MERGER ANTITRUST LAW

Unit 5: Merger Antitrust Settlements

Class 5

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Justice Department Issues Modernized Merger Remedies Manual

Merger Remedies Manual Reaffirms Antitrust Division's Commitment to Effective Structural Relief and Reflects Renewed Focus on Enforcing Consent Decree Obligations

The Department of Justice issued today the Merger Remedies Manual, which provides a framework for the Antitrust Division to structure and implement appropriate relief that preserves competition in merger cases. The Merger Remedies Manual updates the Antitrust Division's 2004 Policy Guide to Merger Remedies.

"The modernized Merger Remedies Manual reflects our renewed focus on enforcing obligations in consent decrees and reaffirms the Division's commitment to effective structural relief," said Assistant Attorney General Makan Delrahim of the Department of Justice's Antitrust Division. "It will provide greater transparency and predictability regarding the Division's approach to remedying a proposed merger's competitive harm."

The Merger Remedies Manual is the first revision of the Antitrust Division's remedies manual in nearly a decade and reflects important changes in the merger landscape over that time. The modernized document includes new sections explaining the approach that the division takes with consummated transactions and upfront buyers. In addition, the Merger Remedies Manual outlines certain "red flags" that in the division's experience increase the risk that a remedy will not preserve competition effectively. Finally, the manual reflects important principles implemented in recent Antitrust Division consent decrees, such as when it may be appropriate to name the divestiture buyer as a party to the consent decree or when it may be appropriate that the divestiture include assets beyond the overlapping relevant markets.

The manual reflects the key elements of the Division's approach to merger remedies.

Commitment to Effective Structural Relief. The Merger Remedies Manual emphasizes that structural remedies are strongly preferred in horizontal and vertical merger cases because they are clean and certain, effective, and avoid ongoing government regulation of the market. The manual also describes the limited circumstances in which conduct remedies may be appropriate: (1) to facilitate structural relief, or (2) if there are significant efficiencies that would be lost through a structural divestiture, if the conduct remedy would completely cure the competitive harm, and if it can be enforced effectively.

Renewed Focus on Enforcing Consent Decree Obligations. The principles outlined in the Merger Remedies Manual describe how the Antitrust Division will ensure that consent decrees are fully implemented. The manual describes several standard consent decree provisions designed to improve the effectiveness of consent decrees and the Antitrust Division's ability to enforce them. In addition, the Manual highlights the role of the newly created Office of Decree Enforcement and Compliance, which oversees the Antitrust Division's decree compliance efforts.

The Merger Remedies Manual also outlines the following key principles that apply to structuring and implementing remedies in all the Antitrust Division's merger cases, both horizontal and vertical:

- Remedies must preserve competition.
- Remedies should not create ongoing government regulation of the market.
- Temporary relief should not be used to remedy persistent competitive harm.
- The remedy should preserve competition, not protect competitors.
- The risk of a failed remedy should fall on the merging parties, not on consumers.
- The remedy must be enforceable.

The Merger Remedies Manual is the culmination of a process first announced by Assistant Attorney General Delrahim in September 2018, when the division withdrew the 2011 Policy Guide to Merger Remedies and announced that the 2004 Policy Guide to Merger Remedies would be in effect pending the release of an updated policy.

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MERGER REMEDIES MANUAL

ANTITRUST DIVISION
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I. Overview

The Antitrust Division ("Division") is charged with enforcing the antitrust laws, including Section 7 of the Clayton Act, 15 U.S.C. § 18, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2.[1] It is the Division's mission to protect American consumers from mergers and acquisitions ("mergers") that may substantially lessen competition.

Most mergers are not anticompetitive and may benefit consumers. Before seeking a remedy, there should be a sound basis for believing that the merger would violate Section 7 of the Clayton Act and that the resulting harm is sufficient to justify remedial action.[2] The Division should not seek remedies that are unnecessary to prevent anticompetitive effects because that could exceed its law enforcement function, unjustifiably restrict companies' ability to compete, and raise costs to consumers. Consequently, even though a party may be willing to settle early in an investigation, the Division must have sufficient information to be satisfied that there is a sound basis for believing that a violation would otherwise occur before agreeing to any settlement.

If the Division has concluded that a merger may substantially lessen competition, it can address the problem in several ways. The Division may seek an injunction that would prevent the parties from consummating the transaction. Parties frequently seek to avoid litigation by offering to cure the Division's concerns, and in those cases the Division may choose, instead, to agree to a settlement (a consent decree[3]) that allows the merger to proceed with modifications that preserve or restore competition.[4]

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[1] The Division is authorized to challenge mergers under Section 15 of the Clayton Act, 15 U.S.C. § 25, and Section 4 of the Sherman Act, 15 U.S.C. § 4.

[2] This manual has no force or effect of law. It does not constitute final agency action, has no legally binding effect on persons or entities outside the federal government, and may be rescinded or modified in the Division's complete discretion. The scope of this Manual is limited to remedies addressing anticompetitive mergers. Conduct that violates the antitrust laws may raise separate and unique considerations with respect to remedies.

[3] A consent decree is an agreement between the Division and defendants that is filed publicly in federal district court and, upon entry, becomes a binding court order. With a fix-it-first remedy, in contrast, the parties cure the Division's concerns upon or before consummation of the transaction. There is no complaint or other court filing. *See infra* Section III.C. Likewise, certain bank mergers can be resolved without a consent decree. *See, e.g.*, U.S. Dep't. of Justice, Antitrust Div., Justice Department Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger (Nov. 8, 2019), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-bbt-and-suntrust-proceed-merger.

[4] The Division employs the criteria set forth in this manual when it evaluates the adequacy of a remedy and exercises its prosecutorial discretion in deciding whether to accept a settlement. As required by the Tunney Act, any proposed consent judgment the Division accepts must be filed in federal district court. *See* 15 U.S.C. § 16. After a period of public comment, the court may approve the proposed settlement upon finding that it is in the public interest. As part of this public-interest inquiry, the scope of the Court's review is limited to ensuring that the proposed consent judgment is a "reasonably adequate remed[y] for the alleged harm" in the complaint. *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152-53 (D.D.C. 2016) (quoting United States v. Newpage Holdings, Inc., 2015 WL 9982691, at *7). In contrast to the limited public-interest inquiry under the Tunney Act, the Division's prosecutorial discretion encompasses a broader set of considerations, including the facts developed in the investigation, the judgment of the prosecuting attorneys, and the allocation of the Division's limited resources.

The purpose of this manual is to provide Division attorneys and economists with a framework for structuring and implementing appropriate relief short of a full-stop injunction in merger cases. This manual updates the Division's 2004 Policy Guide to Merger Remedies.[5] It focuses on the remedies the Division may consider, and is intended to ensure that those remedies are based on sound legal and economic principles and are closely related to the identified competitive harm. The manual also sets forth issues that may arise in connection with different types of relief, and offers Division attorneys and economists guidance on how to resolve them.

Any remedy must be based on sound legal and economic principles and be related to the identified competitive harm. Tailoring the remedy to address the violation is the best way to ensure that the relief obtained cures the competitive harm.[6] Before proposing a remedy to an anticompetitive merger, the Division should satisfy itself that there is a logical nexus between the remedy and the alleged violation—that the remedy both cures the competitive harm and flows from the theory of competitive harm. Effective remedies preserve the efficiencies created by a merger, to the extent possible, while preserving competitive markets.

The Division will review proposed remedies before accepting them. If parties propose a remedy, the Division will need adequate time and information to evaluate it. If the parties propose a remedy after a complaint challenging the transaction is filed, the Division may seek to bifurcate the proceeding into a liability phase and a remedy phase. The Division will investigate post-litigation remedies.

While it is useful to use past decrees as a starting point, it is inappropriate to include a provision in a decree merely because a similar provision was included in previous decrees, particularly where there has been no clear articulation of the purpose behind the inclusion of that provision in the decree at issue. There must be a nexus between the proposed transaction, the nature of the competitive harm, and the proposed remedial provisions.

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[5] The Division withdrew the 2011 Policy Guide to Merger Remedies on September 25, 2018, and announced that the 2004 Guide would be in effect pending the release of an updated policy. *See* Makan Delrahim, Assistant Attorney General, U.S. Dep't. of Justice, Antitrust Div., It Takes Two: Modernizing the Merger Review Process, Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium 12 (Sept. 25, 2018), https://www.justice.gov/opa/speech/file/1096326/download.

[6] Ford Motor Co. v. United States, 405 U.S. 562, 575 (1972) (In a Section 7 action, relief "necessarily must 'fit the exigencies of the particular case.'" (quoting International Salt Co. v. United States, 332 U.S. 392, 401 (1947))); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 133 (1969); United States v. United States Gypsum Co., 340 U.S. 76, 89 (1950) ("In resolving doubts as to the desirability of including provisions designed to restore future freedom of trade, courts should give weight to . . . the circumstances under which the illegal acts occur."); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 726 (1944) ("The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions."); *cf.* Yamaha Motor Co. v. FTC, 657 F.2d 971, 984 (8th Cir. 1981) (Relief barring certain vertical restrictions "goes beyond any reasonable relationship to the violations found."). *See also* Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1228 (D.C. Cir. 2004) (In a Section 2 case, "the court carefully considered the 'causal connection' between Microsoft's anticompetitive conduct and its dominance of the market . . . ." (quoting Microsoft Corp., 253 F.3d 34, 106)); United States v. Microsoft Corp., 253 F.3d 34, 105-07 (D.C. Cir. 2001) (Relief "should be tailored to fit the wrong creating the occasion for the remedy."); United States v. Microsoft Corp., 231 F. Supp. 2d 144, 154, 202 (D.D.C. 2002), *aff'd sub nom,* 373 F.3d 1199 (D.C. Cir. 2004).

Once the Division has accepted a remedy and entered into a consent decree, the Division will commit the time and effort necessary to ensure full compliance with the decree. It is contrary to the Division's law enforcement responsibilities to obtain a remedy and then not enforce it. The Division's work is not over until the remedies mandated in its consent decrees have been fully implemented. This requires, in the first instance, that decrees be drafted with sufficient reporting and access requirements to keep the Division apprised of how the decree is being implemented, and then a continuing commitment of Division resources to decree compliance and enforcement. Responsibility for enforcing all of the Division's outstanding judgments lies with the Office of the Chief Legal Advisor (specifically, with the Office of Decree Enforcement and Compliance), as well as the Division's civil litigating sections—to which the judgments are assigned according to the current allocation of industries or commodities among those sections—with assistance from a criminal section in criminal contempt cases.[7]

II. Principles

The following principles apply to structuring and implementing remedies in all Division merger cases, both horizontal and vertical:

- **Remedies Must Preserve Competition.**[8] Once the Division has determined that the merger is anticompetitive, the Division will insist on a remedy that resolves the competitive problem, irrespective of whether the transaction is horizontal or vertical. This assessment necessarily will be fact-intensive. It normally will require determining (a) what competitive harm the violation has caused or likely will cause and (b) how the proposed relief will effectively remedy the competitive harm. Only after these determinations are made can the Division decide whether the proposed remedy will effectively redress the violation and, just as importantly, be no more intrusive than necessary to cure the competitive harm. Accepting remedies without analyzing whether they are sufficient and necessary to redress the violation would be abdicating the Division's responsibility to protect competition and American consumers.

  Although the remedy always should be sufficient to redress the antitrust violation, the purpose of a remedy is not to enhance premerger competition but to preserve it. Preserving competition is the "key to the whole question of an antitrust remedy,"[9] and preserving competition is the only appropriate goal with respect to crafting merger remedies. Preserving competition requires replacing the competitive intensity that would be lost as a result of the merger rather than focusing narrowly on returning to

[7] *See infra* Section VII.C for a discussion of civil and criminal contempt proceedings.

[8] For simplicity of exposition, this manual uses the phrase "preserving competition" throughout, which should be understood to include the concept of restoring competition, depending on the specific facts of the transaction and its proposed remedy. For example, in the case of consummated mergers, the Division will seek a remedy that will effectively restore competition to the relevant market, including, when appropriate, unwinding a transaction.

[9] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

premerger HHI levels.[10] For example, assessing the competitive strength of a firm purchasing divested assets requires more analysis than simply attributing to this purchaser past sales associated with those assets and calculating HHIs.

- **Remedies Should Not Create Ongoing Government Regulation of the Market.** Merger remedies take two basic forms: one addresses the *structure* of the market, the other the *conduct* of the merged firm.[11] Structural remedies generally will involve the sale of businesses or assets by the merging firms. A conduct remedy usually entails injunctive provisions that would, in effect, regulate the merged firm's post-merger business conduct or pricing authority. Conduct remedies substitute central decision making for the free market. They may restrain potentially procompetitive behavior, prevent a firm from responding efficiently to changing market conditions, and require the merged firm to ignore the profit-maximizing incentives inherent in its integrated structure.[12] Moreover, the longer a conduct remedy is in effect, the less likely it will be well-tailored to remedy the competitive harm in light of changing market conditions. Conduct remedies typically are difficult to craft and enforce. For these reasons, conduct remedies are inappropriate except in very narrow circumstances. *See infra* Section III.B.

- **Temporary Relief Should Not Be Used to Remedy Persistent Competitive Harm.** A merger indefinitely changes the incentives of the merged firm and the structure of the market. Structural remedies designed to preserve a competitive market similarly are in effect indefinitely. A consent decree temporarily regulating conduct, on the other hand, does not effectively redress persistent competitive harm resulting from an indefinite change in market structure. Regulating conduct is inadequate to remedy persistent harm from a loss in competition.

- **The Remedy Should Preserve Competition, Not Protect Competitors.** Because the goal is to preserve competition—rather than to pick winners and losers—consent

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[10] *See* Fed. Trade Comm'n v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015) ("'Restoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels.'" (quoting the Division's 2004 Policy Guide to Merger Remedies)); *see also* United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017).

[11] In appropriate circumstances, the Division may consider seeking disgorgement in consummated merger challenges instead of or in addition to unwinding the transaction. In particular, where available remedies are limited such that the defendant otherwise would be able to retain its unlawful profits, the Division may seek disgorgement of those profits. *See* Competitive Impact Statement at 10-12, United States v. Twin America, No. 1:12-cv-08989 (S.D.N.Y. 2015) ([T]his case involves a consummated joint venture that resulted in actual and substantial consumer harm. . . . By awarding disgorgement of Defendants' ill-gotten gain, the proposed Final Judgment will prevent Defendants from being unjustly enriched by their conduct and deter Defendants and others from engaging in similar conduct in the future."). Previously, the Division has sought and obtained disgorgement in an action brought under Section 1 of the Sherman Act. United States v. Keyspan Corp., 2011 WL 338037 (S.D.N.Y. 2011).

[12] Makan Delrahim, Assistant Attorney General, U.S. Dep't. of Justice, Antitrust Div., Antitrust and Deregulation, Remarks as Prepared for Delivery at the American Bar Association Antitrust Section Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/file/1012086/download.

decree provisions should be designed to preserve competition rather than protect or favor particular competitors.[13]

- **The Risk of a Failed Remedy Should Fall on the Parties, Not on Consumers**. Remedies should be designed to limit the risk of failure as much as possible. To the extent any risk of failure remains, that risk should be borne by the parties, who seek to consummate a merger that would otherwise violate Section 7. Consumers should not bear the risk of a failed remedy.

- **The Remedy Must Be Enforceable.** A remedy is inadequate if it cannot be effectively enforced.[14] Remedial provisions that are too vague to be enforced or that could be construed in such a manner as to fall short of their intended purpose can result in inadequate relief, which would render ineffective the enforcement effort that went into investigating the transaction and obtaining the decree.

  A defendant will scrupulously obey a decree only when the decree's meaning is clear, and when the defendant and its agents know that they face consequences if they do not comply with the decree. Decree provisions should be as clear and straightforward as possible, always focusing on how a judge not privy to the settlement negotiations is likely to construe those provisions at a later time.[15] Likewise, care must be taken to avoid vague language or potential loopholes that might lead to attempted circumvention of the decree. Decrees should include provisions designed to facilitate the Division's future enforcement of the decree.

  Similarly, a decree that fails to bind a person or entity necessary to implementing the remedy may be ineffective.[16] As a result, attention must be given to identifying those persons who must be bound by the decree to make all of the proposed relief effective

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[13] *See, e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) ("[I]t is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458-59 (1993); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990); Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 116-17 (1986); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); Massachusetts v. Microsoft Corp., 373 F.3d at 1211, 1230; United States v. Microsoft Corp., 253 F.3d at 58.

[14] *See, e.g.*, New York v. Microsoft Corp., 224 F. Supp. 2d 76, 137 (D.D.C. 2002), *aff'd sub nom*. Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004) ("Plaintiffs' definition is vague and ambiguous, rendering compliance with the terms of Plaintiffs' remedy which are reliant on this definition to be largely unenforceable.").

[15] *See* New York v. Microsoft Corp., 224 F. Supp. 2d at 100 ("Moreover, the case law counsels that the remedial decree should be 'as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know [ ] their duties and unintended contempts may not occur.'" (quoting International Salt Co. v. United States, 332 U.S. 392, 400 (1947))).

[16] *Cf.* Stipulation and Order, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. 2019) (stipulating to the joinder of DISH, the divestiture buyer, as a party to the action); Stipulation and Order, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (noting that the government, Bayer, Monsanto, and BASF stipulated to the joinder of BASF, the divestiture buyer, as a party to the action for purposes of the divestiture); Stipulation and Order, United States v. Anheuser Busch InBEV SA/NV, No. 1:13-cv-00127 (D.D.C. 2013) (stipulating to the joinder of Constellation, the divestiture buyer, as a party to the action).

and to ensuring that the judgment contains whatever provisions are necessary to ensure fulfillment of their responsibilities.

III. Structuring the Remedy

The goal of a divestiture is to ensure that the purchaser[17] possesses both the means and the incentive to maintain the level of premerger competition in the market[18] of concern.[19]

A. A Divestiture Must Include All Assets Necessary for the Purchaser to Be an Effective, Long-Term Competitor

Any divestiture must include the assets necessary to ensure the efficient current and future production and distribution of the relevant product or service and thereby preserve the competition that would have been lost as a result of the merger. A structural remedy requires a clear identification of the assets a competitor needs to compete effectively in a timely fashion and over the long term. The necessary assets may be tangible (factories capable of producing automobiles or raw materials used in the production of some other final good) or intangible (patents, copyrights, trademarks, or rights to facilities such as airport gates or landing slots). Any divestiture should address whatever obstacles that, absent the divestiture, lead to the conclusion that a competitor would not be able to discipline a merger-generated increase in market power.[20] For example, if the divestiture buyer lacks a distribution system or necessary know-how, effective relief may require that the divestiture include such assets. Effective relief may also require the divestiture of "pipeline" products or R&D necessary to ensure the future competitive significance of the divested assets.[21] That is, the divestiture assets must enable the purchaser to compete effectively[22] and maintain the premerger level of competition, and should

[17] The use of "purchaser" in this manual refers to the third-party purchaser of the divested assets from the merging firms.

[18] In this manual the singular term "market" should be construed to include both the singular and plural.

[19] *See* Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'. . . Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.") (citation omitted).

[20] S*ee, e.g.*, White Consol. Indust., Inc. v. Whirlpool Corp., 612 F. Supp. 1009 (N.D. Ohio 1985), *vacated on other grounds*, 619 F. Supp. 1022 (N.D. Ohio 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986) (court analyzes sufficiency of a proposed divestiture package to restore effective competition); Fed. Trade Comm'n v. Sysco Corporation, 113 F. Supp. 3d 1, 72-8 (D.D.C. 2015) (analyzing the proposed divestiture's ability to preserve competition in the relevant market).

[21] *See, e.g.*, Competitive Impact Statement at 17, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) ("[B]ecause 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.").

[22] *See infra* Section IV.B for a discussion of purchaser approval.

be sufficiently comprehensive that the purchaser will use them in the relevant market and be unlikely to liquidate or redeploy them.[23]

If, for example, a potential entrant or small incumbent would be constrained by the time or the incentive necessary to construct production facilities, then sufficient production facilities should be part of the divestiture package. If the assets being combined through the merger are valuable brand names or other intangible rights, then the divestiture package should include a brand or a license that enables its purchaser to compete quickly and effectively, both in the short term and as the companies continue to innovate.[24] In markets where an installed base of customers is required in order to operate at an effective scale, the divested assets should either convey an installed base of customers to the purchaser or quickly enable the purchaser to obtain an installed customer base.

A critical asset may be intangible, such as when firms with alternative patent rights for producing the same final product are merging.[25] In those cases structural relief must provide one or more purchasers with rights to that asset, either by sale to a different owner or through a fully paid-up license.[26]

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[23] *See* Fed. Trade Comm'n v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015) (quoting the Division's 2004 and 2011 Policy Guides to Merger Remedies); Chemetron Corp. v. Crane Co., 1977-2 Trade Cas. ¶ 61717 at 72930, 1977 WL 1491 (N.D. Ill. 1977). In a merger between firm A and firm B, the Division generally would be indifferent as to which firm's assets are divested, despite possible qualitative differences between the firms' assets, so long as the divestiture preserves competition at the premerger level. However, if the divestiture of one firm's assets would not preserve competition, then the other firm's assets must be divested. For example, if firm A's productive assets can operate efficiently only in combination with other assets of the firm, while firm B's productive assets are free standing, the Division likely would require the divestiture of firm B's assets.

[24] *See* Competitive Impact Statement at 14, United States v. Dairy Farmers of America, Inc., No. 1:20-cv-02658, (E.D. Ill. 2020) (noting that the purchasers will receive a transitional license for the TruMoo chocolate milk brand and a perpetual license to the intellectual property, product formulas, technology, and know-how for TruMoo because "consumers value the taste of the TruMoo milk and the divestiture buyers will benefit from the ability to perpetually offer chocolate milk with the same taste").

[25] A critical asset is one that is necessary for the purchaser to be an effective long-term competitor in the market. When a patent covers the right to compete in multiple product or geographic markets, yet the merger adversely affects competition in only a subset of these markets, the Division will insist only on the sale or license of rights necessary to maintain competition in the affected markets. In some cases, this may require that the purchaser or licensee obtain the rights to produce and sell only the relevant product. In other circumstances, it may be necessary to give the purchaser or licensee the right to produce and sell other products (or use other processes), where doing so permits the realization of scale and scope economies necessary to compete effectively in the relevant market.

[26] United States v. Nat'l Lead Co., 332 U.S. 319, 348 (1947) (courts may order mandatory patent licensing as relief in antitrust cases where necessary to restore competition). When the divestiture involves licensing, the Division will generally insist on fully paid-up licenses rather than running royalties for two reasons. First, running royalties require a continued relationship between the merged firm and the purchaser, which could soften competition between them. The result will be less competition than the two merging firms previously had been providing. Second, running royalty payments, even if they are less expensive to the licensee over the lifetime of the license, add a cost to the licensee's production and sale of incremental units, tending to increase the licensee's profit-maximizing price. The Division may consider the use of running royalties, however, if (a) no deal otherwise would be struck between the merged firm and the licensee (perhaps because the firms differ greatly in their estimates of future revenue streams under the license), (b) blocking the deal entirely likely would sacrifice significant merger-specific efficiencies worth preserving, and (c) the Division is persuaded that the running royalties will completely cure the

In addition, certain intangible assets likely should be conveyed whenever tangible assets are divested. These may include intangible assets that provide valuable information to the purchaser—for example, documents and computer records providing the purchaser with customer information or supply or production information, research results, computer software, and market evaluations. Other intangible assets that likely should be conveyed include those pertaining to patents, copyrights, trademarks, other IP rights, licenses, or access to key intangible inputs (for example, access to a particular range of broadcast spectrum) that are necessary to allow for the most productive use of any tangible assets being divested.[27]

The package of assets to be divested must not only allow a purchaser to preserve the competition that would have been lost due to the merger, but also provide it with the *incentive* to do so.[28] Unless the divested assets are sufficient for the purchaser to become an effective and efficient competitor, the purchaser may have a greater incentive to deploy them outside the relevant market. In addition, there should be no *disincentives* associated with shifting the divested assets or employees to the purchaser. For example, employees should not suffer a financial disadvantage when they leave the seller to become employed by the purchaser.

In some circumstances there may be a trade-off between requiring a somewhat smaller, less valuable package of divestiture assets and accepting greater risk that the remedy will prove inadequate, or demanding a more substantial divestiture in order to be confident that post-merger competition will be preserved. Because consumers should not bear the risk of a failed remedy and the Division must be confident that the merger will not harm competition, the Division's preference is to demand a remedy that is sufficiently robust to provide this confidence. Accordingly, it also may be necessary for the parties to warrant that the divestiture assets are sufficient for the divestiture buyer to maintain the viability and competitiveness of the divested businesses.[29]

1. Divestiture of an Existing Standalone Business Is Preferred

To best achieve the goal of preserving the competition that would have been lost as a result of the merger, the Division has a preference for requiring the divestiture of an existing standalone business, because it has demonstrated success competing in the relevant market.[30] In

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competitive harm. Also, the Division generally will not require royalty free licenses since parties ordinarily should be compensated for the use or sale of their property, intangible as well as tangible. *See id.* at 349 ("[T]o reduce all royalties automatically to a total of zero, regardless of their nature and regardless of their number, appears, on its face, to be inequitable without special proof to support such a conclusion."); Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1231 (D.C. Cir. 2004).

[27] If tangible assets are not being divested because they already are in the hands of the purchaser, intangible assets that are necessary to allow for the most productive use of those tangible assets may need to be conveyed.

[28] *See infra* Section IV.B. for a further discussion of the characteristics of an acceptable purchaser.

[29] *See, e.g.*, Final Judgment at 21, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018).

[30] The Federal Trade Commission's study of merger remedies found that divestitures of ongoing businesses succeeded at higher rates than divestitures of selected assets. FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006-2012, A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-

addition, an existing standalone business typically possesses all of the physical assets, personnel, customer lists, information systems, intangible assets, and management infrastructure necessary for the efficient production and distribution of the relevant product.[31] Parties proposing to divest a standalone business should be prepared to show that the business to be divested includes all of the components necessary to operate such business, that it operates or has in the recent past operated as a standalone business, and that it can be sold to a divestiture buyer who will be able to preserve competition. Where an existing business lacks these characteristics, additional assets from the merging firms will need to be included in the divestiture package.[32]

2. Divestiture of More than an Existing Standalone Business May Be Required When It Is Necessary to Preserve Competition

Divesting an existing business, even if the divestiture includes all of the production and marketing assets responsible for producing and selling the relevant product, will not always give the purchaser both the ability and incentive to preserve the competition threatened by the merger. Where divestiture of an existing standalone business is insufficient to resolve the competitive issues raised by the proposed merger and preserve competition, additional assets from the merging firms will need to be included in the divestiture package. For example, in some industries, it is difficult to compete without offering a "full line" of products.[33] In such cases, the Division may seek to include a full line of products in the divestiture package, even when the antitrust concern relates to only a subset of those products.[34] Similarly, to address competitive problems in a United States market, divestiture of a world-wide business or assets outside of the United States nevertheless may be required, including when necessary to give the purchaser the scale and scope needed to preserve competition.[35] More generally, integrated firms can provide

economics/p143100_ftc_merger_remedies_2006-2012.pdf [hereinafter FTC Merger Remedies Report]. In some cases, an existing business may be a single plant that produces and sells the relevant product; in other cases, it may be an entire division.

[31] *See* United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017).

[32] *See infra* Section III.A.2.

[33] *See, e.g.*, Competitive Impact Statement at 20, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (explaining that divestiture of Bayer's R&D programs associated with wheat was required: "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 divestiture of Bayer's wheat programs will] preserve the scope efficiencies that Bayer enjoys today by keeping these businesses together.").

[34] *See, e.g.*, Competitive Impact Statement at 11, United States v. Transdigm Group, Inc., No. 1:17-cv-02735 (D.D.C. 2017) (proposed remedy required divestiture of business unit developing and manufacturing commercial aircraft passenger restraints, including plants in Florida and Germany, to remedy competitive problems in specific types of restraints).

[35] *See* Dep't of Justice & Fed. Trade Comm'n, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION § 5.1.5 (2017) ("An Agency will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers and is consistent with the Agency's international comity analysis.") (citations omitted), https://www.justice.gov/atr/internationalguidelines/download [hereinafter International Guidelines]; Polypore Int'l, Inc. v. FTC, 686 F.3d 1208, 1218-19 (11th Cir. 2012).

scale and scope economies that a purchaser may not be able to achieve by obtaining only those assets related to the relevant product.[36] When the evidence suggests that this is likely to be the case (such as where only large integrated firms manage to remain viable in the marketplace), suing to block the entire transaction rather than accepting a divestiture may be the only effective solution.

3. An Asset Carve-Out Consisting of Less than an Existing Standalone Business May Be Considered in Limited Circumstances

The Division should scrutinize critically a merging firm's proposal to sell less than the entirety of an existing standalone business. The merging firm may have an incentive to divest fewer assets than are required for the purchaser to compete effectively going forward. Further, at the right price, a purchaser may be willing to purchase and monetize these assets even if they are insufficient to produce competition at the premerger level. A purchaser's interests are not necessarily identical to those of the consumer, and so long as the divested assets produce something of value to the purchaser (possibly providing it with the ability to earn profits in some other market or enabling it to produce weak or short-term competition in the relevant market), it may be willing to buy them at a discounted price regardless of whether they remedy the competitive concerns.

An asset carve-out consisting of less than an existing standalone business may be considered if: (1) there is no existing standalone business smaller than either of the merging firms and a set of acceptable assets can be assembled from one of the merging firms, or (2) certain of the entity's assets are already in the possession of, or readily obtainable in a competitive market by, the divestiture purchaser. As discussed above, the Division will scrutinize these divestitures carefully, and any risk of failure should be borne by the merging parties.[37] If the Division is not satisfied that the parties have addressed the risk of a failed remedy, a more appropriate course may be to sue to block the transaction.

The Division also may approve the divestiture of less than an existing standalone business if the evidence clearly demonstrates that the purchaser does not want or need some of the entity's assets, for example because the purchaser already is in the possession of, or can readily obtain in a competitive market, similar assets, such as non-specialized services like general accounting or computer programming. For example, if the likely purchaser already has its own distribution system, then insisting that a comparable distribution system be included in the divestiture package may create unnecessary and costly redundancy. If the potential purchaser

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[36] *See, e.g.*, Modified Final Judgment, United States v. Parker-Hannifin Corp., No. 1:17- cv- 01384 (D. Del. 2017 (divestiture of international assets necessary to remedy harm in U.S. market); Competitive Impact Statement at 17, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) ("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").

[37] The Division will pay close attention to asset carve-outs where certain customer contracts are divested to the purchaser and others are retained by the seller. In such cases, the Division may require the waiver of any contractual prohibitions on the purchaser soliciting customers during the term of those contracts, or may require the seller to permit customers to switch to the purchaser without penalty. *See, e.g.*, Final Judgment at 11, United States v. CenturyLink, Inc., No. 1:17-cv-02028 (D.D.C. 2017) (requiring Defendants to release customers from contractual obligations and otherwise applicable termination fees).

is given the option of purchasing such assets and declines to do so, divesting only the assets required to design and build the relevant product efficiently may be appropriate. Of course, in those circumstances, the Division would need to know the purchaser's identity in advance and likely would require an upfront buyer.[38]

There may be situations where there is no obvious existing standalone business or collection of assets from a single firm to divest. Although disfavored, in limited circumstances, it may be possible to assemble the full set of assets necessary to preserve competition from both of the merging firms. The Division regards such "mix and match" asset packages with skepticism. The Division will not accept mix-and-match divestitures when there is reason to believe that they will not effectively preserve competition, such as when interoperability or brand are important. Because the assets in a "mix and match" divestiture package are not being operated by the same owner as an existing business, they likely will require some reconfiguration by the buyer, and it is more difficult to determine whether the selected assets are appropriate and can be operated efficiently together. The parties must demonstrate to the Division's satisfaction that the divestiture of these assets will create a viable entity that will preserve competition. In such cases, the Division likely will require an upfront buyer to ensure that the package gives the buyer everything it needs to preserve existing competition.

4. All Assets to Be Divested Must Be Specified in the Consent Decree

Division policy requires that any proposed consent decree include a precise description of the package of assets that, when divested, will resolve the Division's competitive concerns by maintaining competition at premerger levels.[39] The package of assets typically should comprise all assets owned by or used to operate the divested business. If the parties propose to exclude any such assets from the divestiture package, they must demonstrate that the absence of such assets will not affect the purchaser's ability and incentive to maintain the level of premerger competition in the market of concern. The consent decree ordinarily will identify a single set of divestiture assets. In rare circumstances, the decree may include a description of more than one set of assets the divestiture of which would be acceptable to the Division, with the defendant permitted to sell any of the described asset packages during the initial divestiture period.[40] If, at any time after the decree is filed, the Division and the defendant agree that the sale of an asset package not described in the consent decree will resolve the competitive concerns raised by the proposed transaction, the consent decree must be modified to describe this new divestiture

[38] In circumstances in which there are many potential purchasers that possess or could acquire in a competitive market the assets necessary to effectively preserve competition despite purchasing less than an existing standalone business, the Division may not need to know the identity of the purchaser in advance. The Division also might approve divestiture of less than an existing standalone business in matters involving industries where there has been a substantial history of success with divestitures of this kind. *See, e.g.*, Competitive Impact Statement at 8, United States v. CenturyLink, Inc., No. 1:17-cv-02028 (D.D.C. 2017) (explaining that the assets to be divested "are attractive assets that should draw suitable acquirers with sufficient expertise to accomplish the divestitures expeditiously").

[39] Nothing, however, prohibits the merged firm from selling *additional* assets not specified in the decree.

[40] The decree may specify that a selling trustee have similar flexibility to sell the alternative sets of assets or may require the trustee to sell only one of the described sets of assets.

package and the reasons this new divestiture is appropriate must be set forth in the moving papers.[41]

In rare cases, it may be appropriate to permit flexibility in the specification of the divestiture assets. Although the appropriate identification of the divestiture assets is sometimes obvious, either due to the nature of the business or the homogeneity of potential purchasers, this is not always the case. When an upfront buyer is not required, the circumstances of potential bidders may vary in ways that affect the scope of the assets each would need to be an effective competitor. For example, one potential purchaser might require certain distribution assets and another may not. In other cases, the Division may be indifferent between alternative sets of divestiture assets—for example, a manufacturing facility owned by merging firm A versus a similar facility owned by merging firm B, or even differently configured sets of assets, either of which would enable a purchaser to maintain the premerger level of competition in the affected market. The Division recognizes the need for flexibility in defining the divestiture assets in such cases.

