UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. BAYER AG, MONSANTO COMPANY, and BASF SE, *Defendants.*

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b), Plaintiff United States of America files this Competitive Impact Statement relating to the proposed Final Judgment submitted on May 29, 2018, for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On September 14, 2016, Defendant Bayer AG ("Bayer") agreed to acquire Defendant Monsanto Company ("Monsanto") in a merger valued at approximately $66 billion. The United States filed a civil antitrust Complaint against Bayer and Monsanto on May 29, 2018, seeking to enjoin the proposed merger. The Complaint alleges that the proposed merger would lessen competition substantially across various markets in the agricultural industry, resulting in higher prices, less innovation, fewer choices, and lower-quality products for American farmers and consumers, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Simultaneously with the filing of the Complaint, the United States has filed a proposed Final Judgment and a Stipulation and Order designed to prevent the merger's likely

anticompetitive effects. As detailed below, the proposed Final Judgment requires Bayer to divest its businesses that compete with Monsanto, the seed treatment businesses that the merged firm would use to harm competition in certain seed markets, and assets supporting those businesses (collectively, the "Divestiture Assets"). Bayer has agreed to divest the Divestiture Assets to BASF SE ("BASF"), a global chemical company with a multi-billion-dollar crop protection business.[1] The required divestitures will ensure that BASF replaces Bayer as an independent and vigorous competitor in each of the markets in which the proposed merger would otherwise lessen competition.

The terms of the Stipulation and Order require Defendants to take certain steps to ensure that, pending the required divestitures, all of the Divestiture Assets will be preserved and that Monsanto will continue to be operated independently as a separate business concern.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, although the Court would continue to 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 ALLEGED VIOLATION

A. The Defendants and the Merger

Bayer is a life-sciences company based in Leverkusen, Germany. The company employs nearly 100,000 people worldwide and has operations in nearly 80 countries. Bayer has three main business lines: (1) pharmaceuticals, (2) consumer health, and (3) agriculture, the last of which is the Bayer Crop Science division. Over the past decade, Bayer Crop Science has become

[1] Bayer, Monsanto, and BASF are referred to collectively as "Defendants."

one of the largest global agricultural firms. Today, its crop protection business is the second largest in the world, and its seeds and traits business is also among the world's largest. Bayer Crop Science generated almost $12 billion in annual revenues in 2017.

Monsanto is a leading producer of agricultural products based in St. Louis, Missouri. Over 20,000 people work for the company in almost 70 countries. Monsanto's innovative technologies have established it as a global leader in agriculture; today, it is the leading global producer of seeds and traits and is among the world's largest producers of crop protection products. In 2017, Monsanto had almost $15 billion in annual revenues.

On September 14, 2016, Bayer agreed to acquire Monsanto for approximately $66 billion. In recognition of the significant competitive concerns raised by the proposed merger, Bayer has agreed to divest agricultural assets valued at approximately $9 billion to BASF. As discussed in Section III.K, *infra*, BASF has agreed to be bound by the terms of the proposed Final Judgment.

B. The Competitive Effects of the Proposed Merger across Agricultural Markets in the United States

The Complaint alleges that the proposed merger would reduce competition in the United States in 17 distinct agricultural product markets. These markets fit into four broad categories: (1) genetically modified ("GM") seeds and traits, (2) foundational herbicides, (3) seed treatments, and (4) vegetable seeds. In addition to anticompetitive effects in each of the product markets resulting from the loss of head-to-head competition or vertical foreclosure, the Complaint also alleges that the merger would have a significant impact on innovation. Without the merger, competition between Bayer and Monsanto would intensify as both companies pursue what the industry refers to as "integrated solutions"—combinations of seeds, traits, and crop

protection products, supported by digital farming technologies and other services. Without the proposed Final Judgment, that competition would be lost.

1. GM Seeds and Traits

Bayer and Monsanto are close competitors in the GM seeds and traits markets for three important U.S. row crops: cotton, canola, and soybeans. As described in the Complaint, the proposed merger would likely lead to a substantial lessening of competition in each of these markets, resulting in hundreds of millions of dollars in harm each year to American farmers and consumers.

Cotton is a major crop grown across the southern United States. Cotton seeds are widely used in vegetable oil, packaged foods, and animal feed, and cotton fibers are widely used in clothing. In 2017, U.S. farmers planted about 12 million acres of cotton accounting for over $800 million in seed purchases.

Canola is an important crop used in vegetable oil, packaged foods, biodiesel fuels, and animal feed. In the United States, canola is grown on approximately 1.7 million acres, mainly in North Dakota but also in several other states. GM canola seeds accounted for $83 million in domestic sales in 2016.

Soy is the second-largest crop grown in the United States. Soybeans are widely used in vegetable oil, packaged foods, and animal feed. In 2017, U.S. farmers planted almost 90 million acres of soybeans accounting for $4.64 billion in seed purchases.

A genetic trait is simply an attribute of a plant, such as being tall, short, or leafy. In most cases, plant traits derive from the plant's natural DNA; however, a small number of highly sophisticated biotechnology firms can insert DNA from other organisms into the DNA of a plant, giving the plant a desirable trait associated with that non-native DNA. A GM seed is a seed that

contains DNA, and hence a desirable trait, of a different organism. Scientists have developed herbicide-tolerant traits that give crops the ability to withstand exposure to herbicides that would normally damage or kill them, allowing a farmer to spray the herbicide over an entire field and efficiently kill weeds without harming the crop. Scientists also have developed traits that make crops resistant to certain insect pests, allowing farmers to prevent these pests from damaging their crops while also reducing farmers' use of chemical insecticides. Today, more than 90% of the soybeans, cotton, and canola grown in the United States is grown from GM seeds.

a) Relevant Markets

As alleged in the Complaint, GM cotton seeds, GM canola seeds, and GM soybeans are each relevant product markets under Section 7 of the Clayton Act. In canola and soy, nearly all GM seeds contain herbicide-tolerant traits, but no seeds contain insect-resistant traits. In cotton, most GM seeds contain both herbicide-tolerant traits and insect-resistant traits (found on 98% and 88% of all cotton acres, respectively). The vast majority of farmers do not view conventional (*i.e.*, non-GM) seeds as a substitute for GM cotton, GM canola, or GM soybeans because GM seeds eliminate much of the labor and expense associated with more traditional means of weed and pest management, offer higher yields, and reduce soil erosion by decreasing tillage requirements. Accordingly, a hypothetical monopolist of any of these GM seeds markets could profitably raise prices.

