IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, STATE OF CONNECTICUT, STATE OF IOWA, STATE OF MARYLAND, STATE OF MICHIGAN, STATE OF MISSOURI, STATE OF OHIO, and STATE OF TEXAS, Plaintiffs, v. AMERICAN EXPRESS COMPANY, AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., MASTERCARD INTERNATIONAL INCORPORATED, and VISA INC., Defendants.	Civil Action No. CV-10-4496 (Garaufis, J.) (Pollak, M.J.)

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), 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

The United States and the States of Connecticut, Iowa, Maryland, Michigan, Missouri, Ohio, and Texas ("Plaintiff States") brought this lawsuit against Defendants American Express

Company, American Express Travel Related Services Company, Inc. (collectively, "American Express"), Visa Inc. ("Visa"), and MasterCard International Incorporated ("MasterCard") on October 4, 2010, challenging certain of Defendants' rules, policies, and practices that impede merchants from providing discounts or benefits to promote the use of a competing credit card that costs the merchant less to accept ("Merchant Restraints"). These Merchant Restraints have the effect of suppressing interbrand price and non-price competition in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Shortly after the filing of the Complaint, the United States filed a proposed Final Judgment with respect to Defendants Visa and MasterCard. The proposed Final Judgment is described in more detail in Section III below. The United States, Plaintiff States, Visa, and MasterCard have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action as to Visa and MasterCard, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof. The case against American Express will continue.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Industry Background

Defendants provide network services for general purpose credit and charge cards ("General Purpose Cards"). Visa is the largest provider of network services in the United States and MasterCard is the second-largest, closely followed by American Express.

General Purpose Cards are forms of payment that allow cardholders to make purchases without accessing or reserving the cardholder's funds at the time of sale. General Purpose Cards include credit and charge cards issued to consumers and businesses, but do not include cards that can be used at only one merchant (*e.g.*, department store cards), cards that access funds on deposit (debit cards), or pre-paid cards (*e.g.*, gift cards). Acceptance of General Purpose Cards is widespread among merchants because many of their customers prefer to pay with such Cards, due to convenience, security, the ability to defer payment, and other factors.

Defendants, as providers of General Purpose Card network services, operate the infrastructure necessary to authorize, settle, and clear payments made with their General Purpose Cards. Millions of merchants around the United States that accept General Purpose Cards are consumers of network services.

The typical transaction involving a Visa or MasterCard General Purpose Card involves several steps. When a cardholder presents a card to a merchant, the bank that issued the card (the "issuing bank" or "issuer") authorizes the transaction using the card's network. Then the merchant's bank (the "acquiring bank") pays the merchant the amount of the purchase, minus a fee (the "merchant discount fee" or "card acceptance fee") that is shared among the acquiring bank, the network, and the issuing bank. The acquiring bank and the network collect relatively small portions of the merchant discount; the bulk of the merchant discount is collected by the issuing bank in the form of an "interchange fee." Interchange fees are set by the network and vary based on many factors such as the merchant's industry, the merchant's annual charge levels, and the type of card used in the transaction (*e.g.*, rewards card vs. non-rewards card).

American Express issues most of its General Purpose Cards directly to cardholders and generally provides network services directly to merchants. For each transaction, American Express imposes a merchant discount fee, which is typically a percentage of the transaction price. American Express has for many years maintained the highest merchant fees of any network, and American Express card acceptance often costs merchants substantially more than acceptance of other General Purpose Cards.

When merchants agree to accept a particular brand of General Purpose Card, they must use the network services provided by that brand. Merchants cannot reasonably replace General Purpose Card network services with other services or reduce usage of these network services, even if such network services are substantially more expensive for merchants relative to services that enable other payment methods. The challenged Merchant Restraints obstruct the ability of a merchant to vary the amount of network services it buys in response to changes in the merchant's cost of acceptance by encouraging customers at the point of sale to use less-costly General Purpose Cards or other methods of payment.

B. The Challenged Merchant Restraints

When merchants agree to accept Visa or MasterCard General Purpose Cards, they sign a contract agreeing to abide by the rules promulgated by the network, including the Merchant Restraints at issue in this case. Merchants face penalties, including termination of their contracts, if they violate these rules.

