UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, **STATE OF CALIFORNIA,** **COMMONWEALTH OF KENTUCKY,** **STATE OF MICHIGAN,** **STATE OF NORTH CAROLINA,** **STATE OF OHIO,** **COMMONWEALTH OF PENNSYLVANIA, and** **STATE OF TEXAS,** *Plaintiffs,* v. **REPUBLIC SERVICES, INC., and** **ALLIED WASTE INDUSTRIES, INC.,** *Defendants.*	**Civil Action No.:** Case: 1:08-cv-02076 Assigned To : Roberts, Richard W. Assign. Date : 12/3/2008 Description: Antitrust

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 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

Pursuant to a stock purchase agreement dated June 22, 2008, defendant Republic Services, Inc. ("Republic") plans to acquire all of the issued and outstanding voting securities of defendant Allied Waste Industries, Inc. ("Allied"). If consummated, the agreement would give

Republic ownership of all the waste hauling and disposal assets held by Allied throughout the United States. The United States and the State of California, Commonwealth of Kentucky, State of Michigan, State of North Carolina, State of Ohio, Commonwealth of Pennsylvania, and State of Texas (the "States") filed a civil antitrust Complaint on December 3, 2008, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially for small container commercial waste collection and municipal solid waste ("MSW") disposal services in several markets in violation of Section 7 of the Clayton Act. This loss of competition would result in consumers paying higher prices and receiving fewer services for the collection and disposal of MSW.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Republic is required within 90 days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as viable business operations, specified small container commercial waste collection and MSW disposal assets. Under the terms of the Hold Separate Stipulation and Order, Republic and Allied are required to take certain steps to ensure that the assets to be divested will be preserved and held separate from their other assets and businesses.

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

thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendants and the Proposed Transaction

Republic, with revenues in 2007 of approximately $3.2 billion, is the nation's third largest waste hauling and disposal company. Allied, with 2007 revenues of approximately $6.1 billion, is the nation's second largest waste hauling and disposal company. The proposed transaction, as initially agreed to by defendants on June 22, 2008, would lessen competition substantially in the provision of non-franchised small container commercial waste collection services in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Lexington, Kentucky; Lubbock, Texas; and Northwest Indiana. In addition, the transaction as initially proposed would lessen competition substantially in the provision of MSW disposal services in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Denver, Colorado; Flint, Michigan; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Los Angeles, California; Northwest Indiana; Philadelphia, Pennsylvania; and San Francisco, California. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States and the States on December 3, 2008.

B. The Competitive Effects of the Transaction

MSW is solid, putrescible waste generated by households and commercial establishments. Waste collection firms, or haulers, contract to collect MSW from residential and commercial customers and transport the waste to private and public MSW disposal facilities (*e.g.*, transfer stations, incinerators, and landfills), which, for a fee, process and legally dispose of

the waste. Small container commercial waste collection is one component of MSW collection, which also includes residential and other waste collection. Private waste haulers typically contract with customers for the collection of waste generated by commercial accounts. MSW generated by residential customers, on the other hand, often is collected by local governments or by private haulers pursuant to contracts bid by, or franchises granted by, municipal authorities. Republic and Allied compete in the collection of small container commercial waste and the disposal of MSW.

1. The Effects of the Transaction on Competition in Small Container Commercial Waste Collection

a. Small Container Commercial Waste Collection

Small container commercial waste collection service is the collection of MSW from commercial businesses such as office and apartment buildings and retail establishments (*e.g.*, stores and restaurants) for shipment to, and disposal at, an approved disposal facility. Because of the type and volume of waste generated by commercial accounts and the frequency of service required, haulers organize commercial accounts into routes, and generally use specialized equipment to store, collect, and transport MSW from these accounts to approved MSW disposal sites. This equipment (*e.g.*, one- to ten- cubic-yard containers for MSW storage, and front-end load vehicles commonly used for collection and transportation of MSW) is uniquely well suited for providing small container commercial waste collection service. Providers of other types of waste collection services (*e.g.*, residential, hazardous waste, and roll-off services) are not good substitutes for small container commercial waste collection firms. In these types of waste collection efforts, firms use different waste storage equipment (*e.g.*, garbage cans or semi-

stationary roll-off containers) and different vehicles (*e.g.*, rear-load, side-load, or roll-off trucks), which, for a variety of reasons, cannot be conveniently or efficiently used to store, collect, or transport MSW generated by commercial accounts and, hence, rarely are used on small container commercial waste collection routes. In the event of a small but significant increase in price for small container commercial waste collection services, customers would not switch to any other alternative. Thus, the Complaint alleges that the provision of small container commercial waste collection services constitutes a line of commerce, or relevant service, for purposes of analyzing the effects of the transaction.

The Complaint alleges that the provision of small container commercial waste collection service takes place in compact, highly localized geographic markets. It is expensive to transport MSW long distances between collection customers or to disposal sites. To minimize transportation costs and maximize the scale, density, and efficiency of their MSW collection operations, small container commercial waste collection firms concentrate their customers and collection routes in small areas. Firms with operations concentrated in a distant area cannot easily compete against firms whose routes and customers are locally based. Distance may significantly limit a remote firm's ability to provide small container commercial waste collection service as frequently or conveniently as that offered by local firms with nearby routes. Also, local small container commercial waste collection firms have significant cost advantages over other firms, and can profitably increase their charges to local small container commercial waste customers without losing significant sales to firms outside the area.