The Complaint also alleges that insect-resistant traits for cotton and herbicide-tolerant traits for cotton, canola, and soybeans are relevant product markets under Section 7 of the Clayton Act. Again, the vast majority of farmers growing cotton, canola, and soybeans in the United States choose to purchase GM seeds and do not consider conventional seeds an acceptable alternative. Consequently, GM traits are necessary inputs for most seed companies,

and a hypothetical monopolist of any of the trait markets listed above could profitably raise prices.

The Complaint alleges that the relevant geographic markets for these GM seeds and traits markets are regional because seeds are tailored to local growing conditions (such as weather and soil type), and suppliers can charge different prices to customers in different regions. In cotton and canola, however, virtually all of the regions affected by the merger have similar market conditions, so the regions can reasonably be aggregated to a national level for purposes of analysis. For soybeans, the market structure differs across regions, and the relevant geographic market in which the merger will lead to harm is the southern United States, where Bayer has focused its soybean breeding program and been particularly successful.

b) Competitive Effects – GM Seeds

The market for GM cotton seeds in the United States is highly concentrated and would become significantly more so if Bayer were allowed to acquire Monsanto. Bayer and Monsanto have long been the two leading suppliers of GM cotton seeds throughout the United States. In addition to owning critical herbicide-tolerant and insect-resistant traits, discussed in more detail below, the companies each own extensive libraries of elite seed varieties, which are essential for breeding and commercializing competitive cotton seeds. If the proposed merger were allowed to proceed, Bayer and Monsanto would have a combined 59% share of GM cotton seeds in the United States.

In the market for GM canola seeds in the United States, Bayer and Monsanto are by far the two largest competitors, with a combined share of approximately 74%. Bayer and Monsanto compete aggressively, and Bayer's canola innovations in recent years have allowed it to surpass Monsanto, previously the largest firm in this market.

In the market for GM soybeans, the proposed merger would eliminate Bayer as a uniquely positioned challenger to Monsanto, which has dominated the market since traits were first commercialized in soybeans in the 1990s. For years, Monsanto's competitors relied on Monsanto for licenses to GM traits and, in most cases, for licenses to seed varieties as well. Bayer, however, invested over $250 million to develop an independent source of soybean varieties and launched its own branded soybean business, Credenz, which sells varieties that perform well in the southern United States. In 2017, Monsanto had a 39% market share in that region, with Bayer holding a 6% share that it planned to grow in the future.

Even these figures significantly understate the level of dominance the merged company would have in each of these markets. Monsanto licenses seeds with traits to certain smaller seed companies (referred to in the industry as "independent seed companies"), leaving these smaller rivals with limited ability to exert competitive pressure on the merged firm.

c) Competitive Effects – GM Traits

In addition to effects in each GM seed market, the proposed merger would harm American farmers by eliminating head-to-head competition between Bayer and Monsanto to develop and sell GM traits. These trait markets are even more highly concentrated than the GM seed markets. Bayer and Monsanto effectively have a duopoly in cotton herbicide-tolerant traits, and the proposed merger would lead to a monopoly. In 2017, Bayer's herbicide-tolerant cotton traits accounted for 19% of the market, and Monsanto's accounted for 80%. The proposed merger would also lead to a substantial increase in concentration in the market for canola herbicide-tolerant traits; virtually all canola seeds planted in the United States contain either a Bayer or a Monsanto trait. In the soybean herbicide-tolerant trait market, Bayer has chipped away at Monsanto's position, and the merger threatens to eliminate Monsanto's only serious

challenger. In 2017, Bayer and Monsanto represented 14% and 67% of the market, respectively, with the remainder attributable to market participants using an off-patent version of Monsanto's original Roundup Ready trait. Finally, the merger would also significantly increase concentration in the already highly concentrated market for insect-resistant traits for cotton; Bayer and Monsanto accounted for 10% and 75% of that market, respectively, in 2017.

Without the merger, competition between the two companies across the GM trait markets would likely increase over time. Bayer and Monsanto each have new traits in their research pipelines that would confer tolerance to additional herbicides, and farmers would benefit as Bayer and Monsanto continued to develop these new innovations.

d) Entry and Expansion in GM Seeds and Traits Markets

Entry is unlikely to counteract the anticompetitive effects of the proposed merger in any of the GM seed or GM trait markets. To compete in a GM seed market, a company must have high-quality varieties for the current growing season and access to a deep and diverse collection of high-quality seeds for breeding future varieties. The varieties must also be suitable for the particular geographic region. Elite seed varieties suitable for regions in the United States are increasingly difficult to procure and are controlled largely by a handful of vertically integrated companies, including Monsanto, Bayer, DowDuPont, and Syngenta. In addition, the time, expense, and expertise required to commercialize a GM trait is prohibitive for all but these four companies. Although certain smaller companies may participate in some limited aspect of initially discovering a trait, they do not have the ability to commercialize these traits.

