UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, STATE OF COLORADO, STATE OF IDAHO, COMMONWEALTH OF PENNSYLVANIA, STATE OF TEXAS, COMMONWEALTH OF VIRGINIA, STATE OF WASHINGTON, and STATE OF WEST VIRGINIA, *Plaintiffs,* v. SPRINGLEAF HOLDINGS, INC., ONEMAIN FINANCIAL HOLDINGS, LLC, and CITIFINANCIAL CREDIT COMPANY, *Defendants.*	CASE NO.: JUDGE:

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

Pursuant to a Stock Purchase Agreement dated March 2, 2015, Springleaf Holdings, Inc. proposes to acquire OneMain Financial Holdings, LLC from CitiFinancial Credit Company, a wholly owned subsidiary of Citigroup, Inc., for approximately $4.25 billion. The proposed merger would combine the two largest providers of personal installment loans to subprime borrowers in the United States.

The United States filed a civil antitrust Complaint on November 13, 2015, seeking to enjoin the proposed acquisition. The Complaint alleges that the acquisition likely would substantially lessen competition for personal installment loans to subprime borrowers in numerous local markets across eleven states, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. That loss of competition likely would result in a reduction of consumer choice that may drive financially struggling borrowers to much more expensive forms of credit or, worse, leave them with no reasonable alternative.

At the same time the Complaint was filed, the United States filed an Asset Preservation Stipulation and Order and a proposed Final Judgment designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Springleaf is required to divest 127 branches in eleven states to Lendmark Financial Services, or to one or more other Acquirers acceptable to the United States. Under the terms of the Asset Preservation Stipulation and Order, Springleaf will take certain steps to ensure that the divestiture branches are operated as competitively independent, economically viable, and ongoing business concerns; that they remain independent and uninfluenced by the consummation of the acquisition; and that competition is maintained during the pendency of the ordered divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment 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

Defendant Springleaf Holdings, Inc. ("Springleaf") is a Delaware corporation with its headquarters in Evansville, Indiana. Springleaf is the second-largest provider of personal installment loans to subprime borrowers in the United States. Springleaf operates approximately 830 branches in 27 states and has a consumer loan portfolio of about $4.0 billion.

Defendant OneMain Financial Holdings, LLC ("OneMain") is a Delaware limited liability company, headquartered in Baltimore, Maryland. OneMain is the largest provider of personal installment loans to subprime borrowers in the United States. OneMain operates 1,139 branches in 43 states and has a consumer loan portfolio that totals $8.4 billion. OneMain is a subsidiary of CitiFinancial Credit Company, a holding company that is a wholly owned subsidiary of Citigroup, Inc.

B. Background on Personal Installment Loans to Subprime Borrowers

Personal installment loans to subprime borrowers are closed-end, fixed-rate, fixed-term, and fully amortized loan products that typically range from $3,000 to $6,000. Both the principal and interest are paid fully through scheduled installments by the end of the loan term, which typically is between 18 and 60 months in duration. Each monthly payment is the same amount and the schedule of payments is clear.

Personal installment lenders target a unique segment of borrowers who may not be able to obtain cheaper sources of credit from other financial institutions but have enough cash flow to afford the monthly payments of personal installment loans. Borrowers of personal installment loans are considered "subprime" because of blemishes in their credit histories, such as serious delinquencies or defaults. These borrowers likely have been denied credit by a bank in the past and turn to personal installment lenders for the speed, ease, and likelihood of success in obtaining credit. Their borrowing needs vary, for example, from paying for unexpected expenses, such as car repairs or medical bills, to consolidating debts. A typical subprime borrower's annual income is in the range of $35,000 to $45,000.

The blemished credit histories of subprime borrowers suggest a higher propensity for default on future loans relative to so-called "prime" borrowers. Personal installment lenders mitigate this credit risk by closely analyzing a borrower's characteristics and ability to repay the loan, including the borrower's credit history, income and outstanding debts, stability of employment, and availability or value of collateral. Lenders typically require borrowers to meet face-to-face at a branch location to close the loan, even if the application begins online. This face-to-face meeting allows the lender to efficiently collect information used in underwriting and verify key documents (reducing the risk of fraud). Subprime borrowers seeking installment loans also value having a branch office close to where they live or work; a nearby branch reduces the borrower's travel cost to close the loan and allows convenient and timely access to loan proceeds. If approved, borrowers immediately obtain the funds at the branch.