The Visa Merchant Restraints challenged in the Complaint prohibit a merchant from offering a discount at the point of sale to a customer that chooses to use an American Express, Discover, or MasterCard General Purpose Card instead of a Visa General Purpose Card. Visa's

rules do not allow discounts for other General Purpose Cards, unless such discounts are equally available for Visa transactions. *See* Complaint ¶ 26 (citing Visa International Operating Regulations at 445 (April 1, 2010) (Discount Offer – U.S. Region 5.2.D.2)).

The MasterCard Merchant Restraints challenged in the Complaint prohibit a merchant from "engag[ing] in any acceptance practice that discriminates against or discourages the use of a [MasterCard] Card in favor of any other acceptance brand." *See* Complaint ¶ 27 (quoting MasterCard Rule 5.11.1). This means that merchants cannot offer discounts or other benefits to persuade customers to use an American Express, Discover, or Visa General Purpose Card instead of a MasterCard General Purpose Card. *Id.* MasterCard does not allow merchants to favor competing card brands. *Id.*

The challenged Merchant Restraints imposed by Defendants deter or obstruct merchants from freely promoting interbrand competition among networks by offering customers discounts, other benefits, or information to encourage them to use a less-expensive General Purpose Card brand or other payment method. The Merchant Restraints block merchants from taking steps to influence customers and foster competition among networks at the point of sale, such as: promoting a less-expensive General Purpose Card brand more actively than any other brand; offering customers a discount or other benefit for using a particular General Purpose Card that costs the merchant less; posting a sign expressing a preference for another General Purpose Card brand; prompting customers at the point of sale to use another General Purpose Card brand in their wallets; posting the signs or logos of General Purpose Card brands that cost less to the

merchant more prominently than signs or logos of more costly brands; or posting truthful information comparing the relative costs of different General Purpose Card brands.[1]

C. The Relevant Markets

The Complaint alleges two distinct relevant product markets: the market for General Purpose Card network services to merchants, and the market for General Purpose Card network services to travel and entertainment merchants ("T&E market"). In each case, the relevant geographic market is the United States.

1. The General Purpose Card Network Services Market

A relevant product market for this case is the provision of General Purpose Card network services to merchants. For such merchants, there are no reasonable substitutes for network services. Competition from other payment methods would not be sufficient to prevent a hypothetical monopolist of General Purpose Card network services from profitably maintaining supracompetitive prices and terms for network services provided to merchants over a sustained period of time or from imposing anticompetitive conditions on merchants.

Defendants possess market power in the network services market. In 2003, the United States Court of Appeals for the Second Circuit affirmed that Visa and MasterCard hold market power in a General Purpose Card network services market. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238-39 (2d Cir. 2003). American Express' share of General Purpose Card

[1] Federal law mandates that networks permit merchants to offer discounts for cash transactions. Additionally, the new Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, by adding section 920 to the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq*., now forbids networks from prohibiting merchants from offering a discount for an entire payment method category, such as a discount for use of any debit card. All General Purpose Card networks operate under these laws. The Complaint does not seek relief relating to these two types of discounting.

transaction volume today is close to MasterCard's, and similar to MasterCard's share at the time of the Second Circuit's decision.

Because of the Merchant Restraints, a merchant is obstructed in its ability to reduce its purchases of one network's services by encouraging its customers to choose a competing network's General Purpose Card. A merchant may resist a Defendant's high card acceptance fees only by no longer accepting that Defendant's General Purpose Cards. This all-or-nothing choice does not effectively constrain Defendants' market power because merchants cannot refuse to accept these General Purpose Cards without alienating customers and losing significant sales. The Merchant Restraints leave merchants less able to avoid Defendants' supracompetitive prices than they otherwise would be.

Defendants' ability to discriminate in the prices they charge different types of merchants, unexplained by cost differences, also reflects their market power. Defendants target specific merchant segments for differential pricing based on those merchants' ability to pay and their inability to refuse to accept Defendants' General Purpose Cards.