Applying this analysis, the Complaint alleges that local small container waste collection firms, absent competition from other small container waste collection firms, could profitably

increase charges to local customers without losing significant sales to more distant competitors in each of the following areas: Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Lexington, Kentucky; Lubbock, Texas; and Northwest Indiana. Accordingly, the Complaint alleges that each of these areas constitutes a section of the country, or a relevant geographic market, for the purpose of assessing the competitive effects of a combination of Republic and Allied in the provision of small container commercial waste collection services.

There are significant entry barriers into small container commercial waste collection. A new entrant into small container commercial waste collection services must achieve a minimum efficient scale and operating efficiencies comparable to those of existing firms in order to provide a significant competitive constraint on the prices charged by market incumbents. In order to obtain comparable operating efficiencies, a new firm must achieve route density similar to existing firms. An efficient route usually handles 80 or more customers or containers each day. Because most customers have their MSW collected once or twice a week, a new entrant must have several hundred small container commercial waste customers in close proximity to construct an efficient route. However, the incumbent's ability to engage in price discrimination and enter into long-term contracts with small container commercial waste collection customers can leave too few customers available for the entrant in a sufficiently confined geographic area to create an efficient route. The incumbent firm can selectively and temporarily charge an unbeatably low price to specified customers targeted by new entrants. Long-term contracts often run for three to five years and may automatically renew or contain large liquidated damage provisions for contract termination. Such terms make it more costly or difficult for a customer to

switch to a new small container commercial waste hauler and obtain lower prices for its collection service. Because of these factors, a new entrant may find it difficult to compete by offering its small container commercial waste services at pre-entry price levels comparable to the incumbent and may find an increase in the cost and time required to form an efficient route, thereby limiting a new entrant's ability to build an efficient route and reducing the likelihood that the entrant will ultimately be successful.

The need for route density, the use of long-term contracts with restrictive terms, and the ability of existing firms to price discriminate raise significant barriers to entry by new firms, which likely will be forced to compete at lower than pre-entry price levels. Such barriers in the market for small container commercial waste collection have allowed incumbent firms to raise prices successfully.

b. Anticompetitive Effects in Small Container Commercial Waste Collection Markets

(1) Atlanta, Georgia Area

Republic is acquiring the hauling assets of Allied in Atlanta, Georgia. These assets serve small container commercial waste collection customers in Cherokee, Forsyth, Hall, Jackson, Barrow, Gwinnett, Walton, DeKalb, Rockdale, Fulton, Clayton, Cobb, and Paulding Counties, Georgia. In this area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Atlanta, Georgia area is approximately $60 million. After the acquisition, defendants would have approximately 50 percent of the total number of small container commercial waste collection routes in the market.

(2) Cape Girardeau, Missouri Area

Republic is acquiring the hauling assets of Allied in Cape Girardeau, Missouri. These assets serve small container commercial waste collection customers in Cape Girardeau County, Missouri. In this area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Cape Girardeau, Missouri area is approximately $5 million. After the acquisition, defendants would have approximately 64 percent of the total number of small container commercial waste collection routes in the market.

(3) Charlotte, North Carolina Area

Republic is acquiring the hauling assets of Allied in Charlotte, North Carolina. These assets serve small container commercial waste collection customers in Mecklenburg County, North Carolina. In this area, the proposed acquisition would reduce from three to two the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Charlotte, North Carolina area is approximately $40 million. After the acquisition, defendants would have approximately 70 percent of the total number of small container commercial waste collection routes in the market.

(4) Fort Worth, Texas Area

Republic is acquiring the hauling assets of Allied in Fort Worth, Texas. These assets serve small container commercial waste collection customers in Tarrant County, Texas. In this area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small

container commercial waste collection in the Fort Worth, Texas area is approximately $55 million. After the acquisition, defendants would have approximately 42 percent of the total number of small container commercial waste collection routes in the market, and the two largest competitors would have approximately 70 percent of the market.

(5) Greenville-Spartanburg, South Carolina Area

Republic is acquiring the hauling assets of Allied in Greenville-Spartanburg, South Carolina. These assets serve small container commercial waste collection customers in Greenville and Spartanburg Counties, South Carolina. In this area, the proposed acquisition would reduce from three to two the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Greenville-Spartanburg, South Carolina area is approximately $41 million. After the acquisition, defendants would have approximately 69 percent of the total number of small container commercial waste collection routes in the market.

(6) Houston, Texas Area

Republic is acquiring the hauling assets of Allied in Houston, Texas. These assets serve small container commercial waste collection customers in Harris County, Texas. In this area, the proposed acquisition would reduce from three to two the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Houston, Texas area is approximately $109 million. After the acquisition, defendants would have approximately 56 percent of the total number of small container commercial waste collection routes in the market.

(7) Lexington, Kentucky Area

Republic is acquiring the hauling assets of Allied in Lexington, Kentucky. These assets serve small container commercial waste collection customers in Fayette, Jessamine, Woodford, Scott and Franklin Counties, Kentucky. In this area, the proposed acquisition would reduce from three to two the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Lexington, Kentucky area is approximately $9 million. After the acquisition, defendants would have approximately 75 percent of the total number of small container commercial waste collection routes in the market.

(8) Lubbock, Texas Area

Republic is acquiring the hauling assets of Allied in Lubbock, Texas. These assets serve small container commercial waste collection customers in Lubbock County, Texas. In this area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Lubbock, Texas area is approximately $18 million. After the acquisition, defendants would have approximately 63 percent of the total number of small container commercial waste collection routes in the market.

(9) Northwest Indiana Area

Republic is acquiring the hauling assets of Allied in the Northwest Indiana area. These assets serve small container commercial waste collection customers in Lake, Porter and LaPorte Counties, Indiana. In this area, the proposed acquisition would reduce from four to three the

number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Northwest Indiana area is approximately $2.4 million. After the acquisition, defendants would have approximately 44 percent of the total number of small container commercial collection routes in the market.

