

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

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

Plaintiffs,

v.

WASTE MANAGEMENT, INC.

and

ADVANCED DISPOSAL SERVICES, INC.

Defendants.

Civil Action No.:

Judge:

COMPETITIVE IMPACT STATEMENT

The United States of America, under Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the “APPA” or “Tunney Act”), 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

On April 14, 2019, Waste Management, Inc (“WMI”) agreed to acquire Advanced Disposal Services, Inc. (“ADS”) for approximately \$4.9 billion. On June 24, 2020, WMI and ADS agreed to a revised purchase price of approximately \$4.6 billion. The United States, the States of Florida, Illinois, Minnesota, and Wisconsin, and the Commonwealth of Pennsylvania (the “Plaintiff States”) filed a civil antitrust Complaint on October 23, 2020, seeking to enjoin

the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to substantially lessen competition for Small Container Commercial Waste (“SCCW”) collection or municipal solid waste (“MSW”) disposal in 57 geographic markets in the eastern United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, the United States and the Plaintiff States filed an Asset Preservation Stipulation and Order (“Stipulation and Order”) and proposed Final Judgment, which are designed to remedy the loss of competition alleged in the Complaint. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest specified SCCW collection and MSW disposal assets in ten different states. Under the terms of the Stipulation and Order, Defendants will take certain steps to ensure that the assets to be divested are operated in such a way as to ensure that the assets continue to be ongoing, economically viable, and active competitors in the provision of Small Container Commercial Waste Collection and MSW Disposal, and that the assets maintain full economic viability, marketability, and competitiveness during the pendency of the required 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 will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

WMI is a Delaware corporation headquartered in Houston, Texas. WMI is the largest solid waste hauling and disposal company in the United States and provides waste collection,

recycling, and disposal (including transfer) services. WMI operates in 49 states and the District of Columbia. For 2019, WMI reported revenues of approximately \$15.5 billion.

ADS is a Delaware corporation headquartered in Ponte Vedra, Florida. It is the fourth-largest solid waste hauling and disposal company in the United States and provides waste collection, recycling, and disposal (including transfer) services. ADS operates in 16 states, primarily in the Midwest, Mid-Atlantic, and Southeast regions of the United States. For 2019, ADS reported revenues of approximately \$1.6 billion.

On April 14, 2019, WMI agreed to acquire all of the outstanding common stock of ADS for approximately \$4.9 billion. On June 24, 2020, WMI and ADS agreed to a revised purchase price of approximately \$4.6 billion.

B. Relevant Product Markets

1. Small Container Commercial Waste Collection

As alleged in the Complaint, SCCW (small container commercial waste) collection is a relevant product market. Waste collection firms—also called haulers—collect MSW (municipal solid waste) from residential, commercial, and industrial establishments, and transport that waste to a disposal site, such as a transfer station, landfill or incinerator, for processing and disposal.

SCCW collection is the business of collecting MSW from commercial and industrial accounts, usually in small containers (*i.e.*, dumpsters with one to ten cubic yards capacity), and transporting or hauling that waste to a disposal site. Typical SCCW collection customers include office and apartment buildings and retail establishments (*e.g.*, stores and restaurants).

SCCW collection is distinct from the collection of other types of waste such as residential and roll-off waste, each of which is subject to its own regulatory scheme dictating the manner in which it must be collected. An individual commercial customer typically generates substantially

more MSW than a residential customer. To handle this high volume of MSW efficiently, haulers often provide commercial customers with small containers for storing the waste. Haulers organize their commercial accounts into routes, and collect and transport the MSW generated by these accounts in front-end load (“FEL”) trucks uniquely well suited for commercial waste collection.

On a typical SCCW collection route, an operator drives a FEL truck to the customer’s container, engages a mechanism that grasps and lifts the container over the front of the truck, and empties the container into the vehicle’s storage section where the waste is compacted and stored. The operator continues along the route, collecting MSW from each of the commercial accounts, until the vehicle is full. The operator then drives the FEL truck to a disposal facility, such as a transfer station, landfill, or incinerator, and empties the contents of the vehicle. Depending on the number of locations and amount of waste collected on the route, the operator may make one or more trips to the disposal facility in servicing the route.