2. Foundational Herbicides

In addition to competing to sell herbicide-tolerant seeds, Bayer and Monsanto also compete to sell the herbicides that are paired with them. Monsanto's Roundup Ready seeds are

engineered to tolerate the herbicide glyphosate, which Monsanto sells under its Roundup brands, while Bayer's LibertyLink seeds are engineered to tolerate glufosinate ammonium, the herbicide that Bayer sells under the Liberty brand. These "foundational" herbicides, glyphosate and glufosinate, have unique characteristics that make them important competitive alternatives for farmers.

a) Relevant Market

The Complaint alleges that foundational herbicides constitute a relevant product market under Section 7 of the Clayton Act. Foundational herbicides are herbicides used on row crops that have two defining characteristics. First, they are "non-selective," meaning that they kill all types of weeds, thus providing farmers with the broadest possible protection for their crops. In contrast, other types of herbicides are "selective," meaning that they kill only certain types of weeds. Selective herbicides are often used to supplement non-selective herbicides but are not generally used in lieu of them. Second, foundational herbicides can be paired with seeds that are engineered to tolerate the herbicide. Other non-selective herbicides are not a substitute for farmers because no seeds are engineered to withstand them, so spraying those herbicides over a crop would damage it. For these reasons, farmers have no good substitutes for foundational herbicides, and a hypothetical monopolist would find it profitable to increase the price of some foundational herbicides by a small but significant amount. Today, glyphosate and glufosinate are the only two foundational herbicides, but, as discussed further below, new foundational herbicides are in development.

b) Competitive Effects

The proposed merger would combine the world's leading producers of foundational herbicides and would lead to a presumptively anticompetitive increase in market concentration.

Since the launch of herbicide-tolerant crops in the 1990s, Monsanto's Roundup has dominated the market. As some weeds have developed resistance to glyphosate, however, farmers are increasingly turning to Liberty. While glufosinate and glyphosate are now off patent, competition from generic suppliers has not prevented Bayer and Monsanto from maintaining branded price premiums. In 2017, Bayer held a 7% share and Monsanto held a 53% share, with generic manufacturers holding the remaining share.

The proposed merger is also likely to eliminate competition between Bayer and Monsanto to develop next-generation weed management systems. The Complaint explains that Bayer is developing new foundational herbicides and related herbicide-tolerant traits that would rival Monsanto's Roundup Ready-based systems. Likewise, Monsanto is actively pursuing innovations in foundational herbicides, including improvements to its Roundup formulations. Absent the merger, Bayer and Monsanto would each have incentives to pursue these competing pipeline products because any new innovations developed would help win market share from the other. In contrast, the merged firm will have different incentives due to heightened concerns that new innovations would simply cannibalize sales.

c) Entry and Expansion

As alleged in the Complaint, the anticompetitive effects of the proposed merger would not be remedied by entry or expansion in the foundational herbicide market. The manufacture of foundational herbicides is complex and hazardous, requiring regulatory and safety approvals, which are expensive and time-consuming to secure. Reputation, brand loyalty, and economies of scale also present barriers to entry and expansion.

3. Seed Treatments

Seed treatments are coatings applied to seeds that can protect the seed and the young plant from various insects or diseases. Seed treatments are a critical tool for farmers, and one or more seed treatments are applied to the majority of GM seeds sold in the United States today. Multiple seed treatments can be applied to a seed to protect it from various threats; seed treatments designed for one purpose (*e.g.*, killing insects) are rarely an effective substitute for seed treatments designed for a different purpose (*e.g.*, controlling fungal plant diseases).

The Complaint alleges that the proposed merger would likely result in three forms of competitive harm related to seed treatments: (1) the loss of head-to-head competition between Bayer's and Monsanto's seed treatments for nematodes, (2) vertical foreclosure effects resulting from the combination of Monsanto's strong position in corn seeds with Bayer's substantial position in insecticidal seed treatments for corn rootworm, and (3) vertical foreclosure effects resulting from the combination of Monsanto's strong position in soybeans with Bayer's substantial position in fungicidal seed treatments for soybean sudden death syndrome.

a) Nematicidal Seed Treatments for Corn, Cotton, and Soybeans

Nematicidal seed treatments protect crops from parasitic roundworms known as nematodes. Farmers have no cost-effective alternatives to nematicidal seed treatments. Seed treatments are approved for use by the government on a crop-by-crop basis, so a soybean farmer, for example, chooses between a different set of competitive alternatives than a cotton farmer. Accordingly, the Complaint alleges that nematicidal seed treatments for corn, cotton, and soybean seeds are each relevant markets under Section 7 of the Clayton Act and that a hypothetical monopolist in each market could profitably raise prices.

All three nematicidal seed treatment markets are highly concentrated. For years, Bayer has had a monopoly in the market for nematicidal seed treatments for corn; in 2017, its market share was over 95%. Bayer also dominates the market for nematicidal seed treatments for soybeans, with a share over 85%. And in the market for nematicidal seed treatments for cotton, Bayer and Syngenta currently split the market roughly evenly.

Although Monsanto does not currently sell any nematicidal seed treatments, it is about to launch its first product, NemaStrike. Without the merger, both Bayer and Monsanto expected NemaStrike to capture significant share from Bayer in all three seed treatment markets. The Complaint alleges that the proposed merger would harm competition in the nematicidal seed treatment market by removing the most significant threat to Bayer's dominance.

b) Vertical Foreclosure – Seed Treatments for Corn Rootworm and GM Corn Seeds

Corn is the largest crop grown in the United States, accounting for over $8 billion in seed sales annually. Over 90% of U.S. corn seeds are genetically modified, and, like the other GM seeds discussed above, GM corn seeds are a relevant product market under Section 7 of the Clayton Act. Although Bayer does not sell corn seeds, Monsanto effectively controls 50% of the market and faces only one major rival.

Corn rootworm is a destructive pest that can devastate a farmer's fields. To deal with this threat, some farmers rely on Bayer's Poncho insecticidal seed treatment. For many farmers, there are no cost-effective alternatives to insecticidal seed treatments. Because Poncho is the only seed treatment that offers meaningful protection against corn rootworm, corn seed companies purchase Bayer's insecticidal seed treatment to apply to their seeds so they can offer a competitive product.