The Complaint alleges that a combination of Republic and Allied in each of these areas would remove a significant competitor in small container commercial waste collection services. In each of these markets, the resulting increase in concentration, loss of competition, and absence of any reasonable prospect of significant new entry or expansion by market incumbents likely will result in higher prices for the collection of small container commercial waste.

2. The Effects of the Transaction on Competition in the Disposal of Municipal Solid Waste

a. Municipal Solid Waste Disposal

A number of federal, state, and local safety, environmental, zoning, and permit laws and regulations dictate critical aspects of storage, handling, transportation, processing and disposal of MSW. In order to be disposed of lawfully, MSW must be disposed in a landfill or incinerator permitted to accept MSW. Anyone who attempts to dispose of MSW in an unlawful manner risks severe civil and criminal penalties. In some areas, landfills are scarce because of significant population density and the limited availability of suitable land. Accordingly, most MSW generated in these areas is burned in an incinerator or brought to transfer stations where it is compacted and transported on tractor trailer trucks to a more distant permanent MSW disposal site. A transfer station is an intermediate disposal site for processing and temporary storage of MSW before transfer in bulk to more distant landfills or incinerators for final disposal.

Because of the strict laws and regulations that govern MSW disposal, there are no good substitutes for MSW disposal in landfills, or incinerators, or at transfer stations located near the source of the waste. Firms that compete in MSW disposal can profitably increase their charges to haulers of MSW without losing significant sales to any other firms. Thus, for purposes of antitrust analysis, MSW disposal constitutes a line of commerce, or relevant service, for purposes of analyzing the transaction.

MSW disposal generally occurs in localized markets. Because of transportation costs and travel time to more distant MSW disposal facilities, a substantial percentage of the MSW generated in an area is disposed of in landfills within roughly 25 to 35 miles of the relevant geographic market. In certain relevant geographic markets, virtually all of the MSW is disposed of in nearby transfer stations due to the high costs of transporting MSW and the substantial travel time to other MSW disposal facilities based on distance, natural barriers, and congested roadways. In the event that all owners of local disposal facilities imposed a small but significant increase in the price of disposal of MSW, haulers of MSW generated in that area could not profitably turn to more distant disposal sites. Firms that compete in MSW disposal in these markets, absent competition from other local MSW disposal operators, can profitably increase their charges for MSW disposal without losing significant sales to more distant MSW disposal sites.

In other relevant geographic markets, because of transportation costs and travel time to more distant MSW disposal facilities, a substantial percentage of the MSW generated in the area is disposed of in landfills often within roughly 25 to 35 miles of the relevant geographic market. Firms that compete to dispose of MSW generated in these markets can profitably increase their

charges for MSW disposal without losing significant sales to more distant MSW disposal sites.

Applying this analysis, the Complaint alleges that in each of the following areas, the high costs of transporting MSW and the substantial travel time to other disposal facilities based on distance, natural barriers and congested roadways, limit the distance that haulers can travel economically to dispose of their waste: Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Denver, Colorado; Flint, Michigan; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Los Angeles, California; Northwest Indiana; Philadelphia, Pennsylvania; and San Francisco, California. Those areas constitute sections of the country, or relevant geographic markets, for the purpose of assessing the competitive effects of a combination of Republic and Allied in the provision of MSW disposal services.

There are significant barriers to entry in MSW disposal. Obtaining a permit to construct a new disposal facility or expand an existing one is a costly and time-consuming process that typically takes many years to conclude. Local public opposition often increases the time and uncertainty of successfully permitting a facility. It is also difficult to overcome environmental concerns and satisfy other government requirements. In the relevant geographic areas for MSW disposal, entry by a new MSW disposal facility would be costly and time-consuming, and unlikely to prevent market incumbents from significantly raising prices for MSW disposal following the acquisition.

b. Anticompetitive Effects in the Disposal of Municipal Solid Waste

(1) Atlanta, Georgia Area

Republic is acquiring the MSW disposal assets of Allied serving the Atlanta, Georgia area. These assets serve MSW disposal customers in Cherokee, Forsyth, Hall, Jackson, Barrow, Gwinnett, Walton, DeKalb, Rockdale, Fulton, Clayton, Cobb, and Paulding Counties, Georgia. The proposed acquisition would reduce from four to three the number of significant competitors for MSW disposal in the Atlanta, Georgia area. Annual revenue from MSW disposal in this market is approximately $89 million. After the acquisition, defendants would have approximately 46 percent of the MSW disposal market.

(2) Cape Girardeau, Missouri Area

Republic is acquiring the MSW disposal assets of Allied serving the Cape Girardeau, Missouri area. These assets serve MSW disposal customers in Cape Girardeau County, Missouri. The proposed acquisition would reduce from three to two the number of significant competitors for the MSW disposal in the Cape Girardeau, Missouri area. Annual revenue from MSW disposal in this market is approximately $3 million. After the acquisition, defendants would have approximately 70 percent of the MSW disposal market.

(3) Charlotte, North Carolina Area

Republic is acquiring the MSW disposal assets of Allied serving the Charlotte, North Carolina area. These assets serve MSW disposal customers in Mecklenburg County, North Carolina. The proposed acquisition would reduce from three to two the number of significant competitors for the MSW disposal in the Charlotte, North Carolina area. Annual revenue from MSW disposal in this market is approximately $69 million. After the acquisition, defendants

would have approximately 80 percent of the MSW disposal market.

