UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

STATE OF IOWA,

STATE OF MISSISSIPPI,

and

STATE OF MONTANA,

Plaintiffs,

v.

THE DOW CHEMICAL COMPANY

and

E.I. DU PONT DE NEMOURS AND COMPANY,

Defendants.

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

In December 2015, The Dow Chemical Company ("Dow Chemical") and E.I. du Pont de Nemours and Company ("DuPont") announced that they had agreed to a merger of equals in a deal estimated to be valued at over $130 billion. If consummated, the merged entity would be one of the largest chemical companies in the world.

Plaintiffs filed a civil antitrust Complaint on June 15, 2017, seeking to enjoin the proposed acquisition. The Complaint alleges that the acquisition would likely reduce or eliminate competition in the markets for broadleaf herbicides for winter wheat and chewing pest insecticides, and tend to create a monopoly in the markets for acid copolymers and ionomers, in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. That loss of competition likely would result in increased prices and a reduction in service and innovation for the customers who rely upon these products.

At the same time the Complaint was filed, the Plaintiffs filed a proposed Final Judgment and an Asset Preservation Stipulation and Order which, together, are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, DuPont is required to divest its Finesse-formulated herbicide products (active ingredients Metsulfuron Methyl and Chlorsulfuron Methyl), and its Rynaxypyr-formulated insecticide products, along with the assets used to develop, manufacture, and sell those products. Dow Chemical is required to divest its Freeport, Texas acid copolymers and ionomers manufacturing unit and associated assets. Under the terms of the Asset Preservation Stipulation and Order, DuPont and Dow Chemical will also take certain steps to ensure that the divestiture assets are operated as competitively independent, economically viable, and ongoing business concerns; that they remain uninfluenced by the consummation of the acquisition; and that competition is maintained during the pendency of the ordered divestiture.

The plaintiffs 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

Dow Chemical, founded in 1897, is headquartered in Midland, Michigan, operates in approximately 180 countries, and employs over 50,000 people worldwide. In 2016, Dow Chemical had revenues of approximately $48 billion. Dow Chemical's primary lines of business are chemical, plastic, and agricultural products and services. Dow Chemical's products are used in various industries, ranging from agriculture to consumer goods.

DuPont, founded in 1802, is headquartered in Wilmington, Delaware, operates in approximately 90 countries, and employs more than 60,000 people worldwide. In 2016, DuPont reported revenues of $24.5 billion. DuPont's primary products include crop protection chemicals and performance products, such as plastics and polymers.

Pursuant to a December 11, 2015 agreement, Dow Chemical and DuPont have agreed to an all-stock merger of equals. At the time of the merger announcement, the combined market capitalization of the companies was $130 billion. The merger plan contemplates spinning off the firms' combined assets into three separate, publicly-traded companies as soon as feasible. One of those companies would focus on agriculture products (with approximately $18 billion in revenue), another on material sciences (approximately $51 billion in revenue), and a third on "specialty" products, such as organic light-emitting diodes and building wrap (approximately $13 billion in revenue).

B. Crop Protection Chemicals

1. *Background*

Crop protection chemicals are used to protect crops from damage or loss from other biological organisms such as weeds, insects, or disease (e.g., fungus). Crop protection chemicals are critical to protecting crop yield — the total amount of a crop produced at each harvest — which benefits farmers and American consumers. Crop protection chemicals can be separated into three broad categories that have different qualities and attributes: herbicides (to combat weeds); insecticides (to combat insect pests); and fungicides (to combat microbial disease).

The key component of any particular crop protection chemical is the "active ingredient," which is the chemical molecule that produces the desired effect against the targeted weed or insect pest. Crop protection chemicals are typically sold as "formulated products" that contain the active ingredient and also inactive ingredients such as solvents, fillers, and adjuvants used to stabilize the active ingredient and facilitate its effective use on the intended crops.

Both active ingredients and formulated products must be registered with the U.S. Environmental Protection Agency ("EPA") and approved for use. In order to gain approval, products must meet stringent toxicity and efficacy standards. Approvals are granted on a crop-by-crop basis and contain strict dosage requirements. A farmer wishing to control a certain pest on his or her farm can use only the products and dose-rates that the EPA has approved for the particular crops to which the product will be applied.