The merger would likely harm competition in the market for GM corn seeds by combining Monsanto's strong position in GM corn seeds with Bayer's dominant position in insecticidal seed treatments for corn rootworm. The merged firm would have the incentive and ability to make its corn seed rivals less competitive by forcing them to pay more for Poncho or cutting off their supply of the product. This would limit farmers' choices, reduce competition, and ultimately allow the merged firm to increase the price for GM corn seeds.

c) Vertical Foreclosure – Fungicidal Seed Treatments for Sudden Death Syndrome and GM Soybeans

The merger is likely to have similar effects in soy. Sudden death syndrome ("SDS") is a fungal disease afflicting millions of soybean acres across the United States. In 2015, Bayer began selling ILeVO, the only effective fungicidal seed treatment combatting SDS, and ILeVO's sales have doubled annually since its introduction. The merger is likely to reduce competition by combining Monsanto's leading GM soybean business with Bayer's dominant position in fungicidal seed treatments for SDS. The merged firm would have the incentive and ability to make its soybean rivals less competitive by charging them more for ILeVO or cutting off their supply, diminishing competition in the market for GM soybeans and reducing choices available to farmers.

d) Entry and Expansion

As alleged in the Complaint, the anticompetitive effects of the proposed merger would not be remedied by entry or expansion in the relevant seed treatment markets. Developing a new, effective seed treatment is a slow, costly, and difficult process, and new seed treatments require extensive regulatory approvals before farmers can use them. Generic versions of the Bayer seed treatments discussed above will not be available for at least the next several years due to various intellectual property protections. Neither expansion by existing seed treatments nor new seed

treatments expected to launch in the next several years would prevent the anticompetitive effects of the proposed merger.

4. Vegetables

Finally, the Complaint alleges that the proposed merger is likely to substantially lessen competition in the markets for five types of vegetable seeds: carrots, cucumbers, onions, tomatoes, and watermelons. Overall, Monsanto is the largest global vegetable seed company, while Bayer is the fourth largest, and the two companies are strong competitors in all five of these markets.

a) Relevant Markets

The Complaint alleges that the seeds markets for carrots, cucumbers, onions, tomatoes, and watermelons each constitute a relevant market under Section 7 of the Clayton Act. Each vegetable species has unique characteristics, and other crops are not viable substitutes. Many vegetable seed customers rely on access to particular types of vegetables to operate their businesses. For example, in the United States, companies that sell pre-cut baby carrots and other carrot products, such as juice, purchase carrot seeds to grow their carrots. These companies are unlikely to begin growing a different crop in large quantities in response to a price increase. Nor are other farmers likely to switch crops in response to a price increase because they have invested in crop-specific facilities and equipment, possess specialized crop-specific knowledge, or live in an area best suited to growing that particular type of vegetable. A hypothetical monopolist of any of the five vegetable seed species would find it profitable to increase prices by at least a small but significant amount because the bulk of farmers would not switch away from their preferred vegetable crops in response. As vegetable seeds are bred to thrive in particular regions of the country, geographic markets are regional, but, similar to row crops, virtually all

regions affected by the merger have similar market structure, so in this case it is appropriate to aggregate these regions to the national level for convenience.

b) Competitive Effects

Bayer and Monsanto are among the largest domestic producers of all the vegetable seeds at issue. The Complaint alleges that the proposed merger would significantly increase concentration in each market, and each market would be highly concentrated with few, if any, other significant competitors. In carrots and cucumbers, the merged firm would enjoy near-complete dominance, with market shares of 94% and 90%, respectively. The combined company would also have high market shares in onion seeds (71%) and tomato seeds (55%). In watermelon seeds, Bayer holds a 37% market share while Monsanto has a 6% share, with only one other significant competitor. Monsanto's market share in watermelon seeds understates its competitive significance; its recent introduction of competitive seedless watermelon varieties, which are in high demand and already offered by Monsanto's competitors, will likely significantly improve its position going forward. In each of these markets, the proposed merger would eliminate the significant competition between Bayer and Monsanto, not only on price, but also on quality and innovation, to the overall detriment of American farmers and consumers.

c) Entry and Expansion

Firms that sell vegetable seeds use modern breeding techniques that require access to advanced technologies and elite seed varieties, making entry challenging. In addition, entering a new vegetable seed market can be expensive and time consuming because successful vegetable seed companies must invest continuously in developing new, improved varieties, some of which can take over a decade to breed and commercialize. Certain vegetable markets present additional

unique challenges; for instance, onions are among the hardest vegetable seeds to produce, in part, because they are biennials, generating seed only every other growing season.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment remedies the anticompetitive effects of the merger by requiring Bayer to divest its businesses in each relevant market, along with various supporting assets, to BASF, a global chemical company with an existing agricultural crop protection business. To ensure that BASF would replace Bayer as an effective competitor and innovator in each of the 17 markets in which the Complaint alleges that the proposed merger would harm competition, the United States carefully scrutinized the merging parties' and BASF's businesses and operations to identify a comprehensive package of businesses and supporting assets for divestiture. Collectively, these transfers encompass the suite of businesses and assets that constitute the divestiture package.

In evaluating the remedy, the United States recognized that fully preventing the competitive effects of a merger in some cases requires the inclusion of assets or projects that are beyond the affected relevant markets. As the *U.S. Department of Justice Antitrust Division Policy Guide to Merger Remedies* explains, the United States will exercise its enforcement discretion to accept a divestiture only when it is persuaded that the divested "assets will create a viable entity that will effectively preserve competition." *See Antitrust Division Policy Guide to Merger Remedies* at 9 (June 2011) (available at https://www.justice.gov/atr/public/guidelines/272350.pdf). Because Bayer does not operate its businesses that compete with Monsanto as separate, standalone entities, to ensure effective relief the United States is also requiring the divestiture of assets that are complementary to the competitive products or that use shared resources. *See id.* at 11 ("[I]ntegrated firms can provide scale and scope economies that a purchaser may not be able to achieve by obtaining only those assets related to the relevant

product(s).”). Finally, effective relief also requires divestiture of those “pipeline” research projects that Bayer is pursuing to ensure the future competitive significance of the divested businesses.