In contrast to an SCCW collection route, a residential waste collection route is highly labor intensive. A residential customer’s MSW is typically stored in much smaller containers, (*e.g.*, garbage bags or trash cans) and instead of using an FEL manned by a single operator, residential waste collection haulers routinely use rear-end load or side-load trucks manned by two- or three-person teams. On residential routes, crews often hand-load the customer’s MSW by tossing garbage bags and emptying trash cans into the vehicle’s storage section. In light of these differences, haulers typically organize commercial customers into separate routes from residential customers.

Roll-off collection also is not a substitute for SCCW collection. A roll-off container is much larger than an SCCW container, and is serviced by a truck capable of carrying a roll-off

container rather than an FEL. Unlike SCCW customers, multiple roll-off customers are not served between trips to the disposal site because each roll-off truck is typically capable of carrying only one roll-off container at a time.

Other types of waste collection, such as hazardous or medical waste collection, also are not substitutes for SCCW collection. These forms of collection differ from SCCW collection in the hauling equipment required, the volume of waste collected, and the facilities where the waste is disposed.

The Complaint alleges that, absent competition from other SCCW collection firms, SCCW collection providers could profitably increase their prices without losing significant sales to firms engaged in the provision of other types of waste collection services. In other words, in the event of a small but significant price increase for SCCW collection, customers would not substitute to other forms of collection in sufficient numbers so as to render the price increase unprofitable. Accordingly, the Complaint alleges that SCCW collection is therefore a line of commerce, or relevant product market, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

2. Municipal Solid Waste Disposal

As alleged in the Complaint, MSW disposal is a relevant product market. MSW is solid putrescible waste generated by households and commercial establishments such as retail stores, offices, restaurants, warehouses, and industrial facilities. MSW has physical characteristics that readily distinguish it from other liquid or solid waste (*e.g.*, waste from manufacturing processes,

regulated medical waste, sewage, sludge, hazardous waste, or waste generated by construction or demolition sites).

Haulers must dispose of all MSW at a permitted disposal facility. There are three main types of disposal facilities—landfills, incinerators, and transfer stations. Such facilities must be located on approved types of land and operated under prescribed procedures. 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 less densely populated areas, MSW often is disposed of directly into landfills that are permitted and regulated by a state and the federal government. Landfill permit restrictions often impose limitations on the type and amount of waste that can be deposited. In many urban and suburban areas, however, landfills are scarce due to high population density and the limited availability of suitable land. As a result, MSW generated in such areas often is burned in an incinerator or taken to a transfer station. A transfer station is an intermediate disposal site for the processing and temporary storage of MSW before it is transferred, in bulk, to more distant landfills or incinerators for final disposal.

Some haulers—including WMI and ADS—are vertically integrated and operate their own disposal facilities. Vertically-integrated haulers often prefer to dispose of waste at their own disposal facilities. Depending on the market, vertically-integrated haulers may sell a portion of their disposal capacity to customers in need of access to a disposal facility. These disposal customers include independent (non-vertically integrated) and municipally-owned haulers. Disposal customers rely on the availability of cost-competitive disposal capacity to serve their own collection customers and to compete for new ones.

According to the Complaint, due to strict laws and regulations that govern the disposal of MSW, there are no reasonable substitutes for MSW disposal, which must occur at landfills,

incinerators, or transfer stations. Thus, in the event of a small but significant price increase from MSW disposal firms, customers would not substitute to other forms of disposal in sufficient numbers so as to render the price increase unprofitable. Accordingly, the Complaint alleges that MSW disposal is a line of commerce, or relevant product market, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

C. Relevant Geographic Markets

1. Small Container Commercial Waste Collection

As alleged in the Complaint, SCCW collection generally is provided in highly localized areas. This is because a hauler needs a large number of commercial accounts that are reasonably close together to operate efficiently and profitably. If there is significant travel time between customers, then the hauler earns less money for the time that the truck operates. Haulers, therefore, try to minimize the “dead time” in which the truck is operating and incurring costs from fuel, wear and tear, and labor, but not generating revenue from collecting waste. Likewise, customers must be near the hauler’s base of operations as it would be unprofitable for a truck to travel a long distance to the start of a route. Haulers, therefore, generally establish garages and related facilities to serve as bases within each area served.