The crop protection industry includes a handful of large integrated research and development firms (including Dow Chemical and DuPont) that develop, manufacture, and sell

crop protection chemicals. While the large research and development firms sometimes sell directly to farmers, their primary customers are large distributors and farmer co-ops that resell products to farmers.

a. Broadleaf Herbicides for Winter Wheat

Both Dow Chemical and DuPont produce herbicides for winter wheat. Winter wheat is a type of grass that is planted in autumn and produces an edible grain. In the United States, winter wheat is grown primarily in the Great Plains states, including Kansas, Nebraska, and Texas.

Herbicides are chemicals used to combat weeds that harm crops. They can be selective (killing only certain types of plants) or non-selective. Non-selective herbicides kill all plant matter, including weeds and the crop. Because of this, non-selective herbicides are typically used after the crop is harvested, to clear the field of remaining weeds. Selective herbicides target only weeds, and are applied "post-emergence," or during the growth of the crop.

There are three common types of selective herbicide products: broadleaf, grass, and cross-spectrum. Broadleaf herbicides primarily eliminate or suppress broadleaf weeds. Grass herbicides primarily eliminate or suppress grass weeds. Cross-spectrum herbicides are effective on both grass and broadleaf weeds. Each herbicide formulation has a different spectrum of weeds on which it is effective, so a farmer chooses an herbicide based on the particular kinds of weeds threatening the crop.

Herbicides are registered with the EPA for use on particular crops. Because crop choices and weed threats vary from farm to farm, the options available to farmers may vary from location to location, depending on the specific crop/weed combinations a farmer faces.

Dow Chemical and DuPont both offer herbicides that are labeled and registered for the

control of broadleaf weeds in winter wheat crops. DuPont's Finesse product is the top broadleaf herbicide used to combat the weed spectrum that typically threatens winter wheat crops. Dow Chemical recently introduced a new broadleaf herbicide for winter wheat, called Quelex.

b. Insecticides for Chewing Pests

Dow Chemical and DuPont also sell insecticides for chewing pests. Insecticides are used to suppress or eliminate insect infestations in crops. There are three main classes of insect pests: (1) chewing insects (e.g., moth larvae and beetles); (2) sucking insects (e.g., aphids and stink bugs); and (3) thrips (i.e., thunder flies), which have attributes of both chewing and sucking pests.

Insecticide use is particularly important for specialty crop farmers of tree fruit, tree nuts, and other fruits and vegetables ("specialty crops"). Any damage to specialty crops, no matter how slight, can result in the fruit or nut being rejected for sale. Thus, specialty crop farmers are particularly averse to the risk of insect damage when choosing an insecticide. Specialty crop farmers also value selective chemistry insecticides because they are less harmful to beneficial insects (such as bees and parasitic wasps) that not only pollinate fruit, but also help to control damaging insects, such as mites. In contrast, broad spectrum chemistries, such as pyrethroids, kill most of the insects in a field, including beneficial ones. Farmers therefore either minimize their use and/or use them towards the end of a growing season.

DuPont produces the active ingredient chlorantraniliprole, which DuPont markets under the trade name, Rynaxypyr. Rynaxypyr is one of the best selling and most effective active ingredients used to combat chewing pests on the market. Rynaxypyr is patent-protected

until 2022. In the United States, Rynaxypyr is marketed and sold in formulations under the brand names Altacor, Coragen, and Prevathon. DuPont's 2015 U.S. insecticides sales totaled $118 million; of that total, Rynaxypyr sales accounted for $73 million.

Dow Chemical manufactures and sells two active ingredients which are also effective against chewing pests: (1) methoxyfenozide, sold under the brand name Intrepid, and (2) spinetoram, sold under the brand names Delegate and Radiant. In 2015, Dow Chemical had a total of $165 million in U.S. insecticides sales. Of that total, spinetoram sales accounted for $57 million and methoxyfenozide sales accounted for $34 million.

