UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. INTUIT INC. and CREDIT KARMA, INC., *Defendants*.	Civil Action No.: 1:20-cv-03441-ABJ

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THE PROCEEDING

On February 24, 2020, Defendant Intuit Inc. ("Intuit") agreed to acquire Defendant Credit Karma, Inc. ("Credit Karma") for approximately $7.1 billion. The United States filed a civil antitrust Complaint against Intuit and Credit Karma on November 25, 2020, seeking to enjoin the proposed transaction (Docket No. 1). The Complaint alleges that the likely effect of the proposed transaction would be to substantially lessen competition for digital do-it-yourself ("DDIY") tax preparation products used to help individuals file U.S. federal and state tax returns, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, the United States filed an Asset Preservation

and Hold Separate Stipulation and Order ("Stipulation and Order") (Docket No. 2-1) and a proposed Final Judgment (Docket No. 2-2), which are designed to address the anticompetitive effects alleged in the Complaint. Under the proposed Final Judgment, which is explained more fully below, Credit Karma is required to divest its DDIY tax preparation business, known as Credit Karma Tax, including the assets needed to run that business.

Under the terms of the Stipulation and Order, Defendants are required to take certain steps to ensure Credit Karma Tax is operated as a competitively independent, economically viable, and ongoing business concern, which will remain independent and uninfluenced by Defendants, and that competition is maintained during the pendency of the required divestiture.

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

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Intuit is a software company based in Mountain View, California that offers tax preparation, accounting, payroll, and personal finance solutions to individuals and businesses. Intuit offers DDIY tax preparation products under the TurboTax brand. Intuit, through its TurboTax business, is the largest provider of DDIY tax preparation products for U.S. federal and state returns.

Credit Karma is a privately held technology company based in San Francisco, California that offers an online and mobile personal finance platform. Credit Karma's platform provides individuals with access to free credit scores, credit monitoring, and DDIY tax preparation,

among other products and services. Credit Karma's tax business, known as Credit Karma Tax, is the fifth-largest provider of DDIY tax preparation products for U.S. federal and state returns.

On February 24, 2020, Intuit agreed to acquire Credit Karma in a transaction valued at approximately $7.1 billion.

B. Anticompetitive Effects of the Proposed Transaction in the Market for DDIY Tax Preparation Products

The Complaint alleges that the loss of competition in DDIY tax preparation products due to the proposed transaction would result in substantial harm to millions of U.S. taxpayers. The acquisition of a disruptive upstart by the dominant firm in DDIY tax preparation products would lead to a presumptively anticompetitive increase in market concentration. The Complaint further alleges that the proposed transaction would eliminate important head-to-head competition between Intuit and Credit Karma and an important constraint on Intuit in the market for the development, provision, operation, and support of DDIY tax preparation products.

1. The Relevant Market for Analyzing the Transaction's Anticompetitive Effects

The Complaint alleges that the relevant market for analyzing the effects of the proposed acquisition is the development, provision, operation, and support of DDIY tax preparation products ("the market for DDIY tax preparation products"). DDIY tax preparation products enable individuals to prepare their own U.S. federal and state personal income taxes on the provider's website or mobile application or using the provider's software installed on a personal computer.

The Complaint alleges that other methods of tax preparation, including hiring an accountant (i.e., "assisted tax preparation") and completing a tax return manually on paper (the "pen-and-paper" method), are not close substitutes for DDIY tax preparation products. Alternate methods of tax preparation do not offer comparable functionality or are less convenient, more

cumbersome, or more expensive than DDIY tax preparation products. Thus, the Complaint alleges that a hypothetical monopolist likely would impose at least a small but significant and non-transitory increase in the price of DDIY tax preparation products. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 4.1.1 (revised Aug. 19, 2010) ("Merger Guidelines"), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010. Other forms of tax preparation are not sufficiently substitutable to prevent such a price increase.

The Complaint alleges that the relevant geographic market for analyzing the effects of the proposed acquisition is worldwide. All major providers of DDIY tax preparation products for U.S. federal and state tax returns and most customers of such products are located in the United States. DDIY tax preparation products designed for filings in other parts of the world are not substitutes for DDIY tax preparation products designed for U.S. federal and state filings. Nonetheless, because many DDIY tax preparation products are provided over the internet, there appear to be no physical restrictions on the location of providers or customers of DDIY tax preparation products. Accordingly, the relevant geographic market for analyzing the proposed transaction is a worldwide market.

