IV.H of the proposed Final Judgment requires S&P and IHSM to assign, subcontract, or otherwise transfer all contracts, agreements, and customer relationships (or portions of such contracts, agreements, and customer relationships) included in the Divestiture Assets, including all supply and sales contracts, to News Corp. For any contract or agreement that requires the consent of another party to assign, subcontract, or otherwise transfer, S&P and IHSM must use best efforts to accomplish the assignment, subcontracting, or transfer. S&P and IHSM also must not interfere with any negotiations between News Corp. and a contracting party.

Paragraph IV.I of the proposed Final Judgment requires S&P and IHSM to use best efforts to assist News Corp. to obtain all necessary licenses, registrations, and permits to operate the Divestiture Assets, except with respect to S&P's and IHSM's licenses, registrations, or permits to operate as benchmark administrators, for which News Corp. intends to use the services of a third-party benchmark administrator. Until News Corp. obtains the necessary licenses, registrations, and permits, S&P and IHSM must provide News Corp. with the benefit of S&P's and IHSM's licenses, registrations, and permits to the full extent permissible by law.

The proposed Final Judgment requires S&P and IHSM to provide certain transition services to maintain the viability and competitiveness of the Divestiture Assets during the transition to News Corp. Paragraph IV.J of the proposed Final Judgment requires S&P and IHSM, at News Corp.'s option, to enter into a transition services agreement for back office, human resources, accounting, employee health and safety, and information technology services

and support for a period of up to 180 days on terms and conditions reasonably related to market conditions for the provision of the transition services. Any amendment to or modification of any provision of a contract to provide transition services is subject to approval by the United States, in its sole discretion. The United States, in its sole discretion, may approve one or more extensions of any contract for transition services, for a total of up to an additional 180 days. If News Corp. seeks an extension of the term of any contract for transition services, Defendants must notify the United States in writing at least 90 days prior to the date the contract expires. News Corp. may terminate a contract for transition services, or any portion of a contract for transition services, without cost or penalty at any time upon commercially reasonable written notice. The employee(s) of S&P and IHSM tasked with providing transition services must not share any competitively sensitive information of News Corp. with any other employee of S&P and IHSM.

**E. Appointment of Divestiture Trustee**

If S&P and IHSM 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 S&P and IHSM must pay all costs and expenses of the trustee. The divestiture trustee's commission must 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 must provide monthly reports to the United States setting forth his or her efforts to accomplish the divestiture. If the divestiture has not been accomplished within 180 days 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. Required and Prohibited Conduct Related to the Data License**

In order to restore competition in the retail gas price data market, the proposed Final Judgment requires S&P and IHSM to waive the exclusivity and non-compete provisions contained in the Data License and prohibits S&P, IHSM, and OPIS LLC from entering into similar exclusive licenses or non-compete arrangements. Non-compete provisions that are broader than necessary to protect a legitimate business interest—such as the 20-year non-compete on GasBuddy contained in the Data License—operate as unreasonable horizontal restraints that stifle competition. The elimination of these provisions in this matter will allow GasBuddy, the most likely entrant and potential competitor to OPIS LLC in providing retail gas price data to commercial customers in the United States, to bring much-needed competition to the space.

Section IX of the proposed Final Judgment requires S&P and IHSM, no later than five business days after the Court's entry of the Stipulation and Order, to notify GasBuddy that they waive the exclusivity and non-compete provisions contained in the Data License. Paragraph X.A prohibits S&P and IHSM, without the prior written consent of the United States, in its sole discretion, from entering into, enforcing, renewing, or extending the term of any exclusive licenses for, or non-compete provisions relating to, GasBuddy's data. Paragraph X.B prohibits OPIS LLC, without the prior written consent of the United States, in its sole discretion, from entering into, enforcing, renewing, or extending the term of any exclusive licenses for the provision to OPIS LLC of GasBuddy's data or the U.S. retail gas price data of any other third

party, or non-compete provisions relating to GasBuddy's data or the U.S. retail gas price data of any other third-party provider.

**G. Enforcement and Expiration of the proposed Final Judgment**

The proposed Final Judgment also contains provisions designed to promote compliance with and make enforcement of the Final Judgment as effective as possible. Paragraph XIV.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 XIV.B 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 proposed merger and the exclusivity and non-compete provisions of the Data License. Defendants agree that they will abide by the proposed Final Judgment and that they may be held in contempt of the 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 XIV.C 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 an

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 XIV.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, the Defendant must reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with that effort to enforce this Final Judgment, including the investigation of the potential violation.

Paragraph XIV.D 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 XV 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 continuation of the Final Judgment is no longer necessary or in the public interest.

## IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

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, the comments and the United States' responses 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 in English to:

Owen M. Kendler
Chief, Financial Services, Fintech, and Banking Section
Antitrust Division
United States Department of Justice
450 Fifth St. NW, Suite 4000
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 S&P's merger with IHSM and the exclusivity and non-compete provisions of the Data License. The United States is satisfied, however, that the relief required by the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for spot-level PRA services for refined petroleum products, coal, and petrochemicals in the United States and promoting competition for retail gas price data in the United States. 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.

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

Under the Clayton Act and APPA, proposed Final Judgments, or "consent decrees," in antitrust cases brought by the United States are 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
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> (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 proposed Final 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 mechanisms 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 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 also 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 the 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. *Microsoft*, 56 F.3d 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 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.

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Respectfully submitted,

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