As alleged in the Complaint, as currently contemplated, the transaction would likely cause harm in 33 relevant geographic markets for SCCW collection located in six states: Alabama, Florida, Georgia, South Carolina, Minnesota, and Wisconsin (identified in Appendix A). In each of these markets, a hypothetical monopolist of SCCW collection could profitably impose a small but significant non-transitory increase in price to local customers without losing significant sales to more distant competitors. Accordingly, the Complaint alleges that each of the

areas listed in Appendix A constitutes a relevant geographic market and section of the country for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

2. Municipal Solid Waste Disposal

Collection trucks transport MSW to landfills, incinerators, and transfer stations for disposal. The price and availability of disposal sites close to a hauler's routes are major factors that determine a hauler's competitiveness and profitability, as the cost of transporting MSW to a disposal site—including fuel, regular truck maintenance, and hourly labor—is a substantial component of the total cost of disposal. Haulers also prefer nearby disposal sites to minimize the FEL dead time. Due to the costs associated with travel time and customers' preference to have disposal sites close by, an MSW disposal provider must have local disposal facilities to be competitive. The relevant markets for MSW disposal markets are therefore local, often consisting no more than a few counties.

As alleged in the Complaint, as currently contemplated, the transaction would likely cause harm in 24 relevant geographic markets for MSW disposal located in eight states: Alabama, Florida, Georgia, Illinois, Indiana, Michigan, Pennsylvania, and Wisconsin (identified in Appendix B). In each of these local markets, a hypothetical monopolist of MSW disposal could profitably impose a small but significant non-transitory increase in price for the disposal of MSW without losing significant sales to more distant disposal sites.

Accordingly, the Complaint alleges that each of the areas listed in Appendix B constitutes a relevant geographic market and section of the country for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

D. Anticompetitive Effects of the Proposed Transaction

According to the Complaint, the proposed transaction would substantially lessen competition and harm consumers in each alleged relevant market by eliminating the substantial head-to-head competition that currently exists between WMI and ADS. Businesses, municipalities, independent haulers, and other customers would pay higher prices as a result of the acquisition.

WMI's acquisition of ADS would remove a significant competitor for SCCW collection and MSW disposal in markets that are already highly concentrated and difficult to enter. WMI and ADS compete head-to-head for SCCW collection and/or MSW disposal customers in each of the 57 geographic markets identified in Appendices A and B. In these geographic markets, WMI and ADS each account for a substantial share of total revenue generated from SCCW collection and/or MSW disposal and, in each relevant market, are two of no more than four significant (*i.e.*, not fringe) competitors. *See* Appendices A and B (providing a complete list of the number of significant competitors in each relevant market pre-merger). In each SCCW collection market alleged, collection customers including offices, apartment buildings, and retail establishments, have been able to secure better collection rates and improved service by threatening to switch to the competing SCCW hauler. Likewise, in each MSW disposal market alleged, independent haulers and municipalities have been able to negotiate more favorable disposal rates by threatening to move waste to the other competitor's disposal facilit(ies). In each of the relevant markets identified in Appendices A and B, the resulting increase in concentration, loss of competition, and the unlikelihood of significant entry or expansion would likely result in higher prices, lower quality and level of service, and reduced choice for SCCW collection and MSW disposal customers.

E. Difficulty of Entry

1. Difficulty of Entry Into Small Container Commercial Waste Collection

According to the Complaint, entry of new competitors into SCCW collection in each of the relevant markets identified in Appendix A would be difficult and time-consuming and is unlikely to prevent the harm to competition that is likely to result if the proposed transaction is consummated.

A new entrant in SCCW collection could not provide a significant competitive constraint on the prices that market incumbents charge until achieving a minimum efficient scale and operating efficiency comparable to existing competitors. In order to obtain a comparable operating efficiency, a new competitor would have to achieve route densities similar to those of firms already in the market. Incumbents in a geographic market, however, can prevent new entrants from winning a large enough base of customers by selectively lowering prices and entering into longer term contracts with collection customers.

2. Difficulty of Entry Into Municipal Solid Waste Disposal

According to the Complaint, entry of new competitors into MSW disposal in each of the relevant markets identified in Appendix B would be difficult and time-consuming and is unlikely to prevent the harm to competition that is likely to result if the proposed transaction is consummated.

A new entrant in MSW disposal would need to obtain a permit to construct a disposal facility or to expand an existing one, and this process is costly and time-consuming, typically taking many years. Land suitable for MSW disposal is scarce as a landfill must be constructed away from environmentally-sensitive areas, including fault zones, wetlands, flood plains, and other restricted areas. Even when suitable land is available, local public opposition frequently

increases the time and uncertainty of the permitting process. Construction of a new transfer station or incinerator also is difficult and time consuming and faces many of the same challenges as new landfill construction, including local public opposition.