(4) Cleveland, Ohio Area

Republic is acquiring the MSW disposal assets of Allied serving the Cleveland, Ohio area. These assets serve MSW disposal customers in Cuyahoga County, Ohio. In this area, the proposed acquisition would reduce from four to three the number of significant competitors for the MSW disposal. Annual revenue from MSW disposal in this market is approximately $68 million. After the acquisition, defendants would have approximately 56 percent of the MSW disposal market.

(5) Denver, Colorado Area

Republic is acquiring the MSW disposal assets of Allied serving the Denver, Colorado area. These assets serve MSW disposal customers in Denver and Arapahoe Counties, Colorado. In this area, the proposed acquisition would reduce from four to three the number of significant competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $56 million. After the acquisition, defendants would have approximately 37 percent of the MSW disposal market, and the two largest competitors would have roughly 87 percent.

(6) Flint, Michigan Area

Republic is acquiring the MSW disposal assets of Allied serving the Flint, Michigan area. These assets serve MSW disposal customers in Saginaw and Genesee Counties, Michigan. In this area, the proposed acquisition would reduce from four to three the number of competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $29

million. After the acquisition, defendants would have over 51 percent of the MSW disposal market.

(7) Fort Worth, Texas Area

Republic is acquiring the MSW disposal assets of Allied serving the Fort Worth, Texas area. These assets serve MSW disposal customers in Tarrant County, Texas. In this area, the proposed acquisition would reduce from four to three the number of significant competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $84 million. After the acquisition, defendants would have over 55 percent of the MSW disposal market.

(8) Greenville-Spartanburg, South Carolina Area

Republic is acquiring the MSW disposal assets of Allied serving the Greenville-Spartanburg, South Carolina area. These assets serve MSW disposal customers in Greenville and Spartanburg Counties, South Carolina. In this area, the proposed acquisition would reduce from three to two the number of significant competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $40 million. After the acquisition, defendants would have approximately 50 percent of the MSW disposal market.

(9) Houston, Texas Area

Republic is acquiring the MSW disposal assets of Allied serving the Houston, Texas area. These assets serve MSW disposal customers in Harris County, Texas. In this area, the proposed acquisition would reduce from three to two the number of significant competitors for MSW disposal in the Houston, Texas area. Annual revenue from MSW disposal in this market is

approximately $75 million. After the acquisition, defendants would have approximately 70 percent of the MSW disposal market.

(10) Los Angeles, California Area

Republic is acquiring the MSW disposal assets of Allied serving the Los Angeles, California area. These assets serve MSW disposal customers in Los Angeles County, California. In this area, the proposed acquisition would reduce from four to three the number of significant competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $372 million. After the acquisition, defendants would have approximately 39 percent of the MSW disposal market, and the two largest competitors would have 61 percent.

(11) Northwest Indiana Area

Republic is acquiring the MSW disposal assets of Allied serving the Northwest Indiana area. These assets serve MSW disposal customers in Lake, Porter and LaPorte Counties, Indiana. In this area, the proposed acquisition would also reduce from four to three the number of significant competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $28 million. After the acquisition, defendants would have approximately 64 percent of the MSW disposal market.

(12) Philadelphia, Pennsylvania Area

Republic is acquiring the MSW disposal assets of Allied serving the Philadelphia, Pennsylvania area. These assets serve MSW disposal customers in Philadelphia County, Pennsylvania. In this area, the proposed acquisition would reduce from three to two the number of competitors for MSW disposal. Annual revenue from MSW disposal in this market is

approximately $126 million. After the acquisition, defendants would have approximately 52 percent of the available MSW disposal capacity.

(13) San Francisco, California Area

Republic is acquiring the MSW disposal assets of Allied serving the San Francisco, California area. These assets serve MSW disposal customers in Contra Costa, Solano and Alameda Counties, California. In this area, the proposed acquisition would reduce from three to two the number of significant competitors for MSW disposal. Annual revenue from MSW disposal in this market is approximately $101 million. After the acquisition, defendants would have approximately 50 percent of the MSW disposal market.

The Complaint alleges that a combination of Republic and Allied in each of these areas would remove a significant competitor in the market for MSW disposal. In each of these markets, the resulting increase in concentration, loss of competition, and absence of any reasonable prospect of significant new entry or expansion by market incumbents likely will result in higher prices for MSW disposal.

III. Explanation of the Proposed Final Judgment

The divestiture requirements of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in small container commercial waste collection services and MSW disposal services in the markets identified in the Complaint by removing sufficient collection and disposal assets from the merged firm's control and placing them in the hands of a firm that is independent of the merged firm and capable of preserving the competition that otherwise would have been extinguished by the merger. Specifically, the proposed Final

Judgment requires defendants, within 90 days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as a viable ongoing business or businesses, (a) small container commercial waste collection assets (*e.g.*, routes, trucks, containers, and customer lists) in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Lexington, Kentucky; Lubbock, Texas; and Northwest Indiana, and (b) MSW disposal assets (*e.g.*, landfills, transfer stations, airspace disposal rights, leasehold rights, garages and offices, trucks and vehicles, scales, permits and intangible assets such as customer lists and contracts) in the areas of Atlanta, Georgia; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Denver, Colorado; Flint, Michigan; Fort Worth, Texas; Greenville-Spartanburg, South Carolina; Houston, Texas; Los Angeles, California; Northwest Indiana; Philadelphia, Pennsylvania; and San Francisco, California. The assets must be divested to purchasers approved by the United States and in such a way as to satisfy the United States that they can and will be operated by the purchaser or purchasers as part of a viable, ongoing business or businesses that can compete effectively in each relevant market. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

In the event that defendants do not accomplish the divestitures within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee

based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court, United States, and the States as appropriate, setting forth his or her efforts to accomplish the divestitures. At the end of six months, if the divestitures have not been accomplished, the trustee, United States, and the States as appropriate, will make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

A. Divestiture Provisions

The proposed Final Judgment provides that, for any area in which defendants are required to divest assets, all of the assets serving that area shall be sold to a single purchaser, unless defendants receive the prior written consent of the United States to do otherwise. As described below, the divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in each of the nine markets in which the Complaint alleges harm to competition for small container commercial waste collection services and in each of the 13 markets in which the Complaint alleges harm to competition for MSW disposal. These divestitures will preserve the competition that otherwise would have been lost as a result of the acquisition.