5. Permitting the Merged Firm to Retain Access to Divested Intangible Assets May Present a Competitive Risk

When the remedy requires divestiture of intangible assets, often an issue arises as to whether the merged firm can retain rights to these assets, such as the right to operate under the divested patent. Because intangible assets have the peculiar economic property that use of the asset by one party need not preclude unlimited use of that same asset by others, there may be no cost to allowing the seller to retain the same rights as the purchaser. In such cases, the Division may require the merging parties to divest the intangible asset, and then require the purchaser to license it back to the merged firm.[42] Doing so will ensure the purchaser's independence from the merged firm, and will ensure that the purchaser has the same incentive to deploy or invest in the asset that the seller did.

Permitting the merged firm to retain access to critical intangible assets, however, may also present a competitive risk. Because the purchaser of the intangible assets will not have the right to exclude all others (specifically, the merged firm), it may be more difficult for it to differentiate its product from its rivals' and therefore it may be a lesser competitive force in the market. Also, if the purchaser is required to share rights to an intangible asset (like a patent or a brand name), it may not engage in competitive conduct (including investments and marketing) that it might have engaged in otherwise. For example, the purchaser may face greater risks of misappropriation by its rival of future "add on" investments or marketing activities. Where the purchaser is unable effectively to differentiate its offering from that of the merged firm, this may

[41] A minor deletion of assets from the divestiture package, however, may not require a decree modification.

[42] *See, e.g.*, Final Judgment, United States v. Thales S.A., No. 1:19-cv-00569 (D.D.C. 2019) (dividing certain "shared" intangible assets, some of which were to be sold with the divested assets and licensed back to Thales, while others were required to be licensed for use with the divested assets); Final Judgment, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (requiring Bayer to divest intangible assets related to its digital agriculture business, and requiring BASF, the divestiture buyer, to license certain intangible assets back to the merged firm "for the limited purpose of allowing Bayer to sell outside North America" certain digital agriculture products).

weaken its ability and incentive to compete as aggressively as the two formerly independent firms had been competing premerger. Moreover, where multiple firms have rights to the same trademark or copyright, *none* may have the proper incentive to promote and maintain the quality and reputation of the brand. Finally, this type of ongoing entanglement may create close and persistent ties between the merged firm and the purchaser that may serve to enhance the flow of information or align incentives, which may facilitate collusion. In these circumstances, the Division is likely to conclude that permitting the merged firm to retain rights to critical intangible assets will hinder the purchaser from preserving competition and, accordingly, the Division will require that the merged firm relinquish all rights to the critical intangible assets.[43]

There may be other circumstances, however, when the merged firm needs to retain rights to the intangible assets to achieve demonstrable efficiencies—which are not otherwise obtainable through an efficient licensing agreement with the purchaser following divestiture—and a non-exclusive license is sufficient to preserve competition and assure the purchaser's future viability and competitiveness.[44] Under these circumstances, the merged firm may be permitted to retain certain rights to the critical intangible assets and may only be required to provide the purchaser with a non-exclusive license.[45]

B. Structural Relief Is the Appropriate Remedy for Both Horizontal and Vertical Mergers

Structural remedies are strongly preferred in horizontal and vertical merger cases because they are clean and certain, effective, and avoid ongoing government entanglement in the market. A carefully crafted divestiture decree is "simple, relatively easy to administer, and sure" to preserve competition.[46] Almost all merger remedies are structural. There are limited circumstances, however, when conduct remedies may be appropriate.

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[43] For example, the Division required the divestiture of rights to trade dress and other intellectual property relating to certain brands of hair care products in *United States v. Unilever N.V.* Competitive Impact Statement at 11, United States v. Unilever N.V., 1:11-cv-00858 (D.D.C. 2011).

[44] These conditions are more likely to be satisfied in, for example, the case of production process patents than with final product patents, copyrights, or trademarks. This is because the purchaser is almost certain to rely on the latter to distinguish its products from incumbent products. In contrast, patented production technology that is shared, in addition to having the beneficial effect of lowering both producers' marginal costs, is less likely significantly to affect competition since the production process generally does not affect the purchaser's ability to differentiate its product.

[45] *See, e.g.*, United States v. 3D Sys. Corp., 2002-2 Trade Cas. ¶ 73738, 2001 WL 964343 (D.D.C. 2001).

[46] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 331 (1961); *see generally* California v. Am. Stores Co., 495 U.S. 271, 280-81 (1990) ("[I]n Government actions divestiture is the preferred remedy for an illegal merger or acquisition.").

1. Conduct Relief to Facilitate Structural Relief

Tailored conduct relief may be useful in certain circumstances to facilitate effective structural relief.[47] Temporary[48] supply agreements, for example, may be useful when accompanying a structural remedy.[49] If the purchaser is unable to manufacture the product for a limited transitional period (perhaps as plants are reconfigured, product mixes are altered, licenses are applied for or transferred, or new supply contracts are negotiated), a temporary supply agreement can help prevent the temporary loss of a competitor from the market.[50] The Division will scrutinize supply agreements to confirm that they prevent the flow of competitively sensitive information between the parties.

Similarly, divestitures normally involve the transfer of personnel, and *temporary* limits on the merged firm's ability to re-hire these employees may be necessary. Incumbent employees often are essential to the productive operation of the divested assets, particularly in the period immediately following the divestiture. For example, they may have unique technical knowledge of particular manufacturing equipment or may be the authors of essential software. While knowledge is often transferrable or reproducible over time, the immediate loss of certain

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[47] *See, e.g.*, Final Judgment, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018).

[48] The Division pays close attention to the appropriate duration of these types of supply agreements: agreements that are too short may not give a purchaser sufficient time to establish a viable operation, while agreements that are too long may reduce a purchaser's incentives to compete effectively as an independent entity. The Division does not have a one-size-fits-all limit on how long a temporary supply agreement can be, but rather assesses the duration of a proposed supply agreement in the context of the product at issue. Long-term supply agreements between the merged firm and third parties on terms imposed by the Division can raise competitive issues. First, given the merged firm's incentive not to promote competition with itself, competitors reliant upon the merged firm for products or key inputs are likely to be disadvantaged in the long term. Contractual terms are difficult to define and specify with the requisite foresight and precision, and a firm compelled to help another compete against it is unlikely to exert much effort to ensure the products or inputs it supplies are of high quality, arrive as scheduled, match the order specifications, and satisfy other conditions that are necessary to preserve competition. Second, close and persistent ties between two or more competitors (as created by such agreements) can serve to enhance the flow of information or align incentives that may facilitate collusion or cause the loss of a competitive advantage. Third, long-term supply agreements may put the buyer at a competitive disadvantage, for example by being locked in to a non-competitive price.

[49] The Division also considers carefully the pricing terms of these supply agreements. Pricing terms that require the purchaser to pay a markup above the cost incurred by the divestiture business prior to the merger may compromise the purchaser's ability to preserve competition by putting the purchaser at a competitive disadvantage relative to the pre-merger status quo. On the other hand, pricing at the divestiture business's pre-merger cost may reduce the purchaser's incentive to secure an alternative source of supply—and compete as an independent entity—as quickly as possible. The Division evaluates these considerations in the context of the product at issue. For example, if the purchaser's post-divestiture cost is higher than the divestiture business's pre-merger cost, whether and to what extent that higher input price limits the purchaser's ability to compete will depend on the relative significance of the cost of the input to the price of the downstream product or service.

[50] *See, e.g.*, Final Judgment, United States v. United Technologies Corp., No. 1:18-cv-02279 (D.D.C. 2018) (requiring Defendants to supply manufacturing services at the purchaser's option); Competitive Impact Statement at 17, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (noting that interim supply and transition services agreements are "aimed at ensuring that the [divestiture] assets are handed off in a seamless and efficient manner. . . [and that divestiture buyer] BASF can continue to serve customers immediately upon completion of the divestitures.").

employees may substantially reduce the prospect that the divestiture will preserve competition, at least at the outset. To protect against this possibility, the Division may prohibit the merged firm from re-hiring these employees for some limited period.[51]

Restricting the merged firm's right to compete in final output markets or against the purchaser of the divested assets, even as a transitional remedy, is disfavored. Such restrictions directly limit competition in the short term, and any long-term benefits are inherently speculative. For this reason, the Division is unlikely to impose them as part of a merger remedy. When the purchaser appears incapable of surviving or competing effectively against the merged firm without such restrictions, the Division is likely to seek a full-stop injunction against the transaction.[52]

Firewall provisions[53] are designed to prevent the dissemination of information within a firm that could facilitate anticompetitive behavior, such as coordination between competitors.[54] Firewalls are infrequently used because, no matter how well crafted, the risk of collaboration in spite of the firewall is great. They occasionally have been used, however, in limited circumstances to facilitate structural relief or where significant efficiencies could not be achieved without the merger or through a structural remedy.[55]

In considering whether a firewall is appropriate, the Division is careful to ensure that the provision fully prevents the targeted information from being disseminated. Time and effort are devoted to identifying potentially problematic types of information and to considering how to effectively cordon off that information. Effective monitoring also is required to ensure that the firewall provision is adhered to and effective. A necessary aspect of any firewall provision is a carefully designed enforcement mechanism with meaningful consequences for violations.

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[51] *See, e.g.*, Final Judgment, United States v. Thales S.A., No. 1:19-cv-00569 (D.D.C. 2019) (prohibiting Defendants from hiring certain employees hired by the acquirer of the divested assets for a period of one year); Final Judgment, United States v. CVS Health Corp., No. 1:18-cv-02340 (D.D.C. 2019). Of course, in a situation in which there are a limited number of key employees who are essential to any purchaser competing effectively in the market, the Division will scrutinize carefully whether divestiture is an appropriate remedy. If the Division cannot be satisfied that the key personnel are likely to become and remain employees of the purchaser, a more appropriate action may be to sue to block the transaction.

[52] When divestitures are required in a consummated transaction, however, the Division may consider such a provision as a transitional remedy if it is necessary to give the purchaser time to become established as a competitor.

[53] For purposes of this section, the term "firewall provisions" refers to long-term obligations imposed by a Final Judgment as a part of a remedy. This term does not include short-term obligations included in Asset Preservation or Hold Separate Stipulations and Orders, which operate under different incentives and time frames.

[54] While coordination is perhaps the chief concern in such instances, such information sharing could also lead rivals concerned about misappropriation of their proprietary information to under-invest in product development and thus stifle innovation. Further, information sharing could lead to unilateral anticompetitive effects.

[55] *See, e.g.*, Competitive Impact Statement at 18-19, United States v. Northrop Grumman Corp., 1:02-cv-02432 (D.D.C. 2002) (establishing firewall between Northrop's payload and satellite prime businesses); Competitive Impact Statement, United States v. Lehman Bros. Holdings, Inc., 1:98-cv-00796 (D.D.C. 1998) (establishing certain firewalls between L3 Communications and Lockheed Martin regarding certain defense technologies).

2. Stand-Alone Conduct Relief

Stand-alone conduct relief is appropriate only when the parties prove[56] that: (1) a transaction generates significant efficiencies that cannot be achieved without the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the anticompetitive harm, and (4) the remedy can be enforced effectively.[57]

Mergers present the potential to create efficiencies or benefit consumers.[58] Where cognizable efficiencies[59] are significant but the merger is on balance anticompetitive, requiring a structural divestiture might remedy the competitive concerns only at the cost of unnecessarily sacrificing significant efficiencies. In such situations, a stand-alone conduct remedy may be appropriate to consider. For the prospect of potentially attainable efficiencies to justify accepting a conduct remedy, however, the efficiencies in question need to be cognizable[60] (rather than merely asserted), they must mitigate the merger's potential to harm consumers in the relevant market, and they must be unattainable in the context of a structural divestiture.

Mergers may also present the situation where any possible structural remedy that would undo the competitive harm would result in the loss of pre-existing internal efficiencies, i.e., efficiencies already achieved by a merging firm, prior to the merger, that are not due to the merger. For example, in order to minimize costs a firm may use the same distribution system for both the widgets and the gadgets that it produces. A divestiture that requires breaking up the distribution system into a widget distribution system, entirely separate from the gadget distribution system, may eliminate efficiencies that had been created by their original consolidation. The Division will consider a conduct remedy that retains these efficiencies if it

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[56] *See* Makan Delrahim, Assistant Attorney General, U.S. Dep't. of Justice, Antitrust Div., 'Harder Better Faster Stronger': Evaluating EDM as a Defense in Vertical Mergers, Remarks as Prepared for Delivery at George Mason Law Review 22nd Annual Antitrust Symposium 9-10 (Feb. 15, 2019), https://www.justice.gov/opa/speech/file/1132831/download.

[57] *See* Makan Delrahim, Assistant Attorney General, U.S. Dep't. of Justice, Antitrust Div., Antitrust and Deregulation, Remarks as Prepared for Delivery at American Bar Association Antitrust Section Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/file/1012086/download.

[58] Horizontal and vertical mergers often produce different types of efficiencies. Examples of possible horizontal-merger-related efficiencies include achieving economies of scale or scope, and rationalization of sales forces, design teams, and distribution networks. For a discussion of the efficiencies that can arise from a horizontal merger, *see* Dep't of Justice & Fed. Trade Comm'n, HORIZONTAL MERGER GUIDELINES § 10 (2010), https://www.justice.gov/atr/file/810276/download [hereinafter Horizontal Merger Guidelines]. Vertical mergers may benefit consumers through the elimination of double marginalization (i.e., the vertically integrated firm may have an incentive to set lower downstream prices if it can self-supply an input rather than paying an independent upstream firm for the input at a price that includes a markup over the upstream firm's marginal cost), or through the creation of other efficiencies that may benefit competition and consumers. *See* Dep't of Justice & Fed. Trade Comm'n, VERTICAL MERGER GUIDELINES § 6 (2020), https://www.justice.gov/atr/page/file/1290686/download.

[59] If, absent the transaction, assets of the acquired firm otherwise would exit the market, maintaining these assets in the marketplace may be considered a type of economy of scale or scope.

[60] Cognizable efficiencies are "merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service." Horizontal Merger Guidelines, *supra* note 58, § 10.

completely cures the anticompetitive harm arising from the proposed merger, and can be effectively enforced.[61]

In deciding whether a conduct remedy is appropriate, the Division will also consider the costs of monitoring and enforcing the remedy. Monitoring and enforcing a conduct remedy may be easier in markets in which regulatory oversight is already employed and data on the merged firm's conduct would be collected regularly and audited in any event. Although those regulators will not generally have the same incentives and goals as the Division, the greater transparency of market conduct that they permit can lower the cost to the Division and the courts of monitoring and enforcement.[62]

C. A Fix-It-First Remedy Must Fully Eliminate the Competitive Harm

A fix-it-first remedy is a structural solution[63] implemented by the parties that the Division accepts before a merger is consummated.[64] An acceptable fix-it-first remedy eliminates the Division's anticipated (and yet to be determined) competitive concerns and therefore the need to file a case.[65]

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[61] In rare circumstances, the Division has accepted a waiver of legal rights as a remedy to cure anticompetitive harm. For example, when an agricultural cooperative with certain antitrust exemptions under the Capper-Volstead Act acquired assets not exempt under the Act, the Division obtained an injunction prohibiting the merged firm from asserting the exemption with respect to the acquired assets. *See, e.g.*, Final Judgment at 8-9, United States v. Dairy Farmers of America, No. 00-1663 (E.D. Pa. 2000); Competitive Impact Statement at 2, *Dairy Farmers of America*, No. 00-1663 ("Moreover, because both DFA and Land O'Lakes are agricultural cooperatives they are entitled to federate their branded butter businesses under the Capper-Volstead Act, 7 U.S. C. §291, which exempts from antitrust scrutiny collective marketing by or on behalf of agricultural production cooperatives. SODIAAL, however, does not have the benefit of the Capper-Volstead exemption. Thus, DFA's acquisition of the SODIAAL assets would bring the important SODIAAL brands under the control of an exempt cooperative."); *see also* Competitive Impact Statement at 30-31, United States v. Dairy Farmers of America, Inc., No. 1:20-cv-02658, (E.D. Ill. 2020). Such a waiver is more akin to a structural remedy because it preserves independent competition among existing competitors that otherwise would have been lost as a result of the merger.

[62] This will not, however, eliminate all mechanisms through which conduct-regulated firms can evade the conduct remedy. For instance, suppose the Division is considering a conduct remedy partly because a government agency accurately monitors the prices in the industry (but only the prices). One way to comply with the pricing provision (such as a non-discrimination provision) might be to keep prices the same, but decrease quality. However, if quality is not easily altered, or if there are other restraints on the merged firm's incentive to decrease quality, then the conduct remedy may be acceptable.

[63] A fix-it-first remedy usually involves the sale to a third party of a subsidiary or division or of specific assets from one or both of the merging parties.

[64] If the parties *unilaterally* decide to restructure their transaction to eliminate any potential competitive harm, it is not considered a fix-it-first remedy for the purposes of this manual since the Division did not "accept" the fix. Similarly, a one-time action by the parties that eliminates any potential competitive harm and neither regulates ongoing conduct nor requires ongoing monitoring, such as a one-time waiver of a non-compete provision to reduce entry barriers or facilitate entry by a new competitor, would not be considered a fix-it-first remedy.

[65] A fix-it-first remedy does not trigger the Tunney Act process because the statute applies only to "[a]ny proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws." 15 U.S.C. § 16(b); *see also In re* IBM, 687 F.2d 591, 600-03 (2d Cir. 1982) (holding that the Tunney Act does not apply to a stipulated dismissal under Fed. R. Civ. P. 41(a) and noting

A fix-it-first remedy may be inappropriate if it is presented to the Division after the Division has determined that it has a substantial basis for filing a complaint challenging the transaction. Once the Division has made that determination, the Division is unlikely to accept a fix-it-first remedy in lieu of filing a consent judgment in federal district court.[66]

If an acceptable fix-it-first remedy can be implemented, the Division may exercise its prosecutorial discretion to forgo filing a case and conclude its investigation without imposing additional obligations on the parties.

Parties who propose a fix-it-first remedy will be required to give the Division a reasonable period of time and information needed to evaluate it. As part of this process, Division attorneys and economists reviewing fix-it-first remedies will carefully screen the proposed divestiture for any relationships between the seller and the purchaser, since the parties have, in essence, self-selected the purchaser. An acceptable fix-it-first remedy preserves competition indefinitely and contains no less substantive relief than would be sought if a case were filed.[67] The Division, therefore, conducts an investigation sufficient to determine both the nature and extent of the likely competitive harm and whether the proposed fix-it-first remedy will resolve it.[68] Indeed, parties should be prepared for the Division to issue compulsory process to identify and evaluate any potential fixes that the merging parties may be considering.

If the parties propose a remedy after a complaint challenging the transaction is filed, the Division reserves its right to seek to bifurcate the proceeding into a liability phase and a remedy phase.

If the competitive harm requires remedial provisions that entail continuing, post-consummation obligations on the part of the merged firm, a fix-it-first solution is unacceptable. In such situations, a consent decree is necessary to enforce and monitor any ongoing obligations. For example, a fix-it-first remedy may be unacceptable if, as part of the solution, the merged firm would be required to provide the purchaser with a necessary or important input pursuant to a supply agreement. In addition, the prospect that the merged firm may reacquire the divested

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constitutional concerns that would arise if the district court were to be involved in the executive branch's decision to abandon litigation). The legislative history of the Tunney Act confirms that the statute applies only to consent decrees filed in civil court cases brought by the United States; indeed, Congress considered and rejected an alternative version of the bill that would have expanded its scope to "any proposed consent judgment or decree *or other settlement*." S*ee In re* IBM, 687 F.2d at 601 (citing S. 1088, 93d Cong. § 2(a) (1973) (emphasis added)).

[66] *See supra* note 4.

[67] The parties should provide a written agreement regarding the fix-it-first remedy. The agreement should specify which assets will be sold, detail any conditions on those sales (e.g., regulatory approval), provide that the Division be notified when the assets are sold, and state that the agreement constitutes the entire understanding with the Division concerning the divested assets. Unless the parties also enter into a timing agreement, a signed stipulation and consent decree (i.e., a "pocket decree") should be obtained that will be filed if the parties fail timely to comply with the written agreement.

[68] Although the parties may propose a fix-it-first remedy because they face substantial time pressures, the Division must allow itself adequate time to conduct the necessary investigation, including an evaluation of the proposed purchaser. *See* discussion *infra* Section IV.B.

business or assets may make a fix-it-first remedy inappropriate. The Division would insist upon having recourse to a court's contempt power in such circumstances to ensure the merged firm's compliance with the agreement.

D. Remedies for Transactions Challenged Post-Consummation

The Division typically reviews mergers prior to consummation, but it also reviews and challenges consummated transactions.[69] The legal analysis of the competitive effects of a proposed transaction does not differ significantly from that of a consummated deal. Remedying a consummated deal, however, may pose unique issues. The Division's objective in all cases is to eliminate, to the extent possible, the anticompetitive effects that will result or have resulted from the merger. In a consummated transaction, the parties already have acquired, and often integrated, the assets. If the acquired assets are integrated, crafting an effective divestiture to eliminate the anticompetitive effects may be difficult,[70] but nonetheless necessary to undo the illegal effects of the merger.[71] In some cases, unwinding the transaction may be necessary to effectively restore competition in the relevant market.[72] In other cases, divestiture of more than the acquired assets may be required to restore the divested business to the same competitive position it had held prior to the transaction, and transitional assistance for an interim period may be required. In still other cases, divestiture of less than the acquired assets—in particular, of assets necessary and sufficient for smaller competitors or market entrants to restore competition—may be sufficient.[73]

E. Collaboration when Structuring a Remedy

1. Collaboration with International and State Antitrust Enforcers

The Division often interacts with international and state antitrust authorities in merger matters. In many cases, the Division may be able to work collaboratively with other antitrust enforcers to structure remedies that are effective across jurisdictions and that, to the extent

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[69] *See* United States v. Bazaarvoice, Inc., 2014 WL 203966 (N.D. Cal. 2014); United States v. Parker-Hannifin Corp., No. 1:17-cv-01354 (D. Del. 2017); Complaint, United States v. Twin America, LLC, No. 1:12-cv-08989 (S.D.N.Y. 2012).

[70] The difficulty of "unscrambling of the eggs" led Congress to enact the Hart-Scott-Rodino Antitrust Improvements Act of 1976. 15 U.S.C. § 18a.

[71] For instance, in one consummated case in which the respondent had fully integrated the acquired assets, the Federal Trade Commission required the respondent to reorganize the company into two separate, stand-alone divisions, and divest one of them. In the matter of Chicago Bridge & Iron Co. N.V., No. 9300, 138 F.T.C. 1024, *aff'd* Chicago Bridge & Iron Co. v. Fed. Trade Comm'n, 534 F.3d 410 (5th Cir. 2008), http://www.ftc.gov/os/adjpro/d9300/index.shtm.

[72] *See, e.g.*, Final Judgment, United States v. Microsemi Corporation, No. 8:09-cv-00275 (C.D. Cal. 2010).

[73] *See* Competitive Impact Statement at 9, United States and State of New York v. Twin America, LLC, No. 1:12-cv-08989 (S.D.N.Y. 2015) (requiring the divestiture of New York City Department of Transportation bus stop authorizations because "the most intractable barrier to entry is the inability of new firms to obtain bus stop authorizations from NYCDOT at or in sufficient proximity to New York City's top attractions and neighborhoods.").

possible, do not conflict unnecessarily with the remedies of other jurisdictions.[74] Where possible, while the Division continues its investigation of the transaction, it welcomes opportunities to cooperate with international and state antitrust authorities to enact more efficient and effective merger remedies. The Division will not advocate for remedies with international or state enforcement agencies that would not be available to the Division under United States law.

2. Collaboration with Regulatory Agencies

When mergers involve firms in regulated industries, the Division considers the impact of the applicable regulations on the competitive dynamics and any proposed remedy. The existence of regulation typically does not eliminate the need for an antitrust remedy to preserve competition effectively. Just as in unregulated markets, when the Division determines that an antitrust remedy is necessary to eliminate a merger's potential competitive harm in a regulated market, it seeks that remedy.

Whenever the Division is considering a remedy for a merger in a regulated industry, collaboration with the regulatory agency is a best practice. By working together, the Division and the regulatory agency can avoid remedies with inconsistent requirements and can ensure that their remedies work together efficiently and effectively to preserve competition and protect consumers.

F. Characteristics that Increase the Risk a Remedy Will Not Preserve Competition

Based on the Division's experience evaluating remedies, certain characteristics of proposed remedies increase the risk that a remedy will not effectively preserve competition. Proposed remedies that feature one or more of these characteristics are at greater risk of being found by the Division to be unacceptable.

- *Divestiture of less than a standalone business.* The Division prefers the divestiture of an existing standalone business. An existing business typically possesses not only all of the physical assets, but also the personnel, customer lists, information systems, intangible assets, and management infrastructure for the efficient production and distribution of the relevant product, and it has already succeeded in competing in the market. In contrast, divestiture of less than an existing standalone business may not result in a viable entity that will effectively preserve competition.[75]

- *Mixing and matching assets of both firms*. A divestiture that combines assets or personnel that have never operated together increases the risk that the divestiture will not effectively preserve competition.[76]

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[74] Additional guidance concerning cooperation with international enforcers regarding merger remedies is available in the International Guidelines, *supra* note 35, § 5.1.5.

[75] *See supra* Sections III.A.1, III.A.3.

[76] *See supra* Section III.A.3.

- *Allowing the merged firm to retain rights to critical intangible assets*. Divestitures must include all assets, tangible and intangible, necessary for the purchaser to be an effective, long-term competitor. Intangible assets have the peculiar economic property that use of the asset by one party need not preclude unlimited use of that same asset by others, so there may be no cost to allowing the merged firm to retain the same rights as the purchaser. Permitting the merged firm to retain access to divested intangible assets, however, may make it more difficult for the purchaser to differentiate its product from its rivals, or may reduce the purchaser's incentive to invest in the business.[77]

- *Ongoing entanglements*. Ongoing entanglements between the merged firm and the purchaser may put the purchaser in the position of having to rely on its rival in order to compete, and therefore call into question the purchaser's position as a truly independent competitor.[78] In addition, close and persistent ties between the merged firm and the purchaser may serve to enhance the flow of information or align incentives, which may facilitate collusion.

- *Substantial regulatory or logistical hurdles*. Divestitures may require the purchaser to establish legal entities or obtain regulatory approvals. Substantial regulatory or logistical hurdles may put competition at risk to the extent the purchaser is unable to fully and independently deploy the divested assets during the interim period.[79]

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[77] *See supra* Section III.A.5.

[78] Fed. Trade Comm'n v. CCC Holdings Inc., 605 F. Supp. 2d 26, 59 (D.D.C. 2009) ("In order to be accepted, 'curative divestitures' must be made to a new competitor that is 'in fact ... a willing, independent competitor capable of effective production in the . . . market.'" (quoting White Consol. Indus. v. Whirlpool Corp., 781 F.2d 1224, 1228 (6th Cir.1986))); Fed. Trade Comm'n v. Sysco Corp., 113 F. Supp. 3d 1, 77 (D.D.C. 2015) ("As the court observed in *CCC Holdings*, it can be a 'problem' to allow 'continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior.'"); United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) ("Courts are skeptical of a divestiture that relies on a "'continuing relationship[ ] between the seller and buyer of divested assets" because that leaves the buyer susceptible to the seller's actions—which are not aligned with ensuring that the buyer is an effective competitor.'") (quoting Sysco, 113 F.Supp.3d at 77)).

[79] United States v. Aetna Inc., 240 F. Supp. 3d 1, 63 (D.D.C. 2017) (analyzing regulatory hurdles to the parties' proposed divestiture); Complaint at 34, United States v. Halliburton Co. and Baker Hughes Inc., No. 1:16-cv-00233 (D.D.C. 2016) ("[M]any permits and licenses from around the world that are required to engage in the businesses at issue cannot be assigned at all; the divestiture buyer would have to go through a new permitting and licensing process."); *cf*. Plaintiff United States's Unopposed Motion and Memorandum for Entry of Modified Proposed Final Judgment, United States v. General Electric Co., No. 1:17-cv-01146, (D.D.C. 2017) (outlining the challenges (due to legal hurdles in foreign jurisdictions) to completing the divestiture by the agreed-upon deadline, and proposing modifications that would incentivize GE to complete the divestiture as quickly as possible).

IV. Divestiture Buyers

A. Identifying a Buyer

In most merger cases, the Division will require the divestiture of a specific package of assets to an acceptable buyer that has been identified before the Division enters into the consent decree.[80] In such cases, the parties must identify an acceptable "upfront" buyer and then negotiate, finalize, and execute the purchase agreement and all ancillary agreements with that buyer before the Division enters into the consent decree. Identification of an upfront buyer is particularly important in cases where the Division determines that there are likely to be few acceptable and interested buyers who will effectively preserve competition in the relevant market post-divestiture. For example, upfront buyers are particularly important in cases in which: (1) parties seek to divest assets comprising less than a stand-alone, ongoing business; (2) the assets are susceptible to deterioration pending divestiture (and a hold separate order will not minimize the interim harm); (3) the parties propose to divest primarily intellectual property or other limited assets; or (4) the business is so specialized there are likely to be few acceptable buyers.

This type of arrangement can be beneficial for both the merging parties and the Division. For the parties, resolving a merger's competitive issues with an upfront buyer can provide more certainty about the transaction than if they (or a selling trustee) must seek a buyer for a package of assets post-consummation, and avoids the possibility of a sale dictated by the Division. The Division benefits from avoiding the costs that might be incurred in a longer post-consummation sale process and gains certainty that the divestiture will be effective in preserving competition. An upfront buyer consent decree also must give the Division the right to seek appointment of a trustee to sell the assets, in the event that the pre-approved buyer decides to back out of the arrangement.

In limited circumstances, the Division may decide that an upfront buyer is not necessary. In such cases, the Division must be satisfied that the package will be sufficient to attract a purchaser in whose hands the assets will effectively preserve competition, and that there will be a sufficient number of acceptable potential purchasers for the specified asset package. Generally, the Division will allow the parties an opportunity to find a purchaser on their own within 60 to 90 days[81] of the entry of the Asset Preservation and/or Hold Separate Stipulation and Order.[82] The

[80] *See, e.g.*, Final Judgment, United States v. CVS Health Corp., No. 1:18-cv-02340 (D.D.C. 2018) (requiring defendants to first attempt to sell the divestiture assets to a specified buyer).

[81] *Cf.* Proposed Final Judgment at 12, United States v. Dairy Farmers of America, Inc., No. 1:20-cv-02658, (E.D. Ill. 2020) (requiring divestiture within 30 days); Final Judgment at 6, United States v. Nexstar Media Group, Inc., No. 1:19-cv-02295, (D.D.C. 2020) (same); Proposed Final Judgment at 7, United States v. Symrise AG, No. 1:19-cv-03263 (D.D.C. 2019) (requiring divestiture within 45 days).

[82] *Cf.* Final Judgment, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (requiring divestiture by the later of 90 calendar days after the filing of the Complaint or 90 calendar days after receiving all necessary international antitrust approvals); Final Judgment, United States v. Harris Corp., No. 1:19-cv-01809 (D.D.C. 2019) (requiring divestiture by the later of 45 days after the entry of the Hold Separate Stipulation and Order by the Court or 15 calendar days after necessary regulatory approvals have been received); Final Judgment, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. 2019) (requiring divestiture within 90 days after notice of the entry of the Final Judgment by the Court).

Division reserves the right to approve any purchaser chosen by the parties and/or to appoint a selling trustee to complete the sale if the parties are unable to do so.[83]

B. The Division Must Approve the Proposed Purchaser

The Division's approval of a proposed purchaser will be conditioned on three fundamental tests. First, divestiture of the assets to the proposed purchaser must not itself cause competitive harm. For example, if the concern is that the merger will enhance an already dominant firm's ability unilaterally to exercise market power, divestiture to another large competitor in the market is not likely to be acceptable, although divestiture to a fringe incumbent might be. On the other hand, if the concern is one of coordinated effects among a small set of post-merger competitors, divestiture to any firm in that set would itself raise competitive issues. In that situation, the Division likely would approve divestiture only to a firm outside that set.[84]

Second, the Division must be certain that the purchaser has the incentive to use the divestiture assets to compete in the relevant market. Even if the choice of a proposed purchaser does not raise competitive problems, the need for the Division's review arises because the seller has an obvious incentive not to sell to a purchaser that will compete effectively. A seller may wish to sacrifice a higher price for the assets today in return for selling to a rival that will not be especially competitive in the future. In contrast, if the firm selling the assets is itself exiting the market, its incentive is simply to identify and accept the highest offer.

Because the purpose of a divestiture is to preserve competition in the relevant market, the Division will not approve a divestiture if the assets are likely to be redeployed elsewhere.[85] Thus, there should be evidence of the purchaser's intention to compete in the relevant market.[86] Such evidence might include business plans, prior efforts to enter the market, or status as a significant producer of a complementary product.[87] In addition, customers and suppliers of firms in the relevant market are often an important source of information concerning a proposed

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[83] For a more detailed discussion of selling trustees, see *infra* Section VI.C.

[84] *See, e.g.*, Final Judgment, United States v. US Airways Group, Inc., No. 1:13-cv-01236 (D.D.C. 2014) (remedying the competitive harm associated with the merger of two of the four "legacy" air carriers with divestitures to low-cost carriers). Indeed, if harmful coordination is a concern because the merger is removing a uniquely positioned maverick, the divestiture likely would have to be to a firm with maverick-like interests and incentives.

[85] *See supra* Section III.A.

[86] Restrictions that would prohibit the purchaser from using divested assets outside the relevant market, however, may be disfavored. For example, it may be possible to use assets in different product segments, allowing a company to share costs across segments. If the purchaser is prohibited from doing so while its competitors can, the purchaser may be put at a competitive disadvantage.

[87] Complementary businesses often have a strong independent interest in maintaining competition in the relevant market, because higher prices in that market would impact them adversely as sellers of complementary goods or services. Further, if others in the relevant market are not also vertically integrated, creation of a vertically integrated rival may serve to disrupt post-merger coordinated conduct. *See* Horizontal Merger Guidelines, *supra* note 58, § 2.11.

purchaser's intentions and ability to compete. Accordingly, their insights and views will be considered. In no case, however, will they be given veto power over a proposed purchaser.

Third, the Division will evaluate the "fitness" of the proposed purchaser to ensure that the purchaser has sufficient acumen, experience, and financial capability to compete effectively in the market over the long term.[88] As part of this process, the Division will examine the purchaser's financing to ensure that the purchaser can fund the acquisition, satisfy any immediate capital needs, and operate the entity over the long term. It must be demonstrated to the Division's sole satisfaction that the purchaser has the "managerial, operational, technical and financial capability" to compete effectively with the divestiture assets.[89]

In determining whether a proposed purchaser is "fit," the Division will evaluate the purchaser strictly on its own merits. The Division will not compare the relative fitness of multiple potential purchasers and direct a sale to the purchaser that it deems the fittest. The appropriate remedial goal is to ensure that the selected purchaser will effectively preserve competition according to the requirements in the consent decree, not that it will necessarily be the best possible competitor.