Entry by constructing and permitting a new MSW disposal facility would thus be costly and time-consuming and unlikely to prevent market incumbents from significantly raising prices for MSW disposal in each of the disposal markets following the acquisition.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestitures required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor in each of the SCCW collection and MSW disposal markets alleged in the Complaint.

Paragraph IV(A) of the proposed Final Judgment requires that the Divestiture Assets (capitalized terms are defined in the proposed Final Judgment) be divested within 30 days after the entry of the Stipulation and Order by the court to GFL Environmental Inc., or an alternative Acquirer acceptable to the United States, in its sole discretion, after consultation with the Plaintiff States. The assets must be divested in such a way as to satisfy the United States in its sole discretion, after consultation with the Plaintiff States, that the assets can and will be operated by the purchaser as a viable, ongoing SCCW collection and MSW disposal business that can compete effectively in each of the markets alleged in the Complaint.

The Divestiture Assets are defined as all tangible and intangible assets relating to or used in connection with the MSW disposal assets identified in Paragraphs II(O)(1) and II(O)(2) of the proposed Final Judgment and the SCCW collection assets identified in Paragraphs II(O)(3) and II(O)(4) of the proposed Final Judgment. The Divestiture Assets include 15 landfills, 37 transfer stations, 29 hauling locations, and over 200 Routes. The Divestiture Assets also include, *inter*

alia, in each MSW disposal market alleged: all tangible and intangible property and assets related to or used in connection with the transfer stations and landfills, and in each SCCW collection market alleged: all intangible and tangible assets related to or used in connection with the Routes except for what the proposed Final Judgment defines as Straddle Contracts and the hauling facilities identified in Appendix C.

Paragraph IV(K) of the proposed Final Judgment facilitates the transfer of customers and other contractual relationships, except for Straddle Contracts, to the Acquirer. Defendants must transfer all contracts, agreements, and relationships to the Acquirer and must make best efforts to assign, subcontract, or otherwise transfer contracts or agreements that require the consent of another party before assignment, subcontracting or other transfer. Straddle Contracts, which are defined in Paragraph II(P) as customer waste or recycling contracts that include a combination of services and/or collection stops included in the Divestiture Assets and services and/or collection stops not included in the Divestiture Assets, and that make up a small portion of the divestiture package, are required under Paragraph IV(L) to be divested at the option of the Acquirer so that the Acquirer will have the option to acquire the customer contracts which it determines it can efficiently and profitably serve.

The hauling facilities listed in Appendix C are not part of the Divestiture Assets because the Acquirer will acquire other hauling locations from which it can competitively run the acquired Routes in those areas. In certain markets, the Divestiture Assets include not only SCCW collection and MSW disposal assets, but also other collection assets including Roll-Off, Residential, and Recycling assets, which should enhance the viability of the Divestiture Assets.

The proposed Final Judgment contains several provisions to facilitate the transition of the Divestiture Assets to the Acquirer. First, Paragraph IV(N) of the proposed Final Judgment

requires Defendants, at the Acquirer's option, to enter into a transition services agreement for back office, human resources, accounting, employee health and safety, and information technology services and support for the Divestiture Assets for a period of up to six months. The paragraph further provides that the United States, in its sole discretion, may approve one or more extensions of this transition services agreement for a total of up to an additional six months.

Second, Paragraph IV(O) of the proposed Final Judgment requires Defendants, at the Acquirer's option, to enter into a contract to provide rights to landfill disposal at ADS's Orchard Hill's landfill for a period of up to three years. The paragraph further provides that the United States, in its sole discretion, may approve one or more extensions of the agreement for a total of up to two additional years. The proposed Final Judgment also requires Defendants to operate gates, side houses, and disposal areas for the benefit of the Acquirer under terms and conditions that are no less favorable than those provided to WMI's own vehicles. This provision is intended to give the Acquirer an efficient outlet for the waste that it will receive at the West Elburn Transfer Station as it establishes itself in the market.