Significant barriers to entry and expansion protect Defendants' market power, and have contributed to Defendants' ability to maintain high prices for years without threat of price competition by new entry or expansion in the market. Barriers to entry and expansion include the prohibitive cost of establishing a physical network over which General Purpose Card transactions can run, developing a widely recognized brand, and establishing a base of merchants and a base of cardholders. Defendants, which achieved these necessities early in the history of the industry, hold substantial early-mover advantages over prospective subsequent entrants. Successful entry today would be difficult, time consuming, and expensive.

2. The T&E Market

Another relevant market consists of General Purpose Card network services provided to merchants in travel and entertainment businesses (*e.g.*, merchants offering air travel, lodging, or rental cars). The T&E market is what is sometimes termed a "price discrimination market." Merchants in this market share distinct characteristics in their usage of General Purpose Card network services, can be readily identified by Defendants, and are subject to price discrimination by Defendants. Price discrimination occurs when a seller charges different customers (or groups of customers) different prices for the same services, when those different prices are not based on different costs of serving those customers.

Here, Defendants charge merchants in the T&E sector higher fees than they charge most other merchants. The high fees to T&E merchants are not based on Defendants' higher costs of serving their T&E merchants. Each Defendant can charge T&E merchants high fees because those merchants are even less able to substitute away to other networks than other merchants.

Competition from other payment methods would not be sufficient to prevent a hypothetical monopolist in the T&E market from either profitably maintaining supracompetitive prices and terms for network services to T&E merchants over a sustained period of time or imposing anticompetitive conditions on T&E merchants in that market. A hypothetical monopolist could price discriminate profitably against T&E merchants even if other merchants were paying lower prices for network services.

Each Defendant holds market power in the T&E market. As with the market for General Purpose Card network services, discussed above, significant barriers to entry and expansion protect the market for network services to T&E merchants.

D. The Competitive Effects of the Alleged Violation

The Complaint alleges that Defendants' Merchant Restraints suppress price and non-price competition by prohibiting a merchant from offering discounts or other benefits to customers for the use of a particular General Purpose Card. These prohibitions allow Defendants to maintain high prices for network services with confidence that no competitor will take away significant transaction volume through competition in the form of merchant discounts or benefits to customers to use lower cost payment options. Defendants' prices for network services to merchants are therefore higher than they would be without the Merchant Restraints.

Absent the Merchant Restraints, merchants would be free to use various methods, such as discounts or non-price benefits, to encourage customers to use the brands of General Purpose Cards that impose lower costs on the merchants. In order to retain merchant business, the networks would need to respond to merchant preferences by competing more vigorously on price and service to merchants. The increased competition among networks would lead to lower merchant fees and better service terms.

Because the Merchant Restraints result in higher merchant costs, and merchants pass these costs on to consumers, retail prices are higher generally for consumers. Moreover, a customer who pays with lower-cost methods of payment pays more than he or she would if Defendants did not prevent merchants from encouraging network competition at the point of sale. For example, because certain types of premium General Purpose Cards tend to be held by more affluent buyers, less affluent purchasers using non-premium General Purpose Cards, debit cards, cash, and checks effectively subsidize part of the cost of expensive premium card benefits and rewards enjoyed by those cardholders.

The Complaint also alleges that the Merchant Restraints have had a number of other anticompetitive effects, including reducing output of lower-cost payment methods, stifling innovation in network services and card offerings, and denying information to customers about the relative costs of General Purpose Cards that would cause more customers to choose lower-cost payment methods. Defendants' Merchant Restraints also have heightened the already high barriers to entry and expansion in the network services market. Merchants' inability to encourage their customers to use less-costly General Purpose Card networks makes it more difficult for existing or potential competitors to threaten Defendants' market power.

Finally, the Complaint alleges that these anticompetitive effects are not outweighed by any allegedly procompetitive goals of the Merchant Restraints, and there are less restrictive alternatives by which Defendants would be able reasonably to achieve any procompetitive goals.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The prohibitions and required conduct in the proposed Final Judgment achieve all the relief sought from Visa and MasterCard in the Complaint, and thus fully resolve the competitive concerns raised by those Defendants' Merchant Restraints challenged in this lawsuit.