If the divestiture assets have been widely shopped and the seller commits to selling to the highest paying, competitively acceptable bidder, then the review under the incentive/intention and fitness tests may be relatively simple.[90] Ideally, assets should be held by those who value them the most, and in general, the highest paying, competitively acceptable bidder will be the firm that can compete with the assets most effectively. On the other hand, if (a) the seller has proposed a specific purchaser, (b) the shop has been narrowly focused, or (c) the Division has any other reason to believe that the proposed purchaser may not have the incentive, intention, or resources to compete effectively, then a more rigorous review may be warranted and the Division may reject that purchaser.

The Division will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms. Indeed, in some cases a private equity purchaser may be preferred. The Federal Trade Commission's study of merger remedies found that in some cases funding from private equity and other investment firms was important to the success of the remedy because the purchaser had flexibility in investment

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[88] The Division will consider any evidence that casts doubt on the fitness of a proposed purchaser, including the purchaser's views about its own ability to preserve competition. *See* United States v. Aetna Inc., 240 F. Supp. 3d 1, 71 (D.D.C. 2017) ("In short, before even looking at [divestiture buyer] Molina's internal emails, there are reasons to doubt that it has the internal capabilities needed to manage the divestiture plans. Molina executives and board members have the same concerns, at least when expressing their views candidly at the time. It seems more likely that Molina and its board moved forward with the divestiture because, for the price, it was low-risk and high-reward for the company, despite their belief that Molina was not well positioned to be an effective competitor.").

[89] *See, e.g.*, United States v. Thales S.A., No. 1:19-cv-00569 (D.D.C. 2019).

[90] The Division may identify specific firms that the seller should contact when the staff has learned of potential purchasers in the course of its original investigation. In addition, the Division may, under limited circumstances, require that a selling trustee, such as an investment banker or other intermediary, conduct the shop from the outset when the Division is concerned that the defendant will not complete the divestiture within a reasonable time. See *infra* Section VI.C. for a discussion of the role of a selling trustee.

strategy, was committed to the divestiture, and was willing to invest more when necessary.[91] The study also identified cases in which a purchaser's lack of flexibility in financing contributed significantly to the failure of the divestiture.

Private equity purchasers often partner with individuals or entities with relevant experience, which may inform the Division's evaluation of whether the purchaser has sufficient experience to compete effectively in the market over the long term. The Division also will evaluate any links between purchasers with relevant experience and other competitors to assess whether the purchaser has any disincentive to use the divestiture assets to compete in the relevant market.

V. Terms of the Divestiture Sale

A. A Successful Divestiture Does Not Depend on the Price Paid for the Divestiture Assets

The Division's interest in a divestiture lies in the effective preservation of competition, not with whether the divesting firm or the proposed purchaser is getting the better of the deal. Therefore, the Division is not directly concerned with whether the price paid for the divestiture assets is "too low" or "too high." The divesting firm is being forced to dispose of assets within a limited period. Potential purchasers know this. If there are few potential purchasers to bid up the price, the divesting firm may fail to realize the full value of the business or assets being sold. On the other hand, if there are many interested purchasers, the divesting firm may get a price above the appraised market value. In either event, the Division will not consider the price of the divestiture assets unless, as discussed below, it raises concerns about the effectiveness or viability of the purchaser.

The caveat to this general rule is that the purchase will not be approved if the purchase price and other evidence indicate that the purchaser is unable or unwilling to compete in the relevant market. A purchase price that is "too low" may suggest that the purchaser does not intend to keep the assets in the market.[92] A "fire sale" price may indicate that the purchaser has doubts about its ability to operate the divestiture assets, but is willing to try in light of the bargain price. In determining whether a price is "too low," the Division will look at the assets' liquidation value. Liquidation value is defined here as the highest value of the assets when redeployed outside the relevant market. Liquidation value will be used as a constraint on minimum price only when (a) liquidation value can be reliably determined and (b) the constraint is needed as assurance that the proposed purchaser intends to use the divestiture assets to compete in the relevant market. Also, a sale at a price below liquidation value does not *necessarily* imply that the assets will be redeployed outside the relevant market. It may simply mean the purchaser is getting a bargain. Therefore, if the Division has other reasons to conclude

[91] FTC Merger Remedies Report, *supra* note 30, § IV.D.2.

[92] United States v. Aetna Inc., 240 F. Supp. 3d. 1, 72 (D.D.C. 2017) ("An extremely low purchase price reveals the divergent interest between the divestiture purchaser and the consumer: an inexpensive acquisition could still 'produce something of value to the purchaser' even if it does not become a significant competitor and therefore would not 'cure the competitive concerns.'").

that the proposed purchaser intends to compete in the relevant market, the Division will not reject the divestiture solely because the price does not exceed liquidation value. If the Division has other reasons to be concerned about the purchaser's ability to compete in the relevant market, a low purchase price, even if it is above liquidation value, may corroborate those concerns.[93]

A price that appears to be unusually high for the assets being sold could raise concerns for two reasons. First, it could indicate that the proposed purchaser is paying a premium for the acquisition of market power. This concern, however, is adequately and more directly addressed by applying the fundamental test that the proposed purchaser must not itself raise competitive concerns. Second, a purchaser who pays too high a price might be handicapped by debt or lack of adequate working capital, increasing the chance of bankruptcy. Thus, the Division may consider a price that is unusually high when evaluating the financial ability of the purchaser to compete.

B. Seller Financing of the Divestiture Is Strongly Disfavored

The Division generally is opposed to permitting the seller to finance the divestiture. First, seller financing may enable the seller to retain some partial control over the assets, which could weaken the purchaser's competitiveness. Second, seller financing may impede the seller's incentive to compete with the purchaser because of the seller's concern that vigorous competition may jeopardize the purchaser's ability to repay the financing. Similarly, seller financing may make the purchaser disinclined to compete vigorously out of concern that it may cause the seller to exercise various rights under the loan. Third, seller financing may give the seller some legal claim on the divestiture assets in the event the purchaser goes bankrupt. Fourth, the seller may use the ongoing relationship as a conduit for exchanging competitively sensitive information. Finally, seller financing may indicate that the purchaser is unable to obtain financing from banks or other lending institutions, which raises questions about the purchaser's viability. The Division will consider seller financing only when it is persuaded that these potential concerns do not exist or could be eliminated.[94]

In the rare case where the information financial institutions need to evaluate adequately the purchaser's business prospects is either unavailable or costly to obtain relative to the amount of the financing, limited seller financing may be considered.

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[93] *Id*. at 72 (D.D.C. 2017) ("The low purchase price thus further supports the conclusion that [divestiture buyer] Molina has serious doubts about its own ability to manage all the divestiture plans but is willing to try given the low risk to the company reflected in the bargain price. That does not give the Court confidence in Molina's ability to effectively replace the competition lost by the merger.").

[94] The Division may permit the purchaser to make staggered payments to the seller, such as disbursement out of an escrow account pending final due diligence. This is typically not considered seller financing. However, the Division is unlikely to approve any arrangement in which the purchaser's payments to the seller are conditioned on the purchaser hitting benchmarks that can adversely impact the competitive incentives of either the seller or the purchaser.

VI. Decree Terms

Merger remedies are effective only when properly implemented. Several provisions in Division decrees are designed to ensure proper implementation, including provisions governing the time by which the remedy must be fulfilled, those preventing the dissipation of assets before the sale, and those necessary to ensure that the remedy effectively preserves competition in the relevant market after the sale is complete.

The terms of the consent decree govern the parties' obligations to the Division. The seller and purchaser are responsible for ensuring that their purchase agreement is consistent with the consent decree. In the event of a conflict, the parties must comply with the consent decree and assume any risk associated with a breach of the purchase agreement.

A. To the Extent Possible, Divestitures Should Not Be Delayed

The Division will require the parties to accomplish any divestiture as quickly as possible consistent with the objectives of the divestiture. A quick divestiture has two clear benefits. First, it restores premerger competition to the marketplace as soon as possible. Second, it mitigates the potential dissipation of asset value associated with a lengthy divestiture process. Hold separate provisions and asset preservation clauses ensure the independence and viability of the divestiture assets, and that competition is preserved while the divestiture is pending.[95]

Depending on the size and complexity of the divestiture, the divesting firm normally will be given 60 to 90 days[96] to complete the divestiture.[97] The Division may consider a longer period to complete the divestiture if it is clear that there will be no interim competitive harm, and no harm to the competitive significance of the divestiture assets. The consent decree may also permit the Division to exercise discretion in granting short extensions when it appears that the divesting firm is making good faith efforts and an extension seems likely to result in a successful divestiture. On the other hand, the Division may insist upon a more rapid divestiture in cases where critical assets appear likely to deteriorate quickly or there will be substantial competitive harm before the purchaser can operate the assets. In situations where an investment banker or other intermediary conducts the shop, the Division may require that the intermediary's compensation be based in part on speed of the sale.[98]

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[95] *See infra* Section VI.B for a discussion of hold separate provisions and asset preservation clauses.

[96] *But see supra* note 81 for several examples of cases in which shorter periods were required.

[97] The Tunney Act provides for a 60-day waiting period before the court can enter a proposed consent decree. 15 U.S.C. § 16(b). The Division will not oppose the sale of the divestiture assets to a purchaser acceptable to the Division before the judgment is entered if (a) the court is notified of the plan to complete the sale before the court enters the judgment and (b) there is no objection from the court. However, under no circumstance will such a sale preclude the Division from proceeding to trial, dismissing the case, or requesting additional or different relief if the court ultimately rejects the proposed decree. *See generally* United States v. BNS, Inc., 858 F.2d 456, 466 (9th Cir. 1988).

[98] *See infra* Section VI.C. for a discussion of the role of a trustee.

In the event that an upfront buyer is not required, the Division recognizes that a comprehensive "shop" of the assets, the need for due diligence by potential purchasers, and Division review of the divestiture and purchaser take time. The Division will balance these considerations in developing an appropriate timetable for the divestiture process.

The Division will require regular reports on the divestiture process in order to ensure good faith efforts and to facilitate a quick review of the proposed settlement. Once a purchaser is proposed, the Division may require additional information to evaluate the purchaser and the process by which the purchaser was chosen. The divesting firm and the proposed purchaser ordinarily will be required promptly to respond to such requests.

In addition, when the proposed remedy is contingent on the approval of a third party, such as a government permitting agency, and that approval will not be obtained prior to the entry of the decree, the decree should include a contingency provision setting forth alternative relief in the event that the required approval ultimately is not forthcoming.[99] To the extent the divestiture purchaser's cooperation is required to obtain such third-party approvals, the Division may require that the purchaser be named a party and bound by the decree.[100]

B. Hold Separate and Asset Preservation Provisions Are Necessary for Most Consent Decrees

Consent decrees requiring divestiture after the transaction closes should require defendants to take all steps necessary to ensure that the assets to be divested are separately maintained and saleable. A hold separate provision is designed to maintain the independence and viability of the divested assets and to effectively preserve competition in the market during the pendency of the divestiture. The Division also often requires the consent decree to include an asset preservation clause, in which the defendant agrees to preserve and maintain the value and goodwill of the divestiture assets during the divestiture process.

It is unrealistic, however, to expect that hold separate and asset preservation provisions will entirely preserve competition. For example, managers operating entities kept apart by a hold separate provision are unlikely to engage in vigorous competition. Likewise, customers during

[99] In one case in which divestitures were not completed on the prescribed schedule because the parties had not obtained the necessary licenses from certain international jurisdictions, the Division sought a modified final judgment that contains additional provisions designed to give the parties a financial incentive to complete the divestitures promptly. *See* United States v. General Electric Co. and Baker Hughes Incorporated, 1:17-cv-01146, Plaintiff United States's Unopposed Motion and Memorandum for Entry of Modified Proposed Final Judgment (D.D.C. 2017).

[100] *See* Competitive Impact Statement at 29-30, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) ("Including [the divestiture buyer] BASF [as a party] 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."); Stipulation and Order, United States v. Anheuser Busch InBEV SA/NV, No. 1:13-cv-00127 (D.D.C. 2013) (stipulating to the joinder of Constellation, the divestiture buyer, as a party to the action).

the period before divestiture may be influenced in their purchasing decisions by the merger, even if the soon-to-be-divested assets are being operated independently of the merged firm pursuant to a hold separate provision. Similarly, there may be some dissipation of the soon-to-be-divested assets during the period before divestiture, notwithstanding the presence of a hold separate or asset preservation provision—valuable employees may leave and certain investments may not be made. For these reasons, hold separate and asset preservation provisions do not eliminate the need for a speedy divestiture.

C. Selling Trustee Provisions Must Be Included in Consent Decrees

For a divestiture to be an effective merger remedy, the Division must have the ability to seek appointment of a trustee to sell the assets if a defendant is unable to complete the ordered sale within the period prescribed by the decree.[101] A selling trustee provision provides a safeguard that ensures the decree is implemented in a timely and effective manner. In addition, to the extent that defendants desire to control to whom the decree assets are sold and at what price, the potential for a selling trustee to assume that responsibility provides an incentive for defendants to divest the assets promptly and appropriately. Thus, decrees in Division merger cases should include provisions for the appointment of a selling trustee.[102] Although the trustee's obligation is to the Division, the parties will be responsible for compensating the trustee.

In most cases, the defendant will have a reasonable opportunity to divest the decree assets to an acceptable purchaser before the Division asks the court to appoint a trustee to complete the sale. The expectation is that the defendant, at least initially, is best positioned to have complete information about the operation and value of the assets to be divested and to communicate that information quickly to prospective buyers, thereby facilitating a speedy divestiture to an acceptable purchaser. However, as discussed in Section IV.B. *supra*, because a divestiture may strengthen an existing competitor or introduce a viable new competitor into the market, the defendant also has incentives to delay or otherwise frustrate the ordered divestiture. Therefore, the Division will permit the defendant only a limited time to complete the ordered divestiture before seeking appointment of a trustee.

A defendant may fail to complete a divestiture to an acceptable purchaser for any number of reasons. The defendant's selling efforts may have been dilatory. It may have sought a more favorable price or other terms to which potential purchasers were unwilling to agree. A decree-ordered divestiture may also languish for reasons unrelated to the defendant's diligence in seeking to divest the assets, for example, an inability to obtain necessary approvals from a third

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[101] Indeed, even in cases in which a defendant has been ordered to divest the assets to a designated buyer, a trustee may be necessary in the event that the ordered sale is not completed for some unforeseen reason. *See* United States v. Mittal Steel Co. N.V., 2007-1 Trade Cas. ¶ 75719, 2007 WL 9431726 (D.D.C. 2007); United States v. Cargill Inc., 1997-2 Trade Cas. ¶ 71893, 1997 WL 599424 (W.D.N.Y. 1997).

[102] In cases where the Division already has determined that the upfront buyer is the only acceptable purchaser, the Division has declined to include provisions for a selling trustee in the consent decree. *See* Final Judgment, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018). In such cases, the more appropriate action may be to seek to block the transaction.

party such as a government permitting agency, or a purchaser that backed out of the deal at the last minute.

Effective divestiture decrees typically provide that whenever a divestiture has not been completed by the prescribed deadline for any reason, the Division may promptly nominate, and move the court to appoint, a trustee with responsibility for completing the divestiture to a purchaser acceptable to the Division as soon as possible.

The immediate appointment of a selling trustee may, however, be required in the rare instance when the Division has reason to believe at the outset that a defendant will not complete an ordered divestiture within a reasonable time. For example, immediate appointment may be appropriate if the assets will deteriorate quickly, such that the seller has an especially strong incentive to delay divestiture, or when a defendant has taken an inordinately long time to complete an ordered divestiture in a previous case.[103]

D. Monitoring Trustees May Be Required

A monitoring trustee may be required when technical expertise unavailable within the Division is critical to an effective divestiture. Alternatively, one may be required when there is an unusually high burden associated with monitoring compliance with a decree, for example in the case of a complex global asset carve-out that requires an extended transition period, and that burden is more appropriately borne by the parties than the taxpayers.[104] A monitoring trustee is responsible for reviewing a defendant's compliance with its decree obligations to sell the assets to an acceptable purchaser as a viable enterprise and to abide by injunctive provisions to hold separate certain assets from a defendant's other business operations. In a typical merger case, a monitoring trustee's efforts would simply duplicate, and could potentially conflict with, the Division's own decree enforcement efforts.

In all cases the trustee's absolute obligation will be to the Division, while the parties will be responsible for compensating the trustee.

E. Restraints on the Resale of Divestiture Assets Ordinarily Will Not Be Required

Although the Division will insist that the purchaser have both the intention and ability to compete in the market for the foreseeable future, the Division generally will not include in the decree a provision that requires that the assets, once successfully divested, continue to be employed in the relevant market indefinitely. Conditions change over time, and the divested assets may in the future be employed more productively elsewhere. The decree should, however,

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[103] *Cf.* Competitive Impact Statement at 4 and 11-12, United States v. Dairy Farmers of America, Inc., No. 1:20-cv-02658, (E.D. Ill. 2020) (requiring divestitures within 30 days in part because the bankrupt seller faced imminent liquidation).

[104] United States v. Thales S.A., No. 1:19-cv-00569 (D.D.C. 2019); Competitive Impact Statement at 27-28, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018).

prohibit defendants from reacquiring or otherwise exerting control over the assets ordered to be divested.[105]

The market for corporate control is imperfect. In unusual cases, an unfit, poorly informed potential purchaser may overbid and win the divestiture assets. The Division is not able consistently to foresee and correct faulty market outcomes. Also, even when in retrospect the market for corporate control has made a mistake, the market itself tends to correct the mistake as long as the purchaser is free to resell the divestiture assets to the firm capable of operating them most efficiently in the relevant market. Therefore, the Division will not attempt to limit the purchaser's ability to resell the divestiture assets, although the purchaser's business plan should indicate its commitment to competing in the relevant market. If, however, the purchaser plans to sell the divestiture assets promptly after acquiring them, any such plan must be disclosed to the Division.[106]

Although restraints on the resale of divestiture assets ordinarily will not be required, they may be warranted in unusual circumstances. For example, if the Division is confident that during the life of the consent decree the resale of the divestiture assets to a particular entity or type of entity would lessen competition, it may seek to limit the purchaser's ability to sell those assets to such an entity. Alternatively, a requirement that the purchaser notify the Division if it sells the divestiture assets may be warranted in cases where the industry is highly concentrated, there are few acceptable divestiture buyers, and the Division has an interest in preventing the purchaser from quickly reselling the assets, and thereby undermining the effectiveness of the remedy. Such a provision may require joining the purchaser as a party to the decree.

There may be circumstances in which the merging firm will be permitted to limit a licensee's further licensing of divested intangible assets. For example, if the remedy includes the right to use a particular brand name in the relevant market but not elsewhere, and the value of the brand name elsewhere is both significant and reasonably dependent on how it is used in the relevant market, the merging firm may have a legitimate interest in limiting the licensee's ability to re-license the brand name rights.

F. Prior Notice Provisions May Be Appropriate

Prior notice provisions require the merged firm to report otherwise non-reportable deals to the Division. Prior notice provisions may be required when there are competitors to the parties whose acquisition would not be reportable under the Hart-Scott-Rodino Act, and when market conditions indicate that there is reason to believe their acquisition may be competitively significant in the wake of the transaction.

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[105] This prohibition on reacquisition of assets is the key reason that the term of the decree in merger cases exceeds the completion of the divestiture. The typical term of Division merger decrees is 10 years. The decree may, however, permit the merging firm in limited circumstances to retain rights to intangible assets. *See* discussion *supra* Section III.A.5.

[106] To be sure, the Division always should ask whether the divestiture purchaser has any agreements, plans, or intention of selling any part of the divestiture assets.

G. The Decree Must Bind the Entities Against Which Enforcement May Be Sought

For a decree to be effective, it must bind the parties needed to fulfill the objectives of the consent decree. Both parties to the transaction are generally named defendants even if only one will be making the required divestitures.[107] Furthermore, the decree should include language to bind the defendants' successors and assigns, so that a defendant cannot sell its interest in the assets to be divested before divestiture, thereby frustrating the sale of the divestiture package to the approved purchaser. If it is anticipated that a non-party to a decree could be instrumental to its enforcement, consideration should be given to joining that entity as a party,[108] or otherwise obtaining its agreement to be bound by the decree. For example, in some circumstances the purchaser may be subject to certain commitments in the decree, and therefore should be named as a party so that it will be bound by the decree.[109] If other non-parties are needed for effective enforcement, the decree should require that the non-party be given actual notice of the decree.[110]

H. The Consent Decree Must Provide a Means to Investigate Compliance

Consent decrees must include provisions allowing the Division to monitor compliance. For example, they may require defendants to submit written reports and permit the Division to inspect and copy all books and records, and to interview defendants' officers, directors, employees, and agents as necessary to investigate any possible violation of the decree. Division decrees also may require firms to regularly provide to the Division certain data useful for the Division's decree oversight or to self-report decree violations or allegations of violations. Although civil investigative demands may be issued to investigate potential violations,[111] access

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[107] Naming both parties to the transaction as defendants increases the likelihood that (a) the assets to be divested are maintained as separate, distinct, and saleable until they are transferred to the purchaser, (b) the assets to be divested are actually divested, and (c) the Division can obtain appropriate relief in the event the court does not accept the decree or later orders revisions.

[108] 15 U.S.C. § 25; Fed. R. Civ. P. 19.

[109] Competitive Impact Statement at 29-30, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) ("Including [the divestiture buyer] BASF [as a party] 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."); Stipulation and Order, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. 2019) (stipulating to the joinder of DISH, the divestiture buyer, as a party to the action); Stipulation and Order, United States v. Anheuser Busch InBEV SA/NV, No. 1:13-cv-00127 (D.D.C. 2013) (stipulating to the joinder of Constellation, the divestiture buyer, as a party to the action).

[110] The parties' agents and employees, and others who are in active concert or participation with the parties, their agents, or their employees, will be bound by the decree so long as they receive actual notice of the order. *See* Fed. R. Civ. P. 65(d).

[111] 15 U.S.C. §§ 1311(c), 1312(a).

terms should nonetheless be included in the decree, both to monitor compliance and to examine possible decree modification or termination.

I. Consent Decrees Must Include Standard Provisions Allowing Effective Enforcement

Consent decrees must include several standard provisions designed to improve the effectiveness of the decree and the Division's ability to enforce it. First, in a decree enforcement proceeding, the Division may establish the violation and the appropriateness of any remedy by a preponderance of the evidence. Second, if a court finds that a party has violated the consent decree, the Division may apply to the court for a one-time extension of its term. Third, the Division may terminate the decree upon notice to the court and the parties that the remedy is complete and continuation of the decree is no longer necessary or in the public interest. The fourth provision governs the interpretation of the decree, and provides that courts can enforce any provisions that are stated specifically and in reasonable detail, whether or not they are clear and unambiguous on their face. The final provision requires the parties to reimburse the Division for the costs it incurred in connection with a successful enforcement effort.

VII. Consent Decree Compliance and Enforcement

It is incumbent upon the Division, pursuant to its responsibility to the public interest, as well as to the court in the case of a consent decree, to ensure strict implementation of and compliance with the agreed-upon remedy. The Division will commit substantial resources to monitor parties' implementation of and compliance with the remedy and will not hesitate to bring actions to enforce consent decrees, typically through the use of civil or criminal contempt proceedings.[112]

A. The Office of the Chief Legal Advisor Oversees Compliance and Enforcement

It is essential to the Division's mission that all merger remedies are strictly enforced. Even the most appropriately tailored remedy is of little value if it is not enforced. The organization of the Division's enforcement efforts seeks to combine case- and industry-specific expertise with specialized remedy expertise. To ensure that the enforcement of merger remedies is rigorous and benefits from learning across the Division, the evaluation of and oversight over all Division remedies resides in the Office of Decree Enforcement and Compliance, which reports to the Office of the Chief Legal Advisor. The Office of Decree Enforcement and Compliance directly oversees the litigating sections' ongoing review of decree compliance and evaluation of potential decree violations and makes recommendations to the Assistant Attorney General. By concentrating remedy expertise in the Office of the Chief Legal Advisor, the Division can efficiently develop and disseminate remedy best practices and conduct ex post reviews of remedy effectiveness. The Office of Decree Enforcement and Compliance, as

[112] Non-parties are not permitted to enforce Division decrees. The court in New York v. Microsoft Corp., 224 F. Supp. 2d 76, 181 (D.D.C. 2002), *aff'd sub nom.* Massachusetts v. Microsoft, 373 F.3d 1199 (D.C. Cir. 2004), likewise noted that "non-parties should not be allowed direct access to the enforcement mechanisms." *See also* Massachusetts v. Microsoft, 373 F.3d at 1243-44.

supported with appropriate assistance by lawyers and economists with industry expertise assigned to a particular matter, oversees the Division's decree compliance efforts.

B. The Division Will Ensure that Remedies Are Fully Implemented

The Division will devote appropriate resources, both before and after a decree is entered, to ensure that the decree is fully implemented. The specific steps necessary to ensure compliance with a decree will vary depending on its nature. For a divestiture decree, staff will closely monitor the sale, including reviewing (a) the sales process, (b) the financial and managerial viability of the purchaser, (c) any documents related to the sale, and (d) any relationships between the purchaser and defendants, to ensure that no such relationship will inhibit the purchaser's ability or incentive to compete vigorously.

Where a decree requires affirmative acts, such as the submission of periodic reports, Division staff will determine whether the required acts have occurred and evaluate the sufficiency of compliance. With respect to decrees that prohibit certain actions, staff may also conduct periodic inquiries to determine whether defendants are observing the prohibitions.[113]

C. Contempt Proceedings to Enforce Consent Decrees

If the Division concludes that a consent decree has been violated, it will institute an enforcement action. There are two types of contempt proceedings, civil and criminal, and either or both may be used. Civil contempt has a remedial purpose—compelling compliance with the court's order or compensating the complainant for losses sustained.[114] Staff may consider seeking both injunctive relief and fines that accumulate on a daily basis until compliance is achieved.[115] Criminal contempt is not remedial—its purpose is to punish the violator, to vindicate the authority of the court, and to deter others from engaging in similar conduct in the future.[116] Criminal contempt is established under 18 U.S.C. § 401(3) by proving beyond a

[113] Use of special masters for Division decree enforcement is disfavored, Fed. R. Civ. P. 53(b); New York v. Microsoft Corp., 224 F. Supp. 2d at 179-82.

[114] *See* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 826-30 (1994); IBM v. United States, 493 F.2d 112, 115 (2d Cir. 1973).

[115] *See, e.g.*, United States v. United Mine Workers of Am., 330 U.S. 258 (1947); United States v. Work Wear Corp., 602 F.2d 110 (6th Cir. 1979). Moreover, courts have recognized that, under appropriate circumstances, other equitable remedies may also be available (for example, compensation for harm or disgorgement of profits as a proxy for harm). *In re* General Motors Corp., 110 F.3d 1003, 1019 n.16 (4th Cir. 1997); *see also* Settlement Agreement and Order, United States v. Cal Dive International, No. 1:05-cv-02041 (D.D.C. 2007) (requiring disgorgement of profits after the merging parties delayed divesting assets as required in the consent decree; the delay enabled the merging parties to continue to profit from the divestiture assets, which were in high demand because they were being used in clean-up efforts following Hurricanes Katrina and Rita).

[116] A criminal contempt proceeding may be instituted by indictment, *see* United States v. Snyder, 428 F.2d 520, 522 (9th Cir. 1970), or by petition following a grand jury investigation, *see* United States v. Gen. Dynamics Corp., 196 F. Supp. 611 (E.D.N.Y. 1961).

reasonable doubt that there is a clear and definite order, applicable to the person charged, which was knowingly and willfully disobeyed.[117] The penalty may be a fine, imprisonment, or both.

The Division has instituted a number of contempt proceedings to enforce its judgments and will continue to do so where appropriate in the future.[118] In some situations, rather than seeking sanctions for contempt where the correct interpretation of a judgment is disputed, it may be appropriate simply to obtain a court order compelling compliance with the judgment.[119]

[117] *See, e.g.*, United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998); United States v. NYNEX Corp., 8 F.3d 52, 54 (D.C. Cir. 1993) ("There are three essential elements of criminal contempt under 18 U.S.C. § 401(3): (1) there must be a violation, (2) of a clear and reasonably specific order of the court, and (3) the violation must have been willful. United States v. Turner, 812 F.2d 1552, 1563 (11th Cir. 1987). The Government carries the burden of proof on each of these elements, and the evidence must be sufficient to establish guilt beyond a reasonable doubt."); United States v. Smith Int'l, Inc., 2000-1 Trade Cas. ¶ 72763, 2000 WL 145129 (D.D.C. 2000).

[118] *See, e.g., Work Wear Corp.*, 602 F.2d at 115-16; United States v. Greyhound Corp., 508 F.2d 529 (7th Cir. 1974); United States v. Morton Plant Health Sys., Inc., 2000 WL 33223244 (M.D. Fla. July 14, 2000); United States v. Smith Int'l, Inc., 2000-1 Trade Cas. ¶ 72763, 2000 WL 145129 (D.D.C. 2000); United States v. FTD Corp., 1996-1 Trade Cas. ¶ 71395, 1995 WL 864082 (E.D. Mich. 1995); United States v. N. Suburban Multi-List, Inc., 516 F.Supp. 640 (W.D. Pa. 1981). *See also* United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998); United States v. NYNEX Corp., 8 F.3d 52 (D.C. Cir. 1993).

[119] *See, e.g.*, United States v. CBS Inc., 1981-2 Trade Cas. ¶ 64227, 1981 WL 2123 (C.D. Cal. 1981).

The FTC's Merger Remedies 2006-2012

A Report of the Bureaus of Competition and Economics

January 2017

FEDERAL TRADE COMMISSION

Contents

I. Introduction

In the late 1990s, FTC staff embarked on what, at the time, was the first effort by an antitrust enforcement agency to evaluate systematically its merger remedy program. Staff evaluated 35 horizontal merger orders that the Commission issued from 1990 through 1994, relying on a case study method. In 1999, the Bureau of Competition issued its report concluding that "most divestitures appear to have created viable competitors in the market of concern to the Commission."[5] Although there was some criticism at the time that the 1999 Divestiture Study had not gone far enough in assessing the competitive effectiveness of the remedies, the idea of evaluating past orders was generally well received. Since then, antitrust enforcement agencies in other jurisdictions have conducted similar studies with largely similar results.[6]

The Commission made several changes in its merger remedy policies and practices in large part due to the findings of the 1999 Divestiture Study. For example, the Commission began requiring upfront buyers[7] for divestitures of less than an ongoing business[8] or assets that raised particular risks of deterioration pending divestiture. The Commission also shortened the default divestiture period for post-

[5] 1999 Divestiture Study at 8. "The Study was not designed to conduct a complete competitive analysis of the relevant markets or draw definitive conclusions about how any of the markets are performing. Instead, it attempted to draw conclusions about whether the buyer of the divested assets was able to enter the market and maintain operations." *Id.* at 9.

[6] DG Competition of the European Commission, MERGER REMEDIES STUDY (2005), http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf; UK Competition & Markets Authority, UNDERSTANDING PAST MERGER REMEDIES: REPORT ON CASE STUDY RESEARCH (updated July 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448223/Understanding_past_merger_remedies.pdf; and Competition Bureau of Canada, COMPETITION BUREAU MERGER REMEDIES STUDY (2011), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-merger-remedy-study-summary-e.pdf/$FILE/cb-merger-remedy-study-summary-e.pdf.

[7] The "buyer" is the entity that the Commission approves under its order to acquire divested assets. An "upfront buyer" is a buyer named in the proposed order after that buyer has negotiated a transaction agreement with the respondent and the Commission has approved that buyer and the terms of the transaction.

[8] The 1999 Divestiture Study described assets comprising an "ongoing business" as follows:

> [T]he assets include most typically an established customer base, a fully staffed facility of some sort (a manufacturing facility or a retail operation) or an otherwise self-contained business unit that may have product contract packed, a manufacturing and/or sales force, perhaps a research and development team, and other assets that are included in the business, including ancillary agreements and third-party contracts. This type of divestiture should result in the almost immediate transfer of market share from respondent to buyer. Most of the packages of assets labeled as "on-going businesses" had not, however, actually been operated as autonomous businesses before the divestiture; nevertheless, they were characterized this way because the market share attributed to the assets could be transferred immediately and potentially for the long-term. A buyer could buy and be operational the next day, selling to all of the same customers.

1999 Divestiture Study at 11. The present study uses the same criteria to define an ongoing business.

order buyers,[9] from a year or more to six months or less, and started appointing independent third parties more often to monitor complex remedies or those in highly technical industries. In addition, the Commission staff began interviewing buyers of divested assets six months to a year after the divestitures to discuss their progress and any issues that might have arisen.

Early in 2015, the Commission decided to evaluate the impact of the changes implemented since the 1999 Divestiture Study and to conduct another merger remedy study. The Commission designed the study to be more comprehensive in scope and broader in analysis than the 1999 Divestiture Study. As required by the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq*., the Commission sought public comment and approval from the Office of Management and Budget ("OMB"). OMB approved the project in August 2015.[10]

The study relied in large part on the willingness of market participants—respondents,[11] buyers of divested assets, other competitors, and customers—to share their experiences with the Commission's remedies and their impact on competition in the relevant market. During the study, over 200 market participants shared with staff their thoughts and observations.[12] To protect the confidentiality of the information discussed during those interviews and submitted to the Commission, this report does not contain any confidential information or identify the parties from whom information was received.

This study encompassed all 89 orders issued by the Commission from 2006 through 2012 in order to remedy the anticompetitive effects of a proposed or consummated merger.[13] For purposes of analysis, staff divided these 89 orders into three groups based, in large part, on the degree of experience the Commission has with the affected industry.

- Commission staff evaluated 50 of the orders—involving the broadest range of industries—using a case study method that relied on interviews of market participants and sales data. Staff

[9] A "post-order buyer" is a buyer of divested assets approved by the Commission following the issuance of a divestiture order. As with upfront buyers, the Commission will set a deadline by which the divested assets must be transferred.

[10] Office of Management and Budget Control No. 3084-0166.

[11] This report uses the term "respondent" to refer to the parties to a merger order. Although the FTC also has the authority to obtain merger remedies in federal court, where a party to the order would be referred to as the "defendant," *see, e.g.*, *St. Alphonsus Med. Ctr.-Nampa, Inc., et al. v. St. Luke's Health Sys., et al.*, 778 F.3d 775 (9th Cir. 2015), all of the merger orders included in the study were issued by the Commission.