Local branch presence also helps lenders and borrowers establish close customer relationships during the life of the loan. Local branch employees monitor delinquent payments of existing customers and assist borrowers in meeting their payment obligations to minimize loan loss. Borrowers also benefit from knowing the local branch employees. Borrowers may visit a branch to make payments, refinance their loans, or speak with a branch employee at times of financial difficulties. Lenders place branches where their target borrowers live or work so that it is convenient for their borrowers to come in to a branch.

The interest rate on a personal installment loan is the largest component of the total cost of a loan, but other fees increase the effective interest rate that a borrower will pay. The Annual Percentage Rate ("APR") combines the interest rates and fees to indicate the annual charges associated with the loan. Although the maximum interest rates and fees charged on personal installment loans vary by state, Springleaf and OneMain have a self-imposed interest rate cap of 36 percent on their respective loans.

While subprime borrowers consider APR in selecting a loan, they typically focus most on the monthly payment and on the ease and speed of obtaining approval. For these reasons, negotiations between borrowers and lenders tend to focus more on the amount of the loan, the repayment terms, and collateral requirements than on the rates and fees.

Every state requires personal installment lenders to obtain licenses to offer loans to subprime borrowers. Many states also have regulations governing the interest rates and fees on personal installment loans, with some states imposing maximum rates and fees and others utilizing a tiered-rate system that establishes different interest rates and fees for different loan amounts. The nature of state regulations significantly affects the number of personal installment lenders operating in a state.

C. Relevant Product Market

Subprime borrowers turn to personal installment loans when they need cash but have limited access to credit from banks, credit card companies, and other lenders. As explained in the Complaint, the products offered by these lenders are not meaningful substitutes for personal installment loans for a substantial number of subprime borrowers.

For example, banks and credit unions offer personal installment loans at rates and terms much better than those offered by personal installment lenders, but subprime borrowers typically do not meet the underwriting criteria of those institutions and are unlikely to be approved. Further, the loan application and underwriting process at banks and credit unions typically take much longer than that of personal installment lenders.

Payday and title lenders provide short-term cash, but charge much higher rates and fees, usually lend in amounts well below $1,000, and require far quicker repayment than personal installment lenders. Rates and fees for these types of short-term cash advances can exceed 250 percent APR with repayment generally due in less than 30 days.

Credit cards are also not a viable alternative for most subprime borrowers. Subprime borrowers may have difficulty obtaining credit cards, and those who have credit cards have often reached their credit limits and have limited access to additional credit extensions. Although subprime borrowers may use credit cards for everyday purchases, they typically have insufficient remaining credit to pay for larger expenses such as major car repairs or significant medical bills.

Finally, although online lenders have been successful in making loans to prime borrowers, they face challenges in meeting the needs of and mitigating the credit risk posed by subprime borrowers. Without a local branch presence, online lenders do not maintain close customer relationships, nor can they conduct face-to-face meetings to verify key documents, measures which reduce the risk of fraud and borrower default. Online lenders are also unable to process applications and distribute loan proceeds as quickly as local personal installment lenders.

For all of these reasons, as explained in the Complaint, subprime borrowers generally would not turn to banks and credit unions, payday and title lenders, credit cards, or online lenders in the event lenders offering personal installment loans to subprime borrowers were to increase the interest rate or otherwise make their loan terms less appealing by a small but significant amount. Accordingly, the Complaint alleges that the provision of personal installment loans to subprime borrowers is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

D. Relevant Geographic Market

As explained in the Complaint, subprime borrowers seeking personal installment loans value convenience, including quick access to borrowed funds and minimal travel time, and look for a branch near where they live or work. While the distance a borrower is willing to travel may vary by geography, the vast majority of subprime borrowers travel less than twenty miles to a branch for a personal installment loan.

Personal installment lenders have established local trade areas for their branches. Lenders usually rely on direct mail solicitations as the primary means of marketing and solicit customers who live within close proximity to their branches. Lenders who place branches in the same areas compete to serve the same target borrower base. Borrowers view lenders with branches in close proximity to each other as close substitutes.

For these reasons, the overlapping trade areas of competing personal installment lenders form geographic markets where the lenders located within the trade areas compete for subprime borrowers who live or work near the branches. The size and shape of the overlapping trade areas of these branches may vary as the distance borrowers are willing to travel depends on factors specific to each local area. Even so, typically more than three-quarters of the personal installment loans to subprime borrowers made by a given branch are made to borrowers residing within twenty miles of the branch. Personal installment lenders with branches located outside these trade areas usually are not convenient alternatives for borrowers.