Guided by these principles, the United States identified a divestiture package that remedies the various dimensions of harm threatened by the proposed merger. First, the proposed Final Judgment requires Bayer to divest those businesses that vigorously compete head-to-head with Monsanto today. Second, to address certain vertical concerns, the proposed Final Judgment requires Bayer to divest seed treatment businesses that would give the combined company the incentive and ability to harm competition by raising the prices it charges rival seed companies. Third, because Bayer and Monsanto compete to develop new products and services for farmers, the proposed Final Judgment requires the divestiture of associated intellectual property and research capabilities, including “pipeline” projects, to enable BASF to replace Bayer as a leading innovator in the relevant markets. Fourth, the proposed Final Judgment requires the divestiture of additional assets that will give BASF the scale and scope to compete effectively today and in the future.

Because many of the divested assets will be separated from Bayer’s existing business units and incorporated into BASF, the proposed Final Judgment includes provisions aimed at ensuring that the assets are handed off in a seamless and efficient manner. To that end, Bayer is required to transfer existing third-party agreements and customer information to BASF, as well as to enter transition services agreements that ensure that BASF can continue to serve customers immediately upon completion of the divestitures. The transition services and interim supply agreements are time-limited to ensure that BASF will become fully independent of Bayer as soon as practicable. The proposed Final Judgment also requires Bayer to warrant that the assets being

divested are sufficient for BASF to maintain the viability and competitiveness of the divested businesses following BASF's acquisition of the assets. In addition, it gives BASF a one-year window after closing to identify any additional assets that are reasonably necessary to ensure the continued competitiveness of the divested businesses. The United States will have the sole discretion to determine if Bayer must divest these additional assets. Finally, the proposed Final Judgment gives BASF the ability to hire all of the personnel from Bayer needed to support these businesses.

BASF is the only buyer the United States has evaluated and deemed suitable to resolve the range of competitive concerns raised by the merger. BASF already has extensive agricultural experience, but it lacks a seeds and traits business. Combining the businesses and assets being divested with BASF's existing portfolio will allow it to become an integrated player and an effective industry competitor to the merged company and the other integrated players. BASF will have full control over these divested businesses, including the ability to assign licenses and other rights.

In sum, the proposed remedies will ensure that BASF can step into Bayer's shoes, thereby preserving the competition that the merger would otherwise destroy. The monitoring trustee to be appointed will have close oversight over the divestitures to ensure they proceed efficiently (*see*, *infra*, Section III.H). And, as additional protection, the proposed Final Judgment includes robust mechanisms that will allow the United States and the Court to monitor the effectiveness of the relief and to enforce compliance.

A. GM Seeds and Traits

Section IV of the proposed Final Judgment requires Bayer to divest all assets used by Bayer's GM seeds and traits businesses in the United States, including Bayer's cotton, canola,

and soybean seeds and traits businesses, as well as almost all of the assets associated with Bayer's other global GM seeds and traits businesses. Because Bayer and Monsanto are currently competing to introduce the next blockbuster trait or plant variety, BASF can replace Bayer as a competitor only if BASF obtains all the assets required to continue Bayer's legacy of innovation. This includes all assets needed to offer farmers the new products that Bayer was poised to commercialize in the coming years. Notably, BASF will receive all of Bayer's trait research centers (including facilities in Morrisville, North Carolina; Ghent, Belgium; and Astene, Belgium). The proposed Final Judgment also requires Bayer to transfer all intangible assets used by these businesses, such as patents, know-how, and licenses or permits issued by government agencies.

There are limited exceptions to Bayer's obligation to divest all of the assets used by its global GM seeds and traits businesses. Certain assets used exclusively to support a handful of Bayer's small seed businesses or research programs outside of the United States are excluded from the Divestiture Assets. These exceptions are related to (1) rice seed, which Bayer sells only in Asia; (2) Bayer's millet, mustard, and cotton seed businesses in India; (3) R&D programs for Brazilian sugarcane and European sugarbeets; and (4) Bayer's cotton seed business in South Africa. None of these is closely related to the divested U.S. seeds and traits businesses. Bayer will also retain a number of general office facilities that house employees of businesses not affected by the divestitures, as well as one seed cleaning and bagging facility in Germany that is part of Bayer's Crop Science headquarters.

The proposed Final Judgment also requires Bayer to provide BASF with certain complementary assets, which will give scale and scope benefits to the divested GM seeds and

traits businesses, and supply agreements, which will allow BASF to maintain the competitiveness of those businesses as they are transitioned from Bayer.

First, the proposed Final Judgment requires divestiture of Bayer's R&D programs associated with wheat. Bayer does not currently sell wheat in the United States, but it has been pursuing wheat-related research to expand the scope of its global seeds and traits portfolio and sustain the level of R&D investment these businesses require. Because seed and trait innovations can often be applied across multiple crops, a broader seed and trait portfolio will provide the promise of higher returns on investment and increase the incentive to innovate. The proposed Final Judgment preserves the scope efficiencies that Bayer enjoys today by keeping these businesses together. Moreover, separating the wheat business from Bayer's other seeds and traits businesses would have required disentangling and dividing integrated operations and assets. For instance, Bayer's research facility in Ghent, Belgium is used to support R&D for wheat as well as other crops. By requiring the divestiture of Bayer's wheat R&D programs and related facilities, the proposed Final Judgment ensures that BASF has all of the tools needed to run the divested businesses and can leverage these common resources as effectively as Bayer does today.