2. *Relevant Markets*

a. Broadleaf Herbicides for Winter Wheat Sold in the United States

To combat broadleaf weeds in winter wheat, particularly in the central plains of the United States, farmers need broadleaf herbicides that are labeled and registered for use on winter wheat. Farmers of winter wheat cannot use grass herbicides to combat broadleaf weeds because they are ineffective. Farmers would not use cross-spectrum herbicides to combat broadleaf weeds, as cross-spectrum herbicides are significantly more expensive and, thus, it would not be cost-justified to use cross-spectrum herbicides for broadleaf weeds alone. Farmers would not forgo using broadleaf herbicides altogether, because doing so would risk significant wheat yield losses.

All herbicides sold in the United States must be registered and approved by the EPA. Similar products available in other countries cannot be offered to United States customers due to EPA regulations, so they are not competitive constraints.

A small but significant increase in the price of broadleaf herbicides sold in the United States labeled and registered for use on winter wheat would not cause customers of those

herbicides to substitute to grass or cross-spectrum herbicides, nor would farmers forgo using herbicides altogether and risk weed damage to their crops. As a result, customers are unlikely to switch away from broadleaf herbicides sold in the United States in volumes sufficient to defeat such a price increase. Accordingly, the development, manufacture, and sale of broadleaf herbicides sold in the United States labeled and registered for use on winter wheat is a line of commerce and relevant market within the meaning of Section 7 of the Clayton Act.

b. Insecticides for Chewing Pests Sold in the United States

Insecticides for chewing pests are targeted to combat a particular type of pest, and insecticides for other types of pests cannot, in general, be used as substitutes. While there are broad-spectrum insecticides which are effective on more than one type of pest, those insecticides tend to kill indiscriminately, including beneficial insects. Specialty crop farmers in California, Washington and elsewhere need beneficial insects such as bees to pollinate their crops. These farmers would not, however, choose to forgo managing the insect pests which attack their crops, because even slight damage can result in an entire harvest being rejected for sale.

All insecticides sold in the United States must be registered and approved by the EPA. Similar products available in other countries cannot be offered to United States customers due to EPA regulations, so they are not competitive constraints.

A small but significant increase in the price of chewing pest insecticides sold in the United States would not cause customers of those insecticides to substitute to broad-spectrum insecticides, nor would farmers forgo using insecticides altogether and risk severe pest damage to their whole crop, in volumes sufficient to defeat such a price increase. Accordingly, the development, manufacture, and sale of chewing pest insecticides sold in the

United States is a line of commerce and relevant market within the meaning of Section 7 of the Clayton Act.

3. *Anticompetitive Effects of the Proposed Acquisition*

a. Broadleaf Herbicides for Winter Wheat

Dow Chemical and DuPont are two of the four largest suppliers of broadleaf herbicides for winter wheat crops in the United States. Together they account for over forty percent of the total market, with combined annual sales of $81 million in 2015. Dow Chemical and DuPont compete head-to-head for the development, manufacture, and sale of broadleaf herbicides for winter wheat. That competition, which would be lost if the merger is consummated, has benefited farmers through lower prices, more effective solutions, and superior service.

Competition between Dow Chemical and DuPont has also spurred research, development, and marketing of new and improved broadleaf herbicides for winter wheat. For example, Dow Chemical intends to market its Quelex herbicide, which was recently introduced into the market, to farmers of winter wheat that currently use DuPont's market-leading Finesse product. DuPont considered adopting competitive responses, including price reductions, to protect its market share from Dow Chemical's Quelex herbicide.

The proposed merger, therefore, likely would substantially lessen competition for the development, manufacture, and sale of broadleaf herbicides for winter wheat, in violation of Section 7 of the Clayton Act. This likely would lead to higher prices, less favorable contractual terms, and a reduced incentive to spend significant resources in developing new products.

b. Insecticides for Chewing Pests

Dow Chemical and DuPont are the two largest suppliers of insecticides used on chewing pests in the United States. Together they account for $238 million in annual sales. The merger of Dow Chemical and DuPont likely would substantially lessen competition in the market for the development, manufacture, and sale of chewing pest insecticides.