Springleaf and OneMain have a high degree of geographic overlap between their branch networks. In local areas within and around 126 towns and municipalities in eleven states –

Arizona, California, Colorado, Idaho, North Carolina, Ohio, Pennsylvania, Texas, Virginia, Washington, and West Virginia – Springleaf and OneMain have branches located within close proximity of one another, often within five miles. In these overlapping trade areas of Springleaf's and OneMain's branches, few, if any, other lenders have branches offering personal installment loans to subprime borrowers.

According to the Complaint, in local areas within and around the 126 towns and municipalities in Arizona, California, Colorado, Idaho, North Carolina, Ohio, Pennsylvania, Texas, Virginia, Washington, and West Virginia, subprime borrowers of personal installment loans would not seek such loans outside the local areas in the event lenders offering personal installment loans to subprime borrowers were to increase the interest rate or otherwise make their loans less appealing by a small but significant amount. Accordingly, the overlapping trade areas located in the 126 towns and municipalities identified in the Appendix attached to the Complaint constitute relevant geographic markets within the meaning of Section 7 of the Clayton Act.

E. Anticompetitive Effects

As alleged in the Complaint, Springleaf and OneMain are the two largest providers of personal installment loans to subprime borrowers in the United States. Both companies have a long history in the business, an extensive branch network, and close ties to the local communities in which they operate. Both companies have used their years of experience and large customer base to develop sophisticated risk analytics that allow them to minimize expected credit losses. Other lenders that offer personal installment loans to subprime borrowers have much smaller branch footprints and are present in fewer states and local markets than Springleaf and OneMain.

In local markets within and around the 126 towns and municipalities in Arizona, California, Colorado, Idaho, North Carolina, Ohio, Pennsylvania, Texas, Virginia, Washington, and West Virginia identified in the Appendix to the Complaint, the market for the provision of personal installment loans to subprime borrowers is highly concentrated. In these local markets, Springleaf and OneMain are the largest providers of personal installment loans to subprime borrowers, and face little, if any, competition from other personal installment lenders. The Complaint alleges that the proposed acquisition would substantially increase concentration in these local markets and likely would result in subprime borrowers facing higher interest rates or fees, greater limits on the amount they can borrow and restraints on their ability to obtain loans, and more onerous loan terms. The proposed acquisition therefore likely will substantially lessen competition in the provision of personal installment loans to subprime borrowers.

F. Difficulty of Entry

According to the Complaint, entry of additional competitors into the provision of personal installment loans to subprime borrowers in the 126 local markets in Arizona, California, Colorado, Idaho, North Carolina, Ohio, Pennsylvania, Texas, Virginia, Washington, and West Virginia identified in the Complaint is unlikely to be timely or sufficient to defeat the likely anticompetitive effects of the proposed acquisition. In some states, the state regulatory rate caps create unattractive markets for entry. In others, lenders face entry barriers in terms of cost and time to establish a local branch presence. Personal installment lenders need experienced branch employees with knowledge of the local market to build a base of customer relationships. A new lender in a local market faces more risks as it does not have knowledge of local market conditions. A lender also must obtain funding and devote resources to building a successful local presence. As a result of these barriers, entry is unlikely to remedy the anticompetitive effects of the proposed acquisition.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by establishing an independent and economically viable competitor in the provision of personal installment loans to subprime borrowers in each of the local markets of concern.

Specifically, Paragraphs IV(A) and IV(B) of the proposed Final Judgment requires Defendants to divest 127 Springleaf branches, which are identified in the Attachment to the proposed Final Judgment, to Lendmark Financial Services or to one or more alternative Acquirers acceptable to the United States. The branches to be divested are located in the local markets within and around the 126 towns and municipalities identified in the Appendix to the Complaint. The divestiture will establish Lendmark or an alternative Acquirer as a new, independent and economically viable competitor in some states and will allow Lendmark or an alternative Acquirer to compete in new local areas and to enhance its competitive presence in others.

The divestiture of the 127 Springleaf branches includes all active loans originated or serviced at those branches, including all historical performance information (including account-level payment histories) and all customers' credit scores and other credit metrics with respect to loans that are active, closed, paid-off, or defaulted that have been originated or serviced at the Divestiture Branches at any point since January 1, 2010. The historical performance information will allow a lender to gain an understanding of local market conditions and to perform risk analytics essential to making personal installment loans to subprime borrowers. In the event that Lendmark is not the Acquirer, Paragraph II(G)(3) provides that Springleaf will further divest, at the Acquirer's option, assets related to back office and technical support that would provide the Acquirer with additional capability and know-how.