Second, under Paragraph IV.G of the proposed Final Judgment, Bayer will supply BASF with the seed treatments Bayer currently applies to its row crop seeds for a period of up to two years, with extensions subject to approval by the United States. This will allow BASF to offer farmers the same combinations of seeds and seed treatments that Bayer offers today without interruption. During the term of these supply agreements, BASF will transition to using (1) its own seed treatments, (2) the seed treatments it is acquiring from Bayer pursuant to the proposed Final Judgment (discussed in more detail below), (3) seed treatments from alternate suppliers, or (4) a combination thereof.

Third, Paragraph IV.N of the proposed Final Judgment requires Bayer to divest certain groups of Monsanto soybeans used for research and breeding (referred to in the industry as "germplasm"). As discussed in the Complaint, Bayer has aggressively challenged Monsanto in the soybean market, and planned to continue to expand. However, Bayer currently lacks soybeans suitable for the Midwest, an important soybean growing region in the United States. By providing BASF with a richer pool of genetic material, the proposed Final Judgment creates a strong incentive for BASF to continue Bayer's efforts to disrupt the market and provide new benefits to farmers and consumers.

B. Foundational Herbicides

Section IV of the proposed Final Judgment also requires Bayer to divest assets relating to its foundational herbicides business. The proposed Final Judgment requires Bayer to divest all intellectual property related to glufosinate, the active ingredient in Bayer's Liberty herbicide, including intellectual property relating to mixtures of glufosinate with other chemicals. Bayer is also required to divest its R&D projects, which will incentivize BASF to continue to develop new innovations for farmers.

In addition, Bayer will be required to divest all facilities used to manufacture glufosinate. Bayer will also divest certain facilities used to "formulate" (*i.e.*, mix with water and other inactive ingredients) and package glufosinate to create Liberty for sale to customers. Specifically, the proposed Final Judgment requires Bayer to divest its large North American facilities in Regina, Canada and Muskegon, Michigan, which formulate and package a significant percentage of the Liberty sold in the United States. Because Bayer's global formulation facilities are also used for unrelated products not being divested and supply very little of the Liberty used in the United States, the proposed Final Judgment permits Bayer to

retain some formulation facilities, most of which are located outside the United States. However, Paragraph IV.G of the proposed Final Judgment requires Bayer to enter into an agreement to formulate Liberty for BASF, at cost, for up to three years to ensure that BASF can meet farmer demand for the product during the transition. The proposed Final Judgment limits the duration of these formulation services to ensure that BASF will become fully independent of Bayer as soon as practicable.

In certain countries outside of the United States, the proposed Final Judgment also provides that Bayer will distribute glufosinate products on BASF's behalf for a limited period. This accommodation affects only a small portion of total glufosinate sales and ensures business continuity in those international jurisdictions in which BASF requires time to develop the business infrastructure or to secure the local regulatory authorizations necessary to sell the product. To encourage BASF to become fully independent from Bayer as soon as practicable, the proposed Final Judgment limits the duration of these services, and BASF can terminate these distribution contracts on a country-by-country basis as soon as it is able to distribute these products on its own.

C. Pipeline Herbicides

The proposed Final Judgment requires the divestiture of certain crop protection products that are complementary to Bayer's trait business. Today, Bayer engages in parallel research across its various seeds and crop protection businesses, developing new herbicides and new traits that confer tolerance to those herbicides. Bayer is motivated to pursue trait research in part because successful commercialization of a trait will generate additional returns through the sale of the associated herbicide, and vice versa. Therefore, Section IV of the proposed Final Judgment also requires Bayer to divest its R&D projects relating to ketoenole and N,O-chelator

("NOC") herbicides. These herbicides, if successful, would be sold in conjunction with the ketoenole- and NOC-tolerant traits Bayer is developing, which also are being divested. By requiring divestiture of both the trait projects and the associated herbicide projects, the proposed Final Judgment preserves BASF's incentive to pursue these innovations.

The proposed Final Judgment also provides BASF full access to Bayer's Balance Bean herbicide. Bayer recently introduced BalanceGT soybeans, which contain a GM trait conveying tolerance to both glyphosate and isoxaflutole, a selective herbicide contained in Bayer's Balance Bean product. BalanceGT soybeans are poised to compete with Monsanto's herbicide-tolerant soybeans, but Balance Bean is not yet approved for spraying over the top of crops. The proposed Final Judgment requires Bayer to transfer intellectual property associated with its Balance Bean herbicide business to BASF; Paragraph IV.G gives BASF the option of entering a temporary isoxaflutole supply agreement with Bayer; and Paragraph IV.L commits Bayer to using best efforts to obtain the remaining regulatory approvals for use of isoxaflutole over the top of crops. These requirements ensure that BASF will have the same ability to offer farmers the combination of both the BalanceGT trait and the Balance Bean herbicide as Bayer would have if the merger had not occurred.

D. Seed Treatments

Section IV of the proposed Final Judgment also requires Bayer to divest assets relating to its seed treatment businesses. Collectively, these divestitures remedy the likely anticompetitive effects of the merger that would arise both from the horizontal combination of Bayer's and Monsanto's nematicidal seed treatments, as well as from the vertical integration of Bayer's dominant seed treatments and Monsanto's dominant seed businesses.

First, the proposed Final Judgment requires Bayer to divest all intellectual property associated with its Poncho, VOTiVO, and TWO.0 seed treatment brands. The Complaint alleges that the merged firm could use its control over Poncho, which is uniquely effective against corn rootworm, to disadvantage its corn seed rivals and diminish competition in the GM corn seed market. VOTiVO is an important nematicidal seed treatment for corn, soy, and cotton, and in combination with other divestitures described below, its divestiture to BASF remedies the merger's likely harm in the market for nematicidal seed treatments. Because VOTiVO and TWO.0 are each typically sold in combination with Poncho, divestiture of the intellectual property associated with all three products will allow BASF to offer American farmers the same packages of Poncho-branded seed treatments as Bayer does today.