If the merger between Dow Chemical and DuPont is consummated, the combined company will control nearly seventy-five percent of the market for chewing pest insecticides in the United States. Additionally, Dow Chemical and DuPont's closest competitor sells competing products that are mixed with DuPont's Rynaxypyr, for which the competitor has a license. As a result, specialty crop farmers would have little alternative but to accept increased prices post merger.

Competition between Dow Chemical and DuPont has benefited customers of chewing pest insecticides through lower prices, more effective solutions, and superior service. Customers also have benefited from the competition between Dow Chemical and DuPont by obtaining more favorable contract terms, such as financing and priority in product shipments to coincide with crop growing seasons. A combined Dow Chemical and DuPont would have the incentive and ability to eliminate or restrict financial and other incentives to customers, extinguishing this competition and those tangible and valuable benefits to customers.

The proposed merger, therefore, likely would substantially lessen competition for the development, manufacture, and sale of chewing pest insecticides, in violation of Section 7 of the Clayton Act. This likely would lead to higher prices, less favorable contractual terms, and less innovation.

4. *Difficulty of Entry*

The discovery, development, testing, registration, and commercial launch of a new herbicide or insecticide can take ten to fifteen years and can cost well over $150 million dollars. Given the lengthy development cycle, the high hurdles and substantial cost of regulatory approval, entry of additional competitors in the market for either broadleaf herbicides for winter wheat or chewing pest insecticides is not likely to be timely or sufficient to defeat a post-merger price increase.

C. Acid Copolymers and Ionomers

High-pressure ethylene derivatives ("HiPEDs") are plastic resins produced by "cracking," or breaking down, petrochemicals into their constituent parts and combining them with various molecules to produce polymer resins. The resulting resins, such as low density polyethylene, ethylene vinyl acetate, acrylate copolymers, grafted polyolefins, acid copolymers, and ionomers, have different performance characteristics, such as hardness, corrosion resistance or scratch resistance, depending on the materials used in their construction.

HiPED resins are mixed with other plastic resins to manufacture numerous plastic products, such as films, bottles, coatings, and packaging. Customers source particular HiPED resins that meet their specific needs and requirements and build their manufacturing process around specific resin combinations that give the final product the desired performance characteristics.

Unlike most HiPED resins, where there is substitution possible for both the supply and demand of the products, neither customers nor manufacturers can easily switch between acid copolymers and ionomers (two specific types of HiPED resins) and other HiPED resins.

1. *Acid Copolymers*

Acid copolymers are a specific type of HiPED resin manufactured using highly acidic input products. In order to handle inputs with high acid content, HiPED resin manufacturers must install specific corrosion-resistant equipment that is not used for the manufacture of other HiPED resins. Such equipment can cost millions of dollars.

Acidic inputs make acid copolymers both highly adhesive and very durable. As a result, acid copolymers are used to create strong seals between substrates, or "tie layers," of flexible packaging. Their increased adhesive ability is particularly necessary in applications where packaging will be exposed to challenging environments, such as high levels of grease, oil, acid, or dust.

Because of these characteristics, packaging films made using acid copolymers are ideal for use in the food and beverage industry. Indeed, this industry consumes the vast majority of acid copolymers produced, for use in products such as juice boxes, toothpaste tubes, and meat and cheese wrap, among others. Unlike other plastic films, food and beverage packaging must adhere to strict food safety guidelines, and significant deviations from approved formulas must undergo a rigorous requalification process that can take significant time and expense.

Both Dow Chemical and DuPont manufacture acid copolymers in the United States. Dow Chemical manufactures acid copolymers in a dedicated corrosion-resistant facility that is part of its larger chemical complex in Freeport, Texas. DuPont manufactures acid copolymers and other HiPED resins on corrosion-resistant manufacturing lines within facilities located in Sabine, Texas and Victoria, Texas.

2. *Ionomers*

Ionomers are another specific type of HiPED resin. They are directly derived from acid copolymers and are produced by neutralizing acid copolymers with sodium, zinc, magnesium, or other salts. As a result of this process, ionomers are hard and durable. When added to a plastic coating, ionomers make the resulting product more impact- and cut-resistant. Ionomers are used in a multitude of applications, such as decking and automotive parts. Ionomers are preferred for these end uses because their superior toughness and impact resistance protect the underlying product from the repeated blows it is subjected to.