The proposed Final Judgment prohibits Visa and MasterCard from adopting, maintaining, or enforcing any rule, or entering into or enforcing any agreement, that prevents any merchant from: (1) offering the customer a price discount, rebate, free or discounted product or service, or other benefit if the customer uses a particular brand or type of General Purpose Card or particular form of payment; (2) expressing a preference for the use of a particular brand or type of General Purpose Card or particular form of payment; (3) promoting a particular brand or type

of General Purpose Card or particular form of payment through posted information; through the size, prominence, or sequencing of payment choices; or through other communications to the customer; or (4) communicating to customers the reasonably estimated or actual costs incurred by the merchant when a customer pays with a particular brand or type of General Purpose Card. Proposed Final Judgment § IV.A.

For purposes of the Final Judgment, the "brand" of a General Purpose Card refers to its network (*e.g.*, American Express, Discover, MasterCard, or Visa). *Id.* § II.3. The "type" of a General Purpose Card refers to the network's card categories, such as premium cards (*e.g.*, a "Visa Signature Card" or a "World MasterCard"), rewards cards, or traditional cards. *Id.* § II.16. The term "form of payment" is defined as any means by which customers pay for goods and services, including cash, a check, a debit card, a prepaid card, or other means. *Id.* § II.7. The definition includes particular brands or types of debit cards.

The purpose of Section IV.A is to free merchants to influence the method of payment used by their customers by providing them information, discounts, benefits, and choices at the point of sale. For example, merchants will be able to encourage customers, using the methods described in Section IV.A, to use one General Purpose Card instead of another, to use one type of General Purpose Card instead of another (such as by offering a discount for the use of a cheaper non-rewards Visa card instead of a premium-level Visa rewards card), or to use a different General Purpose Card or form of payment than the General Purpose Card the customer initially presents to the merchant. Merchants will also be able to encourage the use of any other payment form, such as cash, check, or debit cards, by using the methods described in Section IV.A.

To clarify the scope of the conduct prohibited by the proposed Final Judgment, Section IV.B provides that Visa and MasterCard would not violate the Final Judgment if they established agreements with merchants, pursuant to which: (1) the merchant agrees to accept only one brand of General Purpose Card; (2) the merchant encourages customers to use co-branded or affinity General Purpose Cards with the merchant's own brand on the card, and not other General Purpose Cards; or (3) the merchant encourages customers to use only one brand of General Purpose Card.[2] The General Purpose Card networks likely will compete with each other to enter these types of agreements, to the benefit of merchants and consumers.

Section IV.B also allows Visa and MasterCard to have a network rule that prohibits a merchant from encouraging customers to use the General Purpose Cards of one issuing bank instead of those of another issuing bank.

Section IV.C allows Visa and MasterCard to have a network rule that prohibits a merchant from disparaging the network's brand, as long as that rule does not restrict a merchant's ability to encourage customers to use other General Purpose Cards or forms of payment.

To facilitate merchants' ability to encourage customers to use particular General Purpose Cards, Section IV.D prevents Visa and MasterCard from denying merchants access to information from their acquiring banks about the cost of each type of General Purpose Card.

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[2] Visa and MasterCard may enter into the latter type of agreement subject to certain conditions: (a) the agreement is individually negotiated with the merchant and is not part of a standard merchant contract; and (b) the merchant's acceptance of the Defendant's General Purpose Card is unrelated to, and not conditioned on, the merchant's entry into the agreement. *Id.* § IV.B.3.

Section V of the proposed Final Judgment requires Visa and MasterCard, within five days of entry of the Judgment, to "delete, discontinue, and cease to enforce" any rule that would be prohibited by Section IV of the Final Judgment. *Id.* § V.A. Sections V.B and V.C require Visa and MasterCard to make specific changes to their rules and regulations governing merchant conduct to implement the requirements of Section IV. Section V also directs Visa and MasterCard, through their acquiring banks, to notify merchants of the rules changes mandated by the Final Judgment, and of the fact that merchants are now permitted to encourage customers to use a particular General Purpose Card or form of payment. Acquiring banks must also provide merchants with a copy of the Final Judgment. Finally, Section V requires Visa and MasterCard to adopt rules that prohibit their acquiring banks from adopting, maintaining, or enforcing any rule that would be inconsistent with the prohibitions of Section IV of the Final Judgment.