[12] Participation in the interviews was voluntary, and the rate of participation was high. Staff interviewed 193 market participants, including 42 respondents, 46 buyers, 49 additional competitors, and 56 customers. Staff also interviewed 14 monitors. Overall, about two-thirds of the proposed interviewees agreed to an interview: 80% of the merged firms, nearly 90% of the buyers, 80% of other competitors, and 45% of customers. In addition, well over half of the buyers that received questionnaires responded to them. The study relied, in large part, on the information obtained in these interviews and from the responses to the questionnaires. The staff appreciates the willingness of all parties who agreed to participate in the interviews and who responded to the questionnaires.

[13] Ninety-two merger orders were first identified, and that number was used in the Federal Register Notice, dated January 16, 2015, requesting comments on the proposed study. Upon further examination, however, staff determined that three of those 92 orders related to mergers that were abandoned for business or other reasons and were thus dropped from the study.

interviewed not only buyers and respondents, as had been done in the 1999 Divestiture Study, but also selected competitors and customers. For these orders, the Commission also went beyond the 1999 Divestiture Study by requesting seven years of sales data from significant market competitors and by compiling market shares based on that data.

- Staff evaluated another 15 orders involving industries with which the Commission is well familiar—supermarkets, drug stores, funeral homes, dialysis clinics, and other health care facilities—using responses to voluntary questionnaires sent to the buyers. The questionnaires focused on several issues that had arisen in prior divestitures in these industries, such as the scope of the asset package and the due diligence process.

- The final 24 orders reviewed involved the pharmaceutical industry, another industry about which the Commission is knowledgeable. These orders were evaluated based on internal expertise, information, and data, as well as information obtained from publicly available sources.

This report focuses primarily on the learning from the case studies, which delved more deeply into the implementation and outcome of the remedies reviewed than the other two parts of the study.[14] The study concluded that most of the remedies in the case studies successfully maintained or restored competition in the identified relevant markets. Section IV.C. explains the criteria for evaluating success and discusses the results of that analysis. The study also identified the concerns interviewees raised about certain aspects of the remedy process, which the Commission has already begun to address. This report summarizes those concerns below and discusses them in more detail in Section IV.D.

The study found that all remedies involving divestitures of assets comprising ongoing businesses succeeded, confirming that such divestitures are most likely to maintain or restore competition. The study also revealed that buyers of less than an ongoing business—buyers of "selected assets"—did not always succeed at maintaining competition, suggesting that the more limited scope of the asset package increases the risk that a remedy will not succeed. The study showed that, even with an upfront buyer, the Commission has not always eliminated the risk associated with divestiture of more limited asset packages.[15] Therefore, proposals to divest selected assets generally warrant more detailed Commission examination.

The 1999 Divestiture Study revealed that respondents sometimes may have proposed buyers that, though marginally acceptable, were less likely to provide robust competition. The new study showed that respondents in most cases proposed buyers likely to fully satisfy the Commission's criteria for strong, viable competitors. But because the success or failure of a divestiture depended, in part, on whether the buyer had adequate funding commitments to ensure success, the Commission will examine more closely, among other things, the source of the buyer's financing, its plans if the transaction does not

[14] The case study findings are consistent with the findings of the other two parts of the study. The results compiled from responses to the questionnaires and review of pharmaceutical orders are summarized in Sections V and VI, respectively.

[15] The reason, of course, that the Commission is concerned about the success of a remedy in restoring or maintaining competition is to protect customers and ultimately end consumers. If a divestiture remedy fails, customers and consumers would likely be harmed.

meet its financial goals, what it has done in other instances when acquisitions have not met financial goals, and related issues.

For their part, most buyers appeared to understand the Commission's remedy process and expressed satisfaction with how it transpired. Some buyers, however, raised concerns about the limited time available for due diligence and the lack of access to respondents' facilities and employees. Although upfront buyers raised this concern more frequently than post-order buyers, several post-order buyers raised it as well. In some cases, the lack of access to facilities and employees during the due diligence process may have delayed the buyers' ability to compete in the relevant markets or increased the buyers' costs.

Some buyers identified unforeseen complexities in transferring "back-office" functions related to the divested assets,[16] regardless of whether the divested assets included those functions or the buyers developed them internally or obtained them from third parties. When respondents did provide those functions on a transitional basis until buyers could perform them on their own, some buyers believed the length of the transition services agreements was too short. In several cases, buyers took longer to transition away from respondents' information technology systems than anticipated, requiring a longer period of transition services than specified in, or available via, the orders.

In addition, some buyers raised questions about the length of supply agreements. Although extensions of supply agreements may not always be warranted, providing mechanisms for extending them may be helpful to accommodate unanticipated complexity in the limited cases where buyers need a temporary extension. Both respondents and buyers raised concerns about the operation of assets that respondents are sometimes required to hold separate from the remainder of their operations pending their divestiture and the role of the hold separate managers typically appointed in orders to hold separate.

Finally, despite the Commission's efforts since the 1999 Divestiture Study to encourage buyers to reach out to staff if they encounter difficulties, it appeared that buyers continue to be reluctant to bring issues to the attention of staff or the monitors when they arise.

The concerns identified by buyers did not necessarily affect the ability of any particular buyer in the study to maintain or restore competition, but they represent potential gaps and risks that may adversely affect merger remedies. Addressing these concerns does not require a change in the Commission's overall approach to remedies. It does, however, necessitate enhanced staff scrutiny, including asking additional questions of respondents and proposed buyers, and, in some instances, increased monitoring of the overall divestiture process. In certain cases, addressing these concerns may also require different order language. The Best Practices section at the end of this report describes the additional steps staff is now taking as part of the Commission's remedy process and provides information to respondents and buyers regarding additional issues they should consider during the course of the remedy process.

[16] "Back-office" functions refer to a variety of support functions such as legal, finance, accounting and tax, risk, insurance, environmental services, and human resources (and includes related personnel and books and records). They also encompass information technology systems and databases, used in connection with warehousing, sales, production, and inventory databases, as well as controls, processing, and operations software.

Sections II-VI omitted

VII. Best Practices

Incorporating learning from the study, these best practices describe what respondents and proposed buyers can expect during the remedy process. While not exhaustive, they specifically respond to concerns raised during the study and incorporate suggestions made by buyers, respondents, and monitors. They do not reflect significant changes to the Commission's current practice, but rather further refine the Commission's approach to remedies and the remedy process. In particular, the aim is to make clear to respondents and buyers what they will be required to do and show as the Commission evaluates proposed remedy proposals. Respondents proposing a remedy must demonstrate that the proposal will solve the likely competitive problem identified by the Commission. The Commission will not accept a remedy unless it determines that the remedy will address the competitive harm caused by the merger and serve the public interest.

A. Defining the Asset Package

1. Scope of Asset Package

Divestitures of selected assets in the study, even with upfront buyers, succeeded less often and raised more concerns than divestitures of ongoing businesses. This confirms the Commission's preference for divestitures of ongoing businesses. When parties propose divestiture of an ongoing business, the Commission must confirm that all aspects of an ongoing business are being divested. The respondent should:

- explain how the proposed business contains all aspects needed for it to operate on its own;
- explain how a buyer can acquire the ongoing business and begin competing right away;
- identify at least three potential buyers that it believes are interested and approvable if it proposes to divest an ongoing business in a post-order divestiture; and
- be aware that staff will talk with potential buyers and other market participants.

While parties may propose a divestiture of selected assets rather than a divestiture of an ongoing business, the Commission will accept such a proposal only if the respondent and the buyer demonstrate that divesting the more limited asset package is likely to maintain or restore competition. In a merger where the respondent proposes a selected asset divestiture as a remedy, the respondent should:

- explain why an alternative ongoing business divestiture is inappropriate or infeasible;
- demonstrate how the selected assets can operate as a viable and competitive business in the relevant market;
- explain what aspects of an ongoing business are excluded from the package and, for each aspect that is excluded, how a proposed buyer would be able to address that gap, at what cost, and how quickly; and
- provide the buyer with adequate time and access to employees, facilities, and information to conduct due diligence.

Where the respondent proposes a selected asset divestiture, a proposed buyer will need to demonstrate that it will be able to compete effectively in all affected relevant markets without all of the assets relating to an ongoing business. The buyer should:

- explain how it plans to maintain or restore competition with a selected asset package;
- assess what additional assets and services it will need to operate the selected assets as a viable and competitive business in the relevant market;
- explain how it will obtain these additional assets and services, at what cost, and how quickly; and
- document its cost and time estimates to obtain these additional assets and services.

The Commission will accept only a divestiture package that it deems sufficient to enable a buyer to maintain or restore competition. Accordingly, a proposal to divest selected assets as a remedy may need to include, for example, assets relating to complementary products outside of the relevant market; manufacturing facilities, even if the facilities also manufacture products outside of the relevant market; or use of applicable brands or trade names. The Commission may also require the respondent to engage

in certain other conduct, including, for example, facilitating the transfer of customers. If the Commission determines that a proposed asset package is inadequate to restore or maintain competition, it may consider alternative settlement proposals or seek to block or undo the merger.

2. Transfer of Back-Office Functions

The provision of back-office functions that relate to the product market and the assets being divested is often more important and more complicated than parties anticipate. Those functions must be assessed to determine whether a proposed buyer can perform them on its own or if they are otherwise easily obtainable. If a proposed buyer does not already have the capability to perform the functions itself or will not be able to access them through, for example, third parties, then the respondent will be required to provide them on a transitional basis. If the buyer does not have access to them because they are specialized and not readily available from third parties, then the respondent will have to divest the assets relating to the provision of these functions. Even if the respondent must divest assets that provide these functions, there may be a transitional period while the respondent is completing the transfer of the assets to the buyer, during which the respondent may be required to provide those services to the buyer while the buyer integrates the assets.

The successful transfer of these back-office functions is often essential for a divestiture buyer to compete in the affected market. To help assess the scope of back-office functions that the buyer will need and to ensure that the buyer has these functions, the respondent should:

- explain to staff and the buyer all back-office functions related to all relevant products, as well as all necessary personnel and documentation;
- ensure that the proposed buyer can conduct adequate due diligence to understand what back-office functions will be needed and the complexities involved in the transfer of such functions;
- make its information technology employees available to discuss and plan the transfer of the back-office functions with the buyer; and
- provide back-office functions to the buyer as needed on a transitional basis for a period sufficient to allow the buyer to transition all services, at no more than respondent's cost.

The buyer should:

- explain to staff the scope of back-office functions it will need to support the asset package and how it will provide or obtain these functions and at what cost; and
- explain the length of time it will need transition services and its options if the transition takes longer than expected.

B. Reviewing the Proposed Buyer

In general, the study revealed that respondents appeared to understand the remedy process and usually proposed approvable buyers. When proposing a buyer to staff, the respondent should:

- explain to staff how it selected the proposed buyer;
- share with staff any offering memoranda or other documents it intends to provide to potential buyers, prior to distribution; and

- be aware that staff will talk to potential buyers as well as other market participants.

In its communications with staff, the proposed buyer should:

- identify all sources of financing for the acquisition of the divested assets, including private equity or other investors, and explain the criteria it used for evaluating such sources;
- explain how it, and all entities providing financing for the transaction, reviewed and evaluated the transaction and formed the basis for authorizing it;
- provide detailed financial and business plans, with supporting documentation, to demonstrate its competitive and financial viability;
- explain the underlying assumptions of its financial and business plans, including contingency plans if sales and other financials do not meet projections;
- make management, sales and marketing representatives, and accounting and other representatives available to staff;
- explain the structure of the funding for the investment, including any limitations of the funds; and
- make representatives from the entities providing financing available for discussions with staff.

C. Implementing the Remedy

Some buyers raised concerns about implementation of the remedy. Some of these concerns could have been allayed with more time to conduct thorough due diligence. Other concerns included difficulty attracting and retaining customers, the length of transition services and supply agreements, and the operation of hold separate orders.

1. Due Diligence

The respondent should provide adequate opportunity for the buyer to conduct due diligence. Specifically, the respondent should:

- provide access to information, facilities, and employees at least to the extent it would in a typical arm's length transaction;
- provide staff information regarding the extent to which the buyer has taken advantage of due diligence opportunities;
- provide direct access to key employees who are identified in the order;
- if the acquired firm's assets are being divested to an upfront buyer, provide the upfront buyer direct access to the acquired firm's information, facilities, and employees; in this circumstance, the upfront buyer should not be required to work through the respondent's representatives; and
- in the case of a post-order buyer, provide the post-order buyer direct access to the hold separate business, including the hold separate monitor and the hold separate manager.

The buyer should ensure that it takes advantage of the due diligence process and conducts adequate due diligence. In particular, the buyer should:

- provide staff information regarding the specific due diligence efforts it undertakes and any concerns about any aspect of the diligence process;
- in the case of an upfront divestiture, access the acquired firm's information, facilities, and employees, directly, without going through the respondent's representatives; and
- in the case of a post-order divestiture, access the hold separate business, including the hold separate monitor and the hold separate manager directly, pending divestiture to a post-order buyer.

2. Customer and Other Third-Party Relationships

Some buyers in the study had difficulty attracting and retaining customers, while others stepped into complicated third-party relationships. Respondents and buyers should be prepared to take certain steps to facilitate the transition in these relationships. The respondent should:

- provide the buyer access to customers, and relevant third parties, early in the process;
- inform customers of the divestiture, of the buyer's identity, and, if applicable, of their right to terminate their contracts with the divesting firms, incorporating input from the buyer into such communication;
- when customer contracts are assignable, assign customer contracts to the buyer;
- when customer consent is required to assign contracts, take steps to assist the buyer in obtaining those consents, including encouraging customers to consent;
- when required, waive contract restrictions that prevent customers from switching to the buyer and allow customers to terminate their contracts early and without penalty; and
- assist the buyer in obtaining any necessary governmental and other regulatory approvals.

The buyer should:

- take advantage of its access to all third parties involved, including customers, suppliers, landlords, and others;
- review and understand customer and other third-party relationships, including customers' buying patterns, customer brand and product loyalty, and customer switching costs; and
- when the order allows customers to terminate their contracts with the respondent, provide input into the respondent's communication with the customers that informs customers of such right.

3. Transition Services Agreements

As discussed above, the respondent should be prepared to provide back-office and other functions for a limited period until the buyer can provide them itself. The respondent will be required to provide those services pursuant to an agreement between the respondent and the buyer that the Commission has approved and that the Commission will monitor. The respondent will be required to:

- provide transition services for a sufficient period until the buyer can perform these services on its own, at no more than respondent's costs, which respondent will be required to document;
- enable the buyer to extend the agreement for a reasonable period, when appropriate;
- enable the buyer to terminate such agreement early, without financial penalty; and

- provide for monitor oversight, when necessary.

The study found that buyers seek to end their reliance on respondents' transition services quickly. Despite this, a few buyers needed the full term of the agreements and one needed the transition services agreement extended beyond what was provided by the order. The buyer should thus keep staff apprised of its progress in transitioning services from the respondent.

4. Supply Agreements

As with transition services agreements, the Commission seeks to minimize the length of time that buyers rely on respondents. The study confirmed that buyers are also wary of relying on respondents for supply of product or inputs. At the same time, supply agreements can be critical, enabling buyers to enter the affected markets quickly. To provide a buyer with supply of product or input for a sufficient period, but not so long as to diminish the buyer's competitive incentives, a respondent will be required to:

- provide supply for a term that extends at least for the length of the product qualification process or the time needed to enable the buyer to manufacture the product on its own or obtain the inputs; and
- allow for an extension when it is clear that the buyer needs additional supply on a transitional basis.

The buyer should keep staff apprised of its progress in transitioning off the supply agreement.

5. Hold Separates

Where there is a need for a hold separate, the assets to be divested are vulnerable to growing stale and the possibility that competitors may make potential inroads during the hold separate period. The hold separate manager, typically experienced in operating the assets, is critical to the success of the ongoing business during the hold separate period. To help the hold separate assets stay competitive during this period, the respondent should:

- allow the hold separate manager open and direct access to staff, independent of the respondent and respondent's counsel; and
- authorize hold separate managers to respond to competitive pricing in the market, maintain levels of production that best position the business to compete in the long term, implement all planned capital investments, and otherwise compete in the market.

The respondent and hold separate monitor should work with staff, beginning as early as possible, to ensure that hold separate operations can be structured efficiently and effectively.

D. Orders in the Pharmaceutical Industry

To ensure the success of divestitures in the pharmaceutical industry, the respondent should:

- divest the easier-to-divest product wherever possible, such as products already made at a third-party manufacturing site;

- provide complete information upfront to the proposed buyer so that the buyer can be prepared to step into the respondent's place with key customers, including regarding any production problems or supply chain issues and more in-depth sales and costs figures;
- work with the proposed buyer to develop a comprehensive technology transfer plan and identify specific employees to oversee respondent's transfer to the new manufacturing facility; and
- retain a Commission-approved monitor prior to entry of the order to facilitate development of the technology transfer plan.

The proposed buyer should identify any necessary third-party contract manufacturers for divested products that the buyer will not manufacture in its own facilities, and provide detailed business plans for investment in products in development, including internal hurdle rates.

E. Communication

Communication with staff is critical at every stage of the remedy process. A buyer, or any other affected party, should bring issues or concerns to the attention of the staff or the monitor as soon as they arise. A buyer should:

- stay in contact with staff and the monitor, if appointed; and
- raise issues as they arise with staff or the monitor.

Respondents should be aware that staff will remain in contact with buyers at least until the respondents have fully divested all required assets and have provided all required supply and transitional services.

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Real deadlines and real consequences

Share This Page

Maribeth Petrizzi, Bureau of Competition
Aug 6, 2020

TAGS: Bureau of Competition | Competition | Merger

Recently, Alimentation Couche-Tard and CrossAmerica Partners (collectively ACT) agreed to pay a $3.5 million civil penalty to settle allegations that they violated a Commission divestiture order that was designed to prevent their merger from harming consumers. A close read of the Commisson's action in this case yields some timely advice for any company that is subject to a divestiture order.

Any deadline in a Commission order is a "real" deadline, and failure to meet the deadline can have real consequences. That means that if the order requires a divestiture by June 15, you must have completed the divesture, including closing, by June 15. Under applicable case law, failure to divest on time is a *per se* violation of an FTC order. The Commission has the discretion to seek civil penalties for any failure to divest by a deadline contained in an order. Additionally, each violation of the order is a separate offense, and maximum potential penalties are calculated for each day of each violation.

Build in ample time for obtaining Commission approval for the divestiture sale *prior* to the deadline. This will take about two months. Under the Commission's Rules, an application for approval of a divestiture is placed on the public record for comment for 30 days. Bureau of Competition management and the Commission will also need time to review the application (and any comments) and decide whether to approve it. As a rule of thumb, you should allow at least two weeks for Bureau management to review the staff recommendation after the 30-day public comment period for the application, and at least two additional weeks after that for the Commission to conduct its review and vote to approve the application.

If a respondent needs extra time, Commission Rule 4.3(b) provides that the Commission can extend a deadline upon a showing of good cause to grant an extension. Respondents should file any such motion *before* the divestiture deadline. The Commission has consistently held respondents to a high standard for granting an extension, because an extension prolongs the period of uncertainty for maintaining or restoring competition in the markets affected by the merger, and forfeits the Commission's right to seek civil penalties or other relief for missing the original deadline. Granting an extension of time is solely within the discretion of the Commission, and seeking an extension does not guarantee it will be approved. Respondents must continue to try to divest as soon as possible.

Contact Compliance staff immediately to report divestiture issues. To ensure the divestiture process remains on track, respondents should make it a practice to engage with staff early in the process and as often as needed. If you reach out at the first sign of trouble, staff can provide guidance or propose solutions; but if you wait, it may be too late to

resolve the problems and stay on track to meet the divestiture deadlines. Expect that Commission staff will seek explanations for any problems, as well as proposed solutions for timely divestiture.

Compliance reports must identify issues that arise during the divestiture process. This is a related but important reminder: the whole point of providing periodic compliance reports is to keep us informed of steps that are being taken to fully comply with the order. If the respondent is running into issues, say so. The same goes if all is well— be clear on which action items have been completed and which ones remain to be done. Compliance reports are an important opportunity to alert the Commission to any problems and concerns about meeting the divestiture deadline. And if something comes up, don't wait until the next compliance report to tell us. Reach out to staff immediately to report and discuss any issues or problems. As alleged in the Commission's complaint against ACT, ACT's compliance reports did not contain sufficient information about what the company was doing to stay on track with the required divestitures, which led staff to require supplemental compliance reports with the needed details. Inadequate compliance reports may constitute separate violations of the order, which could lead to additional civil penalties, as it did in ACT.

Plan ahead for a timely divestiture and, as with any deal, expect bumps in the process. Under FTC orders, respondents are required to divest the assets in good faith and at no minimum price. There are no guarantees that the divestitures will go easily or as planned, so the respondents should be prepared to adapt as necessary to changing conditions in order to ensure timely divestitures.

Settlements without Consent Decrees ("Fix It First")

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, July 1, 2021

Major International Automotive-Parts Suppliers Restructure Deal to Resolve Antitrust Concerns

Auto parts supplier Tupy agreed to restructure its acquisition of Teksid after the Department of Justice raised concerns that the merger would result in higher prices and reduced quality and timeliness of production for crucial components used in heavy-duty engines. As initially proposed, the deal would have combined the two most significant suppliers of engine blocks and cylinder heads for heavy-duty engines to customers in North America. These components are key inputs for engines used in large trucks, construction and agricultural equipment, as well as numerous other vehicles.

Under the original agreement, Tupy would have acquired Teksid's entire iron automotive components business from Teksid's parent company Stellantis N.V. The original acquisition included Teksid's plant and other assets in Mexico used to manufacture iron blocks and heads for U.S. automotive customers. Following the restructuring, Tupy will acquire only Teksid's iron operations in Brazil and Portugal. Teksid will retain its iron operations in Mexico and continue to compete with Teksid to supply U.S. customers.

"Tupy's decision to restructure their merger is a victory for American engine manufacturers and consumers," said Acting Assistant Attorney General Richard A. Powers of the Justice Department's Antitrust Division. "I commend our team for their diligence in conducting a thorough investigation, a testament to the division's resolve to enforce the antitrust laws. As originally proposed, the transaction would have eliminated competition that keeps prices low and quality high for vital industries such as transportation and agriculture."

Tupy S.A., a Brazilian company headquartered in Brazil, is the largest supplier of iron blocks and heads for heavy-duty engines to customers in North America. Tupy owns four iron foundries, two in Brazil and two in Mexico.

Teksid S.p.A., an Italian corporation headquartered in Italy, is a wholly-owned subsidiary of Stellantis, a multinational automobile manufacturer headquartered in Amsterdam, the Netherlands. Teksid is the second largest supplier of blocks and heads for heavy-duty engines in North America. Teksid owns iron foundries in Mexico, Brazil, Poland, and Portugal. Teksid is also part of a joint venture that owns an iron foundry in China.

Topic(s):
Antitrust

Press Release Number:
21-618

Component(s):
Antitrust Division

Updated July 1, 2021

MATERIAL FACT

AGREEMENT TO ACQUIRE THE BRAZILIAN AND PORTUGUESE CAST IRON OPERATIONS OF TEKSID

Joinville, July 1st, 2021 – Tupy S.A. ("Company", B3: TUPY3), pursuant to article 157, paragraph 4, of Federal Law 6,404, of December 15, 1976 ("Brazilian Corporate Law") and Instruction 358 of the Brazilian Securities and Exchange Commission, of January 3, 2002, informs its shareholders and the market in general that it entered into an Amendment and Restatement to the Share Purchase and Sale Agreement, dated December 19, 2019, with Stellantis N.V. ("Stellantis" or "Seller"), the successor of Fiat Chrysler Automobiles N.V., and Teksid SpA ("Teksid"), a wholly owned subsidiary of Stellantis, to acquire the Brazilian and Portuguese cast iron components operations of Teksid by way of the acquisition of Teksid's interests in Teksid Iron do Brasil Ltda. and Funfrap-Fundição Portuguesa S.A. ("Transaction").

The Company had announced on 12.19.2019 its agreement to acquire the global cast iron components operations of Teksid. Based on review and input from U.S. competition authorities, the Company and Stellantis agreed to revise the transaction. In addition, the Company has decided that a revised perimeter for the transaction will focus on assets with higher strategic fit. Therefore, the Company will not proceed with the acquisition of Teksid's Mexican, Chinese and Polish operations and Teksid's offices in Italy and in the United States.

The Company will maintain the strategic alliance for global supply with Stellantis, considering the commitments already assumed with the Brazilian antitrust authority.

In 2019, Teksid's cast iron components operations in Brazil and Portugal recorded net revenue of €242 million and EBITDA of €14.4 million. The Enterprise Value for the new perimeter is €67.5 million.

The Transaction has been approved by Company's Board of Directors on July 1st and is expected to be completed in the fourth quarter of 2021.

According to the appraisal elaborated pursuant to article 256, of Brazilian Corporate Law, which will be timely released to shareholders and the market, the Transaction: (a) represents a relevant investment for the Company and, therefore, is subjected to ratification by the General Meeting and (b) grants right of withdrawal to its dissenting shareholders, who abstain or who do not attend the General Meeting. The reimbursement amount will be calculated based on the shareholder´s equity of the Company, calculated on 12.31.2020.

In addition, the Company states that received a communication from BNDES Participações S.A. – BNDESPAR and Caixa de Previdência dos Funcionários do Banco do Brasil – PREVI, which own shares representing 28.2% and 24.8%, respectively of the Company's share capital. BNDESPAR and PREVI have irrevocably committed to approving the Transaction at the Extraordinary Shareholders' Meeting.

Finally, a conference call will be held on July 1, according to the information below to present the Transaction's and its next stages.

Date of the conference call: July 1 , 2021

08h30 – EST

09h30 – BRT

EUA dial-in: +1 412 717 9627

EUA toll-free: +1 844 204 8942

Brazil dial-in: (11) 3181 8565 / (11) 4210 1803

Access code: Tupy

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Iron Mountain/Recall
DOJ Consent Settlement

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, March 31, 2016

Iron Mountain and Recall Holdings Agree to Divest Records Management Assets as a Condition to Proceed with Transaction

Divesture Protects Competition and Consumers in 15 Metropolitan Areas

The Department of Justice's Antitrust Division announced today that it will require Iron Mountain Inc. to divest records management assets in 15 metropolitan areas in order to proceed with its $2.6 billion acquisition of Recall Holdings Ltd. The Antitrust Division filed a civil antitrust lawsuit in the U.S. District Court for the District of Columbia to block the proposed acquisition and simultaneously filed a proposed settlement that, if approved by the court, would resolve the competitive harm alleged in the lawsuit.

Iron Mountain and Recall both offer records management services – storing, protecting and organizing large volumes of hard-copy records at secure, off-site locations – in many cities across the United States. To address the division's competitive concerns, the parties will divest records management assets in the following 15 metropolitan areas where they are two of the three largest providers of these services and there are few, if any, significant remaining competitors: Detroit; Kansas City, Missouri; Charlotte, North Carolina; Durham, North Carolina; Raleigh, North Carolina; Buffalo, New York; Tulsa, Oklahoma; Pittsburgh; Greenville/Spartanburg, South Carolina; Nashville, Tennessee; San Antonio, Texas; Richmond, Virginia; San Diego; Atlanta; and Seattle.

"Iron Mountain's proposed acquisition of Recall would have harmed records management customers in 15 metropolitan areas by dramatically reducing competition in these markets," said Assistant Attorney General Bill Baer of the Justice Department's Antitrust Division. "As a result of today's settlement, these customers will continue to enjoy the fruits of competition – lower prices and higher quality services."

The transaction is also being reviewed by the Australian Competition and Consumer Commission, the United Kingdom's Competition & Markets Authority and the Canadian Competition Bureau. The department cooperated closely with them throughout the course of its investigation, with frequent contact between the agencies.

Iron Mountain is a Delaware corporation headquartered in Boston. Iron Mountain is the largest records management company in the United States, providing document storage and related services throughout the nation. For fiscal year 2014, Iron Mountain reported worldwide revenues of approximately $3.1 billion.

Recall is an Australian company headquartered in Norcross, Georgia. As the second-largest records management company in the United States, Recall provides document storage and related services throughout the nation. Recall's worldwide revenues for fiscal year 2014 were approximately $836.1 million.

As required by the Tunney Act, the proposed settlement, along with the department's competitive impact statement, will be published in the *Federal Register*. Any person may submit written comments concerning

the proposed settlement during a 60-day comment period to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 450 5th Street, N.W., Suite 8700, Washington, D.C. 20530. At the conclusion of the 60-day comment period, the U.S. District Court for the District of Columbia may enter the proposed final judgment upon finding that it serves the public interest.

Attachment(s):
Download Iron Mountain Complaint
Download Iron Mountain Explanation
Download Iron Mountain CIS

Topic(s):
Antitrust

Component(s):
Antitrust Division

Press Release Number:
16-387

Updated March 31, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
U.S. Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 7100
Washington, DC 20530

Plaintiff,

v.

IRON MOUNTAIN INC.,
One Federal Street
Boston, MA 02110

and

RECALL HOLDINGS LTD.
697 Gardeners Road
Alexandria, Sydney
Australia

Defendants.

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the proposed acquisition by Defendant Iron Mountain Incorporated ("Iron Mountain") of Defendant Recall Holdings Limited ("Recall"). The United States alleges as follows:

I. NATURE OF THE ACTION

1. Iron Mountain and Recall are the two largest providers of hard-copy records management services ("RMS") in the United States and compete directly to serve RMS

customers in numerous geographic areas. RMS are utilized by a wide array of businesses that for legal, business, or other reasons have a need to store and manage substantial volumes of hard copy records for significant periods of time.

2. In 15 metropolitan areas located throughout the United States, Iron Mountain and Recall are either the only significant providers of RMS, or two of only a few significant providers. In these 15 metropolitan areas—Detroit, Michigan; Kansas City, Missouri; Charlotte, North Carolina; Durham, North Carolina; Raleigh, North Carolina; Buffalo, New York; Tulsa, Oklahoma; Pittsburgh, Pennsylvania; Greenville/Spartanburg, South Carolina; Nashville, Tennessee; San Antonio, Texas; Richmond, Virginia; San Diego, California; Atlanta, Georgia; and Seattle, Washington—Iron Mountain and Recall have competed aggressively against one another for customers, resulting in lower prices for RMS and higher quality service. Iron Mountain's acquisition of Recall would eliminate this vigorous competition and the benefits it has delivered to RMS customers in each of these metropolitan areas.

3. Accordingly, Iron Mountain's acquisition of Recall likely would substantially lessen competition in the provision of RMS in these 15 metropolitan areas in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and should be enjoined.

II. JURISDICTION, VENUE, AND INTERSTATE COMMERCE

4. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, as amended, to prevent and restrain the violation by Defendants of Section 7 of the Clayton Act, 15 U.S.C. § 18.

5. This Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345. In their RMS

businesses, Iron Mountain and Recall each make sales and purchases in interstate commerce, ship records in the flow of interstate commerce, and engage in activities substantially affecting interstate commerce.

6. Defendants Iron Mountain and Recall transact business in the District of Columbia and have consented to venue and personal jurisdiction in this District. This Court has personal jurisdiction over each Defendant and venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(c).

III. THE DEFENDANTS AND THE TRANSACTION

7. Iron Mountain is a Delaware corporation headquartered in Boston, Massachusetts. Iron Mountain is the largest RMS company in the United States, providing document storage and related services throughout the nation. For fiscal year 2014, Iron Mountain reported worldwide revenues of approximately $3.1 billion.

8. Recall is an Australian company headquartered in Norcross, Georgia. Recall is the second-largest RMS company in the United States and provides document storage and related services throughout the nation. Recall's worldwide revenues for 2014 were approximately $836.1 million.

9. On June 8, 2015, Iron Mountain and Recall entered into a Scheme Implementation Deed by which Iron Mountain proposes to acquire Recall for approximately $2.6 billion in cash and stock, subject to adjustments.

IV. TRADE AND COMMERCE

A. Relevant Service Market: Records Management Services

10. For a variety of legal and business reasons, companies must often retain hard-copy records for significant periods of time. Given the physical space required to store any substantial volume of records and the effort required to manage stored records, many customers contract with RMS vendors such as Iron Mountain and Recall to provide these services.

11. RMS vendors pick up records from customers and bring them to a secure off-site facility, where they then index the records to allow their customers to keep track of them. RMS vendors retrieve stored records for their customers upon request and often perform other services related to the storage, tracking, and shipping of records. For example, they sometimes destroy stored records on behalf of the customer once preservation no longer is required.

12. Customers that purchase RMS range from Fortune 500 companies to small firms that have a need to manage and store records. Customers include corporations with business records maintenance requirements, healthcare providers with patient records, and other companies that may wish to manage and store other types of records, such as case files, employee records, and other information.

13. RMS procurements are typically made by competitive bid. Contracts usually specify fees for each service provided (*e.g.,* pickup, monthly storage, retrieval, delivery, and transportation). Most customers purchase RMS in only one city. Some customers with operations in multiple cities prefer to purchase RMS from a single vendor pursuant to a single contract; other multi-city customers disaggregate their contracts and purchase RMS from different vendors in different cities.

14. For companies with a significant volume of records, in-house storage is generally not a viable substitute for RMS. For a company to manage its records in-house, it must have a substantial amount of unused space, racking equipment, security features, and one or more dedicated employees. Similarly, entirely replacing RMS with digital records management services is generally not feasible. To switch from physical to electronic records, a customer would need to fundamentally shift its method of creating, using, and storing records and adapt to an entirely paperless system. For many customers, the time, expense, and other burdens associated with doing so are prohibitive.

15. For these reasons, a hypothetical monopolist of RMS could profitably increase its prices by at least a small but significant non-transitory amount. Accordingly, RMS constitutes a relevant product market and line of commerce for purposes of analyzing the likely competitive effects of the proposed acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18.

B. Relevant Geographic Markets

16. The geographic market for RMS consists of a metropolitan area or a radius around a metropolitan area. Customers generally require a potential RMS vendor to have a storage facility located within a certain proximity to the customer's location. Customers generally will not consider vendors located outside a particular radius, because the vendor will not be able to retrieve and deliver records on a timely basis. The radius a customer is willing to consider is usually measured in time, rather than miles, as the retrieval of records may be a time-sensitive matter. Transportation costs also likely render a distant RMS vendor uncompetitive with vendors located closer to the customer.

17. RMS vendors in the following 15 metropolitan areas—Detroit, Michigan; Kansas City, Missouri; Charlotte, North Carolina; Durham, North Carolina; Raleigh, North Carolina; Buffalo, New York; Tulsa, Oklahoma; Pittsburgh, Pennsylvania; Greenville/Spartanburg, South Carolina; Nashville, Tennessee; San Antonio, Texas; Richmond, Virginia; San Diego, California; Atlanta, Georgia; and Seattle, Washington—could profitably increase prices to local customers without losing significant sales to more distant competitors. As a result, a hypothetical monopolist of RMS in each of these 15 metropolitan areas could profitably increase its prices by at least a small but significant non-transitory amount. Accordingly, each of these areas is a relevant geographic market for the purposes of analyzing the competitive effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18.