1. Atlanta, Georgia Area

Defendants must divest 13 of Allied's approximately 35 small container commercial waste collection routes and related assets in the Atlanta, Georgia area. The specific routes to be divested are identified in the proposed Final Judgment and form an efficient network of routes

serving the northern and eastern portions of the Atlanta area, where Allied and Republic routes overlap most directly and the firms compete most intensely. The divestiture of these routes to an independent, economically viable acquirer will thus preserve such competition and also position the acquirer to expand its service throughout the Atlanta area.

Defendants must also divest to the same acquirer Republic's Central Gwinnett Transfer Station in Lawrenceville, Georgia and Allied's BFI Smyrna Transfer Station in Smyrna, Georgia to remedy MSW disposal concerns in the Atlanta, Georgia area. In this area, transfer stations are the primary disposal option for haulers of MSW because MSW landfills are generally too far away from collection routes for direct hauling to the landfill to be economical. Republic's Central Gwinnett Transfer Station is located in the northeastern portion of the Atlanta area and provides an efficient MSW disposal option for the acquirer of the 13 small container commercial waste collection routes to be divested in this market. Allied's BFI Smyrna Transfer Station, which is in the western portion of the Atlanta area, is also efficiently located. Together, the two transfer stations will provide efficient access to disposal for collection routes throughout the Atlanta area. The United States' investigation found that there are sufficient independent MSW landfills economically reached via these transfer stations to allow the acquirer to provide effective disposal competition in the Atlanta area, both for its own waste streams as well as those of other independent haulers throughout the Atlanta area.

Paragraph IV(A) of the proposed Final Judgment requires defendants to offer the Atlanta area divestiture assets for sale separately from the other assets required to be divested, so as to expand the pool of potential bidders for the Atlanta area divestiture assets. Local or regional waste firms that might wish to combine the Atlanta area divestiture assets with their own assets

serving this market may not be interested in or capable of bidding on the assets to be divested in this market if they were offered only as part of a significantly larger group of divestiture assets located in multiple markets.

Pursuant to the terms of the Modified Final Judgment entered in *United States v. Allied Waste Industries, Inc. & Browning-Ferris Industries, Inc.*, (D.D.C. 1999) (No. 1:99 CV 01962) [hereinafter *Allied/BFI*], Allied was required to divest its Newnan Transfer Station, located in Newnan, Georgia. Republic acquired the Newnan Transfer Station from Allied and owns it today. Paragraph VIII(A) of the *Allied/BFI* Modified Final Judgment prohibits Allied's reacquisition of assets that it divested without the prior written consent of the United States. Although Republic's acquisition of Allied will recombine this transfer station with Allied's other disposal assets in the Atlanta area, the United States has consented to this recombination because it concluded that the Newnan Transfer Station no longer participates meaningfully in the Atlanta market for MSW disposal, and no competitive issues exist in the rural areas southwest of Atlanta served by the Newnan Transfer Station. Specifically, the United States' investigation found that, although Allied used the Newnan Transfer Station to serve the Atlanta disposal market as of 1999 – and that facility competed directly with transfer stations in the Atlanta area that Allied was acquiring in the *Allied/BFI* transaction – the focus of the Newnan Transfer Station has changed under Republic ownership, and other transfer stations in the Atlanta area now accept the waste streams that previously went to the Newnan Transfer Station. Waste flow reports show that the Newnan facility disposes of waste generated in rural areas southwest of Atlanta and competes much less directly with other disposal facilities in the Atlanta area. Accordingly, the United States concluded that the proposed acquisition of Allied by Republic, whereby Allied's MSW disposal assets would be recombined with the Newnan Transfer Station, would not

substantially diminish competition for the provision of MSW disposal services in the Atlanta, Georgia area. Instead, the divestiture of the Republic's Central Gwinnett Transfer Station and Allied's BFI Smyrna Transfer Station would be an effective remedy for the anticompetitive effects of the proposed acquisition on MSW disposal in this market.

2. Cape Girardeau, Missouri Area

Defendants must divest Allied's two routes and related assets that serve small container commercial waste collection customers in the Cape Girardeau, Missouri area to an independent, economically viable competitor. This divestiture encompasses all of Allied's existing small container commercial waste collection routes in this market, and the acquirer of these assets will therefore fill the same competitive role previously occupied by Allied.

Defendants must also divest to the same acquirer Allied's only transfer station in the Cape Girardeau, Missouri area – the Jackson Solid Waste Transfer Station in Jackson, Missouri – to remedy MSW disposal concerns in this market. In this area, transfer stations are the primary disposal option for haulers of MSW because MSW landfills are generally too far away from collection routes for direct hauling to the landfill to be economical. Allied's Jackson Solid Waste Transfer Station has historically provided MSW disposal services for the two Allied small container commercial waste collection routes that will be divested in this market, and there is sufficient independent MSW landfill capacity economically reached via the transfer station to enable the acquirer of the divested assets to provide effective collection and disposal competition in the Cape Girardeau area.