Both Dow Chemical and DuPont produce ionomers in the United States. DuPont manufactures ionomers in-line with its acid copolymer production in Sabine, Texas. Dow Chemical manufactures acid copolymers in its Freeport, Texas facility and then ships them to Odessa, Texas, where a third party converts them to ionomers.

3. *Relevant Markets*

a. Acid Copolymers

Food and beverage packaging manufacturers purchase the majority of acid copolymers produced in the United States. These customers rely upon the superior sealant and adhesive characteristics acid copolymers provide as compared to other HiPED resins. Additionally, because food and beverage packaging must adhere to strict food safety guidelines, significant deviations from approved formulas must undergo a rigorous qualification process that can take significant time and incur additional costs. Most customers therefore would not switch to another product if faced with a significant and non-transitory increase in the price of acid copolymers.

Customers have consistently reported that purchasing acid copolymers abroad is not a

realistic option for domestic purchasers, due to taxes, tariffs, logistical costs, and the longer lead times associated with importing acid copolymers. Most customers report that it would take considerably more than a small, significant, and non-transitory increase in price to make European suppliers a viable alternative to Dow Chemical and DuPont.

A small but significant increase in price for acid copolymers sold in the United States would not cause customers to turn to another product in sufficient numbers to defeat such a price increase. Thus, the development, manufacture, and sale of acid copolymers in the United States constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act.

b. Ionomers

Customers purchase ionomers for the superior impact- and cut-resistance characteristics that are not available in other HiPED resins. These customers rely on the hardness and resilience that an ionomer-based coating provides as compared to other coatings. Customers cannot switch to other, less resilient, coatings and cannot forgo the use of protective coatings altogether, as either choice would significantly decrease the useful lifespan of the underlying products. Most customers therefore would not switch to another product if faced with a small but significant and non-transitory increase in the price of ionomers.

U.S. customers cannot turn to ionomer suppliers abroad due to taxes, tariffs, logistical costs, and longer lead times associated with importing ionomers. Most customers report that it would take considerably more than a small, significant, and non-transitory increase in price to make European suppliers a viable alternative to Dow Chemical and DuPont.

A small but significant increase in price for ionomers sold in the United States would not cause customers to turn to another product in sufficient numbers to defeat such a price

increase. Thus, the development, manufacture, and sale of ionomers in the United States constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act.

4. *Anticompetitive Effects of the Proposed Transaction*

a. Acid Copolymers

Dow Chemical and DuPont are the only two manufacturers of acid copolymers in the United States. Dow Chemical controls over 80 percent of the U.S. market and DuPont is responsible for 19 percent of sales (less than one tenth of one percent of acid copolymers are imported). The merger of the only U.S. manufacturers of these products would leave customers with little alternative but to accept increased prices post merger.

As a result of head-to-head competition between Dow Chemical and DuPont, customers have obtained better pricing, service, and contract terms. In some cases, customers report that Dow Chemical and DuPont have competed to assist customers with the development of new uses for existing acid copolymer products, allowing customers to expand sales and better serve their own consumers. Customers also have benefited from the development of new acid copolymer products, which has been spurred on by competition between Dow Chemical and DuPont.

The proposed merger would likely substantially lessen competition for the development, manufacture, and sale of acid copolymers in violation of Section 7 of the Clayton Act. The U.S. market for acid copolymers is highly concentrated and would become significantly more concentrated as a result of the proposed merger to monopoly: Dow Chemical and DuPont will control over 99 percent of the acid copolymers market in the United States post merger, leading to higher prices and reduced innovation.

b. Ionomers

Dow Chemical and DuPont are the only two manufacturers of ionomers in the United States, where the two companies collectively are responsible for all sales. Dow Chemical and DuPont are each other's only competitor for ionomers and customers would have no alternative but to accept increased prices post merger.

Customers have benefited from the competition between Dow Chemical and DuPont. Dow Chemical is the only company contesting DuPont's near-monopoly in ionomers. Its presence has resulted in better pricing and contract terms for customers, who otherwise would have no choice but to purchase from DuPont. Customers also have benefited from competition between Dow Chemical and DuPont to develop new products from ionomers and new uses for existing ionomer products.