C. Anticompetitive Effects of the Proposed Acquisition

18. Iron Mountain and Recall are the two largest RMS providers in the United States and directly compete to provide RMS in each relevant geographic market. Each relevant geographic market for the provision of RMS is highly concentrated. In each of the relevant geographic markets, Iron Mountain is the largest RMS provider and Recall is either the second or third-largest competitor, while few, if any, other significant competitors exist. Iron Mountain and Recall compete very closely for accounts, target one another's customers, and, in most of the relevant geographic markets, view one another as the other's most formidable competitor. The resulting significant increase in concentration in each metropolitan area and loss of head-to-head competition between Iron Mountain and Recall likely will result in higher prices and lower quality service for RMS customers in each relevant geographic market.

D. Entry into the Market for RMS

19. It is unlikely that entry or expansion into the provision of RMS in the relevant geographic markets alleged herein would be timely, likely, or sufficient to defeat the likely anticompetitive effects of the proposed acquisition.

20. Any new RMS entrant would be required to expend significant time and capital to successfully enter any of the relevant geographic markets. RMS entry into a new geographic market generally requires a secure facility, racking equipment, delivery trucks, tracking software, and employees. In addition, a new entrant would have to expend substantial effort to build a reputation for dependable service, which is important to RMS customers who demand quick and reliable pickup of and access to their stored records.

21. In order to recoup the costs of entry, an RMS vendor must fill a substantial amount of its facility's capacity. However, acquiring customers from existing RMS vendors in order to fill this capacity is often complicated by provisions in the customers' contracts requiring payment of permanent withdrawal fees if the customer permanently removes a box or record from storage. Customers will sometimes pay these withdrawal fees themselves, but more commonly, the new vendor will have to offer to pay the fees to induce the customer to switch. The vendor must then recoup the cost of the fees by imposing its own permanent withdrawal fees, amortizing the cost over a longer contract, or charging higher prices while still charging a competitive price for its services. Customer contracts also often impose a cap on the number of boxes per month that a customer may permanently remove from a RMS vendor's facility, such that a switch to a new RMS vendor may take several months to complete. Taken together,

permanent withdrawal fees and other withdrawal restrictions make it difficult for a new RMS entrant to win customers away from existing RMS vendors.

22. Likewise the permanent withdrawal fees and other withdrawal restrictions also make it more difficult for an RMS vendor already in a market to win enough customers away from competitors to expand significantly.

V. VIOLATION ALLEGED

23. The United States hereby incorporates paragraphs 1 through 22 above.

24. The proposed acquisition of Recall by Iron Mountain likely would substantially lessen competition for RMS in the 15 relevant geographic markets identified above in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Unless enjoined, the proposed acquisition likely would have the following anticompetitive effects relating to RMS in the relevant geographic markets, among others:

(a) actual and potential competition between Iron Mountain and Recall for RMS in each relevant geographic market will be eliminated;

(b) competition generally for RMS in each relevant geographic market will be substantially lessened; and

(c) prices for RMS will likely increase and the quality of service will likely decrease in each relevant geographic market.

VI. REQUESTED RELIEF

25. The United States requests that this Court:

(a) adjudge and decree that Iron Mountain's acquisition of Recall would be unlawful and violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

(b) permanently enjoin and restrain Defendants and all persons acting on their behalf from consummating the proposed acquisition of Recall by Iron Mountain, or from entering into or carrying out any other contract, agreement, plan or understanding, the effect of which would be to combine Iron Mountain with Recall;

(c) award the United States the cost for this action; and

(d) award the United States such other and further relief as the Court deems just and proper.

Dated: March 31, 2016

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

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Assistant Attorney General for Antitrust

JAMES J. TIERNEY (D.C. Bar # 434610)
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CLOSED,TYPE-A

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:16-cv-00595-APM

UNITED STATES OF AMERICA v. IRON MOUNTAIN INC. et al
Assigned to: Judge Amit P. Mehta
Cause: 15:1 Antitrust Litigation

Date Filed: 03/31/2016
Date Terminated: 11/14/2016
Jury Demand: None
Nature of Suit: 410 Anti-Trust
Jurisdiction: U.S. Government Plaintiff

Plaintiff

UNITED STATES OF AMERICA represented by **Soyoung Choe**
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ATTORNEY TO BE NOTICED

V.

Defendant

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

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Date Filed	#	Docket Text
03/31/2016	1	COMPLAINT against All Defendants (Fee Status:Filing Fee Waived) filed by UNITED STATES OF AMERICA. (Attachments: # 1 Civil Cover Sheet Civil Cover Sheet)(Choe, Soyoung) (Entered: 03/31/2016)
03/31/2016	2	ENTERED IN ERROR....NOTICE OF TUNNEY ACT REQUIREMENTS by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit Proposed Final Judgment, # 2 Exhibit Hold Separate Stipulation and Order)(Choe, Soyoung) Modified on 4/1/2016 (jd). (Entered: 03/31/2016)
03/31/2016	3	COMPETITIVE IMPACT STATEMENT by UNITED STATES OF AMERICA. (Choe, Soyoung) (Entered: 03/31/2016)
03/31/2016		Case Assigned to Judge Amit P. Mehta. (jd) (Entered: 03/31/2016)
03/31/2016	4	NOTICE OF TUNNEY ACT REQUIREMENTS by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit Hold Separate and Stipulation Order, # 2 Exhibit Proposed Final Judgment Corrected to Include Attachments)(Choe, Soyoung) (Entered: 03/31/2016)
03/31/2016		SUMMONS Not Issued as to IRON MOUNTAIN INC., RECALL HOLDINGS LTD. (SUMMONS NOT FILED WITH COMPLAINT) (jd) (Entered: 03/31/2016)
04/01/2016	5	NOTICE of Appearance by Laura A. Wilkinson on behalf of IRON MOUNTAIN INC. (Wilkinson, Laura) (Entered: 04/01/2016)
04/01/2016	6	Corporate Disclosure Statement by IRON MOUNTAIN INC.. (Wilkinson, Laura) (Entered: 04/01/2016)
04/04/2016	7	NOTICE of Appearance by William Blumenthal on behalf of RECALL HOLDINGS LTD. (Blumenthal, William) (Entered: 04/04/2016)
04/04/2016	8	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by RECALL HOLDINGS LTD. (Blumenthal, William) (Entered: 04/04/2016)
04/07/2016	9	HOLD SEPARATE STIPULATION AND ORDER. Signed by Judge Amit P. Mehta on 04/06/2016. (Attachments: # 1 Exhibit Text of Proposed Final Judgment) (lcapm3) (Entered: 04/07/2016)
04/08/2016	10	NOTICE *of Written or Oral Communications Concerning the Proposed Final Judgment and Certification of Compliance under 15 U.S.C. 16(g)* by IRON MOUNTAIN INC. (Wilkinson, Laura) (Entered: 04/08/2016)
04/13/2016	11	NOTICE *Description Of Written Or Oral Communications Concerning The Proposed Final Judgment In This Action And Certification Of Compliance Under 15 U.S.C. § 16(G)* by RECALL HOLDINGS LTD. (Blumenthal, William) (Entered: 04/13/2016)
07/28/2016	12	NOTICE *of Extension of Time* by UNITED STATES OF AMERICA (Choe, Soyoung) (Entered: 07/28/2016)
08/29/2016	13	RESPONSE TO PUBLIC COMMENTS in Antitrust Case by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit Comment by National Records Centers, Inc.)(Choe, Soyoung) (Entered: 08/29/2016)

08/30/2016	14	NOTICE *on Divestiture Timing* by UNITED STATES OF AMERICA (Choe, Soyoung) (Entered: 08/30/2016)
09/09/2016	15	MOTION for Entry of Final Judgment by UNITED STATES OF AMERICA (Attachments: # 1 Exhibit Proposed Final Judgment, # 2 Exhibit Certificate of Compliance)(Choe, Soyoung) (Entered: 09/09/2016)
09/09/2016	16	CERTIFICATE OF SERVICE by UNITED STATES OF AMERICA re 15 MOTION for Entry of Final Judgment . (Choe, Soyoung) (Entered: 09/09/2016)
11/11/2016	17	MEMORANDUM OPINION granting 15 Motion for Entry of Final Judgment. Please see the attached Memorandum Opinion for additional details. Signed by Judge Amit P. Mehta on 11/11/2016. (lcapm1) (Entered: 11/11/2016)
11/11/2016	18	ORDER entering Final Judgment for the reasons stated in the 17 Memorandum Opinion. Please see the attached Order for further details. Signed by Judge Amit P. Mehta on 11/11/2016. (lcapm1) (Entered: 11/11/2016)
11/15/2016	19	NOTICE *of Extension of Time* by UNITED STATES OF AMERICA (Choe, Soyoung) (Entered: 11/15/2016)
12/15/2016	20	NOTICE *of Extension of Time* by UNITED STATES OF AMERICA (Attachments: # 1 Certificate of Service Certificate of Service)(Choe, Soyoung) (Entered: 12/15/2016)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

IRON MOUNTAIN INC.,

and

RECALL HOLDINGS LTD.

Defendants.

UNITED STATES' EXPLANATION OF CONSENT DECREE PROCEDURES

The United States submits this short memorandum summarizing the procedures regarding the Court's entry of the proposed Final Judgment. This Judgment would settle this case pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the "APPA" or "Tunney Act"), which applies to civil antitrust cases brought and settled by the United States.

1. Today, the United States has filed a Complaint and, attached to this Explanation of Consent Decree Procedures, a proposed Final Judgment and a Hold Separate Stipulation and Order ("Hold Separate") between the parties by which they have agreed that the Court may enter the proposed Final Judgment after the United States has complied with the APPA. The United States has also filed a Competitive Impact Statement relating to the proposed Final Judgment.

2. The Hold Separate is a document that has been agreed to by both the United States and the Defendants. The United States and the Defendants ask that the Court sign this Order, which ensures that the Defendants preserve competition by complying with the provisions of the proposed Final Judgment and by maintaining any assets to be divested during the pendency of the proceedings required by the Tunney Act. *See* 15 U.S.C. § 16(b)-(h).

3. The APPA requires that the United States publish the proposed Final Judgment and the Competitive Impact Statement in the *Federal Register* and cause to be published a summary of the terms of the proposed Final Judgment and the Competitive Impact Statement in certain newspapers at least sixty (60) days prior to entry of the proposed Final Judgment. Defendants in this matter have agreed to arrange and bear the costs for the newspaper notices. The notice will inform members of the public that they may submit comments about the proposed Final Judgment to the United States Department of Justice, Antitrust Division, 15 U.S.C. § 16(b)-(c).

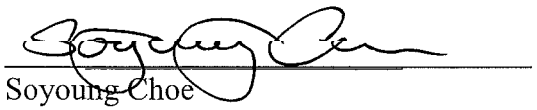
4. During the sixty-day period, the United States will consider, and at the close of that period respond to, any comments that it has received, and it will publish the comments and the United States' responses in the *Federal Register*.

5. After the expiration of the sixty-day period, the United States will file with the Court the comments and the United States' responses, and it may ask the Court to enter the proposed Final Judgment (unless the United States has decided to withdraw its consent to entry of the Final Judgment, as permitted by Section IV.A of the Hold Separate, *see* 15 U.S.C. § 16(d)).

6. If the United States requests that the Court enter the proposed Final Judgment after compliance with the APPA, 15 U.S.C. § 16(e)-(f), then the Court may enter the Final Judgment without a hearing, provided that it concludes that the Final Judgment is in the public interest.

Dated: March 31, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Soyoung Choe, hereby certify that on March 31, 2016, I caused a copy of the Complaint, Competitive Impact Statement, proposed Final Judgment, Hold Separate Stipulation and Order, and the foregoing Explanation of Consent Decree Procedures to be served on Defendants Iron Mountain Inc. and Recall Holdings Ltd. by mailing the documents electronically to the duly authorized legal representatives of the defendants, as follows:

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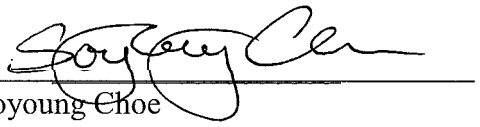
Counsel for Defendant Recall Holdings Ltd.



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

IRON MOUNTAIN INC.,

and

RECALL HOLDINGS LTD.

Defendants.

HOLD SEPARATE STIPULATION AND ORDER

It is hereby stipulated and agreed by and between the undersigned parties, subject to approval and entry by the Court, that:

I. Definitions

As used in this Hold Separate Stipulation and Order:

A. "Acquirer" or "Acquirers" means the entity or entities to whom Defendants divest the Divestiture Assets.

B. "Iron Mountain" means Defendant Iron Mountain Incorporated, a Delaware corporation with its headquarters in Boston, Massachusetts, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Recall" means Defendant Recall Holdings Limited, an Australian public company limited by shares and registered in New South Wales under Australian law, with its headquarters in Norcross, Georgia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. "Appendix A Divestiture Assets" means:

1. The Records Management facilities listed in Appendix A to the proposed Final Judgment ("Appendix A"); and

2. All tangible and intangible assets used in the operation of the Records Management businesses associated with the Records Management facilities listed in Appendix A, including, but not limited to:

a. All tangible assets, including fixed assets, vehicles, garages, capital equipment, personal property, inventory, office furniture, materials, supplies, and other tangible property, and all assets used in connection with the Records Management facilities listed in Appendix A; all licenses, permits and authorizations issued by any governmental organization relating to the Records Management facilities listed in Appendix A; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Records Management facilities listed in Appendix A; all customer lists relating to the Records Management facilities listed in Appendix A; all customer contracts, accounts, and credit records relating to the Records Management facilities listed in Appendix A (other than for Split Multi-City Customers who choose to remain with Defendants); and all repair and performance records and all other records relating to the Records Management facilities listed in Appendix A; and

b. All intangible assets used in the development, production, servicing and sale of the Records Management services associated with the Records Management facilities listed in Appendix A, including all patents, licenses and sublicenses, intellectual property, copyrights, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees relating to the Records Management facilities listed in Appendix A.

E. "Appendix B Divestiture Assets" means:

1. The Records Management facilities listed in Appendix B to the proposed Final Judgment ("Appendix B"); and

2. All tangible and intangible assets used in the operation of the Records Management businesses associated with the Records Management facilities listed in Appendix B, including, but not limited to:

a. All tangible assets, including fixed assets, vehicles, garages, capital equipment, personal property, inventory, office furniture, materials, supplies, and other tangible property, and all assets used in connection with the Records Management facilities listed in Appendix B; all licenses, permits and authorizations issued by any governmental organization relating to the Records Management facilities listed in Appendix B; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Records Management facilities listed in Appendix B; all customer lists relating to the

Records Management facilities listed in Appendix B; all customer contracts, accounts, and credit records relating to the Records Management facilities listed in Appendix B (other than for Split Multi-City Customers who choose to remain with Defendants); and all repair and performance records and all other records relating to the Records Management facilities listed in Appendix B; and

b. All intangible assets used in the development, production, servicing and sale of the Records Management services associated with the Records Management facilities listed in Appendix B, including all patents, licenses and sublicenses, intellectual property, copyrights, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees relating to the Records Management facilities listed in Appendix B.

F. "Divestiture Assets" means the Appendix A Divestiture Assets and Appendix B Divestiture Assets.

G. "Records Management" means the storage and management of physical records and the provision of services relating to physical records, such as transporting and indexing records.

H. "Split Multi-City Customer" means a Recall customer that, as of the date of divestiture of a Divestiture Records Management Facility, has records stored at both the Divestiture Records Management Facility and one or more other Recall Records Management

facilities that are to be retained by Defendants. A Split Multi-City Customer does not include a Recall customer that has separate contracts for each Recall facility in which it stores records.

II. Objectives

The Final Judgment filed in this case is meant to ensure Defendants' prompt divestitures of the Divestiture Assets for the purpose of establishing one or more viable competitors in the Records Management business in order to remedy the effects that the United States alleges would otherwise result from Iron Mountain's acquisition of Recall. This Hold Separate Stipulation and Order ensures, prior to such divestitures, that the Divestiture Assets remain independent, economically viable, and ongoing business concerns that will remain independent and uninfluenced by Iron Mountain, and that competition is maintained during the pendency of the ordered divestitures.

III. Jurisdiction and Venue

The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia. Defendants waive service of summons of the Complaint.

IV. Compliance With and Entry of Final Judgment

A. The parties stipulate that a Final Judgment in the form attached hereto as Exhibit A may be filed with and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on Defendants and by filing that notice with the Court. Defendants agree to arrange, at their expense, publication as quickly

as possible of the newspaper notice required by the APPA, which shall be drafted by the United States in its sole discretion. The publication shall be arranged no later than three (3) business days after Defendants' receipt from the United States of the text of the notice and the identity of the newspaper within which the publication shall be made. Defendants shall promptly send to the United States (1) confirmation that publication of the newspaper notice has been arranged, and (2) the certification of the publication prepared by the newspaper within which the notice was published.

B. Defendants shall abide by and comply with the provisions of the proposed Final Judgment, pending the Judgment's entry by the Court, or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment. The United States shall have the full rights and enforcement powers in the proposed Final Judgment, including Section X, as though the same were in full force and effect as the Final order of the Court.

C. Defendants shall not consummate the transaction sought to be enjoined by the Complaint herein before the Court has signed this Hold Separate Stipulation and Order.

D. This Stipulation shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court.

E. In the event (1) the United States has withdrawn its consent, as provided in Section IV(A) above, or (2) the proposed Final Judgment is not entered pursuant to this Stipulation, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then the parties are released from all

further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

F. Defendants represent that the divestitures ordered in the proposed Final Judgment can and will be made, and that Defendants will later raise no claim of mistake, hardship or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein.

V. Hold Separate Provisions

Until the divestitures required by the Final Judgment have been accomplished:

A. Defendants shall preserve, maintain, and continue to operate the Divestiture Assets as independent, ongoing, economically viable competitive businesses, with management, sales and operations of such assets held entirely separate, distinct and apart from those of Iron Mountain's other operations. Iron Mountain shall not coordinate its production, provision, marketing, or terms of sale of any products or services with those provided from, produced by or sold under any of the Divestiture Assets. Within twenty (20) days after the entry of the Hold Separate Stipulation and Order, Defendants will inform the United States of the steps Defendants have taken to comply with this Hold Separate Stipulation and Order.

B. Iron Mountain shall take all steps necessary to ensure that (1) the Divestiture Assets will be maintained and operated as independent, ongoing, economically viable and active competitors in the Records Management business; (2) management of the Divestiture Assets will not be influenced by Iron Mountain (or Recall); and (3) the books, records, competitively sensitive sales, marketing and pricing information, and decision-making concerning production, provision, distribution or sales of products or services by or under any of the Divestiture Assets will be kept separate and apart from Iron Mountain's other operations.

C. Defendants shall use all reasonable efforts to maintain and increase the sales and revenues of the products or services produced by, provided from, or sold under Divestiture Assets, and shall maintain at 2016 or previously approved levels for 2017, whichever are higher, all promotional, advertising, sales, technical assistance, marketing and merchandising support for the Divestiture Assets.

D. Iron Mountain shall provide sufficient working capital and lines and sources of credit to continue to maintain the Divestiture Assets as economically viable and competitive, ongoing businesses, consistent with the requirements of Sections V(A) and (B).

E. Iron Mountain shall take all steps necessary to ensure that the Divestiture Assets are fully maintained in operable condition at no less than its current capacity and sales, and shall maintain and adhere to normal repair and maintenance schedules for the Divestiture Assets.

F. Defendants shall not, except as part of a divestiture approved by the United States in accordance with the terms of the proposed Final Judgment, remove, sell, lease, assign, transfer, pledge or otherwise dispose of any of the Divestiture Assets.

G. Defendants shall maintain, in accordance with sound accounting principles, separate, accurate and complete financial ledgers, books and records that report on a periodic basis, such as the last business day of every month, consistent with past practices, the assets, liabilities, expenses, revenues and income of the Divestiture Assets.

H. Defendants shall take no action that would jeopardize, delay, or impede the sale of the Divestiture Assets.

I. Defendants' employees with primary responsibility for the operation and management of the Divestiture Assets or the sale of Records Management services provided from the Divestiture Assets shall not be transferred or reassigned to other areas within the

company except for transfer bids initiated by employees pursuant to Defendants' regular, established job posting policy. Defendant shall provide the United States with ten (10) calendar days notice of such transfer.

J. Defendants shall appoint, subject to the approval of the United States, a person or persons to oversee the Divestiture Assets, and who will be responsible for Defendants' compliance with this section. This person shall have complete managerial responsibility for the Divestiture Assets, subject to the provisions of this Final Judgment. In the event such person is unable to perform his duties, Defendants shall appoint, subject to the approval of the United States, a replacement within ten (10) working days. Should Defendants fail to appoint a replacement acceptable to the United States within this time period, the United States shall appoint a replacement.

K. Defendants shall take no action that would interfere with the ability of any trustee appointed pursuant to the Final Judgment to complete the divestitures pursuant to the Final Judgment to an Acquirer or Acquirers acceptable to the United States.

VI. Duration of Hold Separate and Asset Preservation Obligations

Defendants' obligations under Section V of this Hold Separate Stipulation and Order shall remain in effect until (1) consummation of the divestitures required by the proposed Final Judgment or (2) until further order of the Court. If the United States voluntarily dismisses the Complaint in this matter, Defendants are released from all further obligations under this Hold Separate Stipulation and Order.

Dated: March 31, 2016

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

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O R D E R

IT IS SO ORDERED by the Court, this ____ day of _____ 2016.

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

IRON MOUNTAIN INC.,

and

RECALL HOLDINGS LTD.

Defendants.

FINAL JUDGMENT

WHEREAS, Plaintiff United States of America filed its Complaint on March 31, 2016, the United States and Defendants Iron Mountain Incorporated and Recall Holdings Limited, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the Defendants to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the divestitures required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

II. Definitions

As used in this Final Judgment:

A. "Acquirer" or "Acquirers" means the entity or entities to whom Defendants divest the Divestiture Assets.

B. "Acquirer of the Appendix A Divestiture Assets" means Access or another entity to which Defendants divest the Appendix A Divestiture Assets.

C. "Acquirer(s) of the Appendix B Divestiture Assets" means the entity or entities to which Defendants divest the Appendix B Divestiture Assets.

D. "Iron Mountain" means Defendant Iron Mountain Incorporated, a Delaware corporation with its headquarters in Boston, Massachusetts, its successors and assigns, and its

subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

E. "Recall" means Defendant Recall Holdings Limited, an Australian public company limited by shares and registered in New South Wales under Australian law, with its headquarters in Norcross, Georgia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

F. "Access" means Access CIG, LLC, a Delaware limited liability company headquartered in Livermore, California, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

G. "Appendix A Divestiture Assets" means:

1. The Records Management facilities listed in Appendix A; and

2. All tangible and intangible assets used in the operation of the Records Management businesses associated with the Records Management facilities listed in Appendix A, including, but not limited to:

a. All tangible assets, including fixed assets, vehicles, garages, capital equipment, personal property, inventory, office furniture, materials, supplies, and other tangible property, and all assets used in connection with the Records Management facilities listed in Appendix A; all licenses, permits and authorizations issued by any governmental organization relating to the Records Management facilities listed in Appendix A; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Records Management facilities listed in Appendix A; all customer lists relating to the

Records Management facilities listed in Appendix A; all customer contracts, accounts, and credit records relating to the Records Management facilities listed in Appendix A (other than for Split Multi-City Customers who choose to remain with Defendants); and all repair and performance records and all other records relating to the Records Management facilities listed in Appendix A; and

b. All intangible assets used in the development, production, servicing and sale of the Records Management services associated with the Records Management facilities listed in Appendix A, including all patents, licenses and sublicenses, intellectual property, copyrights, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees relating to the Records Management facilities listed in Appendix A.

H. "Appendix B Divestiture Assets" means:

1. The Records Management facilities listed in Appendix B; and

2. All tangible and intangible assets used in the operation of the Records Management businesses associated with the Records Management facilities listed in Appendix B, including, but not limited to:

a. All tangible assets, including fixed assets, vehicles, garages, capital equipment, personal property, inventory, office furniture, materials, supplies, and other tangible property, and all assets used in connection with the Records Management facilities listed in

Appendix B; all licenses, permits and authorizations issued by any governmental organization relating to the Records Management facilities listed in Appendix B; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Records Management facilities listed in Appendix B; all customer lists relating to the Records Management facilities listed in Appendix B; all customer contracts, accounts, and credit records relating to the Records Management facilities listed in Appendix B (other than for Split Multi-City Customers who choose to remain with Defendants); and all repair and performance records and all other records relating to the Records Management facilities listed in Appendix B; and

b. All intangible assets used in the development, production, servicing and sale of the Records Management services associated with the Records Management facilities listed in Appendix B, including all patents, licenses and sublicenses, intellectual property, copyrights, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees relating to the Records Management facilities listed in Appendix B.

I. "Divestiture Assets" means the Appendix A Divestiture Assets and Appendix B Divestiture Assets.

J. "Divestiture Records Management Facilities" means the Records Management facilities listed in Appendices A and B.

K. "Records Management" means the storage and management of physical records and the provision of services relating to physical records, such as transporting and indexing records.

L. "Split Multi-City Customer" means a Recall customer that, as of the date of divestiture of a Divestiture Records Management Facility, has records stored at both the Divestiture Records Management Facility and one or more other Recall Records Management facilities that are to be retained by Defendants. A Split Multi-City Customer does not include a Recall customer that has separate contracts for each Recall facility in which it stores records.

III. Applicability

A. This Final Judgment applies to Iron Mountain and Recall, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Sections IV and V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirers of the assets divested pursuant to this Final Judgment.

IV. Divestitures

A. Defendants are ordered and directed, within 10 calendar days after consummation of the transaction sought to be enjoined by the Complaint, to divest the Appendix A Divestiture Assets in a manner consistent with this Final Judgment to Access or another Acquirer of the Appendix A Divestiture Assets acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Appendix A Divestiture Assets as expeditiously as possible.

B. Defendants are ordered and directed, within ninety (90) calendar days after consummation of the transaction sought to be enjoined by the Complaint, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Appendix B Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer or Acquirer(s) of the Appendix B Divestiture Assets acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Appendix B Divestiture Assets as expeditiously as possible.

C. In the event Defendants are attempting to divest the Appendix A Divestiture Assets to an Acquirer other than Access, and in accomplishing the divestiture of the Appendix B Divestiture Assets ordered by this Final Judgment, Defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendants shall inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that they

are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all qualified prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

D. Defendants shall provide the Acquirer(s) and the United States information relating to the personnel involved in the operation and management of the Divestiture Assets or the sale of Records Management services provided from the Divestiture Assets to enable the Acquirer(s) to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer(s) to employ any Defendant employee whose primary responsibility is the operation and management of the Divestiture Assets or the sale of Records Management services provided from the Divestiture Assets.

E. Defendants shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of the Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

F. Defendants shall warrant to the Acquirer(s) that the Divestiture Assets will be operational on the date of sale.

G. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

H. Defendants shall warrant to the Acquirer(s) that there are no material defects in the environmental, zoning or other permits pertaining to the operation of the Divestiture Assets, and that following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

I. At the option of the Acquirer(s), Defendants shall enter into a Transition Services Agreement for any services that are reasonably necessary for the Acquirer(s) to operate any of the Divestiture Records Management Facilities for a period of up to six (6) months. The United States, in its sole discretion, may approve one or more extensions of this agreement for a total of up to an additional six (6) months. Defendants shall perform all duties and provide all services required of Defendants under the Transition Services Agreement. The terms and conditions of any contractual arrangement meant to satisfy this provision must be reasonably related to market conditions. Any amendments, modifications or extensions of the Transition Services Agreement may only be entered into with the approval of the United States, in its sole discretion.

J. For a period of one (1) year from the date of the sale of any Divestiture Assets to an Acquirer, Defendants shall allow any Split Multi-City Customer to terminate or otherwise modify its contract with Recall so as to enable the Split Multi-City Customer to transfer some or all of its records to that Acquirer without penalty or delay and shall not enforce any contractual provision providing for permanent withdrawal fees, retrieval fees, or other fees associated with transferring such customer's records from a Recall Records Management facility to a facility operated by the Acquirer; except that if a Split Multi-City Customer requests that Defendants physically transport such records to the Acquirer, nothing in this Section IV.J prohibits Defendants from charging: (1) either the transportation fees listed in the Split Multi-City

Customer's contract with Recall or $.30 per carton, whichever is less; or (2) either the re-filing fees listed in the Split Multi-City Customer's contract with Recall or $.45 per carton, whichever is less, if the Split Multi-City Customer requests that Defendants handle the re-filing of the cartons at the Acquirer's facility.

K. Within five (5) business days of the date of the sale of the Divestiture Assets to an Acquirer, Defendants shall send a letter, in a form approved by the United States in its sole discretion, to all Split Multi-City Customers of the Divestiture Records Management Facilities acquired by that Acquirer notifying the recipients of the divestiture and providing a copy of this Final Judgment. Defendants shall provide the United States a copy of their letter at least five (5) business days before it is sent. The letter shall specifically advise customers of the rights provided under Section IV.J of this Final Judgment. The Acquirer shall have the option to include its own letter with Defendants' letter.

L. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by Divestiture Trustee appointed pursuant to Section V, of this Final Judgment, (1) shall include the entire Divestiture Assets (unless the United States in its sole discretion approves the divestiture of a subset of the Divestiture Assets), and (2) shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer(s) as part of a viable, ongoing Records Management business. Divestiture of the Divestiture Assets may be made to one or more Acquirers provided that in each instance it is demonstrated to the sole satisfaction of the United States that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment,

(1) shall be made to an Acquirer(s) that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the records management business; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer(s) and Defendants give Defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer(s) to compete effectively.

V. Appointment of Divestiture Trustee

A. If Defendants have not divested all of the Divestiture Assets within the time periods specified in Sections IV.A and IV.B, Defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of any remaining Divestiture Assets.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the remaining Divestiture Assets. The Divestiture Trustee shall have the power and authority to accomplish the divestiture to an Acquirer(s) acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V.D of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture Trustee, reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture. Any such investment bankers, attorneys, or other agents shall serve on such terms and conditions as the United States approves including confidentiality requirements and conflict of interest certifications.

C. Defendants shall not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the Divestiture Trustee within ten (10) calendar days after the Divestiture Trustee has provided the notice required under Section VI.

D. The Divestiture Trustee shall serve at the cost and expense of Defendants pursuant to a written agreement, on such terms and conditions as the United States approves including confidentiality requirements and conflict of interest certifications. The Divestiture Trustee shall account for all monies derived from the sale of the assets sold by the Divestiture Trustee and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the Divestiture Trustee, all remaining money shall be paid to Defendants and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the Divestiture Assets to be sold by the Divestiture Trustee and based on a fee arrangement providing the Divestiture Trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount. If the Divestiture Trustee and Defendants are unable to reach agreement on the Divestiture Trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within fourteen (14) calendar days of appointment of the Divestiture Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court. The Divestiture Trustee shall, within three (3) business days of hiring any other professionals or

agents, provide written notice of such hiring and the rate of compensation to Defendants and the United States.

E. Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any consultants, accountants, attorneys, and other agents retained by the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendants shall develop financial and other information relevant to such business as the Divestiture Trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture.

F. After its appointment, the Divestiture Trustee shall file monthly reports with the United States and, as appropriate, the Court setting forth the Divestiture Trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the Divestiture Trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth (1) the Divestiture Trustee's efforts to accomplish the required divestiture, (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished, and (3) the Divestiture Trustee's recommendations. To the extent such report~~s~~ contains information that the Divestiture Trustee deems confidential, such report~~s~~ shall not be filed in the public docket of the Court. The Divestiture Trustee shall at the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

H. If the United States determines that the Divestiture Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute Divestiture Trustee.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, Defendants or the Divestiture Trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the Divestiture Trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who

offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirer(s), any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer(s), and any other potential Acquirer. Defendants and the Divestiture Trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer(s), any third party, and the Divestiture Trustee, whichever is later, the United States shall provide written notice to Defendants and the Divestiture Trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Section V.C of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V.C, a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, Defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendants have taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information

provided by Defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

X. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Hold Separate Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and

documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the

United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. Notification

A. Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), Defendants, without providing advance notification to DOJ, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity or management interest, in any Records Management business located within a fifty (50) mile radius of any Iron Mountain Records Management facility in the metropolitan statistical areas associated with the cities listed in Appendix C during the term of this Final Judgment; provided that notification pursuant to this Section shall not be required where the assets or interest being acquired generated less than $1 million in revenue from Records Management services in the most recent completed calendar year.

B. Such notification shall be provided to the DOJ in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 8 of the instructions must be provided only about Records Management. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the Antitrust Division make a written

request for additional information, Defendants shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XII. No Reacquisition

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XV. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any

comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

_____

United States District Judge

Appendix A

1. Recall's facility located at 1462 Corporate Center Drive, San Diego, California.
2. Recall's facility located at 17501 West 98th Street, #18-56, Lenexa, Kansas.
3. Recall's facility located at 41199 Van Born Road, Belleville, Michigan.
4. Recall's facility located at 8600 N.E. Underground Drive, Kansas City, Missouri.
5. Recall's facility located at 2863 Broadway Street, Cheektowaga, New York.
6. Recall's facility located at 9510 Rodney Street, Pineville, North Carolina.
7. Recall's facility located at 3835 South Alston Avenue, Durham, North Carolina.
8. Recall's facility located at 900 Aviation Parkway, Morrisville, North Carolina.
9. Recall's facility located at 7001 East 38th Street, Tulsa, Oklahoma.
10. Recall's facilities located at 1018 and 1103 Western Avenue, Pittsburgh, Pennsylvania.
11. Recall's facilities located at 923, 1003, 1004, 1009, and 1019 Bidwell Street, Pittsburgh, Pennsylvania.
12. Recall's facility located at 1101 West North Avenue, Pittsburgh, Pennsylvania.
13. Recall's facility located at 6543 Penn Avenue, Pittsburgh, Pennsylvania.
14. Recall's facility located at 1200 Allegheny Avenue, Pittsburgh, Pennsylvania.
15. Recall's facility located at 651 Mansfield Avenue, Green Tree, Pennsylvania.
16. Recall's facility located at 1605 Old Route 18, Wampum, Pennsylvania.
17. Recall's facility located at 209 Cove Run Road, East Brady, Pennsylvania.
18. Recall's facility located at 160-A Discovery Drive, Roebuck, South Carolina.
19. Recall's facility located at 3258 Ezell Pike, Nashville, Tennessee.