3. Charlotte, North Carolina Area

Defendants must divest Republic's ten routes and related assets that serve small container commercial waste collection customers in the Charlotte, North Carolina area to an independent, economically viable competitor. This divestiture encompasses all of Republic's existing small container commercial waste collection routes in this area, and the acquirer of these assets will therefore fill the same competitive role previously occupied by Republic.

Defendants must also divest to the same acquirer Republic's Queen City Transfer Station in Charlotte, North Carolina and Allied's Anson County Landfill in Polkton, North Carolina to remedy MSW disposal concerns in the Charlotte, North Carolina area. Republic's Queen City Transfer Station in Charlotte, North Carolina is the facility Republic uses to serve its ten routes in the Charlotte area, and is an efficient MSW disposal option. Allied's Anson County Landfill is efficiently located relative to the Queen City Transfer Station and possesses ample capacity to preserve disposal competition in the Charlotte area once divested to an independent, economically viable operator. The proposed Final Judgment does not require the divestiture of the landfill used by Republic to serve this area – Republic's Uwharrie Environmental Landfill in Mount Gilead, North Carolina – because a significant portion of the capacity of that landfill, which is farther from the Queen City Transfer Station than Allied's Anson County facility, is devoted by Republic to serving waste streams from areas to the north of the Charlotte area, where the United States' investigation found that there was no competitive concern.

4. Cleveland, Ohio Area

Defendants must divest to a single Acquirer Republic's Harvard Road Transfer Station in Newburgh Heights, Ohio and Allied's Superior Oakland Marsh Landfill in Shiloh, Ohio to

remedy MSW disposal concerns in the Cleveland, Ohio area. Republic's Harvard Road Transfer Station is a large transfer station that is centrally located in the Cleveland, Ohio market. The Superior Oakland Marsh Landfill is efficiently located to accept MSW from the divested Harvard Road Transfer Station and other transfer stations serving the Cleveland, Ohio area, and it possesses ample capacity to preserve disposal competition in the Cleveland area once it is divested to an independent, economically viable operator. The proposed Final Judgment does not require divestiture of the landfill used by Republic to serve waste delivered via the Harvard Road Transfer Station – Republic's Countywide Recycling and Disposal Landfill in East Sparta, Ohio – because that facility has unresolved environmental issues related to its operation that would make it an unattractive candidate for divestiture.

Paragraph IV(A) of the proposed Final Judgment requires defendants to offer the Cleveland area divestiture assets for sale separately from the other assets required to be divested, so as to expand the pool of potential bidders for the Cleveland area divestiture assets. Local or regional waste firms that might wish to combine the Cleveland area divestiture assets with their own assets serving this market may not be interested in or capable of bidding on the assets to be divested in this market if they were offered only as part of a significantly larger group of divestiture assets located in multiple markets.

5. Denver, Colorado Area

Defendants must divest Republic's only MSW disposal facility serving the Denver, Colorado area – the Front Range Landfill in Erie, Colorado – to remedy MSW disposal concerns in this market.

6. Flint, Michigan Area

Defendants must divest Republic's only actively operating MSW disposal facility serving the Flint, Michigan area – the Brent Run Landfill in Montrose, Michigan – to remedy MSW disposal concerns in this market. The proposed Final Judgment does not require defendants to divest an inactive landfill owned by Republic that could serve this market – the Tay Mouth Landfill in Birch Run, Michigan – because Republic's Brent Run Landfill possesses ample capacity to preserve competition once divested to an independent, economically viable operator.

7. Fort Worth, Texas Area

Defendants must divest Republic's five routes and related assets that serve small container commercial waste collection customers in the Fort Worth, Texas area to an independent, economically viable competitor. This divestiture encompasses all of Republic's existing small container commercial waste collection routes in this market, and the acquirer of these assets will therefore fill the same competitive role previously occupied by Republic.

Defendants must also divest to the same acquirer one of two landfills in the Fort Worth area: (1) Allied's Turkey Creek Landfill in Alvaredo, Texas, or (2) all of Allied's rights, titles, and interests in the Fort Worth Southeast Landfill in Kennedale, Texas, a disposal site that Allied leases from the City of Fort Worth. The selection of which landfill is to be divested is to be made by the acquirer. The divestiture of either of the two Allied landfills to an independent, economically viable competitor will eliminate the competitive harm caused by the acquisition. Both landfills are located close to Fort Worth, Texas, and are efficiently situated to serve this market as MSW disposal options.

If the acquirer selects Allied's Turkey Creek Landfill, which has been inactive since 2007, the proposed Final Judgment required defendants to warrant to the purchaser that, at the date of sale, the landfill will be operational and ensure that it is capable of disposing of 675,000 tons of MSW annually, which is the approximate volume disposed of during 2005, when the landfill was fully operational. If the landfill is not so capable, defendants shall be required to divest alternative disposal assets in the Fort Worth area acceptable to the United States as sufficient to remedy the competitive harm caused by the acquisition.

If the acquirer selects the Fort Worth Southeast Landfill, which Allied leases pursuant to a long-term contract with the City of Fort Worth, the acquirer would have to obtain the prior approval of Fort Worth to the sale, and the proposed Final Judgment requires defendants to use their best efforts to obtain such approval.