The proposed merger would likely substantially lessen competition for the development, manufacture, and sale of ionomers in violation of Section 7 of the Clayton Act. The market for ionomers is highly concentrated and the proposed merger would result in a monopoly, leading to higher prices and reduced innovation.

5. *Difficulty of Entry*

a. Acid Copolymers

In addition to the specialized equipment required to produce ethylene derivatives generally, acid copolymer manufacturing requires a high-pressure autoclave and all equipment surfaces must be coated with a corrosion-resistant material. Only Dow Chemical and DuPont have both high-pressure autoclaves and corrosion-resistant equipment. The cost associated with upgrading an existing ethylene derivative manufacturing operation to produce acid copolymers is estimated to be in the millions of dollars. If the merged firm were to raise

prices, timely and sufficient entry is unlikely to deter or counteract competitive harm.

b. Ionomers

The manufacturing of ionomers requires specialized know-how as well as ready and reliable access to acid copolymers, a key input into ionomer manufacturing. Post merger, Dow Chemical and DuPont will effectively control the entire U.S. market for acid copolymers. As such, even if a third party has the technical capability to manufacture ionomers, it would be limited by the amount of acid copolymers it could obtain on the open market — a market primarily controlled by the merged entity. Because of the specialized know-how and the likely foreclosure of access to a key ingredient, if the merged firm were to raise prices, timely and sufficient entry would be unlikely to deter or counteract competitive harm.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestitures required by the proposed Final Judgment will eliminate the anticompetitive effects of the merger between Dow Chemical and DuPont by establishing two new, independent, and economically viable competitors. The Crop Protection Divestiture Assets include DuPont's Finesse-formulated herbicide products, which contain the active ingredients Metsulfuron Methyl and Chlorsulfuron Methyl, and its Rynaxypyr-formulated insecticide products, along with the assets which facilitate the development, manufacture, and sale of those products. The Material Science Divestiture Assets include Dow's Freeport, Texas acid copolymers and ionomers manufacturing unit and associated assets. Both of these divestitures must be sold as viable ongoing businesses.

Prior to divestiture, defendants must maintain the Crop Protection Divestiture Assets and Material Science Divestiture Assets under an Asset Preservation Stipulation and Order ("APSO"). Under the APSO, defendants must preserve, maintain, and continue to operate both

sets of assets as ongoing, economically viable competitive product lines. This includes the requirement that defendants appoint a person or persons to oversee the Crop Protection and Material Science Divestiture Assets. This person or persons shall have complete managerial responsibility for each asset package, subject to the provisions of the proposed Final Judgment, and shall make all business decisions relating to the operation of the assets, including all production, sale, pricing, and discounting decisions, independent of defendants.

The assets must also be divested in such a way as to satisfy the United States in its sole discretion, that each business can and will be operated by the Acquirers as viable, ongoing businesses that can compete effectively in the relevant markets (in the case of the Crop Protection Divestiture Assets, the United States will exercise its discretion after consultation with the Plaintiff States). Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

Pursuant to Paragraphs IV(A) and V(A) of the proposed Final Judgment, both the Crop Protection Divestiture and Material Science Divestiture must be completed within thirty (30) days after the consummation of the merger of Dow Chemical and DuPont, or sixty (60) days after notice of the entry of the Final Judgment by the Court, whichever is later. Each divestiture package remedies a separate competitive harm alleged in the complaint and must be sold to an Acquirer that will operate the business as a viable, ongoing business. The two asset packages relate to different industries with different customers, market conditions, and required expertise. In order to ensure that the each divestiture package is operated as a viable, ongoing business, the Crop Protection and Material Science Divestiture Assets will likely be sold to different Acquirers.

These divestiture periods are longer than those often found in Antitrust Division consent

decrees, but are warranted in this case. Transfer of the Crop Protection Divestiture Assets and the Material Science Divestiture Assets are both subject to numerous government approvals, including approvals from authorities outside the United States. The longer divestiture period allows defendants and the Acquirer(s) to obtain these regulatory approvals, but still ensures that the divestitures are made as quickly as possible, thus reducing the risk that the assets will decrease in value.