2. The Transaction is Presumed to Enhance Intuit's Market Power

The proposed transaction would significantly increase market concentration in the market for DDIY tax preparation products. The Complaint alleges that Intuit has a 66% market share and Credit Karma has a 3% market share. Market concentration is often a useful indicator of the level of competitive vigor in a market and the likely competitive effects of an acquisition. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that the transaction would result in harm to consumers by meaningfully reducing competition.

Market concentration is typically measured by the Herfindahl-Hirschman Index ("HHI"). Markets in which the HHI is above 2,500 are considered highly concentrated. Transactions that increase the HHI by more than 200 points and result in a highly concentrated market are presumed to be likely to enhance market power. *See* Merger Guidelines § 5.3.

Intuit's proposed acquisition of Credit Karma would further increase concentration in a market that is already highly concentrated, resulting in a post-acquisition HHI of over 5,000 points. As a result of the transaction, the HHI in the relevant market would increase by more than 400 points. These HHI measures indicate that the transaction is presumptively likely to enhance market power. *See* Merger Guidelines § 5.3.

As the Complaint alleges, these concentration measures understate the likely anticompetitive effects of the proposed transaction. As explained more fully in Section II.B.3 below, Credit Karma Tax has been a disruptive competitor in the market by offering its DDIY tax preparation product for free to consumers regardless of the complexity of their individual tax returns. Further, Credit Karma Tax is expected to continue to grow rapidly in the near future. Thus, current concentration measures in the market for DDIY tax preparation products understate Credit Karma Tax's competitive importance in the market.

3. The Transaction Would Eliminate Head-to-Head Competition Between Intuit and Credit Karma

The Complaint alleges that Intuit and Credit Karma compete directly against each other to provide DDIY tax preparation products to millions of U.S. taxpayers. For over a decade, Intuit has been the dominant DDIY tax preparation products provider. In 2017, Credit Karma entered the market with a completely free DDIY tax preparation product for U.S. taxpayers. Over the last four years, Credit Karma's free tax product has disrupted TurboTax's dominance in the market by winning over customers from TurboTax. In response to the competitive threat posed by Credit

Karma, Intuit has lowered the price of certain DDIY tax preparation products and expanded the scope and quality of services it offers to TurboTax users for free.

Since entering the market, Credit Karma has been a disruptive competitor to Intuit in DDIY tax preparation. Indeed, as the Complaint alleges, Intuit itself has recognized that Credit Karma has been its most disruptive competitor within DDIY tax preparation. Unlike any other provider, Credit Karma offers a completely free DDIY tax preparation product for a broad range of simple and complex U.S. and state tax returns. Credit Karma is able to offer its DDIY tax preparation product for free because it is paid by third parties when it successfully markets their offers for financial products, like credit cards or personal loans, to its customer base of over 100 million users. The data Credit Karma obtains from its users' tax filings helps Credit Karma better tailor offers for other products to its users. Credit Karma's users are more likely to accept tailored offers, which in turn, increases Credit Karma's commissions from the third parties.

Absent the proposed transaction, competition between Intuit and Credit Karma is expected to continue to increase in the future. As the Complaint alleges, Credit Karma Tax has grown significantly since its 2017 launch, serving over 2 million filers in 2020. In the coming tax seasons, Credit Karma Tax is expected to continue to grow and increase its market share, at the expense of TurboTax, as its product gains further traction in the market and as Credit Karma continues to improve and expand its tax product's functionality.

The Complaint, therefore, alleges that by eliminating the head-to-head competition between Intuit and Credit Karma, Intuit's proposed acquisition of Credit Karma would likely substantially lessen competition in the market for DDIY tax preparation products in violation of Section 7 of the Clayton Act.

4. Entry and Efficiencies Are Unlikely to Counteract the Proposed Transaction's Anticompetitive Effects

As the Complaint alleges, new entry or expansion in DDIY tax preparation products is unlikely to prevent the acquisition's anticompetitive effects. Apart from Credit Karma, no other companies have successfully entered the market for DDIY tax preparation products in over a decade. There are significant barriers to entry or expansion in DDIY tax preparation products, including the cost of developing and maintaining a robust, easy-to-use product, marketing costs to acquire and retain customers, and the time and expense needed to build a strong, trusted brand.