The proposed Final Judgment does not require divestiture of the garage facilities used by Republic to serve the routes to be divested. Both Republic and Allied own garages that serve the Fort Worth area, but both of these facilities are much larger than necessary to serve the routes to be divested and are used predominantly to serve collection routes (such as residential franchise routes) as to which there is no competitive harm. The defendants intend to continue using both facilities after the acquisition is consummated. If the acquirer selects the Turkey Run Landfill for divestiture, it would be able to make use of space at that facility to service trucks used to operate the collection routes to be divested. If the acquirer selects the Forth Worth Southeast Landfill, the proposed Final Judgment requires the defendants to provide the acquirer with an option to lease for up to one year a sufficient portion of Republic's garage located in Arlington, Texas, to support fully the operation of the five routes to be divested as well as the potential growth of the

divested collection business.

Paragraph IV(A) of the proposed Final Judgment requires defendants to offer the Fort Worth area divestiture assets for sale separately from the other assets required to be divested, so as to facilitate bids by local or regional waste firms that might wish to combine the Fort Worth area divestiture assets – which do not encompass all of the collection or disposal assets of either Republic or Allied in this area – with their own assets serving this market in order to create a more efficient, vertically integrated competitor serving the Fort Worth, Texas market. Such firms may not be interested in or capable of bidding on the assets to be divested in this market if they were offered only as part of a significantly larger group of divestiture assets located in multiple markets.

8. Greenville-Spartanburg, South Carolina Area

Defendants must divest Allied's eight routes and related assets that serve small container commercial waste collection customers in the Greenville-Spartanburg, South Carolina area to an independent, economically viable competitor. This divestiture encompasses all of Allied's existing small container commercial waste collection routes in this market, and the acquirer of these assets will therefore fill the same competitive role previously occupied by Allied.

Defendants must also divest to the same acquirer all of Allied's MSW disposal assets serving the Greenville-Spartanburg, South Carolina area – Allied's Greer Transfer Station in Greer, South Carolina, and its Anderson Regional Landfill in Anderson, South Carolina – to remedy MSW disposal concerns in this market.

9. Houston, Texas Area

Defendants must divest 32 of Republic's 54 small container commercial waste collection routes and related assets in the Houston, Texas area. The specific routes to be divested are identified in the proposed Final Judgment and form an efficient network of routes serving the entire Houston area. The divestiture of these routes to an independent, economically viable acquirer will thus preserve competition and position the acquirer to expand its service.

Defendants must also divest Republic's Hardy Road Transfer Station in Houston, Texas and Seabreeze Landfill in Angleton, Texas to remedy MSW disposal concerns in the Houston, Texas area. Together, these two MSW disposal facilities will preserve competition for MSW disposal in the Houston area. The proposed Final Judgment does not require the divestiture of Republic's interest in two transfer stations owned by the City of Houston and operated by Republic under a long-term disposal contract and lease. The United States' investigation found that competition for that disposal contract would not be adversely affected by the proposed transaction.

In order to provide the acquirer of the divested routes serving the southern portion of the Houston area with an efficient direct-haul disposal option, the proposed Final Judgment requires that the defendants offer the acquirer airspace disposal rights at Republic's Blue Ridge Landfill for the term of the proposed Final Judgment. The United States contemplates that such an agreement, subject to the approval of the United States, would be negotiated between the defendants and the acquirer and contain reasonable commercial terms, consistent with the proposed Final Judgment.

10. Lexington, Kentucky Area

Defendants must divest Republic's five routes and related assets that serve small container commercial waste collection customers in the Lexington, Kentucky area to an independent, economically viable competitor. This divestiture encompasses all of Republic's existing small container commercial waste collection routes in this market, and the acquirer of these assets will therefore fill the same competitive role previously occupied by Republic.

11. Lubbock, Texas Area

Defendants must divest Allied's seven routes and related assets that serve small container commercial waste collection customers in the Lubbock, Texas area to an independent, economically viable competitor. This divestiture encompasses all of Allied's existing small container commercial waste collection routes in this market, and the acquirer of these assets will therefore fill the same competitive role previously occupied by Allied.

12. Northwest Indiana Area

Defendants must divest five of Allied's nine small container commercial waste collection routes and related assets in the Northwest Indiana area. The specific routes to be divested are identified in the proposed Final Judgment and form an efficient network of routes serving the portions of the Northwestern Indiana area where Allied and Republic routes overlap most directly and the firms compete most intensely. The divestiture of these routes to an independent, economically viable acquirer will thus preserve such competition and also position the acquirer to expand its service throughout the Northwestern Indiana area.

Defendants must also divest to the same acquirer Allied's Valparaiso Transfer Station in

Valparaiso, Indiana to remedy MSW disposal concerns in the Northwest Indiana area. Allied's Valparaiso Transfer Station is centrally located in this area and will allow the acquirer to provide efficient access to disposal for collection routes throughout the Northwestern Indiana area, including those to be divested.

The United States' investigation found that there are sufficient independent MSW landfills economically reached via the Valparaiso Transfer Station to allow the acquirer to provide effective disposal competition in the Northwestern Indiana area. To facilitate the acquirer's transition of waste streams served by this transfer stations to other landfills, the proposed Final Judgment requires that the purchaser of the transfer station be offered the option of entering a disposal agreement providing access to up to 350 tons per day of capacity for up to two years at Allied's Newton County Development Corporation Landfill in Brook, Indiana for the final disposal of waste received at the transfer station. The United States contemplates that such an agreement, subject to the approval of the United States, would be negotiated between the defendants and the acquirer and contain reasonable commercial terms, consistent with the proposed Final Judgment.

13. Los Angeles, California Area

Defendants must divest Republic's only landfill serving the Los Angeles, California area – the Chiquita Canyon Sanitary Landfill in Valencia, California – to remedy MSW disposal concerns in this market.