20. Recall's facility located at 611 N. Cherry Street, San Antonio, Texas.

21. Recall's facility located at 1790 Ruffin Mill Road, Colonial Heights, Virginia.

22. Recall's facilities located at 120 and 200 Giant Drive, Richmond, Virginia.

Appendix B

1. Recall's facility located at 6751 Discovery Boulevard, Mableton, Georgia.
2. Recall's facility located at 5945 Cabot Parkway, Suite 125, Alpharetta, Georgia.
3. Recall's facility located at 2148 American Industrial Way, Suite C&D, Chamblee, Georgia.
4. Recall's facility located at 3995 70th Avenue, Fife, Washington.

Appendix C

1. Phoenix, Arizona
2. San Diego, California
3. Denver, Colorado
4. Jacksonville, Florida
5. Miami, Florida
6. Orlando, Florida
7. Atlanta, Georgia
8. Detroit, Michigan
9. Minneapolis, Minnesota
10. Kansas City, Missouri
11. St. Louis, Missouri
12. Las Vegas, Nevada
13. Buffalo, New York
14. Charlotte, North Carolina
15. Durham, North Carolina
16. Raleigh, North Carolina
17. Cleveland, Ohio
18. Tulsa, Oklahoma
19. Portland, Oregon
20. Pittsburgh, Pennsylvania
21. Greenville/Spartanburg, South Carolina
22. Nashville, Tennessee

23. Dallas, Texas

24. Houston, Texas

25. San Antonio, Texas

26. Richmond, Virginia

27. Seattle, Washington

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

IRON MOUNTAIN INC.,

and

RECALL HOLDINGS LTD.

Defendants.

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THE PROCEEDING

On June 8, 2015, Iron Mountain Inc. ("Iron Mountain") reached an agreement to acquire all of the outstanding shares of Defendant Recall Holdings Ltd. ("Recall") in a transaction valued at approximately $2.6 billion. The United States filed a civil antitrust Complaint on March 31, 2016, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of the acquisition would be to lessen competition substantially for the provision of hard-copy records management services ("RMS") in violation of Section 7 of the Clayton Act, 15 U.S.C. §

18, in the following fifteen metropolitan areas: Detroit, Michigan; Kansas City, Missouri; Charlotte, North Carolina; Durham, North Carolina; Raleigh, North Carolina; Buffalo, New York; Tulsa, Oklahoma; Pittsburgh, Pennsylvania; Greenville/Spartanburg, South Carolina; Nashville, Tennessee; San Antonio, Texas; Richmond, Virginia; San Diego, California; Atlanta, Georgia; and Seattle, Washington. This loss of competition likely would result in consumers paying higher prices for RMS and receiving inferior service in these areas.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest specified RMS assets in each of the 15 metropolitan areas of concern. Under the terms of the Hold Separate, Defendants will take certain steps to ensure that the assets are operated as competitively independent, economically viable, and ongoing business concerns that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestitures.

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

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

A. *The Defendants and the Proposed Transaction*

Iron Mountain is a Delaware corporation headquartered in Boston, Massachusetts. Iron Mountain is the largest RMS company in the United States, providing document storage and related services throughout the nation. For fiscal year 2014, Iron Mountain reported worldwide revenues of approximately $3.1 billion.

Recall is an Australian company headquartered in Norcross, Georgia. Recall is the second-largest RMS company in the United States and provides document storage and related services throughout the nation. Recall's worldwide revenues for 2014 were approximately $836.1 million.

On June 8, 2015, Iron Mountain and Recall entered into an agreement pursuant to which Iron Mountain proposes to acquire Recall for approximately $2.6 billion in cash and stock, subject to adjustments.

The proposed transaction, as initially agreed to by Defendants, would lessen competition substantially in the provision of RMS in the relevant markets. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on March 31, 2016.

B. *The Competitive Effects of the Transaction*

1. The Relevant Service Market

The Complaint alleges that RMS constitute a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18. For a variety of legal and business reasons, companies frequently must keep hard-copy records for significant periods of time. Given the physical space required to store any substantial volume of records

and the effort required to manage stored records, many customers contract with RMS vendors such as Iron Mountain and Recall to provide these services.

RMS vendors typically pick up records from customers and bring them to a secure off-site facility, where they then index the records to allow their customers to keep track of them. RMS vendors retrieve stored records for their customers upon request and often perform other services related to the storage, tracking, and shipping of records. For example, they sometimes destroy stored records on behalf of the customer once preservation is no longer required.

Customers of RMS include Fortune 500 firms, as well as local businesses throughout the United States. Customers often procure RMS by competitive bid and contracts usually specify fees for each service provided (*e.g.,* pickup, monthly storage, retrieval, delivery, and transportation). Most customers purchase RMS in only one city. Some customers with operations in multiple cities prefer to purchase RMS from a single vendor pursuant to a single contract; other multi-city customers disaggregate their contracts and purchase RMS from different vendors in different cities.

The Complaint alleges for companies with a significant volument of records, in-house storage is generally not a viable substitute for RMS. For a company to manage its records in-house, it must have a substantial amount of unused space, racking equipment, security features, and one or more dedicated employees. Similarly, entirely replacing RMS with digital records management services is generally not feasible. To switch from physical to electronic records, a customer would need to fundamentally shift its method of creating, using and storing records and adopt an entirely paperless system.

For these reasons, the Complaint alleges that a hypothetical monopolist of RMS could profitably increase its prices by at least a small but significant non-transitory amount. In the event of a small but significant increase in price for RMS, customers would not switch to any other alternative. Thus, the Complaint alleges that the provision of RMS constitutes a relevant service market for purposes of analyzing the effects of the transaction.

2. Relevant Geographic Markets

The geographic market for RMS consists of a metropolitan area or a radius around a metropolitan area. Customers generally require a potential RMS vendor to have a storage facility located within a certain proximity to the customer's location. Customers generally will not consider vendors located outside a particular radius, because the vendor will not be able to retrieve and deliver records on a timely basis. The radius a customer is willing to consider is usually measured in time, rather than miles, as the retrieval of records may be a time-sensitive matter. Transportation costs also likely render a distant RMS vendor uncompetitive with vendors located closer to the customer.

In each of the metropolitan areas identified in the Complaint, a hypothetical monopolist RMS firm could profitably increase prices to local customers without losing significant sales to more distant competitors. Accordingly, each of these metropolitan areas is a relevant geographic market for the purposes of analyzing the competitive effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18.

3. Anticompetitive Effects of the Proposed Acquisition

As alleged in the Complaint, Iron Mountain and Recall are the two largest RMS providers in the United States and the only significant RMS providers, or two of only a few

significant RMS providers, in each of the relevant geographic markets. In each of the geographic markets, Iron Mountain is the largest RMS provider, Recall is the second- or third-largest RMS competitor, and the market is highly concentrated. In each of these markets, Iron Mountain and Recall directly compete with one another to provide RMS, resulting in lower prices and better quality service for RMS customers. According to the Complaint, the significant increase in concentration and loss of head-to-head competition that will result from the proposed acquisition will likely cause prices for RMS to increase and the quality of RMS services to decline in each relevant market.

4. Difficulty of Entry

According to the Complaint, it is unlikely that entry or expansion into the provision of RMS in the relevant geographic markets would be timely, likely, or sufficient to defeat the likely anticompetitive effects of the proposed acquisition.

Any new RMS entrant would be required to expend significant time and capital to successfully enter any of the relevant markets. Entry into a new geographic market requires a secure facility, racking equipment, delivery trucks, tracking software, and employees. In addition, a new entrant would have to expend substantial effort to build a reputation for dependable service, which is important to RMS customers who demand quick and reliable pickup of and access to their stored records. In order to recoup the costs of entry, an RMS vendor must fill a substantial amount of its facility's capacity. However, acquiring customers from existing RMS vendors in order to fill this capacity is often complicated by provisions in the customers' contracts requiring payment of permanent withdrawal fees if the customer permanently removes a box or record from storage. Customers will sometimes pay these

withdrawal fees themselves, but more commonly, the new vendor will have to offer to pay the fees to induce the customer to switch. The vendor must then recoup the cost of the fees by amortizing the cost over a longer contract, or charging higher prices while still charging a competitive price for its services. Contracts often impose a cap on the number of boxes per month that a customer may permanently remove from a RMS vendor's facility, such that a switch to a new RMS vendor may take several months or more to complete. Taken together, permanent withdrawal fees and other withdrawal restrictions make it difficult for a new RMS entrant to win customers away from existing RMS vendors.

Such fees and withdrawal restrictions also make it more difficult for existing RMS vendors to expand significantly. For all of these reasons, the Complaint alleges that new entry or expansion by existing firms is unlikely to remedy the anticompetitive effects of the proposed acquisition.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. *Divestitures*

The divestitures required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by establishing independent and economically viable competitors in the provision of RMS in each of the relevant geographic markets.

The proposed Final Judgment requires Defendants to divest, as viable ongoing business concerns, Recall RMS assets in all fifteen geographic markets identified in the Complaint (collectively, the "Divestiture Assets"). The Divestiture Assets include specified Recall records management facilities in these areas along with all tangible and intangible assets used in the operation of the records management businesses associated with these facilities. In each of the

geographic markets other than Atlanta, Defendants are divesting all of Recall's RMS assets. In Atlanta, Defendants are divesting most, but not all, of Recall's RMS facilities because the facilities to be divested are sufficient to serve all of Recall's local customers in Atlanta and to compete for new business in the area.

Section IV.A of the proposed Final Judgment requires Defendants, within 10 calendar days after consummation of the transaction sought to be enjoined by the Complaint, to divest RMS assets in thirteen of the fifteen geographic markets to Access CIG, LLC ("Access"). Access is an established player in the RMS industry and is currently the third-largest RMS provider in the United States. In addition to preserving competition in each of the thirteen geographic markets, the divestitures, when combined with Access's existing operations, will enable Access to offer RMS in all of the metropolitan areas that Recall currently offers RMS. Access will be acquiring the Divestiture Assets in Detroit, Kansas City, Charlotte, Durham, Raleigh, Buffalo, Tulsa, Pittsburgh, Greenville/Spartanburg, Nashville, San Antonio, Richmond, and San Diego. If, for some reason, Defendants are unable to complete the divestitures to Access, they must sell the Divestiture Assets to an alternative purchaser approved by the United States.

Section IV.B of the proposed Final Judgment requires Defendants, within ninety days after consummation of the transaction sought to be enjoined by the Complaint, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest specified RMS assets as viable ongoing businesses in the remaining two geographic markets. In these two geographic areas—Atlanta and Seattle—Access is already a significant RMS provider, and thus a divestiture to Access would not restore the competition lost through the proposed acquisition.

Pursuant to Section IV.L, Defendants must divest the Divestiture Assets in such a way as to satisfy the United States in its sole discretion that the assets can and will be operated by the purchasers as viable, ongoing records management businesses that can compete effectively in the relevant markets. Defendants must take all reasonable steps necessary to accomplish the divestitures required by Sections IV.A and IV.B quickly and shall cooperate with prospective purchasers.

In the event that the Defendants do not accomplish all of the divestitures within the periods prescribed in the proposed Final Judgment, Section V provides that the Court will appoint a trustee selected by the United States to effect the divestiture of any remaining Divestiture Assets. If a trustee is appointed, Section V provides that Defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestitures have not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

C. *Other Divestiture-Related Provisions*

Section IV.I of the proposed Final Judgment gives the purchasers of the Divested Assets the right to require the Defendants to provide certain transition services pursuant to a transition services agreement. This provision is designed to ensure the smooth operation of the divested

assets during the first six months after the sale of the Divestiture Assets.

Section IV.J of the proposed Final Judgment is designed to help ensure that the purchasers of the Divestiture Assets can compete to provide RMS to customers that are served by both divested records management facilities and records management facilities that are being retained by Defendants. These customers are defined as Split Multi-City Customers in Section II.L. Section IV.J of the proposed Final Judgment requires Defendants to allow any Split Multi-City Customer to terminate or otherwise modify its contract with Defendants so as to enable the customer to transfer records to the purchaser(s) of the Divestiture Assets without paying permanent withdrawal fees, retrieval fees, or other fees associated with transferring such customer's records from a Recall records management facility that would otherwise be required under the customer's contract with Defendants. If a Split Multi-City Customer chooses to exercise this provision, it will only be required to pay Defendants the costs associated with transporting the records from Defendants' RMS facilities to the new facility, and the costs associated with reshelving the records at the new facility, if such customer requests such services from the Defendants. All Split Multi-City Customers will be informed of their rights under Section IV.J by letter as specified in Section IV.K of the proposed Final Judgment.

D. *Notification of Future Acquisitions*

Section XI of the proposed Final Judgment requires Defendants to provide advance notification of certain future proposed acquisitions not otherwise subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a. Specifically, Defendants must provide at least thirty days advance written notice to the United States before Defendants acquire, directly or indirectly, any interest in any RMS business located within fifty miles of any

Iron Mountain RMS facility located in the geographic areas listed in Appendix C of the proposed Final Judgment where the business to be acquired generated at least $1 million in revenues from RMS in the most recent completed calendar year. Section XI then provides for waiting periods and opportunities for the United States to obtain additional information similar to the provisions of the HSR Act before acquisitions in these geographic areas can be consummated.

The geographic areas listed in Appendix C include the fifteen geographic markets subject to divestitures as well as certain other metropolitan areas where Iron Mountain and Recall both provided RMS prior to the proposed acquisition. Although the United States did not believe that divestitures in these geographic areas were necessary, given the consolidation trends in the RMS industry, the United States sought to ensure that the Division had the opportunity to review future acquisitions in these areas so that it can seek effective relief, if necessary. The additional metropolitan areas covered by Section XI are: Phoenix, Arizona; Denver, Colorado; Jacksonville, Florida; Miami, Florida; Orlando, Florida; Minneapolis, Minnesota; St. Louis, Missouri; Las Vegas, Nevada; Cleveland, Ohio; Portland, Oregon; Dallas, Texas; and Houston, Texas.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

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

private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the *Federal Register*, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

Maribeth Petrizzi, Chief
Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 8700
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against the proposed acquisition. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of RMS in the relevant markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

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

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

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

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v, U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the

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

adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc*., 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

[2] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom*. *Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements) (citing *Microsoft*, 56 F.3d at 1461); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

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

entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

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

[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977)

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.

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: March 31, 2016

Respectfully submitted,

Soyoung Choe
U.S. Department of Justice, Antitrust Division
Networks & Technology Enforcement Section
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Washington, D.C. 20530
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("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.").

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

IRON MOUNTAIN INC.,

and

RECALL HOLDINGS LTD.

Defendants.

Civil Action No.: 1:16-cv-00595-APM

HOLD SEPARATE STIPULATION AND ORDER

It is hereby stipulated and agreed by and between the undersigned parties, subject to approval and entry by the Court, that:

I. Definitions

As used in this Hold Separate Stipulation and Order:

A. "Acquirer" or "Acquirers" means the entity or entities to whom Defendants divest the Divestiture Assets.

B. "Iron Mountain" means Defendant Iron Mountain Incorporated, a Delaware corporation with its headquarters in Boston, Massachusetts, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

[Pages 2-9 of the Order are identical to the corresponding pages in the proposed order and are omitted]

Dated: March 31, 2016

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

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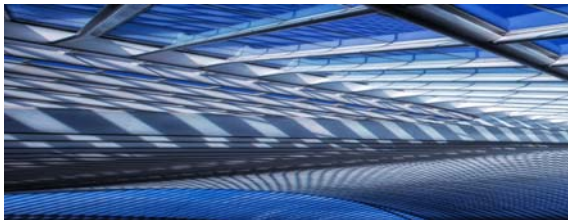
O R D E R

IT IS SO ORDERED by the Court, this 6th day of April 2016.

United States District Judge

PRESS RELEASES



Back to listing (http://www.ironmountain.com/about-us/news-events)

IRON MOUNTAIN COMPLETES ACQUISITION OF RECALL

Acquisition strengthens global footprint, opens up new markets and enhances service delivery

BOSTON, MA - MAY 2ND, 2016
Iron Mountain Incorporated (http://www.ironmountain.com/)(NYSE: IRM), the global leader in storage and information management services, today announced the completion of its acquisition of Recall Holdings Limited as a primarily stock transaction for approximately $2 billion (US). With the acquisition, Iron Mountain acquires the entirety of Recall's global operations, including all facilities, vehicles, employees and customer assets and excluding operations to be divested in accordance with regulatory agreements in the United States, Canada and Australia; the acquisition of the Recall business in the UK remains subject to regulatory review. Additionally, Iron Mountain appointed Recall directors Neil Chatfield and Wendy Murdock to its Board of Directors, who are included among director nominees standing for election at the company's upcoming Annual Meeting of Stockholders on June 17, 2016.

Increasing regulations, ongoing security threats, and the need to turn data into business value has elevated both the complexity and priority of managing information and assets. From business records to data to valuable items like art, the stakes have never been higher for organizations of all sizes to ensure their most critical assets are protected while able to be accessed immediately. They require a partner located where they are with the right combination of trust and security to protect what matters most, while also providing expertise and product and services designed to get the most out of those assets. And they need to be sure that as their business matures and changes, their partner can scale with them – supporting their growth across geographies and into new industries.

"Today marks an important milestone for Iron Mountain, and we welcome our new colleagues from Recall as well as their customers and shareholders into our company," said William L. Meaney, president and CEO of Iron Mountain. "This acquisition significantly boosts our vision to serve as the trusted guardians of our customers' most important assets, as it expands both our services and footprint

for better assisting them with their storage and information management needs. That trust is a cornerstone of our business, whether it's securing the strategic value of information and assets or continuing to develop innovative products and services that give customers improved access, control and value from those assets. We're now strongly positioned to deliver on our strategic and financial goals, drawing on the combined capabilities and expertise of both companies to ensure a superior customer experience across the globe."

For more on Iron Mountain's acquisition of Recall, please visit www.ironmountain.com/Iron-Mountain-Recall-Acquisition.aspx.

ABOUT IRON MOUNTAIN

Iron Mountain Incorporated (NYSE: IRM) is the global leader for storage and information management services. Trusted by more than 220,000 organizations around the world, Iron Mountain's real estate network comprises more than 85 million square feet across more than 1,400 facilities in 45 countries dedicated to protecting and preserving what matters most for its customers. Iron Mountain's solutions portfolio includes records management , data management , document management , data centers, art storage and logistics, and secure shredding, helping organizations to lower storage costs, comply with regulations, recover from disaster, and better use their information. Founded in 1951, Iron Mountain stores and protects billions of information assets, including critical business documents, electronic information, medical data and cultural and historical artifacts. Visit www.ironmountain.com (http://www.ironmountain.com/) for more information.

ADDITIONAL NEWS & EVENTS

SEPTEMBER 22ND, 2018

AHIMA 2018 (//www.ironmountain.com/about-us/news-events/events/2018/september/ahima-2018)

OCTOBER 16TH, 2018

Iron Mountain Concert Series: John Waite (//www.ironmountain.com/about-us/news-events/events/2018/october/iron-mountain-concert-series-john-waite)

SEPTEMBER 5TH, 2018

Register for Gartner IT Sourcing, Procurement, Vendor & Asset Management S... (//www.ironmountain.com/about-us/news-events/events/2018/september/register-for-gartner-it-sourcing-procurement-vendor-asset-management-summit)

JULY 27TH, 2018

Iron Mountain Reports Second Quarter 2018 Results (//www.ironmountain.com/about-us/news-events/news-categories/press-releases/2018/iron-mountain-reports-second-quarter-2018-results)

Careers (http://www.ironmountain.com/about-us/careers)

Certifications and Awards (http://www.ironmountain.com/about-us/certifications-and-awards)

Corporate Social Responsibility (http://www.ironmountain.com/about-us/corporate-social-responsibility)

Customer Success Stories (http://www.ironmountain.com/resources/customer-success-stories)

History (http://www.ironmountain.com/about-us/history)

Investors (http://investors.ironmountain.com/company/for-investors/investors-overview/default.aspx)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. IRON MOUNTAIN INC., and RECALL HOLDINGS LTD., Defendants.	Civil Action No. 1:16-cv-00595-APM Judge Amit P. Mehta

DESCRIPTION OF WRITTEN OR ORAL COMMUNICATIONS CONCERNING THE PROPOSED FINAL JUDGMENT IN THIS ACTION AND CERTIFICATION OF COMPLIANCE UNDER 15 U.S.C. § 16(G) BY IRON MOUNTAIN INCORPORATED

Under Section 2(g) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(g), defendant Iron Mountain Incorporated ("Iron Mountain"), by its attorney, submits this description of all written or oral communications by or on behalf of Iron Mountain with any officer or employee of the United States concerning the proposed Final Judgment filed in this action on March 31, 2016. In accordance with Section 2(g), this description excludes any communications "made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone." 15 U.S.C. § 16(g).

To the best of Iron Mountain's knowledge, after appropriate inquiry, there have been no written or oral communications by or on behalf of Iron Mountain with any officer or employee of the United States concerning the proposed Final Judgment, except for communications between counsel of record for Iron Mountain and employees of the Department of Justice

Antitrust Division. Iron Mountain therefore certifies that the requirements of Section 2(g) have been complied with and that this description of communications by or on behalf of Iron Mountain and required to be reported under Section 2(g) is true and complete.

Dated: April 8, 2016

/s/ Laura A. Wilkinson
Laura A. Wilkinson, Esq.
D.C. Bar No. 413497
Weil, Gotshal & Manges LLP
1300 Eye Street, NW – Suite 900
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laura.wilkinson@weil.com

Counsel for Defendant
Iron Mountain Incorporated

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2016, the foregoing Description of Written or Oral Communications Concerning the Proposed Final Judgement in this Action and Certification of Compliance under 15 U.S.C. § 16(g) by Iron Mountain Incorporated was filed using the Court's CM/ECF system, which shall send notice to all counsel of record.

/s/ Laura A. Wilkinson
Laura A. Wilkinson, Esq.

Counsel for Defendant
Iron Mountain Incorporated

[Note: A corresponding document was filed by Recall Holding s on April 13, 2016]

11. *Project Development Costs and Economic Analysis:* Estimate the costs of development, including the cost of studies to determine feasibility, environmental compliance, project design, construction, financing, and the amortized annual cost of the investment. Estimate annual operation, maintenance, and replacement expenses, annual payments to the United States that are potentially associated with the Boise Project. Estimate costs associated with any anticipated additional transmission or wheeling services. Identify proposed methods of financing the project. Estimate the anticipated return on investment and present an economic analysis that compares the present worth of all benefits and the costs of the project.

12. *Performance Guarantee and Assumption of Liability:* Describe plans for (1) providing the government with performance bonds or other guarantee covering completion of the proposed project; (2) assuming liability for damage to the operational and structural integrity of the Anderson Ranch Dam and Reservoir facilities or other aspects of the Boise Project caused by construction, commissioning, operation, and/or maintenance of the pumped-storage hydropower power development; and (3) obtaining general liability insurance.

13. *Other Information:* (This final paragraph is provided for the applicant to include additional information considered relevant to Reclamation's selection process in this matter.)

Selection of Lessee

Reclamation will evaluate proposals received in response to this published notice. Proposals will be ranked according to response to the factors described in Fundamental Considerations and Requirements and Proposal Content Guidelines sections provided in this notice. In general, Reclamation will give more favorable consideration to proposals that (1) are well adapted to developing, conserving, and utilizing the water resource and protecting natural resources; (2) clearly demonstrate that the offeror is qualified to develop the hydropower facility and provide for long-term operation and maintenance; and (3) best share the economic benefits of the pumped-storage hydroelectric power development among parties to the LOPP. A proposal will be deemed unacceptable if it is inconsistent with Boise Project purposes, as determined by Reclamation.

Reclamation will give preference to those entities that qualify as preference entities (as defined under Proposal Content Guidelines, item (1.), of this notice) provided that the preference entity is well qualified and their proposal is at least as well adapted to developing, conserving, and utilizing the water and natural resources as other submitted proposals. Preference entities will be allowed 90 days to improve their proposals, if necessary, to be made at least equal to a proposal(s) that may have been submitted by a non-preference entity.

Notice and Time Period To Enter Into LOPP

Reclamation will notify, in writing, all entities submitting proposals of Reclamation's decision regarding selection of the potential lessee. The selected potential lessee will have three years from the date of such notification to accomplish NEPA compliance and enter into a LOPP for the proposed development of pumped-storage hydroelectric power at Anderson Ranch Reservoir. The lessee will then have up to three years from the date of execution of the lease to complete the designs and specifications and an additional two years to secure financing and to begin construction. Such timeframes may be adjusted for just cause resulting from actions and/or circumstances that are beyond the control of the lessee.

Dated: January 25, 2016.

Lorri J. Lee,

Regional Director, Pacific Northwest Region.

[FR Doc. 2016–08237 Filed 4–8–16; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–770–773 and 775 (Third Review)]

Stainless Steel Wire Rod From Italy, Japan, Korea, Spain, and Taiwan; Revised Schedule for the Subject Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

DATES: *Effective Date:* April 4, 2016.

FOR FURTHER INFORMATION CONTACT: Fred Ruggles (202–205–3187), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: Effective January 6, 2016, the Commission established a schedule for the conduct of the final phase of the subject reviews (81 FR 1642, January 13, 2016). The Commission is revising its schedule by changing the time of the hearing.

The Commission's new schedule for the hearing in these reviews is as follows: The hearing will be held at the U.S. International Trade Commission Building at 10:00 a.m. on May 18, 2016. All other aspects of the schedule remain unchanged.

For further information concerning these reviews see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: April 6, 2016.

By order of the Commission.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–08216 Filed 4–8–16; 8:45 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Iron Mountain Inc. and Recall Holdings Ltd.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Iron Mountain Inc. and Recall Holdings Ltd.,* Civil Action No. 1:16–cv–00595. On March 31, 2016, the United States filed a Complaint alleging that Iron Mountain's proposed acquisition of Recall would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed

Final Judgment, filed at the same time as the Complaint, requires Iron Mountain to divest Recall records management assets in fifteen metropolitan areas.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's Web site at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's Web site, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 450 5th Street NW., Suite 8700, Washington, DC 20530 (telephone: (202) 307–0924).

Patricia A. Brink,

Director of Civil Enforcement.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
U.S. Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 7100
Washington, DC 20530

Plaintiff,

v.

IRON MOUNTAIN INC.,
One Federal Street
Boston, MA 02110

and

RECALL HOLDINGS LTD.
697 Gardeners Road
Alexandria, Sydney
Australia

Defendants.

CASE NO.: 1:16–cv–00595
JUDGE: Amit P. Mehta
FILED: 03/31/2016

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the proposed acquisition by Defendant Iron Mountain Incorporated (''Iron Mountain'') of Defendant Recall Holdings Limited (''Recall''). The United States alleges as follows:

I. NATURE OF THE ACTION

1. Iron Mountain and Recall are the two largest providers of hard-copy records management services (''RMS'') in the United States and compete directly to serve RMS customers in numerous geographic areas. RMS are utilized by a wide array of businesses that for legal, business, or other reasons have a need to store and manage substantial volumes of hard copy records for significant periods of time.

2. In 15 metropolitan areas located throughout the United States, Iron Mountain and Recall are either the only significant providers of RMS, or two of only a few significant providers. In these 15 metropolitan areas—Detroit, Michigan; Kansas City, Missouri; Charlotte, North Carolina; Durham, North Carolina; Raleigh, North Carolina; Buffalo, New York; Tulsa, Oklahoma; Pittsburgh, Pennsylvania; Greenville/Spartanburg, South Carolina; Nashville, Tennessee; San Antonio, Texas; Richmond, Virginia; San Diego, California; Atlanta, Georgia; and Seattle, Washington—Iron Mountain and Recall have competed aggressively against one another for customers, resulting in lower prices for RMS and higher quality service. Iron Mountain's acquisition of Recall would eliminate this vigorous competition and the benefits it has delivered to RMS customers in each of these metropolitan areas.

3. Accordingly, Iron Mountain's acquisition of Recall likely would substantially lessen competition in the provision of RMS in these 15 metropolitan areas in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and should be enjoined.

II. JURISDICTION, VENUE, AND INTERSTATE COMMERCE

4. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. 25, as amended, to prevent and restrain the violation by Defendants of Section 7 of the Clayton Act, 15 U.S.C. 18.

5. This Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345. In their RMS businesses, Iron Mountain and Recall each make sales and purchases in interstate commerce, ship records in the flow of interstate commerce, and engage in activities substantially affecting interstate commerce.

6. Defendants Iron Mountain and Recall transact business in the District of Columbia and have consented to venue and personal jurisdiction in this District. This Court has personal jurisdiction over each Defendant and venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(c).

III. THE DEFENDANTS AND THE TRANSACTION

7. Iron Mountain is a Delaware corporation headquartered in Boston, Massachusetts. Iron Mountain is the largest RMS company in the United States, providing document storage and related services throughout the nation. For fiscal year 2014, Iron Mountain reported worldwide revenues of approximately $3.1 billion.

8. Recall is an Australian company headquartered in Norcross, Georgia. Recall is the second-largest RMS company in the United States and provides document storage and related services throughout the nation. Recall's worldwide revenues for 2014 were approximately $836.1 million.

9. On June 8, 2015, Iron Mountain and Recall entered into a Scheme Implementation Deed by which Iron Mountain proposes to acquire Recall for approximately $2.6 billion in cash and stock, subject to adjustments.

IV. TRADE AND COMMERCE

A. Relevant Service Market: Records Management Services

10. For a variety of legal and business reasons, companies must often retain hard-copy records for significant periods of time. Given the physical space required to store any substantial volume of records and the effort required to manage stored records, many customers contract with RMS vendors such as Iron Mountain and Recall to provide these services.

11. RMS vendors pick up records from customers and bring them to a secure off-site facility, where they then index the records to allow their customers to keep track of them. RMS vendors retrieve stored records for their customers upon request and often perform other services related to the storage, tracking, and shipping of records. For example, they sometimes destroy stored records on behalf of the customer once preservation no longer is required.

12. Customers that purchase RMS range from Fortune 500 companies to small firms that have a need to manage and store records. Customers include corporations with business records maintenance requirements, healthcare providers with patient records, and other companies that may wish to manage and store other types of records, such as case files, employee records, and other information.

13. RMS procurements are typically made by competitive bid. Contracts usually specify fees for each service provided (*e.g.,* pickup, monthly storage, retrieval, delivery, and transportation).

Most customers purchase RMS in only one city. Some customers with operations in multiple cities prefer to purchase RMS from a single vendor pursuant to a single contract; other multi-city customers disaggregate their contracts and purchase RMS from different vendors in different cities.

14. For companies with a significant volume of records, in-house storage is generally not a viable substitute for RMS. For a company to manage its records in-house, it must have a substantial amount of unused space, racking equipment, security features, and one or more dedicated employees. Similarly, entirely replacing RMS with digital records management services is generally not feasible. To switch from physical to electronic records, a customer would need to fundamentally shift its method of creating, using, and storing records and adapt to an entirely paperless system. For many customers, the time, expense, and other burdens associated with doing so are prohibitive.

15. For these reasons, a hypothetical monopolist of RMS could profitably increase its prices by at least a small but significant non-transitory amount. Accordingly, RMS constitutes a relevant product market and line of commerce for purposes of analyzing the likely competitive effects of the proposed acquisition under Section 7 of the Clayton Act, 15 U.S.C. 18.

B. Relevant Geographic Markets

16. The geographic market for RMS consists of a metropolitan area or a radius around a metropolitan area. Customers generally require a potential RMS vendor to have a storage facility located within a certain proximity to the customer's location. Customers generally will not consider vendors located outside a particular radius, because the vendor will not be able to retrieve and deliver records on a timely basis. The radius a customer is willing to consider is usually measured in time, rather than miles, as the retrieval of records may be a time-sensitive matter. Transportation costs also likely render a distant RMS vendor uncompetitive with vendors located closer to the customer.

17. RMS vendors in the following 15 metropolitan areas—Detroit, Michigan; Kansas City, Missouri; Charlotte, North Carolina; Durham, North Carolina; Raleigh, North Carolina; Buffalo, New York; Tulsa, Oklahoma; Pittsburgh, Pennsylvania; Greenville/Spartanburg, South Carolina; Nashville, Tennessee; San Antonio, Texas; Richmond, Virginia; San Diego, California; Atlanta, Georgia; and Seattle, Washington—could profitably increase prices to local customers without losing significant sales to more distant competitors. As a result, a hypothetical monopolist of RMS in each of these 15 metropolitan areas could profitably increase its prices by at least a small but significant non-transitory amount. Accordingly, each of these areas is a relevant geographic market for the purposes of analyzing the competitive effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. 18.

C. Anticompetitive Effects of the Proposed Acquisition

18. Iron Mountain and Recall are the two largest RMS providers in the United States and directly compete to provide RMS in each relevant geographic market. Each relevant geographic market for the provision of RMS is highly concentrated. In each of the relevant geographic markets, Iron Mountain is the largest RMS provider and Recall is either the second or third-largest competitor, while few, if any, other significant competitors exist. Iron Mountain and Recall compete very closely for accounts, target one another's customers, and, in most of the relevant geographic markets, view one another as the other's most formidable competitor. The resulting significant increase in concentration in each metropolitan area and loss of head-to-head competition between Iron Mountain and Recall likely will result in higher prices and lower quality service for RMS customers in each relevant geographic market.

D. Entry Into the Market for RMS

19. It is unlikely that entry or expansion into the provision of RMS in the relevant geographic markets alleged herein would be timely, likely, or sufficient to defeat the likely anticompetitive effects of the proposed acquisition.

20. Any new RMS entrant would be required to expend significant time and capital to successfully enter any of the relevant geographic markets. RMS entry into a new geographic market generally requires a secure facility, racking equipment, delivery trucks, tracking software, and employees. In addition, a new entrant would have to expend substantial effort to build a reputation for dependable service, which is important to RMS customers who demand quick and reliable pickup of and access to their stored records.

21. In order to recoup the costs of entry, an RMS vendor must fill a substantial amount of its facility's capacity. However, acquiring customers from existing RMS vendors in order to fill this capacity is often complicated by provisions in the customers' contracts requiring payment of permanent withdrawal fees if the customer permanently removes a box or record from storage. Customers will sometimes pay these withdrawal fees themselves, but more commonly, the new vendor will have to offer to pay the fees to induce the customer to switch. The vendor must then recoup the cost of the fees by imposing its own permanent withdrawal fees, amortizing the cost over a longer contract, or charging higher prices while still charging a competitive price for its services. Customer contracts also often impose a cap on the number of boxes per month that a customer may permanently remove from a RMS vendor's facility, such that a switch to a new RMS vendor may take several months to complete. Taken together, permanent withdrawal fees and other withdrawal restrictions make it difficult for a new RMS entrant to win customers away from existing RMS vendors.