Paragraph IV(A) of the proposed Final Judgment requires Springleaf to divest the Divestiture Assets within 120 calendar days after the filing of the Complaint or within five (5) calendar days after satisfaction of all state licensing requirements, whichever is sooner. The United States, in its sole discretion, after consultation with the Plaintiff States, may agree to one or more extensions of the time period, not to exceed sixty (60) calendar days in total. In addition, in the event that Lendmark has initiated the state licensing process in a particular state but has not satisfied the state's licensing requirements before the end of the period specified in Paragraph IV(A), the period to divest the Divestiture Assets of that particular state shall be extended to five (5) calendar days after satisfaction of the state licensing requirements. Paragraph IV(A) also requires Springleaf to use its best efforts to divest the Divestiture Assets as expeditiously as possible.

In the event that Lendmark is unable to acquire the Divestiture Assets in one or more states, Paragraphs IV(B) provides that Springleaf shall divest the remaining Divestiture Assets to an alternative Acquirer(s) acceptable to the United States, in its sole discretion, after consultation with the relevant Plaintiff States. Springleaf shall divest the remaining Divestiture Assets within thirty (30) days after the United States receives notice that Lendmark is not the Acquirer of such Divestiture Assets, or within five (5) days of satisfaction of all state licensing requirements, whichever is sooner. The United States, in its sole discretion, after consultation with the relevant Plaintiff States, may agree to one or more extensions of the time period, not to exceed sixty (60) calendar days in total. Pursuant to Paragraph V(I), Springleaf must divest to a single Acquirer all of the Divestiture Branches located in a particular state.

Paragraph IV(G) prohibits Defendants from entering into non-compete agreements with any employee at any of Defendants' branches or with any regional manager with responsibility for managing any of Defendants' branches for a period of two (2) years from the date of the filing of the Complaint. Defendants also must waive any existing non-compete agreements with such employees. Paragraph IV(G) ensures that competing providers of personal installment loans, including the Acquirer, may hire Defendants' branch employees and regional managers who are experienced in making personal installment loans to subprime borrowers.

Paragraph IV(H) provides for the possibility of a transition services agreement between Springleaf and the Acquirer(s) for a period of up to six (6) months. This provision is necessary because the transfer of loan records and customer information from Springleaf's data system to the Acquirer's data system will require system testing, and the transition may take a period of months after the divestiture. The transition services provided pursuant to such an agreement shall include providing the Acquirer(s) access to a separate information technology environment within Springleaf's information system for loan origination, administration and services. During the term of the transition services agreement, Springleaf shall implement and maintain procedures to preclude the sharing of data between Springleaf and the Acquirer(s). The United States, in its sole discretion, may approve one or more extensions of this agreement for a total of up to an additional six (6) months.

Section X of the proposed Final Judgment provides that the United States may appoint a Monitoring Trustee with the power and authority to investigate and report on Defendants' compliance with the terms of the proposed Final Judgment and the Asset Preservation Stipulation and Order during the pendency of the divestiture. Because satisfaction of the state licensing requirements may take 120 calendar days or longer, a Monitoring Trustee will assist

Plaintiffs in monitoring the divestiture process and ensuring Defendants' compliance with the Asset Preservation Stipulation and Order. The Monitoring Trustee shall file monthly reports with the United States and shall serve until the completion of the divestiture and the expiration of any transition services agreement.

In the event that Springleaf does not accomplish the divestiture to either Lendmark or an alternative Acquirer(s) within the periods prescribed in the proposed Final Judgment, pursuant to Section V, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture. If a Divestiture Trustee is appointed, the proposed Final Judgment provides that Springleaf will pay all costs and expenses of the trustee. After its appointment becomes effective, the Divestiture Trustee will file monthly reports with the Court and the United States setting forth its efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the Divestiture Trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the Final Judgment, including extending the trust or the term of the Divestiture Trustee's appointment.

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 Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least 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. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's Internet website and, under certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8700
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, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Springleaf's acquisition of OneMain. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for personal installment loans to subprime borrowers. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 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 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); *United States v, U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, 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.").[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 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) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981));

[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts 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).

see also Microsoft, 56 F.3d at 1460-62; *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:

> [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 U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *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's 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 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*

[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'").

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 U.S. Airways*, 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements) (citing *Microsoft*, 56 F.3d at 1461); *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 U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("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 this Court 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); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). 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 Sen. 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] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 76.

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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.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (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, 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.

Dated: November 13, 2015

Respectfully submitted,

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