The proposed Final Judgment also contains provisions intended to facilitate the Acquirer's efforts to hire certain employees. Paragraph IV(I) of the proposed Final Judgment requires Defendants to provide the Acquirer, the United States, and the Plaintiff States with organization charts and information relating to certain employees and to make them available for interviews. It also provides that Defendants must not interfere with any negotiations by the Acquirer to hire these employees. In addition, for employees who elect employment with the Acquirer, Defendants must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, provide any pay pro-rata, provide all other compensation and benefits that those employees have fully or partially accrued, and provide all

other benefits that those employees otherwise would have been provided had those employees continued employment with Defendants, including but not limited to any retention bonuses or payments. This paragraph further provides that the Defendants may not solicit to hire any employees who elect employment with the Acquirer, unless that individual is terminated or laid off by the Acquirer or the Acquirer agrees in writing that the Defendants may solicit or hire that individual. The non-solicitation period runs for 12 months from the date of the divestiture.

If the Defendants do not accomplish the divestiture within the period prescribed in Section IV of the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that the Defendants will pay all costs and expenses of the trustee. The divestiture 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 divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee will provide monthly reports to the Plaintiffs setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the United States may make recommendations to the Court, which may enter such orders as appropriate, in order to carry out the purpose of the Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment.

Section XI of the proposed Final Judgment requires WMI to notify the United States and any Plaintiff State in which any of the assets or interests are located in advance of acquiring, directly or indirectly (including by asset swap), in a transaction that would not otherwise be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), any interest in any business engaged in waste collection or

disposal in a market where the Complaint alleged a violation, which are listed in Appendix D. The proposed Final Judgment further provides for waiting periods and opportunities for the United States to obtain additional information analogous to the provisions of the HSR Act. The notification requirement applies when the acquired business's annual revenues from the relevant service in the market exceeded \$500,000 for the 12 months preceding the proposed acquisition. Because many of the markets alleged in the Complaint are highly concentrated, it is important for the Division and Plaintiff States to receive notice of even small transactions that have the potential to reduce competition in these markets. Requiring notification of any such acquisition will permit the United States to assess the competitive effects of that acquisition before it is consummated and, if necessary, seek to enjoin the transaction.

The proposed Final Judgment also contains provisions designed to promote compliance and make enforcement of the Final Judgment as effective as possible. Paragraph XIV(A) provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that the Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph XIV(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to restore

competition the United States and Plaintiff States allege would otherwise be harmed by the transaction. The Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIV(C) of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that a Defendant has violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XIV(C) provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendant will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Paragraph XIV(D) states that the United States may file an action against a Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XV of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and the Defendants that the divestiture has been completed and that continuation of the Final Judgment is no longer necessary or in the public interest.

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 neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this

Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, 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:

Katrina Rouse, Chief
Defense, Industrials, and Aerospace Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, 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

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against WMI's acquisition of ADS. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the provision of SCCW collection and MSW disposal in each of the geographic markets alleged in the Complaint. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits 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 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment “is in the public interest.” 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court’s inquiry is necessarily a limited one as the government is entitled to “broad discretion to settle with the defendant within the reaches of the public interest.” *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the “court’s inquiry is limited” in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court’s review of a consent judgment is limited and only inquires “into whether the government’s determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable”).

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government’s complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not “make de novo determination of facts and issues.” *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, “[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General.” *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). “The court should bear in mind the *flexibility* of the public interest inquiry: the court’s function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest.” *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would “have enormous practical consequences for the government’s ability to negotiate future settlements,” contrary to congressional intent. *Id.* at 1456. “The Tunney Act was not intended to create a disincentive to the use of the consent decree.” *Id.*

The United States’ predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g., Microsoft*, 56 F.3d at 1461 (recognizing courts should give

“due respect to the Justice Department’s . . . view of the nature of its case”); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) (“In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.”) (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting “the deferential review to which the government’s proposed remedy is accorded”); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (“A district court must accord due respect to the government’s prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case.”). The ultimate question is whether “the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest.’” *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co.*, 900 F.2d at 309).