22. Likewise the permanent withdrawal fees and other withdrawal restrictions also make it more difficult for an RMS vendor already in a market to win enough customers away from competitors to expand significantly.

V. VIOLATION ALLEGED

23. The United States hereby incorporates paragraphs 1 through 22 above.

24. The proposed acquisition of Recall by Iron Mountain likely would substantially lessen competition for RMS in the 15 relevant geographic markets identified above in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Unless enjoined, the proposed acquisition likely would have the following anticompetitive effects relating to RMS in the relevant geographic markets, among others:

(a) actual and potential competition between Iron Mountain and Recall for RMS in each relevant geographic market will be eliminated;

(b) competition generally for RMS in each relevant geographic market will be substantially lessened; and

(c) prices for RMS will likely increase and the quality of service will likely decrease in each relevant geographic market.

VI. REQUESTED RELIEF

25. The United States requests that this Court:

(a) adjudge and decree that Iron Mountain's acquisition of Recall would be unlawful and violate Section 7 of the Clayton Act, 15 U.S.C. 18;

(b) permanently enjoin and restrain Defendants and all persons acting on their behalf from consummating the proposed acquisition of Recall by Iron

Mountain, or from entering into or carrying out any other contract, agreement, plan or understanding, the effect of which would be to combine Iron Mountain with Recall;

(c) award the United States the cost for this action; and

(d) award the United States such other and further relief as the Court deems just and proper.

Dated: March 31, 2016

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

WILLIAM J. BAER (DC BAR #324723)
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
IRON MOUNTAIN INC.,
and
RECALL HOLDINGS LTD.
Defendants.

CASE NO.: 1:16–cv–00595
JUDGE: Amit P. Mehta
FILED: 03/31/2016

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THE PROCEEDING

On June 8, 2015, Iron Mountain Inc. (''Iron Mountain'') reached an agreement to acquire all of the outstanding shares of Defendant Recall Holdings Ltd. (''Recall'') in a transaction valued at approximately $2.6 billion. The United States filed a civil antitrust Complaint on March 31, 2016, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of the acquisition would be to lessen competition substantially for the provision of hard-copy records management services (''RMS'') in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, in the following fifteen metropolitan areas: Detroit, Michigan; Kansas City, Missouri; Charlotte, North Carolina; Durham, North Carolina; Raleigh, North Carolina; Buffalo, New York; Tulsa, Oklahoma; Pittsburgh, Pennsylvania; Greenville/Spartanburg, South Carolina; Nashville, Tennessee; San Antonio, Texas; Richmond, Virginia; San Diego, California; Atlanta, Georgia; and Seattle, Washington. This loss of competition likely would result in consumers paying higher prices for RMS and receiving inferior service in these areas.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order (''Hold Separate'') and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest specified RMS assets in each of the 15 metropolitan areas of concern. Under the terms of the Hold Separate, Defendants will take certain steps to ensure that the assets are operated as competitively independent, economically viable, and ongoing business concerns that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestitures.

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

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

A. The Defendants and the Proposed Transaction

Iron Mountain is a Delaware corporation headquartered in Boston, Massachusetts. Iron Mountain is the largest RMS company in the United States, providing document storage and related services throughout the nation. For fiscal year 2014, Iron Mountain reported worldwide revenues of approximately $3.1 billion.

Recall is an Australian company headquartered in Norcross, Georgia. Recall is the second-largest RMS company in the United States and provides document storage and related services throughout the nation. Recall's worldwide revenues for 2014 were approximately $836.1 million.

On June 8, 2015, Iron Mountain and Recall entered into an agreement pursuant to which Iron Mountain proposes to acquire Recall for approximately $2.6 billion in cash and stock, subject to adjustments.

The proposed transaction, as initially agreed to by Defendants, would lessen competition substantially in the provision of RMS in the relevant markets. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on March 31, 2016.

B. The Competitive Effects of the Transaction

1. The Relevant Service Market

The Complaint alleges that RMS constitute a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18. For a variety of legal and business reasons, companies frequently must keep hard-copy records for significant periods of time. Given the physical space required to store any substantial volume of records and the effort required to manage stored records, many customers contract with RMS vendors such as Iron Mountain and Recall to provide these services.

RMS vendors typically pick up records from customers and bring them to a secure off-site facility, where they then index the records to allow their customers to keep track of them. RMS vendors retrieve stored records for their customers upon request and often perform other services related to the storage, tracking, and shipping of

records. For example, they sometimes destroy stored records on behalf of the customer once preservation is no longer required.

Customers of RMS include Fortune 500 firms, as well as local businesses throughout the United States. Customers often procure RMS by competitive bid and contracts usually specify fees for each service provided (*e.g.,* pickup, monthly storage, retrieval, delivery, and transportation). Most customers purchase RMS in only one city. Some customers with operations in multiple cities prefer to purchase RMS from a single vendor pursuant to a single contract; other multi-city customers disaggregate their contracts and purchase RMS from different vendors in different cities.

The Complaint alleges for companies with a significant volument of records, in-house storage is generally not a viable substitute for RMS. For a company to manage its records in-house, it must have a substantial amount of unused space, racking equipment, security features, and one or more dedicated employees. Similarly, entirely replacing RMS with digital records management services is generally not feasible. To switch from physical to electronic records, a customer would need to fundamentally shift its method of creating, using and storing records and adopt an entirely paperless system.

For these reasons, the Complaint alleges that a hypothetical monopolist of RMS could profitably increase its prices by at least a small but significant non-transitory amount. In the event of a small but significant increase in price for RMS, customers would not switch to any other alternative. Thus, the Complaint alleges that the provision of RMS constitutes a relevant service market for purposes of analyzing the effects of the transaction.

2. Relevant Geographic Markets

The geographic market for RMS consists of a metropolitan area or a radius around a metropolitan area. Customers generally require a potential RMS vendor to have a storage facility located within a certain proximity to the customer's location. Customers generally will not consider vendors located outside a particular radius, because the vendor will not be able to retrieve and deliver records on a timely basis. The radius a customer is willing to consider is usually measured in time, rather than miles, as the retrieval of records may be a time-sensitive matter. Transportation costs also likely render a distant RMS vendor uncompetitive with vendors located closer to the customer.

In each of the metropolitan areas identified in the Complaint, a hypothetical monopolist RMS firm could profitably increase prices to local customers without losing significant sales to more distant competitors. Accordingly, each of these metropolitan areas is a relevant geographic market for the purposes of analyzing the competitive effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. 18.

3. Anticompetitive Effects of the Proposed Acquisition

As alleged in the Complaint, Iron Mountain and Recall are the two largest RMS providers in the United States and the only significant RMS providers, or two of only a few significant RMS providers, in each of the relevant geographic markets. In each of the geographic markets, Iron Mountain is the largest RMS provider, Recall is the second- or third-largest RMS competitor, and the market is highly concentrated. In each of these markets, Iron Mountain and Recall directly compete with one another to provide RMS, resulting in lower prices and better quality service for RMS customers. According to the Complaint, the significant increase in concentration and loss of head-to-head competition that will result from the proposed acquisition will likely cause prices for RMS to increase and the quality of RMS services to decline in each relevant market.

4. Difficulty of Entry

According to the Complaint, it is unlikely that entry or expansion into the provision of RMS in the relevant geographic markets would be timely, likely, or sufficient to defeat the likely anticompetitive effects of the proposed acquisition.

Any new RMS entrant would be required to expend significant time and capital to successfully enter any of the relevant markets. Entry into a new geographic market requires a secure facility, racking equipment, delivery trucks, tracking software, and employees. In addition, a new entrant would have to expend substantial effort to build a reputation for dependable service, which is important to RMS customers who demand quick and reliable pickup of and access to their stored records. In order to recoup the costs of entry, an RMS vendor must fill a substantial amount of its facility's capacity. However, acquiring customers from existing RMS vendors in order to fill this capacity is often complicated by provisions in the customers' contracts requiring payment of permanent withdrawal fees if the customer permanently removes a box or record from storage. Customers will sometimes pay these withdrawal fees themselves, but more commonly, the new vendor will have to offer to pay the fees to induce the customer to switch. The vendor must then recoup the cost of the fees by amortizing the cost over a longer contract, or charging higher prices while still charging a competitive price for its services. Contracts often impose a cap on the number of boxes per month that a customer may permanently remove from a RMS vendor's facility, such that a switch to a new RMS vendor may take several months or more to complete. Taken together, permanent withdrawal fees and other withdrawal restrictions make it difficult for a new RMS entrant to win customers away from existing RMS vendors.

Such fees and withdrawal restrictions also make it more difficult for existing RMS vendors to expand significantly. For all of these reasons, the Complaint alleges that new entry or expansion by existing firms is unlikely to remedy the anticompetitive effects of the proposed acquisition.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Divestitures

The divestitures required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by establishing independent and economically viable competitors in the provision of RMS in each of the relevant geographic markets.

The proposed Final Judgment requires Defendants to divest, as viable ongoing business concerns, Recall RMS assets in all fifteen geographic markets identified in the Complaint (collectively, the ''Divestiture Assets''). The Divestiture Assets include specified Recall records management facilities in these areas along with all tangible and intangible assets used in the operation of the records management businesses associated with these facilities. In each of the geographic markets other than Atlanta, Defendants are divesting all of Recall's RMS assets. In Atlanta, Defendants are divesting most, but not all, of Recall's RMS facilities because the facilities to be divested are sufficient to serve all of Recall's local customers in Atlanta and to compete for new business in the area.

Section IV.A of the proposed Final Judgment requires Defendants, within 10 calendar days after consummation of the transaction sought to be enjoined by the Complaint, to divest RMS assets in thirteen of the fifteen geographic

markets to Access CIG, LLC (''Access''). Access is an established player in the RMS industry and is currently the third-largest RMS provider in the United States. In addition to preserving competition in each of the thirteen geographic markets, the divestitures, when combined with Access's existing operations, will enable Access to offer RMS in all of the metropolitan areas that Recall currently offers RMS. Access will be acquiring the Divestiture Assets in Detroit, Kansas City, Charlotte, Durham, Raleigh, Buffalo, Tulsa, Pittsburgh, Greenville/Spartanburg, Nashville, San Antonio, Richmond, and San Diego. If, for some reason, Defendants are unable to complete the divestitures to Access, they must sell the Divestiture Assets to an alternative purchaser approved by the United States.

Section IV.B of the proposed Final Judgment requires Defendants, within ninety days after consummation of the transaction sought to be enjoined by the Complaint, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest specified RMS assets as viable ongoing businesses in the remaining two geographic markets. In these two geographic areas—Atlanta and Seattle—Access is already a significant RMS provider, and thus a divestiture to Access would not restore the competition lost through the proposed acquisition.

Pursuant to Section IV.L, Defendants must divest the Divestiture Assets in such a way as to satisfy the United States in its sole discretion that the assets can and will be operated by the purchasers as viable, ongoing records management businesses that can compete effectively in the relevant markets. Defendants must take all reasonable steps necessary to accomplish the divestitures required by Sections IV.A and IV.B quickly and shall cooperate with prospective purchasers.

In the event that the Defendants do not accomplish all of the divestitures within the periods prescribed in the proposed Final Judgment, Section V provides that the Court will appoint a trustee selected by the United States to effect the divestiture of any remaining Divestiture Assets. If a trustee is appointed, Section V provides that Defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestitures have not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

C. Other Divestiture-Related Provisions

Section IV.I of the proposed Final Judgment gives the purchasers of the Divested Assets the right to require the Defendants to provide certain transition services pursuant to a transition services agreement. This provision is designed to ensure the smooth operation of the divested assets during the first six months after the sale of the Divestiture Assets.

Section IV.J of the proposed Final Judgment is designed to help ensure that the purchasers of the Divestiture Assets can compete to provide RMS to customers that are served by both divested records management facilities and records management facilities that are being retained by Defendants. These customers are defined as Split Multi-City Customers in Section II.L. Section IV.J of the proposed Final Judgment requires Defendants to allow any Split Multi-City Customer to terminate or otherwise modify its contract with Defendants so as to enable the customer to transfer records to the purchaser(s) of the Divestiture Assets without paying permanent withdrawal fees, retrieval fees, or other fees associated with transferring such customer's records from a Recall records management facility that would otherwise be required under the customer's contract with Defendants. If a Split Multi-City Customer chooses to exercise this provision, it will only be required to pay Defendants the costs associated with transporting the records from Defendants' RMS facilities to the new facility, and the costs associated with reshelving the records at the new facility, if such customer requests such services from the Defendants. All Split Multi-City Customers will be informed of their rights under Section IV.J by letter as specified in Section IV.K of the proposed Final Judgment.

D. Notification of Future Acquisitions

Section XI of the proposed Final Judgment requires Defendants to provide advance notification of certain future proposed acquisitions not otherwise subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a. Specifically, Defendants must provide at least thirty days advance written notice to the United States before Defendants acquire, directly or indirectly, any interest in any RMS business located within fifty miles of any Iron Mountain RMS facility located in the geographic areas listed in Appendix C of the proposed Final Judgment where the business to be acquired generated at least $1 million in revenues from RMS in the most recent completed calendar year. Section XI then provides for waiting periods and opportunities for the United States to obtain additional information similar to the provisions of the HSR Act before acquisitions in these geographic areas can be consummated.

The geographic areas listed in Appendix C include the fifteen geographic markets subject to divestitures as well as certain other metropolitan areas where Iron Mountain and Recall both provided RMS prior to the proposed acquisition. Although the United States did not believe that divestitures in these geographic areas were necessary, given the consolidation trends in the RMS industry, the United States sought to ensure that the Division had the opportunity to review future acquisitions in these areas so that it can seek effective relief, if necessary. The additional metropolitan areas covered by Section XI are: Phoenix, Arizona; Denver, Colorado; Jacksonville, Florida; Miami, Florida; Orlando, Florida; Minneapolis, Minnesota; St. Louis, Missouri; Las Vegas, Nevada; Cleveland, Ohio; Portland, Oregon; Dallas, Texas; and Houston, Texas.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

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

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United

States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet Web site and, under certain circumstances, published in the **Federal Register**.

Written comments should be submitted to:

Maribeth Petrizzi, Chief
Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW., Suite 8700
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against the proposed acquisition. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of RMS in the relevant markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

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

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

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

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v, U.S. Airways Group, Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the ''court's inquiry is limited'' in Tunney Act settlements); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.'').[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.''* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not

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

[2] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'''').

require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also U.S. Airways,* 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

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 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

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

[3] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* No. 73–CV–681–W–1, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

VIII. DETERMINATIVE DOCUMENTS

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

Dated: March 31, 2016

Respectfully submitted,

_____/s/_____

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U.S. Department of Justice, Antitrust Division
Networks & Technology Enforcement Section
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Washington, DC 20530
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

IRON MOUNTAIN INC.,
and
RECALL HOLDINGS LTD.

Defendants.

CASE NO.: 1:16–cv–00595
JUDGE: Amit P. Mehta
FILED: 03/31/2016

FINAL JUDGMENT

WHEREAS, Plaintiff United States of America filed its Complaint on March 31, 2016, the United States and Defendants Iron Mountain Incorporated and Recall Holdings Limited, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the Defendants to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the divestitures required below can and will

be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. ''Acquirer'' or ''Acquirers'' means the entity or entities to whom Defendants divest the Divestiture Assets.

B. ''Acquirer of the Appendix A Divestiture Assets'' means Access or another entity to which Defendants divest the Appendix A Divestiture Assets.

C. ''Acquirer(s) of the Appendix B Divestiture Assets'' means the entity or entities to which Defendants divest the Appendix B Divestiture Assets.

D. ''Iron Mountain'' means Defendant Iron Mountain Incorporated, a Delaware corporation with its headquarters in Boston, Massachusetts, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

E. ''Recall'' means Defendant Recall Holdings Limited, an Australian public company limited by shares and registered in New South Wales under Australian law, with its headquarters in Norcross, Georgia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

F. ''Access'' means Access CIG, LLC, a Delaware limited liability company headquartered in Livermore, California, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

G. ''Appendix A Divestiture Assets'' means:

1. The Records Management facilities listed in Appendix A; and

2. All tangible and intangible assets used in the operation of the Records Management businesses associated with the Records Management facilities listed in Appendix A, including, but not limited to:

a. All tangible assets, including fixed assets, vehicles, garages, capital equipment, personal property, inventory, office furniture, materials, supplies, and other tangible property, and all assets used in connection with the Records Management facilities listed in Appendix A; all licenses, permits and authorizations issued by any governmental organization relating to the Records Management facilities listed in Appendix A; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Records Management facilities listed in Appendix A; all customer lists relating to the Records Management facilities listed in Appendix A; all customer contracts, accounts, and credit records relating to the Records Management facilities listed in Appendix A (other than for Split Multi-City Customers who choose to remain with Defendants); and all repair and performance records and all other records relating to the Records Management facilities listed in Appendix A; and

b. All intangible assets used in the development, production, servicing and sale of the Records Management services associated with the Records Management facilities listed in Appendix A, including all patents, licenses and sublicenses, intellectual property, copyrights, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees relating to the Records Management facilities listed in Appendix A.

H. ''Appendix B Divestiture Assets'' means:

1. The Records Management facilities listed in Appendix B; and

2. All tangible and intangible assets used in the operation of the Records Management businesses associated with the Records Management facilities listed in Appendix B, including, but not limited to:

a. All tangible assets, including fixed assets, vehicles, garages, capital equipment, personal property, inventory, office furniture, materials, supplies, and other tangible property, and all assets used in connection with the Records Management facilities listed in Appendix B; all licenses, permits and authorizations issued by any governmental organization relating to the Records Management facilities listed in Appendix B; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Records Management facilities listed in Appendix B; all customer lists relating to the Records Management facilities listed in Appendix B; all customer contracts, accounts, and credit records relating to the Records Management facilities listed in Appendix B (other than for Split Multi-City Customers who choose to remain with Defendants); and all repair and performance records and all other records relating to the Records Management facilities listed in Appendix B; and

b. All intangible assets used in the development, production, servicing and sale of the Records Management services associated with the Records Management facilities listed in Appendix B, including all patents, licenses and sublicenses, intellectual property, copyrights, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees relating to the Records Management facilities listed in Appendix B.

I. ''Divestiture Assets'' means the Appendix A Divestiture Assets and Appendix B Divestiture Assets.

J. ''Divestiture Records Management Facilities'' means the Records Management facilities listed in Appendices A and B.

K. ''Records Management'' means the storage and management of physical records and the provision of services relating to physical records, such as transporting and indexing records.

L. ''Split Multi-City Customer'' means a Recall customer that, as of the date of divestiture of a Divestiture Records Management Facility, has records stored at both the Divestiture Records Management Facility and one or more other Recall Records Management facilities that are to be retained by Defendants. A Split Multi-City Customer does not include a Recall customer that has separate contracts for

each Recall facility in which it stores records.

III. Applicability

A. This Final Judgment applies to Iron Mountain and Recall, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Sections IV and V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirers of the assets divested pursuant to this Final Judgment.

IV. Divestitures

A. Defendants are ordered and directed, within 10 calendar days after consummation of the transaction sought to be enjoined by the Complaint, to divest the Appendix A Divestiture Assets in a manner consistent with this Final Judgment to Access or another Acquirer of the Appendix A Divestiture Assets acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Appendix A Divestiture Assets as expeditiously as possible.

B. Defendants are ordered and directed, within ninety (90) calendar days after consummation of the transaction sought to be enjoined by the Complaint, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Appendix B Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer or Acquirer(s) of the Appendix B Divestiture Assets acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Appendix B Divestiture Assets as expeditiously as possible.

C. In the event Defendants are attempting to divest the Appendix A Divestiture Assets to an Acquirer other than Access, and in accomplishing the divestiture of the Appendix B Divestiture Assets ordered by this Final Judgment, Defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendants shall inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all qualified prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

D. Defendants shall provide the Acquirer(s) and the United States information relating to the personnel involved in the operation and management of the Divestiture Assets or the sale of Records Management services provided from the Divestiture Assets to enable the Acquirer(s) to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer(s) to employ any Defendant employee whose primary responsibility is the operation and management of the Divestiture Assets or the sale of Records Management services provided from the Divestiture Assets.

E. Defendants shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of the Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

F. Defendants shall warrant to the Acquirer(s) that the Divestiture Assets will be operational on the date of sale.

G. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

H. Defendants shall warrant to the Acquirer(s) that there are no material defects in the environmental, zoning or other permits pertaining to the operation of the Divestiture Assets, and that following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

I. At the option of the Acquirer(s), Defendants shall enter into a Transition Services Agreement for any services that are reasonably necessary for the Acquirer(s) to operate any of the Divestiture Records Management Facilities for a period of up to six (6) months. The United States, in its sole discretion, may approve one or more extensions of this agreement for a total of up to an additional six (6) months. Defendants shall perform all duties and provide all services required of Defendants under the Transition Services Agreement. The terms and conditions of any contractual arrangement meant to satisfy this provision must be reasonably related to market conditions. Any amendments, modifications or extensions of the Transition Services Agreement may only be entered into with the approval of the United States, in its sole discretion.

J. For a period of one (1) year from the date of the sale of any Divestiture Assets to an Acquirer, Defendants shall allow any Split Multi-City Customer to terminate or otherwise modify its contract with Recall so as to enable the Split Multi-City Customer to transfer some or all of its records to that Acquirer without penalty or delay and shall not enforce any contractual provision providing for permanent withdrawal fees, retrieval fees, or other fees associated with transferring such customer's records from a Recall Records Management facility to a facility operated by the Acquirer; except that if a Split Multi-City Customer requests that Defendants physically transport such records to the Acquirer, nothing in this Section IV.J prohibits Defendants from charging: (1) Either the transportation fees listed in the Split Multi-City Customer's contract with Recall or $.30 per carton, whichever is less; or (2) either the re-filing fees listed in the Split Multi-City Customer's contract with Recall or $.45 per carton, whichever is less, if the Split Multi-City Customer requests that Defendants handle the re-filing of the cartons at the Acquirer's facility.

K. Within five (5) business days of the date of the sale of the Divestiture Assets to an Acquirer, Defendants shall send a letter, in a form approved by the United States in its sole discretion, to all Split Multi-City Customers of the Divestiture Records Management Facilities acquired by that Acquirer notifying the recipients of the divestiture and providing a copy of this Final Judgment. Defendants shall provide the United States a copy of their letter at least five (5) business days

before it is sent. The letter shall specifically advise customers of the rights provided under Section IV.J of this Final Judgment. The Acquirer shall have the option to include its own letter with Defendants' letter.

L. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by Divestiture Trustee appointed pursuant to Section V, of this Final Judgment, (1) shall include the entire Divestiture Assets (unless the United States in its sole discretion approves the divestiture of a subset of the Divestiture Assets), and (2) shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer(s) as part of a viable, ongoing Records Management business. Divestiture of the Divestiture Assets may be made to one or more Acquirers provided that in each instance it is demonstrated to the sole satisfaction of the United States that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment,

(1) shall be made to an Acquirer(s) that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the records management business; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer(s) and Defendants give Defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer(s) to compete effectively.

V. Appointment of Divestiture Trustee

A. If Defendants have not divested all of the Divestiture Assets within the time periods specified in Sections IV.A and IV.B, Defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of any remaining Divestiture Assets.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the remaining Divestiture Assets. The Divestiture Trustee shall have the power and authority to accomplish the divestiture to an Acquirer(s) acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V.D of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture Trustee, reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture. Any such investment bankers, attorneys, or other agents shall serve on such terms and conditions as the United States approves including confidentiality requirements and conflict of interest certifications.

C. Defendants shall not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the Divestiture Trustee within ten (10) calendar days after the Divestiture Trustee has provided the notice required under Section VI.

D. The Divestiture Trustee shall serve at the cost and expense of Defendants pursuant to a written agreement, on such terms and conditions as the United States approves including confidentiality requirements and conflict of interest certifications. The Divestiture Trustee shall account for all monies derived from the sale of the assets sold by the Divestiture Trustee and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the Divestiture Trustee, all remaining money shall be paid to Defendants and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the Divestiture Assets to be sold by the Divestiture Trustee and based on a fee arrangement providing the Divestiture Trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount. If the Divestiture Trustee and Defendants are unable to reach agreement on the Divestiture Trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within fourteen (14) calendar days of appointment of the Divestiture Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court. The Divestiture Trustee shall, within three (3) business days of hiring any other professionals or agents, provide written notice of such hiring and the rate of compensation to Defendants and the United States.

E. Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any consultants, accountants, attorneys, and other agents retained by the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendants shall develop financial and other information relevant to such business as the Divestiture Trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture.

F. After its appointment, the Divestiture Trustee shall file monthly reports with the United States and, as appropriate, the Court setting forth the Divestiture Trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the Divestiture Trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth (1) the Divestiture Trustee's efforts to accomplish the required divestiture, (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished, and (3) the Divestiture Trustee's recommendations. To the extent such reports contains information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. The Divestiture Trustee shall at

the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

H. If the United States determines that the Divestiture Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute Divestiture Trustee.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, Defendants or the Divestiture Trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the Divestiture Trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirer(s), any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer(s), and any other potential Acquirer. Defendants and the Divestiture Trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer(s), any third party, and the Divestiture Trustee, whichever is later, the United States shall provide written notice to Defendants and the Divestiture Trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Section V.C of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V.C, a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, Defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendants have taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

X. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Hold Separate Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) Access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States,

except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' then the United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. Notification

A. Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the ''HSR Act''), Defendants, without providing advance notification to DOJ, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity or management interest, in any Records Management business located within a fifty (50) mile radius of any Iron Mountain Records Management facility in the metropolitan statistical areas associated with the cities listed in Appendix C during the term of this Final Judgment; provided that notification pursuant to this Section shall not be required where the assets or interest being acquired generated less than $1 million in revenue from Records Management services in the most recent completed calendar year.

B. Such notification shall be provided to the DOJ in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 8 of the instructions must be provided only about Records Management. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, Defendants shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XII. No Reacquisition

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XV. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

_____

United States District Judge

[FR Doc. 2016–08210 Filed 4–8–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[OMB Number 1121–NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Census of State and Local Law Enforcement Agencies Serving Tribal Lands (CSLLEASTL)

AGENCY: Bureau of Justice Statistics, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register** at 81 FR 6295, February 5, 2016, allowing for a 60 day comment period.

DATES: Comments are encouraged and will be accepted for an additional 30 days until May 11, 2016.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Suzanne Strong, Statistician, Bureau of Justice Statistics, 810 Seventh Street NW., Washington, DC 20531 (email: *Suzanne.M.Strong@ojp.usdoj.gov;* telephone: 202–616–3666). Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

McBREEN & KOPKO

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May 31, 2016

Via Federal Express
United States Department of Justice
450 Fifth Street
Suite 7100
Washington, D.C 20530

Attn: Maribeth Petrizzi
Chief Litigation II Section
Antitrust Division

Dear Sirs/Madam:

Please accept these public comments from Robert S. Moran, Jr., the undersigned, a partner of the law firm of McBreen & Kopko in connection with the pending matter captioned United States vs. Iron Mountain Inc. ("Iron Mountain") and Recall Holdings Ltd. ("Recall"); Proposed Final Judgment and Competitive Impact Statement Civil Action No. 1-16-cv-00595. Please be advised that the undersigned represents National Records Centers, Inc. ("NRC") a nationwide provider of records management services ("RMS") throughout the United States. NRC competes directly with Iron Mountain, Recall and Access CIG, LLC ("Access") in many markets.

It is our position that the proposed acquisition will have an anticompetitive effect and a detrimental impact on the customers of Iron Mountain, Recall and Access throughout the United States. NRC urges the Department of Justice to completely re-think the Iron Mountain/Recall merger in its totality. Combining the number one company in the industry with the number two company is unfair and anticompetitive by its very nature. Approving such an anticompetitive combination of businesses by merely causing business number two to shed some of its business is clearly not enough to result in open and fair competition. Forcing divestiture of this business to

the number three company in the industry makes no sense at all. Instead of forcing this divestiture to a huge and growing company, the Department of Justice should just simply allow those customers affected by the merger out of their contracts, without penalty, should they chose to do so. Then those customers could pick their service provider by price and service and not be forced with the unhappy choice of staying with company two or going to company three. Customers are much better served with choices. The foundation of our pro-competition philosophy is choice. The Department of Justice should not engineer a Proposed Final Judgment that serves to limit customer choices.

It is our further position that the Proposed Final Judgment requires changes, at a minimum, to make it more equitable and to address our anti-competitive concerns.

First, we see no reason why any customer of Recall (not just a "Split-City Customer") should not have the right to terminate its contract with Recall without penalty. This is fair and reasonable.

Second, the definition for "Split Multi-City Customer" is overly restrictive. The definition used in the Proposed Final Judgment contains the qualification that "a Split Multi-City Customer does not include a Recall customer that has separate contracts for each Recall facility in which it stores records". It is our belief that this qualifying statement should be deleted from the Split Multi-City Customer definition.

In the Proposed Final Judgment Section IV "Divestitures", subparagraph J it is provided that for a period of one (1) year from the date of the sale of any Divestiture Assets to an Acquirer, defendant shall allow any Split Multi-City Customer to terminate or otherwise modify its contract with Recall so as to enable the Split Multi-City Customer to transfer some or all of its records to that Acquirer without penalty or delay and shall not enforce any contractual provision providing for permanent withdrawal fees, retrieval fees, or other fees associated with transferring such customers' records from a Recall Management Facility to a facility operated by Acquirer".

We see no reason why provision J does not allow that any Split Multi-City Customer can have the discretion to terminate or otherwise modify its contract with Recall so as to enable the Split Multi-City Customer to transfer some or all of its records to any other person or entity engaged in the records management business and not solely to Access. In this way fair and open competition for the business of any Split Multi-City Customer would occur allowing either Access or any other service provider to win the business. The substantial benefit to any Split Multi-City Customer is obvious. To restrict the discretion of these Split Multi-City Customers so that they have to do business with Access is unfair and inequitable. Also the qualification to the definition of Split Multi-City Customer further has anti-competitive affects and restricts open and fair competition.

It is our sincere hope that the acquisition of Recall by Iron Mountain not go forward. If it were to go forward then Recall customers in the affected markets should be free (without penalty) to choose any new service provider. Should the Department of Justice move forward with this Proposed Final Judgment, NRC strongly encourages the Department of Justice to modify the proposed Final Judgment in two ways. First, to delete the qualification to the

definition of Split Multi-City Customer and second, to modify Provision IV Subsection J to enlarge the period from one (1) year to three (3) years and to allow any Split Multi-City Customer to terminate or otherwise modify its contract with Recall so as to enable the Split Multi-City Customer to transfer its records without penalty or delay to any records storage provider and not only to Access.

The foregoing is submitted respectfully and in the interest of fair and open competition to enhance the opportunity for any records storage company to obtain the business that is being divested as part of this proposed Final Judgment.

Thank you.

Very truly yours,

Robert S. Moran, Jr.

RSM:km

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. IRON MOUNTAIN INC., and RECALL HOLDINGS LTD., *Defendants.*	Civil Action No. 1:16-cv-00595-APM Judge Amit P. Mehta

RESPONSE OF THE UNITED STATES TO
PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States hereby responds to a single public comment received regarding the proposed Final Judgment in this case. After consideration of the submitted comment, the United States continues to believe that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this Response have been published in the *Federal Register* pursuant to 15 U.S.C. § 16(d).

I. BACKGROUND

On March 31, 2016, the United States filed the Complaint in this matter, alleging that defendant Iron Mountain Inc.'s ("Iron Mountain") acquisition of defendant Recall Holdings Ltd.

("Recall") likely would substantially lessen competition in the provision of hard-copy records management services in several markets in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint further alleged that, as a result of the acquisition as originally proposed, prices for these services likely would have increased and customers would have received services of lower quality.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment, a Hold Separate Stipulation and Order, and a Competitive Impact Statement ("CIS") that explains how the proposed Final Judgment is designed to remedy the likely anticompetitive effects of the proposed acquisition. As required by the Tunney Act, the United States published the proposed Final Judgment and CIS in the *Federal Register* on April 11, 2016. *See* 81 Fed. Reg. 21,383 (Apr. 11, 2016). In addition, the United States ensured that a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments, were published in *The Washington Post* on seven different days during the period of April 4, 2016, to April 10, 2016. *See* 15 U.S.C. §16(c). The 60-day waiting period for public comments ended on June 10, 2016. One comment was received and is described below and attached as Exhibit 1.

II. THE INVESTIGATION AND PROPOSED RESOLUTION

After Iron Mountain and Recall announced their plans to merge, the United States conducted an investigation into the competitive effects of the proposed transaction. The United States considered the potential competitive effects of the transaction on hard-copy records management services ("RMS") in a number of geographic areas. As a part of this investigation, the United States obtained documents and information from the merging parties and others and

conducted more than 160 interviews with customers, competitors, and other individuals knowledgeable about the industry.

RMS involves the off-site storage of records and the provision of services related to records storage. For a variety of legal and business reasons, companies frequently must keep hard-copy records for significant periods of time. Given the physical space required to store any substantial volume of records and the effort required to manage stored records, many customers contract with RMS vendors such as Iron Mountain and Recall to provide these services. RMS vendors typically pick up records from customers and bring them to a secure off-site facility, where they index the records to allow their customers to keep track of them. RMS vendors retrieve stored records for customers upon request and often perform other services related to the storage, tracking, and shipping of records. For example, they sometimes destroy stored records on behalf of the customer once preservation is no longer required.

Customers often procure RMS through competitive bidding and have contracts that usually specify fees for each service provided (*e.g.*, pick-up, monthly storage, retrieval, delivery, and transportation). Most customers purchase RMS in only one city. Customers with operations in multiple cities sometimes purchase RMS from a single vendor pursuant to a single contract. But, other multi-city customers purchase RMS under separate contracts for each city, often using different vendors in different cities.

The provision of RMS generally occurs in localized markets in a radius around a metropolitan area. Customers generally require a potential RMS vendor to have a storage facility located within a certain proximity to the customers' locations. Customers generally will not consider vendors located outside a particular radius, because the vendor will not be able to retrieve and deliver records on a timely basis. The travel radius a customer is willing to consider

is usually measured in time, rather than miles, as retrieval of records is often a time-sensitive matter. Transportation costs also likely render a distant RMS vendor uncompetitive with vendors located closer to the customer.