The proposed Final Judgment also requires Bayer to divest intellectual property associated with its ILeVO and COPeO seed treatments, which are both based on the same active ingredient, fluopyram. ILeVO and COPeO protect soybeans and cotton seeds, respectively, from nematodes; ILeVO is also the first seed treatment to combat soybean SDS effectively. The ILeVO and COPeO divestitures, in combination with the divestiture of VOTiVO, will address the merger's likely harm in the markets for nematicidal seed treatments. The divestiture of ILeVO will also prevent Bayer from using its control over ILeVO to disadvantage Monsanto's soybean seed rivals and diminish competition in the market for GM soybean seeds, as alleged in the Complaint.

Bayer also will transfer all intellectual property used by these divested seed treatment businesses, including all patents, licenses, know-how, trade names, and data or information collected on the products. The only exception is patents related to fluopyram, which Bayer primarily uses in other non-seed treatment products, such as fungicides applied to foliage.

Therefore, the proposed Final Judgment requires Bayer to provide BASF with a perpetual, royalty-free license for all patents related to the use of fluopyram in seed treatments. The proposed Final Judgment also requires Bayer to divest all R&D projects associated with these seed treatment products, as well as a product in development that would expand and improve on these existing seed treatment businesses.

Paragraph IV.G of the proposed Final Judgment requires Bayer, at BASF's option, to toll manufacture the active ingredients used in the divested seed treatments for an initial period of up to two years, and to provide formulation and distribution services for the seed treatments for up to two years. With prior approval of the United States, certain of these arrangements may be extended for up to an additional four years. These agreements ensure that BASF can immediately replace Bayer as an effective competitor with the divested seed treatments. BASF has its own existing seed treatment businesses and will use the time under the agreements to prepare its own facilities to manufacture and distribute the seed treatments, or to arrange for other suppliers to do so.

E. Digital Agriculture

Section IV of the proposed Final Judgment also requires Bayer to divest its digital agriculture business to BASF. Currently, the leading global agricultural businesses project that the industry will move toward "integrated solutions," which are combinations of traditional agricultural input products that are optimized for use with one another or combined with other services. These companies have described digital agriculture as the "glue" that binds the products together and the core of any future integrated solution. This trend has led them to develop digital agriculture products to protect their position in traditional agricultural markets, including GM seed markets. To provide BASF with the digital agriculture capabilities needed to replace Bayer

as a competitor going forward, the proposed Final Judgment requires Bayer to divest all assets related to its digital agriculture portfolio and pipeline of products.

F. Vegetables

Finally, Section IV of the proposed Final Judgment requires Bayer to divest a comprehensive set of tangible and intangible assets representing Bayer's entire global vegetable seed business. Bayer's vegetable seed business operates under the Nunhems brand name, a business acquired by Bayer in 2002.

The assets to be divested include all of Bayer's vegetable seed breeding capabilities, which encompass 24 different crops (including tomatoes, onions, carrots, cucumbers, and watermelons, among others) and approximately 2,400 varieties. Additional assets to be divested include Bayer's worldwide headquarters in Nunhem, Netherlands, and all global R&D facilities, sales offices, and operations centers. This will provide BASF with the necessary assets and infrastructure to continue vigorously competing, innovating, and developing new vegetable varieties. All customer information, including lists, accounts, and credit records will also be transferred to ensure that existing customers receive uninterrupted service.

Bayer also will divest intangible assets currently used by the vegetable seed business. Critically, all intellectual property—including patents, licenses, and copyrights—will be transferred to BASF. In addition, BASF will receive research data relating to historic and current R&D efforts. These divestitures will allow BASF to develop new and innovative vegetable seeds for current and future customers.

G. Employees

As part of the divestitures, over four thousand Bayer employees who currently support the various divestiture businesses will become BASF employees. These employees will

immediately bring critical business experience to BASF. As an added safeguard, Paragraph IV.E of the proposed Final Judgment provides BASF the right to hire additional personnel to ensure that BASF can become as effective a competitor and innovator as Bayer is today in each of the relevant markets. Bayer is required to make information available to BASF about the employees supporting the businesses and assets to be divested, subject to applicable privacy and confidentiality protections. BASF then will have the right to make offers of employment to these individuals. To ensure that BASF will have the ability to hire experienced personnel, the proposed Final Judgment prohibits Bayer from interfering with BASF's efforts to hire any Bayer or Monsanto employees with relevant expertise.

H. Monitoring Trustee

Section VIII of the proposed Final Judgment provides the United States the option to seek the appointment of a Monitoring Trustee subject to the Court's approval. The United States intends to recommend a trustee for the Court's approval. The person selected will have the necessary expertise and experience to ensure that competition continues unabated across the various markets. Given the scope of the required divestitures, it is critical that the trustee be in a position to review and resolve any issues that may arise beginning immediately after the divestitures are completed.

The Monitoring Trustee will ensure: (1) that Defendants expeditiously comply with all of their obligations and perform all of their responsibilities under the proposed Final Judgment and the Stipulation and Order, (2) that the Divestiture Assets remain economically viable, competitive, and ongoing businesses prior to being fully divested to BASF, and (3) that competition in the relevant businesses is maintained throughout the United States. The Monitoring Trustee will have the power and authority to monitor the Defendants' compliance

with the terms of the proposed Final Judgment. The Monitoring Trustee also will have the authority to investigate complaints relating to Bayer and Monsanto's compliance with the proposed Final Judgment including, but not limited to, any complaints relating to the agreements Bayer and Monsanto have or will enter into with BASF. The Monitoring Trustee will have access to all personnel, books, records, and information necessary to monitor Defendants' compliance with the proposed Final Judgment, and will serve at the cost and expense of Bayer.