Moreover, the Court’s role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to “construct [its] own hypothetical case and then evaluate the decree against that case.” *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government’s decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 (“[T]he ‘public interest’ is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged”). Because the “court’s authority to review the decree depends entirely on the government’s exercising its prosecutorial discretion by bringing a case in the first

place,” it follows that “the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: “[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). “A court can make its public interest determination based on the competitive impact statement and response to public comments alone.” *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

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: October 23, 2020

Respectfully submitted,

/s/ Jeremy Cline

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Appendix A: SCCW Geographic Markets and Number of Significant Competitors Pre-Merger

| <u>Small Container Commercial Waste</u> | | | |
|--|--------------------------------------|---|---|
| Geographic Market | | Counties/Municipalities within Geographic Market | Number of Significant Competitors Pre-Merger |
| 1 | Lee County, Alabama | Lee County, AL | 3 |
| 2 | Macon County, Alabama | Macon County, AL | 2 |
| 3 | Mobile, Alabama | City of Mobile, AL | 3 |
| 4 | Montgomery County, Alabama | Montgomery County, AL | 3 |
| 5 | Tuscaloosa, Alabama | City of Tuscaloosa, AL | 3 |
| 6 | Jacksonville, Florida | Duval, St. Johns, and Clay Counties, FL | 3 |
| 7 | Ocala, Florida | Marion and Citrus Counties, FL | 3 |
| 8 | Augusta, Georgia | Columbia and Richmond Counties, GA and Edgefield and Aiken Counties, SC | 4 |
| 9 | Rochester, Minnesota | City of Rochester, MN | 3 |
| 10 | St. Cloud, Minnesota | City of St. Cloud, MN | 3 |
| 11 | Calumet County, Wisconsin | Calumet County, WI | 2 |
| 12 | Clark, Wisconsin | Clark and Taylor Counties, WI | 3 |
| 13 | Dane County, Wisconsin | Dane County, WI | 3 |
| 14 | Fond du Lac and Sheboygan, Wisconsin | Dodge, Fond du Lac, Ozaukee, Sheboygan, and Washington Counties, WI | 2 |
| 15 | Green Bay, Wisconsin | Brown and Outagamie Counties, WI | 4 |
| 16 | Green County, Wisconsin | Green County, WI | 3 |
| 17 | Green Lake, Wisconsin | Columbia, Green Lake, and Marquette Counties, WI | 2 |
| 18 | Eau Claire, Wisconsin | Chippewa and Eau Claire Counties, WI | 4 |
| 19 | Jackson County, Wisconsin | Jackson County, WI | 3 |
| 20 | Jefferson County, Wisconsin | Jefferson County, WI | 3 |
| 21 | Kenosha County, Wisconsin | Kenosha County, WI | 2 |
| 22 | Kewaunee County, Wisconsin | Kewaunee County, WI | 2 |
| 23 | Langlade, Wisconsin | Langlade, Lincoln, Oneida, and Shawano Counties, WI | 2 |

| <u>Small Container Commercial Waste</u> | | | |
|--|-----------------------------|---|---|
| Geographic Market | | Counties/Municipalities within Geographic Market | Number of Significant Competitors Pre-Merger |
| 24 | Manitowoc County, Wisconsin | Manitowoc County, WI | 3 |
| 25 | Mar-Oco, Wisconsin | Marinette and Oconto Counties, WI | 3 |
| 26 | Marathon, Wisconsin | Marathon, Portage, and Wood Counties, WI | 3 |
| 27 | Milwaukee, Wisconsin | Milwaukee, Racine, and Waukesha Counties, WI | 2 |
| 28 | Price County, Wisconsin | Price County, WI | 3 |
| 29 | Rock County, Wisconsin | Rock County, WI | 3 |
| 30 | Sauk County, Wisconsin | Sauk County, WI | 3 |
| 31 | Walworth County, Wisconsin | Walworth County, WI | 3 |
| 32 | Waupaca, Wisconsin | Waupaca County, WI | 4 |
| 33 | Waushara, Wisconsin | Waushara and Winnebago Counties, WI | 2 |