To aid in enforcement, the proposed Final Judgment requires Visa and MasterCard to notify the Department of Justice of any future rule change that limits or restrains "how Merchants accept, process, promote, or encourage use of Forms of Payment other than General Purpose Cards or of General Purpose Cards bearing the Brand of another General Purpose Card Network." *Id.* § V.F.

The proposed Final Judgment expressly states that there is no limitation on the United States' (or the Plaintiff States') ability to investigate and bring an antitrust enforcement action in the future concerning any rule of either Visa or MasterCard, including any rule either of them may adopt in the future. *Id.* § VIII.

Merchants that currently accept only Visa or MasterCard, or both, will benefit immediately from the Final Judgment by having the freedom to encourage their customers to choose the merchants' preferred method of payment. Merchants will have several new options available to accomplish this, such as offering customers a price discount, a rebate, a free product or service, rewards program points, or other benefits; placing signs that encourage customers to use particular payment methods; prompting customers to use particular General Purpose Cards or other forms of payment; or communicating to customers the costs of particular forms of payment.

Merchants that accept American Express cards, including the vast majority of the major retailers in the United States, will be unable to influence customers' payment methods because the anticompetitive American Express Merchant Restraints will continue to constrain those merchants pending the outcome of this litigation. American Express stands as the last obstacle to achieving the full benefits of competition now suppressed by the challenged Merchant Restraints. The United States will continue this case against American Express to obtain complete relief for the affected merchants, and for the benefit of their customers.

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 will neither impair nor assist 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 private lawsuit that may be brought against Defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States, Plaintiff States, Visa, and MasterCard 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 sixty (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 sixty (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 United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

John R. Read
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
450 Fifth Street, 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

The United States considered, as an alternative to the proposed Final Judgment, proceeding to a full trial on the merits against Visa and MasterCard. The United States is satisfied, however, that the prohibitions and requirements contained in the proposed Final Judgment will fully address the competitive concerns set forth in the Complaint against Visa and MasterCard. The proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation against Visa and MasterCard, and will avoid the delay, risks, and costs of a trial on the merits of the Complaint.[3]

[3] The Antitrust Division has investigated a number of Defendants' other merchant rules, including the prohibition on surcharging, that are not challenged in this Complaint. Tunney Act review is limited to the scope of the complaint and the court may not "reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made." *United States v. Microsoft*, 56 F.3d 1448, 1459-60 (D.C. Cir. 1995); *see also infra* § VII, at 20. The proposed Final Judgment contains a clause preserving the rights of the United States and providing that "[n]othing in this Final Judgment shall limit the right of the United States or of the Plaintiff States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule of MasterCard or Visa, including any current Rule and any Rule adopted in the future." Proposed Final Judgment §VIII. At this time, the

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 sixty-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 United States 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); *see also United States v. Alex Brown & Sons, Inc.*, 963 F. Supp. 235, 238 (S.D.N.Y. 1997) (noting that the court's role in the public interest determination is "limited" to "ensur[ing] that the resulting settlement is 'within the reaches of the public interest'") (quoting *Microsoft*, 56 F.3d at 1460), *aff'd sub nom. United States v. Bleznak*, 153

United States takes no position on whether any Visa or MasterCard rule not challenged in the Complaint is in violation of the antitrust laws.

F.3d 16 (2d Cir. 1998); *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the 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."). [4]

As the United States Court of Appeals for the District of Columbia Circuit has held, a court considers under the APPA, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *Alex Brown*, 963 F. Supp. at 238; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[4] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

> [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. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[5] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *Alex Brown*, 963 F. Supp. at 239 (stating that the court should give "due deference to the Government's evaluation of the case and the remedies available to it"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' "prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree

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[5] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"); *see generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

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 InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the '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. As the United States District Court for the District of Columbia recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest

determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding 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). This language effectuates what Congress intended when it 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 Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[6]

[6] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

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.

Respectfully submitted,

/s/

Craig W. Conrath
Michael G. Dashefsky
Justin M. Dempsey
Mark H. Hamer
Gregg I. Malawer
Bennett J. Matelson
Anne Newton McFadden
Rachel L. Zwolinski

Attorneys for the United States
United States Department of Justice
Antitrust Division
Litigation III
450 Fifth Street, NW, Suite 4000
Washington, DC 20530

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