The Monitoring Trustee will file reports every 30 days with the United States and, as appropriate, the Court until the completion of the required divestitures. The reports will set forth the efforts by Bayer and Monsanto to comply with their obligations under the proposed Final Judgment and the Stipulation and Order. After completion of the divestitures, the Monitoring Trustee will provide reports as requested by the United States.

I. Firewall

Section IX of the proposed Final Judgment requires Bayer and BASF to implement firewall procedures to prevent each company's confidential business information from being used by the other for any purpose that could harm competition. Within twenty days of the Court approving the Stipulation and Order, Bayer and Monsanto must submit their planned procedures for maintaining firewalls. Additionally, Bayer and BASF must explain the requirements of the firewalls to certain officers and other business personnel responsible for the commercial relationships between the two companies about the required treatment of confidential business information. Bayer's and BASF's adherence to these procedures is subject to a semi-annual audit by the Monitoring Trustee. These measures are necessary to ensure that the supply and transition services agreements between Bayer and BASF do not facilitate coordination or other

anticompetitive behavior during the interim period before BASF becomes fully independent of Bayer.

J. Prohibition on Recombinations

To ensure that BASF and Bayer remain independent competitors, Section XI of the proposed Final Judgment prohibits Bayer and BASF from recombining any of the Divestiture Assets with competing Bayer businesses. First, Bayer is prohibited from reacquiring any of the Divestiture Assets during the term of the Final Judgment. Second, BASF may not acquire from Bayer any assets or businesses that compete with the Divestiture Assets. These provisions ensure that Bayer and BASF cannot undermine the purpose of the proposed Final Judgment by later entering into a new transaction that would reduce the competition that the divestitures have preserved. Finally, Section XI prohibits Bayer and BASF from entering into any new collaboration, such as a research and development joint venture, or from expanding the scope of any existing collaboration, involving the Divestiture Assets. This provision prevents Bayer and BASF from circumventing the purpose of the proposed Final Judgment by, for example, entering into a partnership to jointly develop new traits, which could reduce or eliminate BASF's incentive to innovate independently in some or all of the relevant markets. The provision permits BASF and Bayer to engage in certain ordinary-course-of-business commercial relationships, such as crop protection product supply agreements. They also may engage in other collaborations if approved by the United States in its sole discretion.

K. Enforcement Provisions

The proposed Final Judgment contains provisions designed to promote compliance and make the enforcement of consent decrees as effective as possible. As set forth in the Stipulation and Order, BASF has agreed to be joined to this action for purposes of the divestiture. Including

BASF is appropriate because, after extensive analysis, the United States has determined that BASF is a necessary party to effectuate complete relief; the divestiture package was crafted specifically taking into consideration BASF's existing assets and capabilities, and divesting the package to another purchaser would not preserve competition. Thus, as discussed above, the proposed Final Judgment imposes certain obligations on BASF to ensure that the divestitures take place expeditiously and that BASF and Bayer reduce entanglements as quickly as possible after BASF acquires the Divestiture Assets.

Paragraph XIV.A provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including rights to seek an order of contempt from the Court. Under the terms of this Paragraph, all Defendants, including BASF, have agreed that in any civil contempt action, any motion to show cause, or any other 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 obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph XIV.B provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment was drafted to restore all competition that would otherwise be harmed by the merger. 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 further provides that should the Court find in an enforcement proceeding that the Defendants have 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, in order to compensate American taxpayers for any costs associated with the investigation and enforcement of violations of the proposed Final Judgment, Paragraph XIV.C provides that in any successful effort by the United States to enforce this Final Judgment against a Defendant, whether litigated or resolved prior to litigation, that Defendant agrees to reimburse the United States for attorneys' fees, experts' fees, or costs incurred in connection with any enforcement effort, including the investigation of the potential violation.

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 six (6) years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestitures have been completed and that the continuation of the Final Judgment is no longer necessary or in the public interest.

L. Stipulation and Order

Bayer, Monsanto, and BASF have entered into the Stipulation and Order, which was filed with the Court at the same time as the Complaint, to ensure that, pending the divestitures, the Divestiture Assets are maintained such that the divestitures will be effective. The Stipulation and Order also requires Bayer to hold Monsanto as a separate entity until the divestitures are complete, so that the merger can be unwound if Bayer fails to complete the required divestitures to BASF. This step is necessary in this case because the divestiture package was crafted specifically taking into consideration BASF's existing assets and capabilities, and if BASF is

unable to acquire the assets, simply divesting the package to another purchaser would not preserve competition. The Stipulation and Order also binds all three defendants to the terms of the proposed Final Judgment pending the Judgment's entry by the Court.

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 damages 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 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 United States, 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 Antitrust Division's internet website and, in certain circumstances, published in the *Federal Register*.

Written comments should be submitted by mail to:

Kathleen S. O'Neill
Chief, Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
450 5th Street, NW, Suite 8000
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 necessary or appropriate modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, seeking preliminary and permanent injunctions against the merger and proceeding to a full trial on the merits. The United States is satisfied, however, that the relief in the proposed Final Judgment will preserve competition in each relevant market in the United States. Thus, the proposed Final Judgment will protect competition as effectively as, and will achieve all or substantially all of the relief the United States would have obtained through, litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

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 such a 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, 15-17 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").[2]

As the United States Court of Appeals for the District of Columbia Circuit has held,

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

under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *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).[3] In determining whether a proposed settlement is in the public interest, a 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.*

[3] *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'").

Archer-Daniels-Midland Co., 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree 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 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461)); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[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. As a court in this district 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." 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[4] A

[4] *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

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.

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: May 29, 2018

Respectfully Submitted,

/s/

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response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").