14. Philadelphia, Pennsylvania Area

Defendants must divest Republic's Girard Point Transfer Station and Allied's Philadelphia Recycling and Transfer Station, both in Philadelphia, Pennsylvania, to remedy

MSW disposal concerns in the Philadelphia, Pennsylvania area. In this area, transfer stations are the primary disposal option for haulers of MSW in this market, because roadways in much of the area are highly congested and MSW landfills are generally too far away from collection routes for direct hauling to the landfill to be economical. Both transfer stations to be divested are easily accessible to MSW haulers in this market, and both are located in densely populated areas of the market where Republic and Allied currently compete to provide MSW disposal services: Republic's Girard Point Transfer Station is south of central Philadelphia and Allied's Philadelphia Recycling and Transfer Station is located to the west of central Philadelphia.

The United States' investigation found that there are sufficient independent MSW landfills economically reached via these transfer stations to allow the acquirer to provide effective disposal competition in the Philadelphia area. To facilitate the acquirer's transition of waste streams served by these transfer stations to other landfills – including compliance with municipal regulations requiring that any landfill accepting MSW generated in the City of Philadelphia, either directly or through a transfer station, be approved in advance – the proposed Final Judgment requires that the purchaser of the transfer stations be offered the option of entering a disposal agreement providing access to up to 1,300 tons per day of capacity for up to 18 months at Republic's Modern Landfill in York, Pennsylvania for the final disposal of MSW received at the transfer stations. The United States contemplates that such an agreement, subject to the approval of the United States, would be negotiated between the defendants and the acquirer and contain reasonable commercial terms, consistent with the proposed Final Judgment.

Paragraph IV(A) of the proposed Final Judgment requires defendants to offer the Philadelphia area divestiture assets for sale separately from the other assets required to be

divested, so as to expand the pool of potential bidders for the Philadelphia area divestiture assets. Local or regional waste firms that might wish to combine the Philadelphia area divestiture assets with their own assets serving this market may not be interested in or capable of bidding on the assets to be divested in this market if they were offered only as part of a significantly larger group of divestiture assets located in multiple markets.

15. San Francisco, California Area

Defendants must divest Republic's Potrero Hills Sanitary Landfill in Suisun, California to remedy MSW disposal concerns in the San Francisco, California area. Republic's Potrero Hills Sanitary Landfill has been a significant disposal competitor for MSW generated in this market. This divestiture will preserve the competition between the Potrero Hills facility and Allied's disposal facilities in this market.

Pursuant to the terms of the Modified Final Judgment entered in *Allied/BFI*, Allied was required to divest the Vasco Road Landfill, located in Livermore, California and serving the San Francisco, California area. Republic acquired the Vasco Road Landfill from Allied and owns it today. Paragraph VIII(A) of the *Allied/BFI* Modified Final Judgment prohibits Allied's reacquisition of assets that it divested without the prior written consent of the United States. Although Republic's acquisition of Allied will recombine the Vasco Road Landfill with Allied's other disposal assets in the San Francisco area, the United States has consented to this recombination. The United States has consented because it concluded that the competitive significance of the Vasco Road Landfill has diminished considerably since 1999. Specifically, Republic's Vasco Road Landfill is not a significant competitor to Allied's Keller Canyon Landfill, located in Pittsburg, California, for the disposal of MSW generated outside Alameda

County because of its location and the relatively high taxes levied on each ton of MSW disposed at Vasco Road. For disposal of MSW generated in Alameda County, Vasco Road faces competition from a large landfill located in Alameda County and owned by another firm. Today, the Vasco Road Landfill predominantly competes for the disposal of special waste (such as contaminated soil), which is not subject to the higher tax rate applied to MSW. Accordingly, the United States concluded that the proposed acquisition of Allied by Republic, whereby Allied's MSW disposal assets would be recombined with the Vasco Road Landfill, would not substantially diminish competition for the provision of MSW disposal services in the San Francisco, California area, and that the divestiture of the Potrero Hills Sanitary Landfill would be an effective remedy for the anticompetitive effects of the proposed acquisition in this MSW disposal market.

B. Notice of Future Acquisitions

Paragraph VII of the proposed Final Judgment requires that defendants provide advance notification of certain proposed acquisitions not otherwise subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 , 15 U.S.C. §18a. That provision requires 30 days' advance written notice to the United States and the relevant state before defendants may acquire, directly or indirectly, any interest in any business engaged in waste collection or disposal in a market as to which the Complaint alleged a violation where the acquired business's annual revenues from the relevant service in the market exceed $500,000 for the 12 months preceding the proposed acquisition. This provision will enable the United States and the States to investigate prior to consummation the competitive effects of proposed transactions in markets of concern.

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 subsequent private lawsuit that may be brought against the defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States, the 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. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. 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:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 3000
Washington, D.C. 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, a full trial on the merits against defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Republic's acquisition of all of Allied's issued and outstanding voting securities. The United States is satisfied, however, that the divestiture of assets and other relief described in the proposed Final Judgment will preserve competition for small container commercial waste collection services and MSW disposal in the relevant markets identified by the United States.

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
>
> (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); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act).[1]

As the United States 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 set forth in the government's 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

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[1] 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).

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; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [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).[2] 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"); *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

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[2] *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'").

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 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. 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. *Id.* at 1459-60. As this Court 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). The language wrote into the statute 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.[3]

VIII. Determinative Documents

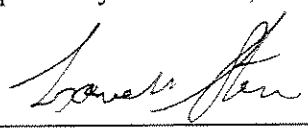
There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

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[3] *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.").

Dated: December 3, 2008

Respectfully submitted,



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