**Appendix B: MSW Disposal Geographic Markets and Number of Significant Competitors
Pre-Merger**

| <u>MSW Disposal</u> | | | |
|----------------------------|---|--|---|
| | Geographic Market | Counties/Municipalities within Geographic Market | Number of Significant Competitors Pre-Merger |
| 1 | East Central, Alabama | Lee and Macon Counties, AL | 2 |
| 2 | Mobile, Alabama | City of Mobile, AL | 3 |
| 3 | Phenix City, Alabama | Phenix City, AL | 2 |
| 4 | Ocala, Florida | Marion and Citrus Counties, FL | 3 |
| 5 | Atlanta, Georgia | Cherokee, Forsyth, Gwinnett, Fulton, Clayton, and Cobb Counties, GA | 3 |
| 6 | Kane County, Illinois | Kane County, IL | 3 |
| 7 | Lake County, Illinois | Lake County, IL | 3 |
| 8 | Northern Cook County, Illinois | Area west of Interstate 94 and north of Interstate 90 in Cook County, Illinois | 4 |
| 9 | Fort Wayne, Indiana | Allen, Kosciusko, and Whitley Counties, IN | 3 |
| 10 | Detroit, Michigan | Wayne, Macomb and Oakland Counties, MI | 4 |
| 11 | Bedford County, Pennsylvania | Bedford County, PA | 2 |
| 12 | Fayette County, Pennsylvania | Fayette and Greene Counties, PA | 4 |
| 13 | Indiana County, Pennsylvania | Clarion, Jefferson, and Indiana Counties, PA | 3 |
| 14 | Somerset County, Pennsylvania | Cambria and Somerset Counties, PA | 2 |
| 15 | State College, Pennsylvania | Centre and Clearfield Counties, PA | 3 |
| 16 | Dane County, Wisconsin | Dane County, WI | 3 |
| 17 | Eau Claire, Wisconsin | Chippewa and Eau Claire Counties, WI | 2 |
| 18 | Fond du Lac and Sheboygan, Wisconsin | Dodge, Fond du Lac, Ozaukee, Sheboygan, and Washington Counties, WI | 2 |
| 19 | Greater Green Bay, Appleton, Oshkosh, Wisconsin | Brown, Outagamie, and Winnebago Counties, WI | 2 |
| 20 | Greater Manitowoc, Wisconsin | Calumet, Kewaunee, and Manitowoc Counties, WI | 2 |

| <u>MSW Disposal</u> | | | |
|----------------------------|--------------------------|---|---|
| | Geographic Market | Counties/Municipalities within Geographic Market | Number of Significant Competitors Pre-Merger |
| 21 | Green County, Wisconsin | Green County, WI | 3 |
| 22 | Janesville, Wisconsin | Jefferson, Rock, and Walworth Counties, WI | 3 |
| 23 | Milwaukee, Wisconsin | Milwaukee, Racine, and Waukesha Counties, WI | 2 |
| 24 | St. Croix, Wisconsin | Pierce and St. Croix Counties, WI | 3 |

Appendix C: List of Retained Hauling Facilities

I. Florida

- a. WMI's hauling facility located at 8708 NE 44th Drive, Wildwood, Florida, 34785;
- b. WMI's hauling facility located at 6501 Greenland Road, Jacksonville, Florida, 32258.

II. Wisconsin

- a. ADS's hauling facility located at 2301 W B R Townline Road, Beloit, Wisconsin, 53511;
- b. WMI's hauling facility located at 301 Thomas Street, Fond du Lac, Wisconsin, 54935;
- c. ADS's hauling facility located at 2626 Mondovi Road, Eau Claire, Wisconsin, 54701;
- d. ADS's hauling facility located at 559 Progress Drive, Hartland, Wisconsin, 53029.

III. Illinois

- a. ADS's hauling facility located at 2230 Ernie Krueger Circle, Waukegan, Illinois, 60087.

IV. Georgia

- a. ADS's hauling facility located at 5734 Columbia Road, Grovetown, GA 30813.