Paragraph IV(G) provides that the Acquirer of the Crop Protection Divestiture Assets may contract with the defendants for the provision of formulation services for a transitional period. Formulation is the process of adding inert chemicals to the active ingredients that provide the efficacy of crop protection products. Providers of crop protection products routinely use third parties for formulation services in order to optimize supply chains and minimize shipping costs on completed products. However, formulation services must be provided at a facility that has received the appropriate regulatory approvals in the United States (through the United States Environmental Protection Agency) and abroad, a process that may be time-consuming. So, the Acquirer of the Crop Protection Divestiture Assets may choose to enter a formulation services agreement with the defendants prior to being in a position to formulate the acquired products at an approved facility of its own choosing. The formulation services agreement shall be in effect for one (1) year after all necessary regulatory approvals have been granted by jurisdictions where the Finesse-formulated products and the Rynaxypyr-formulated products are currently registered. During the term of the formulation services agreement, defendants shall implement and maintain procedures to preclude the sharing of information between defendants and the Acquirer. The United States, in its sole discretion, may approve an extension of the formulation services agreement for a period not to exceed two (2) years.

Paragraph V(G) provides that the Acquirer of the Material Science Divestiture Assets may contract with the defendants for the provision of operating services that include the operation of process controls at the acid copolymer production facility under the management and supervision of the Acquirer. The Acquirer of the Material Science Divestiture Assets may choose to enter an operating services agreement with the defendants because the Material Science Divestiture Assets are located within a significantly larger chemical complex in Freeport, Texas where such services can be more efficiently provided across multiple facilities. Dow offers similar services on an arms-length basis to other firms that own manufacturing assets within the larger chemical complex in Freeport, Texas. During the term of the operating services agreement, defendants shall implement and maintain procedures to preclude the sharing of information between defendants and the Acquirer.

Given the complexity of these industries, Section XI of the proposed Final Judgment also provides that the United States may appoint a Monitoring Trustee(s). Because of the size and complexity of the divestitures, separate Monitoring Trustees are required for the Crop Protection Divestiture Assets and Material Science Divestiture Assets. The Monitoring Trustees will have the power and authority to investigate and report on the defendants' compliance with the terms of the proposed Final Judgment and the APSO during the pendency of the divestiture, including the ability to hire at the cost and expense of defendants any consultants, accountants, attorneys, or other agents necessary in the Monitoring Trustees' judgment. The Monitoring Trustees would not have any responsibility or obligation for the operation of the parties' businesses. The Monitoring Trustees will serve at defendants' expense, on such terms and conditions as the United States approves, and defendants must assist the trustees in fulfilling their obligations. The Monitoring Trustees will file monthly reports and will serve for at least six (6) months

following the divestiture of all Divestiture Assets, a period which may be extended by the United States, in its sole discretion.

Finally, in the event that defendants do not accomplish the divestiture within the periods prescribed in Paragraphs IV(A) and V(A) of the proposed Final Judgment, Section VI of the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. 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 divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the 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 trust, including extending the trust or the term of the trustee's appointment.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the provision of broadleaf herbicides for winter wheat, insecticides for chewing pests, acid copolymers, and ionomers in the United States.

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 plaintiffs 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 plaintiffs considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants. The plaintiffs could have continued the litigation and sought preliminary and permanent injunctions against the merger between Dow Chemical and DuPont. The plaintiffs are satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition in the markets for broadleaf herbicides for winter wheat, insecticides for chewing pests, acid copolymers, and ionomers. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the plaintiffs 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

> (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) (noting the court has broad discretion of the adequacy of the relief at issue); *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

[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).

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)); *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' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

[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'").

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 U.S. Airways*, 38 F. Supp. 3d at 74 (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 74 (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 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); *see also U.S. Airways*, 38 F. Supp. 3d at 75 (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]

[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

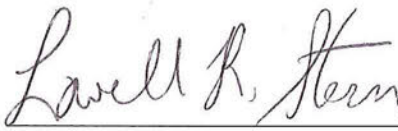
A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 75.

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: June 15, 2017

Respectfully submitted,



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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.").