The Complaint also alleges that the anticompetitive effects of the proposed acquisition are not likely to be eliminated by any efficiencies the proposed acquisition may achieve.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor in the market for DDIY tax preparation products. The proposed Final Judgment requires Defendants, within 30 calendar days after the entry of the Stipulation and Order by the Court, to divest the products, intellectual property, and other related assets and rights that Credit Karma Tax uses to provide DDIY tax preparation products (collectively, the "Divestiture Assets"). The Divestiture Assets must be divested to Square, Inc., or to another acquirer approved by the United States, in such a way as to satisfy the United States in its sole discretion that the Divestiture Assets can and will be operated as a viable, ongoing business that can compete effectively in the market for DDIY tax preparation products. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly.

The proposed Final Judgment includes certain provisions to protect the viability of the Divestiture Assets during the transition of those assets to the Acquirer. As explained in more

detail below, the proposed Final Judgment requires Defendants to provide certain transition services during the 2021 tax filing season and restricts Defendants from taking certain actions that could threaten the viability of the Divestiture Assets while the acquirer prepares to independently operate the divested business.

A. Divestiture Assets and Employees

The proposed Final Judgment requires Defendants to divest the Divestiture Assets, which are defined in Paragraph II.F of the proposed Final Judgment. The Divestiture Assets will provide the acquirer with all of the assets and rights owned by or licensed to Credit Karma Tax, and all material assets and rights that are needed to run the Credit Karma Tax business in substantially the same manner as it had been run prior to the transfer. The Divestiture Assets include, among other things: all Credit Karma Tax products, including their underlying software and data; all intellectual property owned by Credit Karma Tax; all certifications and material contracts; copies of all books and records related to Credit Karma Tax; and copies of all marketing materials related to Credit Karma Tax.

The Divestiture Assets also include a worldwide, non-exclusive, irrevocable, perpetual license to all other intellectual property, except for Credit Karma trademarks, owned by Credit Karma or its subsidiaries that is used by the Credit Karma Tax business. Finally, the Divestiture Assets include a limited, non-exclusive license to use the Credit Karma trademarks for the Credit Karma Tax business during the 2021 tax filing season.

Further, under Paragraph IV.H of the proposed Final Judgment, the acquirer will, for up to 12 months after the date of the divestiture, have the right to hire any employees currently employed by Credit Karma Tax, or currently employed by Credit Karma who dedicated at least 50% of their total time to Credit Karma Tax at any point from October 1, 2019 to September 30,

2020. Defendants must provide the acquirer with information on these employees and are prohibited from interfering with the acquirer's efforts to hire them.

B. Transition Services

The proposed Final Judgment requires Defendants to provide certain transition services to maintain the viability and competitiveness of the Credit Karma Tax business during its transition to the acquirer.

Paragraph IV.L of the proposed Final Judgment requires Defendants, at the acquirer's election, to enter into a transition services agreement, for a period of up to 24 months, for engineering, product support, data migration, information security, information technology, technology infrastructure, customer support, marketing, finance, accounting, and knowledge transfer related to the tax industry. Because the Divestiture Assets may be transferred to the acquirer during the 2021 tax filing season, the proposed Final Judgment allows certain transition services to extend beyond 12 months to give the acquirer sufficient time to integrate the Divested Assets into its existing business and to ensure customers can smoothly transition from Credit Karma Tax to the acquirer.

Under Paragraphs IV.M.2 and IV.M.4, for the 2021 tax filing season, Defendants must make the Credit Karma Tax website and mobile application available to consumers with the same level of functionality, availability, access, and customer support as Credit Karma provided during the year preceding the divestiture. This will ensure that Credit Karma Tax customers can continue to fully use these services when filing their 2020 tax returns, while providing the acquirer with the time necessary to integrate Credit Karma Tax into its own business and platform. For the 2021 tax filing season, Paragraph IV.M.1 of the proposed Final Judgment further requires Defendants to distribute acquirer-created marketing content to Credit Karma Tax

filers at least as frequently as Credit Karma sent such communications between October 2019 and the date of the divestiture.

C. Marketing and Steering Prohibitions

The proposed Final Judgment contains provisions that limit Defendants' ability to steer customers away from the acquirer's tax business to TurboTax while Defendants fulfill their transition services obligations to the acquirer. These provisions will help ensure that Defendants do not degrade the competitiveness of the divested business while they are providing the transitional services.