**Appendix D: Areas for Which the Notice Provision in Paragraph XI(A) of the Proposed
Final Judgment Applies**

| Geographic Market | Counties/Municipalities within Geographic Market | Relevant Service |
|-----------------------------------|--|-------------------------------------|
| East Central, Alabama | Lee and Macon Counties, AL | MSW Disposal |
| Lee County, Alabama | Lee County, AL | SCCW Collection |
| Macon County, Alabama | Macon County, AL | SCCW Collection |
| Mobile, Alabama | City of Mobile, AL | SCCW Collection and MSW Disposal |
| Montgomery County, Alabama | Montgomery County, AL | SCCW Collection |
| Phenix City, Alabama | Phenix City, AL | MSW Disposal |
| Tuscaloosa, Alabama | City of Tuscaloosa, AL | SCCW Collection |
| Jacksonville, Florida | Duval, St. Johns, and Clay Counties, FL | SCCW Collection |
| Ocala, Florida | Marion and Citrus Counties, FL | SCCW Collection and MSW Disposal |
| Atlanta, Georgia | Cherokee, Forsyth, Gwinnett, Fulton, Clayton, and Cobb Counties, GA | MSW Disposal |
| Augusta, Georgia | Columbia and Richmond Counties, GA and Edgefield and Aiken Counties, SC | SCCW Collection |
| Kane County, Illinois | Kane County, IL | MSW Disposal |
| Lake County, Illinois | Lake County, IL | MSW Disposal |
| Northern Cook County, Illinois | Area west of Interstate 94 and north of Interstate 90 in Cook County, Illinois | MSW Disposal |
| Fort Wayne, Indiana | Allen, Kosciusko, and Whitley Counties, IN | MSW Disposal |
| Detroit, Michigan | Wayne, Macomb and Oakland Counties, MI | MSW Disposal |
| Rochester, Minnesota | City of Rochester, MN | SCCW Collection |
| St. Cloud, Minnesota | City of St. Cloud, MN | SCCW Collection |
| State College, Pennsylvania | Centre and Clearfield Counties, PA | MSW Disposal |
| Indiana County, Pennsylvania | Clarion, Jefferson, and Indiana Counties, PA | MSW Disposal |
| Fayette County, Pennsylvania | Fayette and Greene Counties, PA | MSW Disposal |
| Somerset County, Pennsylvania | Cambria and Somerset Counties, PA | MSW Disposal |
| Bedford County, Pennsylvania | Bedford County, PA | MSW Disposal |

| | | |
|---|---|----------------------------------|
| Greater Green Bay, Appleton, Oshkosh, Wisconsin | Brown, Outagamie, and Winnebago Counties, WI | MSW Disposal |
| Calumet County, Wisconsin | Calumet County, WI | SCCW Collection |
| Clark, Wisconsin | Clark and Taylor Counties, WI | SCCW Collection |
| Dane County, Wisconsin | Dane County, WI | SCCW Collection and MSW Disposal |
| Eau Claire, Wisconsin | Chippewa and Eau Claire Counties, WI | SCCW Collection and MSW Disposal |
| Fond du Lac and Sheboygan, Wisconsin | Dodge, Fond du Lac, Ozaukee, Sheboygan, and Washington Counties, WI | SCCW Collection and MSW Disposal |
| Greater Manitowoc, Wisconsin | Calumet, Kewaunee, and Manitowoc Counties, WI | MSW Disposal |
| Green Bay, Wisconsin | Brown and Outagamie Counties, WI | SCCW Collection |
| Green County, Wisconsin | Green County, WI | SCCW Collection and MSW Disposal |
| Green Lake, Wisconsin | Columbia, Green Lake, and Marquette Counties, WI | SCCW Collection |
| Jackson County, Wisconsin | Jackson County, WI | SCCW Collection |
| Janesville, Wisconsin | Jefferson, Rock, and Walworth Counties, WI | MSW Disposal |
| Jefferson County, Wisconsin | Jefferson County, WI | SCCW Collection |
| Kenosha County, Wisconsin | Kenosha County, WI | SCCW Collection |
| Kewaunee County, Wisconsin | Kewaunee County, WI | SCCW Collection |
| Langlade, Wisconsin | Langlade, Lincoln, Oneida, and Shawano Counties, WI | SCCW Collection |
| Manitowoc County, Wisconsin | Manitowoc County, WI | SCCW Collection |
| Mar-Oco, Wisconsin | Marinette and Oconto Counties, WI | SCCW Collection |
| Marathon, Wisconsin | Marathon, Portage, and Wood Counties, WI | SCCW Collection |
| Milwaukee, Wisconsin | Milwaukee, Racine, and Waukesha Counties, WI | SCCW Collection and MSW Disposal |
| Price County, Wisconsin | Price County, WI | SCCW Collection |
| Rock County, Wisconsin | Rock County, WI | SCCW Collection |
| Sauk County, Wisconsin | Sauk County, WI | SCCW Collection |
| St. Croix, Wisconsin | Pierce and St. Croix Counties, WI | MSW Disposal |
| Walworth County, Wisconsin | Walworth County, WI | SCCW Collection |
| Waupaca, Wisconsin | Waupaca County, WI | SCCW Collection |
| Waushara, Wisconsin | Waushara and Winnebago Counties, WI | SCCW Collection |