For example, during the 2021 tax filing season, the proposed Final Judgment limits Defendants' ability to market TurboTax on the Credit Karma website and mobile application to certain Credit Karma users. During this period, Defendants may market TurboTax only to Credit Karma users that have not previously filed with Credit Karma Tax or shown an intent to use Credit Karma Tax, and only if Defendants also market Credit Karma Tax with equal prominence. Defendants cannot market TurboTax on the Credit Karma platform to any other users during this period. Further, during the 2021 and 2022 tax filing seasons, under Paragraph IV.O.2, Defendants may not directly target previous Credit Karma Tax filers with e-mail marketing related to TurboTax.

Similarly, Paragraphs IV.M.5 and IV.N.2 of the proposed Final Judgment limit Defendants' ability to redirect certain individuals to TurboTax from the Credit Karma website or mobile application. During the 2021 tax season, Defendants must redirect any person from the Credit Karma website or mobile application to the Credit Karma Tax website if the person has indicated an intent to use Credit Karma Tax. Defendants may not direct any such person to the TurboTax website. During the 2022 tax season, the same restrictions on redirection apply but only with respect to previous Credit Karma Tax filers.

Finally, Paragraphs IV.P–Q require Defendants to delete any user data collected from Credit Karma Tax filers that could be used by Defendants to identify any users as Credit Karma Tax filers, except as necessary to provide transitional services to the acquirer.

D. Other Provisions

Section XII of the proposed Final Judgment prevents Defendants from reacquiring any part of or interest in the Divestiture Assets during the term of the Final Judgment. This section further prohibits Defendants from entering into or expanding any new joint venture, partnership, or collaboration with the acquirer related to DDIY tax preparation products during the term of the Final Judgment without prior written consent from the United States.

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

Paragraph XIV.B provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to restore competition that the United States alleges would otherwise be harmed by the transaction. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held

in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIV.C of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that 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, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XIV.C provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendants will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

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

Finally, Section XV of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its

entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and that continuation of the Final Judgment is no longer necessary or in the public interest.

E. Monitoring Trustee

Section X of the proposed Final Judgment provides that the United States may appoint a monitoring trustee with the power and authority to investigate and report on the Defendants' compliance with the terms of the Final Judgment and the Stipulation and Order. The monitoring trustee will not have any responsibility or obligation for the operation of the Defendants' businesses. The monitoring trustee will serve at Defendants' expense, on such terms and conditions as the United States approves, and Defendants must assist the trustee in fulfilling its obligations. The monitoring trustee will provide periodic reports to the United States and will serve until the later of the completion of the divestiture or the expiration of any transition services contract, unless the United States determines a shorter monitoring period is appropriate.

F. Divestiture Trustee

If Defendants do not accomplish the divestiture within the period prescribed in Paragraph IV.A of the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that Defendants will pay all costs and expenses of the trustee. The divestiture trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee will provide monthly reports to the United States setting forth his or her efforts to accomplish the divestiture. If the divestiture has not been accomplished within six months of the divestiture trustee's appointment, the divestiture trustee and the United States may make

recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to

the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court and in the *Federal Register*, unless the Court agrees that the United States instead may publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted to:

Robert A. Lepore,
Chief, Transportation, Energy, and Agriculture Section
Antitrust Division
U.S. Department of Justice
450 Fifth 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 order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Intuit's acquisition of Credit Karma. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the provision of DDIY tax preparation products in the United States. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

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

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

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

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

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

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

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

VIII. DETERMINATIVE DOCUMENTS

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

Dated: December 10, 2020

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

/s/
BRIAN HANNA

Attorney for the United States

U.S. Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 8000
Washington, DC 20530
Tel: (202) 598-8360
Email: brian.hanna2@usdoj.gov

CERTIFICATE OF SERVICE

I, Brian Hanna, hereby certify that on December 10, 2020, I caused a copy of the Competitive Impact Statement to be served on Defendants Intuit Inc. and Credit Karma, Inc., by mailing the documents electronically to their duly authorized legal representatives as follows:

For Defendant Intuit Inc.:

AMANDA P. REEVES
Latham & Watkins LLP
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004-1304
Tel.: (202) 637-2183
Email: Amanda.Reeves@LW.com

For Defendant Credit Karma, Inc.:

SCOTT ANDREW SHER
Wilson Sonsini Goodrich & Rosati LLP
1700 K Street NW, Fifth Floor
Washington, DC 20006
Tel: (202) 973-8822
Email: ssher@wsgr.com

/s/
BRIAN HANNA

Attorney for the United States

U.S. Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 8000
Washington, DC 20530
Tel: (202) 598-8360
Email: brian.hanna2@usdoj.gov