After its investigation, the United States concluded that the proposed transaction likely would substantially lessen competition in the provision of RMS in 15 metropolitan areas: Detroit, Michigan; Kansas City, Missouri; Charlotte, North Carolina; Durham, North Carolina; Raleigh, North Carolina; Buffalo, New York; Tulsa, Oklahoma; Pittsburgh, Pennsylvania; Greenville/Spartanburg, South Carolina; Nashville, Tennessee; San Antonio, Texas; Richmond, Virginia; San Diego, California; Atlanta, Georgia; and Seattle, Washington. In each of these geographic areas, Iron Mountain and Recall are two of only a few significant firms providing RMS. As explained more fully in the Complaint and the CIS, in each of these areas, the resulting substantial increase in concentration and loss of head-to-head competition between Iron Mountain and Recall likely would result in higher prices and lower quality service for RMS customers in each of the relevant metropolitan areas. Complaint ¶ 18; CIS § II(B).

The proposed Final Judgment is designed to address competitive concerns in each of these 15 metropolitan areas. The proposed Final Judgment contemplates divesting Recall assets in 13 metropolitan areas to Access CIG, LLC ("Access") and Recall assets in the remaining two metropolitan areas (Atlanta and Seattle) to Acquirers who will be identified to and approved by the United States in the future. Divestiture of the assets to independent, economically viable competitors will ensure that customers of these services will continue to receive the benefits of competition.

The proposed Final Judgment requires the divestiture of over 26 Recall facilities, together with associated assets, including customer contracts. With respect to customer contracts, the

proposed Final Judgment addresses the situation in which a Recall customer has records stored in more than one metropolitan area, which are covered by the same contract, and as a result of the divestitures, a portion of their records will be stored by Defendants and another portion will be stored by an Acquirer. Section II.L of the proposed Final Judgment defines these customers as "Split Multi-City Customers." To protect the interests of Split Multi-City Customers, Section IV.J of the proposed Final Judgment allows Split Multi-City Customers to terminate or otherwise modify their existing Recall contracts to enable them to transfer their records from an RMS facility retained by Defendants to a facility owned by an Acquirer without paying permanent withdrawal fees, retrieval fees, or other fees required under their contracts with Recall. This will ensure that the Acquirer of the Divestiture Assets can compete to provide RMS to customers that are served by both divested RMS facilities and RMS facilities retained by Defendants.

III. STANDARD OF JUDICIAL REVIEW

The Tunney Act requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day public 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). 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 also United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 10-11 (D.D.C. 2007) (assessing public-interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, No. 08-cv-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (discussing nature of review of consent judgment under the Tunney Act; inquiry is limited to "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").

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the Complaint, whether the decree is sufficiently clear, whether the 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) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)). Instead, 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).

In determining whether a proposed settlement is in the public interest, "the court 'must accord deference to the government's predictions about the efficacy of its remedies.'" *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 76 (D.D.C. 2014) (quoting *SBC Commc'ns*, 489 F. Supp. 2d at 17); *see also Microsoft*, 56 F.3d at 1461 (noting that the government is entitled to deference as to its "predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' "prediction as to the effect of the proposed remedies, its perception of the market structure, and its views of the nature of the case"); *United States v. Morgan Stanley*, 881 F. Supp. 2d 563, 567-68 (S.D.N.Y. 2012) (explaining that the government is entitled to deference in choice of remedies).

Courts "may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17. Rather, the ultimate question is 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.'" *Microsoft*, 56 F.3d at 1461. Accordingly, 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; *see also United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012). And 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 the public interest." *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations and internal quotations omitted); *see also 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).

In its 2004 amendments to the Tunney Act,[1] Congress made clear its intent to preserve the practical benefits of using 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). 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 the Tunney Act proceedings." *SBC Commc'ns,* 489 F. Supp. 2d at 11; *see also United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) ("[T]he Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to public comments alone."); *US Airways*, 38 F. Supp. 3d at 76 (same).

IV. SUMMARY OF PUBLIC COMMENT AND THE RESPONSE OF THE UNITED STATES

A. Summary of NRC's Comment

During the 60-day public comment period, the United States received one comment from National Records Centers, Inc. ("NRC"). NRC is a nationwide RMS provider that competes with the Defendants and Access in multiple metropolitan areas. NRC asserts that the "proposed acquisition will have an anticompetitive effect and a detrimental impact on the customers of Iron Mountain, Recall, and Access throughout the United States" and urges the United States to "re-think the Iron Mountain/Recall merger in its totality," and block the merger.

In the alternative, NRC urges modification of the proposed Final Judgment to allow all Recall customers affected by the merger to transfer their records to any RMS provider without

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

penalty. NRC believes the proposed Final Judgment limits customer choice by forcing customers to switch to Access as the divestiture buyer (or to another approved Acquirer). NRC argues that, in lieu of requiring divestitures to Access (or to another Acquirer), the United States "should just simply allow those customers affected by the merger out of their contracts, without penalty, should they choose to do so" such that customers could select their RMS vendor instead of "staying with [Defendants] or going to [Access or another Acquirer]."

NRC also proposes two modifications to the proposed Final Judgment and contends the proposed definition of Split Multi-City Customer is overly restrictive. First, NRC argues that Split Multi-City Customers should be allowed to terminate their contracts with Defendants without penalty under Section IV.J and switch to NRC or some other RMS vendor. NRC would also extend the period for a customer to elect to move its records without penalty under Section IV.J from one to three years. Second, NRC proposes that the definition of Split Multi-City Customer be broadened by deleting the following from Section II.L: "A Split Multi-City Customer does not include a Recall customer that has separate contracts for each Recall facility in which it stores records."

B. Response of the United States to NRC's Comment

1. Divestitures in the 15 Relevant Geographic Markets are Sufficient to Preserve Competition

NRC complains that limiting divestitures to 15 geographic areas is not enough to protect competition. However, because competition for the provision of RMS generally occurs in localized markets in a radius around a metropolitan area, requiring divestitures in those local geographic areas in which the transaction would result in substantial increase in concentration and loss of head-to-head competition between Iron Mountain and Recall is appropriate to preserve competition.

As described in Section II above, because of a strong customer desire for timely pick-up and delivery of records, customers typically procure services from RMS vendors located within the same metropolitan area as the customer. RMS vendors located outside a given local geographic area generally are considered by customers to be located too far away to be a viable RMS vendor. Further, RMS vendors located outside the local geographic area generally are unable to compete effectively as the distance from the customer's locations to the RMS vendor's facilities render the RMS vendor uncompetitive on price as well as service. Even large customers that choose one vendor across multiple local geographic areas generally require the single RMS vendor to be present in all of the local geographic areas where the customer is located. Accordingly, the United States focused on the potential competitive impact of the transaction on the local geographic level.

Over the course of its investigation, the United States determined that the proposed acquisition likely would lessen competition in 15 local geographic markets that are identified in the Complaint. The United States did not identify a competitive problem in any other geographic markets where Iron Mountain and Recall compete. Because Defendants agreed to a divestiture remedy to address the competitive issues in the 15 relevant geographic markets, the United States determined that blocking the merger was not necessary and that requiring divestitures in the affected 15 relevant geographic markets is sufficient to protect competition.

2. Access is an Appropriate Buyer for the Divested Assets

NRC complains that Access is not an appropriate buyer for the Divestiture Assets. Access is a multi-city RMS vendor and the third-largest RMS vendor nationally, but it lacks RMS facilities in the 13 metropolitan areas where it is acquiring RMS facilities from the Defendants. Because Access lacked RMS facilities in these areas, it was not a viable

competitive alternative to Iron Mountain or Recall to serve customer locations in these areas. The divestiture of Recall's RMS assets to Access in these areas establishes Access as a viable competitor in those areas and, thus, maintains existing competition that would otherwise be lost. The proposed Final Judgment does not direct Defendants to sell divestiture assets in the remaining two areas—Seattle and Atlanta—to Access, as Access is a significant competitor in these areas.

While the identity of the Acquirer or Acquirers of the assets in Seattle and Atlanta has yet to be determined, any proposed Acquirer will be subject to the United States' approval under Section IV of the proposed Final Judgment. Pursuant to Section IV.L, Defendants must divest the Divestiture Assets in such a way as to satisfy the United States that the assets can and will be operated by the purchasers as viable, ongoing records management businesses that can compete effectively in the relevant markets. Because Access (and other Acquirers) will effectively replace the lost competition, the proposed Final Judgment is in the public interest. *See Microsoft*, 56 F.3d at 1459-61 (noting that the government has discretion to settle "within the reaches of the public interest").

3. Limiting the Right to Terminate Recall Contracts to Customers in the 15 Relevant Geographic Markets is Sufficient to Preserve Competition

NRC proposes a modification to Section IV.J to grant all Recall customers, wherever they are located, the right to terminate their contracts with Recall without penalty in order to switch to NRC or some other RMS vendor. The proposed Final Judgment is not designed to assist NRC or other RMS vendors to obtain Recall customers. The purpose of the proposed Final Judgment is to ensure that the Acquirers of the Divested Assets will be viable, ongoing RMS businesses that can compete effectively in the 15 relevant geographic markets. Because the United States determined that the transaction would likely lead to competitive harm in 15

local geographic areas, the proposed Final Judgment is designed only to address competitive harm to customers who are served in some capacity by Defendants' RMS facilities located in the 15 relevant geographic markets alleged in the Complaint. NRC's proposal would expand the scope of the decree beyond the 15 relevant geographic markets alleged in the Complaint. Including all Recall customers outside the 15 markets would far exceed what is necessary to remedy the harm found by the United States and alleged in the Complaint. *See Microsoft*, 56 F.3d at 1459-60 (discussing nature of review of consent decrees as limited to the allegations made).

4. The Definition of Split Multi-City Customers is Appropriate for the Preservation of Competition

NRC proposes that the last sentence of Section II.L of the proposed Final Judgment, which states that "[a] Split Multi-City Customer does not include a Recall customer that has separate contracts for each Recall facility in which it stores records," be struck. The proposed Final Judgment is designed to allow customers with the preference for a single vendor pursuant to a single contract to transfer their records such that the records will not be stored at facilities managed by different vendors (*i.e.*, Iron Mountain and an Acquirer of the Divestiture Assets). As noted above, some customers prefer to use a single vendor pursuant to a single contract for all their RMS needs, while other customers use separate contracts for different metropolitan areas. The proposed Final Judgment limits this right to customers who have expressed this preference by having a single contract with a single vendor. The proposed Final Judgment does not include customers who have chosen to disaggregate their RMS business with separate contracts for each metropolitan area in which they store records. The contracts for disaggregated customers will either be divested or retained by Defendants, as appropriate, depending on whether each contract covers services in one of the 15 relevant geographic markets where harm is alleged. For that

reason, the definition of Split Multi-City Customers is an effective and appropriate remedy for the antitrust violations alleged in the Complaint. *See Microsoft*, 56 F.3d at 1459-61 (discussing government's "broad discretion to settle with the defendant within the reaches of the public interest").

5. Allowing Split Multi-City Customers One Year to Transfer Records is Appropriate for the Preservation of Competition

NRC proposes that Split Multi-City Customers be allowed to transfer their records to any RMS provider for a period of three years rather than the one-year period allowed under Section IV.J. The goal of the divestitures is to allow for the divested assets to be operated as viable, ongoing businesses that can compete effectively in the relevant markets. It is in the best interest of the industry and competition that any period of disruption or uncertainty in the relevant markets be minimized. For these reasons, limiting to a one-year period the right of Split Multi-City Customers to transfer their records provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint. *See Microsoft*, 56 F.3d at 1459-61 (discussing government's "broad discretion to settle with the defendant within the reaches of the public interest").

V. CONCLUSION

After reviewing the one public comment, the United States continues to believe that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is in the public interest. The United States will move this Court to enter the Final Judgment soon after the comment and this Response are published in the *Federal Register*.

Dated: August 29, 2016

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2016, the foregoing Notice of Extension of Time was filed using the Court's CM/ECF system, which shall send notice to all counsel of record.

/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. IRON MOUNTAIN INC., and RECALL HOLDINGS LTD., *Defendants*.	Civil Action No. 1:16-cv-00595-APM Judge: Amit P. Mehta

MOTION AND MEMORANDUM OF THE
UNITED STATES IN SUPPORT OF ENTRY OF FINAL JUDGMENT

Pursuant to Sections 2(b)-(h) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h)("APPA" or "Tunney Act"), Plaintiff, the United States of America ("United States"), moves for entry of the proposed Final Judgment ("PFJ") (attached hereto as Exhibit A), filed in this civil antitrust proceeding. The PFJ may be entered at this time without further hearing if the Court determines that entry is in the public interest. The Competitive Impact Statement ("CIS") filed in this matter on March 31, 2016, discusses the provisions of the PFJ and explains why its entry would be in the public interest. ECF No. 3. The United States is also filing a Certificate of Compliance With Provisions of the Antitrust Procedures and Penalties Act ("Certificate of Compliance"), attached hereto as Exhibit B, which demonstrates that the requirements of the APPA have been met.

I. BACKGROUND

On March 31, 2016, the United States filed a civil antitrust Complaint alleging that the proposed acquisition by Defendant Iron Mountain Inc. ("Iron Mountain") of Defendant Recall Holdings Ltd. ("Recall"), pursuant to an agreement entered into on June 8, 2015, would be likely to substantially lessen competition in the provision of hard-copy records management services ("RMS") in a number of markets in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint further alleged that, as a result of the acquisition as originally proposed, prices for these services in the United States would likely have increased and customers would have received services of lower quality.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate Order"); a PFJ; and a CIS, that describes how the PFJ is designed to remedy the likely anticompetitive effects of the proposed acquisition. The Hold Separate Order, which was signed by the Court on April 6, 2016, provides that the PFJ may be entered by the Court after the satisfaction of the applicable requirements of the APPA. ECF No. 9. As demonstrated by the Certificate of Compliance, the parties have complied with those requirements. Entry of the PFJ would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment and to punish violations thereof.

II. COMPLAINCE WITH THE APPA

The APPA requires a sixty-day period for the submission of public comments on a proposed Final Judgment. *See* 15 U.S.C. § 16(b). In compliance with this provision of the APPA, the United States filed the CIS on March 31, 2016, and published the PFJ and CIS in the

Federal Register on April 11, 2016.[1] In addition, the United States ensured that a summary of the terms of the PFJ, together with directions for the submission of written comments relating to the PFJ, were published in *The Washington Post* on seven different days during the period of April 4, 2016 to April 10, 2016. *See* 15 U.S.C. § 16(c). The sixty-day public comment period commenced on April 11, 2016 and terminated on June 10, 2016. During this period, the United States received one comment, dated May 31, 2016. The United States filed its response with the Court on August 29, 2016 and published the comment and response in the *Federal Register* on September 6, 2016.[2] Since, as set forth in the Certificate of Compliance, all the requirements of the APPA have been satisfied, it is now appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e).

III. ENTRY OF THE PROPOSED FINAL JUDGMENT IS IN THE PUBLIC INTEREST

In its CIS and Response to Public Comment, the United States set forth the legal standards for determining the public interest under the APPA and now incorporates those statements by reference. ECF Nos. 3, 13. As indicated above, the United States alleged in its Complaint that the proposed acquisition of Recall by Iron Mountain would be likely to substantially lessen competition in hard-copy records management services in 15 geographic areas in the United States. As explained in the CIS, the PFJ is designed to eliminate the likely anticompetitive effects of this acquisition. It requires Iron Mountain, among other things, to divest RMS related assets in the 13 of the 15 geographic areas to Access CIG, LLC ("Access")

[1] *See* 81 Fed. Reg. 21,383 (Apr. 11, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-04-11/pdf/2016-08210.pdf.
[2] *See* 81 Fed. Reg. 61,244 (Sept. 6, 2016), *available at* https://federalregister.gov/a/2016-21287.

and the RMS related assets in the remaining two geographic areas to a buyer approved by the United States who will be an effective, long-term RMS competitor.

As explained in the CIS and Response to Public Comment, the public, including affected competitors and customers, has had the opportunity to comment on the PFJ as required by the APPA. Moreover, there has been no allegation that the proposed settlement constitutes an abuse of the United States' discretion or that it is not within the zone of settlements consistent with the public interest.

IV. CONCLUSION

For the reasons set forth in this Motion and Memorandum and in the CIS, the Court should find that the PFJ is in the public interest and should enter the Final Judgment without further hearings. Accordingly, the United States respectfully requests that the Final Judgment, attached as Exhibit A, be entered as soon as possible.

Plaintiff is authorized by counsel for Defendants to state that Defendants join in this request.

Dated: September 9, 2016

Respectfully submitted,

/s/ Soyoung Choe

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Exhibit A

Civil Action No. 1:16-cv-00595-APM

Proposed Final Judgment

Omitted: Identical to orignally proposed Final Judgment]

Exhibit B

Civil Action No. 1:16-cv-00595-APM

Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. IRON MOUNTAIN INC., and RECALL HOLDINGS LTD., *Defendants*.	Civil Action No. 1:16-cv-00595-APM Judge: Amit P. Mehta

CERTIFICATE OF COMPLIANCE WITH PROVISIONS
OF THE ANTITRUST PROCEDURES AND PENALTIES ACT

Plaintiff, United States of America, hereby certifies that it has compliance with the provisions of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), the following procedures have been followed in preparation for the entry of the Final Judgment in this matter:

1. The Complaint, proposed Final Judgment, and Hold Separate Stipulation and Order, by which the parties have agreed to the Court's entry of the Final Judgment, following compliance with the APPA, were filed with the Court on March 31, 2016. The United States also filed its Competitive Impact Statement with the Court on March 31, 2016;

2. Pursuant to 15 U.S.C. § 16(b), the proposed Final Judgment and Competitive Impact Statement were published in the *Federal Register* on April 11, 2016, 81 Fed. Reg. 21,383;

3. Pursuant to 15 U.S.C. § 16(c), copies of the proposed Final Judgment and Competitive Impact Statement were furnished to all persons requesting them and made available on the Department of Justice, Antitrust Division's Internet site, as were the Complaint and Hold Separate Stipulation and Order.

4. Pursuant to 15 U.S.C. § 16(c), a summary of the terms of the proposed Final Judgment was published in *The Washington Post*, a newspaper of general circulation in the District of Columbia, for seven days beginning on April 4, 2016 and ending on April 10, 2016.

5. There were no determinative materials or documents within the meaning of 15 U.S.C. § 16(b) that were considered by the United States in formulating the proposed Final Judgment, so none was furnished to any person pursuant to 15 U.S.C. § 16(b) or listed pursuant to 15 U.S.C. § 16(c).

6. As required by 15 U.S.C. § 16(g), on April 8, 2016 and April 13, 2016, Defendants Iron Mountain Inc. and Recall Holdings Ltd., filed with the Court descriptions of written or oral communications by or on behalf of each defendant, or any other person, with any officer or employee of the United States concerning the proposed Final Judgment.

7. The sixty-day comment period prescribed by 15 U.S.C. §§ 16(b) and (d) for the receipt and consideration of written comments, during which the proposed Final Judgment could not be entered, commenced on April 11, 2016 and terminated on June 10, 2016.

8. During the comment period, the United States received one comment, dated May 31, 2016. The United States filed its response with the Court on August 29, 2016 and published the comment and response in the *Federal Register* on September 6, 2016, 81 Fed. Reg. 61,244.

9. The parties have satisfied all the requirements of the APPA, 15 U.S.C. §§ 16(b)-(h), that are conditions for entering the proposed Final Judgment. The Court may now enter the Final Judgment if the Court determines, pursuant to 15 U.S.C. § 16(e), that entry of the Final Judgment is in the public interest.

Dated: September 9, 2016.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America,	)	
Plaintiff,	)	
v.	)	**Civil No. 16-cv-00595 (APM)**
Iron Mountain, Inc., *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

I. INTRODUCTION

The United States filed this action against Iron Mountain, Inc. ("Iron Mountain"), and Recall Holdings Ltd. ("Recall") (collectively "Defendants"), alleging that Iron Mountain's proposed acquisition of Recall would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. *See* Compl., ECF No. 1, ¶¶ 3, 25. The United States filed with its Complaint a Hold Separate Stipulation and Order, ECF No. 4-1, which the court executed, ECF No. 9; a proposed Final Judgment, ECF No. 4-2; and a Competitive Impact Statement, ECF No. 3 [hereinafter CIS]. Thereafter, as required by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "Tunney Act"), the United States published and subjected the proposed Final Judgment to a 60-day public comment period, which expired on May 25, 2015, *see* Mot. and Mem. of the United States, ECF No. 15 [hereinafter U.S. Mot.], at 3. The public comment period elicited a single response—from National Records Center, Inc.—to which the United States responded and published the comment and response in the *Federal Register*. *See* Resp. of the United States to Public Comment, ECF No. 13 [hereinafter U.S. Resp.]. The United States now asks the court to

enter the agreed-upon Final Judgment, which would permit Iron Mountain and Recall to complete the proposed transaction subject to conditions intended to remedy the violations identified in the Complaint. *See* U.S. Mot.

II. BACKGROUND

A. Factual Background

1. Relevant Product and Geographic Markets

Iron Mountain is the largest hard-copy records management services ("RMS") provider in the United States, with reported worldwide revenues of approximately $3.1 billion in 2014. CIS at 3. Recall is the country's second-largest RMS provider, with worldwide revenues of $836.1 million in 2014. *Id.* The relevant product market—RMS—involves the off-site storage of records and the provision of related services, such as indexing, transporting, and destroying records. *Id.* at 3–4. "[T]he Complaint alleges that a hypothetical monopolist of RMS could profitably increase its prices by at least a small but significantly non-transitory amount . . . [and] customers would not switch to any other alternative." *Id.* at 5.

RMS customers include companies throughout the United States, ranging from Fortune 500 companies to small local businesses. *Id.* at 4. The relevant geographic market, however, is a metropolitan area or a radius around such area. *Id.* at 5. That is because customers typically require a RMS vendor to have a storage facility located within a certain proximity of the customer's location. *Id.* Vendors outside a particular radius are not competitive with closer-in vendors because longer-distance "vendor[s] will not be able to retrieve and deliver records on a timely basis" and because such vendors are likely to incur higher transportation costs, rendering them a more costly alternative. *Id.* The Complaint identifies 15 metropolitan areas—the relevant

geographic markets—in which RMS vendors "could profitably increase prices to local customers without losing significant sales to more distant competitors." *Id.*; Compl. ¶ 17.

2. Proposed Merger between Iron Mountain and Recall

On June 8, 2015, Iron Mountain reach an agreement to acquire all the outstanding shares of Recall, a transaction valued at $2.6 billion. CIS at 1. After the proposed merger's announcement, the United States, through the Department of Justice, conducted an investigation into the potential anti-competitive effects of the proposed transaction on RMS consumers in various geographic areas. U.S. Resp. at 2. "As part of [this] investigation, the United States obtained documents and information from the merging parties and others and conducted more than 160 interviews with customers, competitors, and other persons with knowledge of the [RMS] industry." *Id.* at 2–3.

Following its investigation, the United States concluded that the proposed merger likely would lessen competition in 15 metropolitan areas. *Id.* at 4; Compl. ¶ 17. "In each of these geographic areas, Iron Mountain and Recall are two of only a few significant firms providing RMS." U.S. Resp. at 4. Furthermore, in each of those areas, the United States found, the merger would result in a "substantial increase in concentration and loss of head-to-head competition between Iron Mountain and Recall" and "likely would result in higher prices and lower quality services for RMS customers." *Id.*

To address these competitive concerns, the United States required, as a condition of approving the merger, a divestiture of Recall's assets. In 13 metropolitan areas, Recall will be required to sell its assets to a third-party, Access CIG, LLC ("Access"), and in two metropolitan areas, Recall will be required to sell its assets to a to-be-determined buyer acceptable to the United States. *Id.* The required divestiture will include the sale of 26 Recall storage facilities, along with

associated assets, such as customer contracts. *Id.* According to the United States, the "[d]ivestiture of the assets to independent, economically viable competitors will ensure that customers of [RMS] will continue to receive the benefits of competition." *Id.*

B. Procedural Background

The United States filed this action against Iron Mountain and Recall, alleging that the proposed merger would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. *See* Compl. ¶¶ 3, 25. The United States filed with its Complaint a Hold Separate Stipulation and Order, which the court entered on April 7, 2016, ECF No. 9. The purpose of that Stipulation and Order was to "ensure[], prior to [the] divestitures, that the Divestiture Assets remain independent [and] economically viable[,] . . . [that] ongoing business concerns . . . remain independent and uninfluenced by Iron Mountain, and that competition is maintained during the pendency of the ordered divestitures." *Id.* at 5. With its Complaint, the United States also filed a proposed Final Judgment and a Competitive Impact Statement. *See* Final Judgment, ECF No. 4-2; CIS.

Thereafter, as required by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "Tunney Act"), the United States published and subjected the proposed Final Judgment to a 60-day public comment period, which expired on May 25, 2015, *see* U.S. Mot. at 3. The public comment period elicited a single comment from a competitor in the RMS industry, National Records Centers, Inc. ("NRC"). U.S. Resp. at 8. The United States published NRC's comment and the United States' response in the *Federal Register*. *See id.* at 13. Now before the court is the United States' Motion for Entry of Final Judgment. *See generally* U.S. Mot.

III. LEGAL STANDARD

The Tunney Act requires courts, "[b]efore entering any consent judgment proposed by the United States," to "determine that the entry of such judgment is in the public interest." 15 U.S.C.

§ 16(e). The parameters of the Tunney Act's "public interest" standard are well defined by statute, *see* 15 U.S.C. § 16(e)(1), and case law, *see, e.g.*, *United States v. Newpage Holdings, Inc.*, No. 14-cv-2216, 2015 WL 9982691, at *4–5 (D.D.C. Dec. 11, 2015). The court, therefore, need not provide a fulsome recitation of the applicable standards. It suffices for present purposes to note that the government enjoys "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). And, although a court may not simply "rubber stamp" the government's proposal and is required to "make an independent determination" as to the public interest, *id.* at 1458 (internal quotation marks omitted), it "is not permitted to reject the proposed remedies merely because the court believes other remedies are preferable," *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 15 (D.D.C. 2007). Indeed, the court is required to be "deferential to the government's predictions as to the effect of the proposed remedies." *Microsoft Corp.*, 56 F.3d at 1461. In short, "the relevant inquiry is whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlement are reasonable." *SBC Commc'ns, Inc.*, 489 F. Supp. 2d at 15–16.

IV. DISCUSSION

A. The Public Interest Inquiry

The court has carefully reviewed the United States' Complaint, as well as its proposed Final Judgment, Competitive Impact Statement, and Response to NRC's comment, and finds that the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In reaching that conclusion, the court has considered, in particular, the clarity of the proposed Final Judgment, the sufficiency of its enforcement mechanisms, and the competitive impact on third parties. *See Microsoft*, 56 F.3d at 1458–62. The court briefly discusses each of those factors.

A "district judge who must preside over the implementation of the decree is certainly entitled to insist on that degree of precision concerning the resolution of known issues as to make his task, in resolving subsequent disputes, reasonably manageable." *Id.* at 1461–62. On that score, the Final Judgment is satisfactory. The Final Judgment turns largely on the proposed divestiture of Recall's assets and provides a detailed framework by which such divestiture is to occur. Proposed Final Judgment, ECF No. 15-1, at 7–11. The Final Judgment, among other things, outlines the geographic markets and assets located in those markets subject to the divestiture, *id.* at 7 & apps. A, B; the timing of the divestiture, *id.* at 7; the mechanism for publicizing the sale of assets if not divested to Access, *id.* at 7–8; the method for transitioning Recall employees to the acquiring company, *id.* at 8; and the availability of a transition services agreement by an acquiring company, *id.* at 9. The Final Judgment also addresses the situation of Recall customers—defined as "Split Multi-City Customers"—who presently contract for RMS both from Recall's records management facilities subject to the divestiture *and* from its facilities that are to be retained by the post-merger entity. *Id.* at 6, 9–10. To enable such customers to consolidate their RMS needs with an acquiring company, the Final Judgment permits them to terminate or modify existing contracts with Recall without paying a permanent withdrawal fee, retrieval fees, or other fees associated with transferring records. *Id.* at 9–10. In short, the court is satisfied that the Final Judgment reflects the "degree of precision" necessary for the court to resolve any subsequent disputes that might arise concerning the Final Judgment's implementation.

Next, the Final Judgment contains sufficient enforcement mechanisms to ensure that its remedies are implemented, even if Iron Mountain and Recall fail to meet their divestiture obligations. Specifically, in the event that Defendants do not accomplish the required divestitures within the periods prescribed, the court must appoint a Trustee selected by the United States and

approved by the court to carry out the divestiture of any remaining assets. *Id.* at 11–12. The Trustee shall have the power to sell any remaining assets to a buyer acceptable to the United States, and the Defendants may not object to such sale except for Trustee malfeasance. *Id.* The Trustee will be required to file monthly reports with the court, and Defendants will be responsible for all costs and expenses of the Trustee. *Id.* Based on the foregoing, the court is satisfied that the Final Judgment contains a sufficient enforcement mechanism to ensure a complete sale of Recall's assets subject to divestiture. *Cf. Newpage Holdings*, 2015 WL 9982691, at *6 (finding similar enforcement provisions "adequate").

Finally, the court finds that the planned divestiture will likely mitigate any anti-competitive effects of the merger. As discussed, the United States conducted an extensive investigation of the merger's potential anti-competitive effects, *see* U.S. Resp. at 2–3, and it concluded that such effects would be eliminated by Recall's divestiture of assets in 15 geographic markets, *see* CIS at 7 ("The divestitures required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by establishing independent and economically viable competitors in the provision of RMS in each of the relevant geographic markets."). Because "[t]he United States' predictions are entitled to deference," particularly as they relate to the effect of proposed remedies, *Newpage Holdings*, 2015 WL 9982691, at *5; *Microsoft Corp.*, 56 F.3d at 1461, the court finds that the planned divestiture will likely neutralize the merger's anti-competitive impacts.

Accordingly, the court finds that, under the limited standard of review required by the Tunney Act, the proposed Final Judgment is in the public interest.

B. National Records Centers, Inc.'s Comment

During the Tunney Act's 60-day public comment period, National Records Centers, Inc. ("NRC")—a competitor in multiple markets—submitted a three-page letter objecting to the

proposed approval of the merger. U.S. Resp., Ex. 1, ECF No. 13-1 [hereinafter NRC Letter]. NRC complained that "[c]ombining the number one company in the industry with the number two company is unfair and anticompetitive by its very nature" and urged the Department of Justice to "re-think" the merger "in its totality." *Id.* at 1. Alternatively, NRC suggested that *all* customers affected by the merger should be permitted to switch their RMS provider without penalty, not just those specified in the Final Judgment. *Id.* at 1–2. Finally, NRC recommended two less drastic changes to the Final Judgment: (1) that Split Multi-City Customers be permitted to terminate their contracts with Defendants without penalty so as to allow transfer to *any* RMS provider, not just an acquiring company, and that the period to make such a move be extended from one to three years; and (2) that the Final Judgment's definition of "Spilt Multi-City Customer" be broadened by deleting the following from Section II.L: "A Split Multi-City Customer does not include a Recall customer that has separate contracts for each Recall facility in which it stores records." *Id.* at 2–3.

"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.'" *Newpage Holdings*, 2015 WL 9982691, at *7 (quoting *United States v. Abitibi-Consol, Inc.*, 584 F. Supp. 2d 162, 165 (D.D.C. 2008)). Accordingly, the court's role is limited to "evaluating whether the Proposed Final Judgment provides a reasonably adequate remedy for the harms alleged in the Complaint, and the court will defer to the United States' predictions regarding the effect of its proposed remedies." *Id.*

Here, the United States has provided a sufficient factual basis that its proposed remedy—the divestiture of certain of Recall's assets—is adequate to remedy the alleged harms. Again,

following a substantial investigation, the United States identified anti-competitive effects in 15 local markets as the potential harm arising from the merger. U.S. Resp. at 4. "The proposed Final Judgment is designed to address the competitive concerns in each of these 15 metropolitan markets." *Id.* The United States' proposed solution to remedy that harm is to require Recall to divest its assets, including customer contracts, in 13 of those markets to Access and in two of those markets to another acquirer approved by the United States. *Id.* As to NRC's demand that the Department of Justice "re-think" the merger "in its totality," NRC Letter at 1, the United States has adequately explained that requiring divestitures in those 15 local markets "is sufficient to protect competition," U.S. Resp. at 10. It also has offered facts that enable the court to conclude that Access is an appropriate divestiture partner. CIS at 8 ("Access is an established player in the RMS industry and is currently the third-largest RMS provider in the United States."). The court must defer to that assessment. *See Microsoft Corp.*, 56 F.3d at 1461.

The same holds true with respect to NRC's complaint that *all* customers affected by the merger should be able to switch providers without incurring any fees. NRC Letter at 1–2. As the United States has explained, the harm it sought to remedy was limited to 15 geographical markets. U.S. Resp. at 11–12. Therefore, NRC's proposal to allow *all* customers—regardless of their location—to switch customers without incurring a penalty "would far exceed what is necessary to remedy the harm found by the United States and alleged in the Complaint." *Id.* at 12 (citing *Microsoft Corp.*, 56 F.3d at 1459–60). Again, the court defers to the United States' determination as to the appropriate scope of the remedy. *See Microsoft Corp.*, 56 F.3d at 1461.

Lastly, as to NRC's final two criticisms—both of which concern the treatment of Split Multi-City Customers, NRC Letter at 2–3—the United States has explained that the "Final Judgment is designed to allow customers with a preference for a single vendor pursuant to a single

contract to transfer their records such that the records will not be stored at facilities managed by different vendors." U.S. Resp. at 12. The court must defer to the United States' determination that the definition of "Split Multi-City Customers" is sufficient to satisfy that objective. Likewise, as to NRC's suggestion that time period for a transfer be increased from one year to three years, the court accepts the United States' explanation that the shorter time period is preferable because "it is in the best interest of the industry and competition that any period of disruption or uncertainty in the relevant markets be minimized." *Id.*

In summary, none of NRC's comments alter the court's determination that the proposed Final Judgment satisfies the "public interest" standard.

V. CONCLUSION

For the foregoing reasons, the court is satisfied that the United States has complied with the requirements of the Tunney Act and that entry of the proposed Final Judgment is in the public interest. Accordingly, the court grants the United States' Motion for Entry of Final Judgment. The Final Judgment will issue separately.

Dated: November 11, 2016

Amit P. Mehta
United States District Judge

Utica Hospitals New York AG Settlement

Dated: December 11, 2013 **Español**

A.G. Schneiderman Announces Settlement With Utica Hospitals To Address Competitive Concerns

Settlement Ensures Continued Patient Access To Key Health Care Services At Competitive Prices After Hospitals' Merger

NEW YORK – Attorney General Eric T. Schneiderman today announced a settlement with the two general acute care hospitals in the city of Utica, resolving concerns that the hospitals' proposed affiliation would adversely affect competition in the healthcare market in Utica. The settlement allows the two financially troubled hospitals, Faxton-St. Luke's Healthcare and St. Elizabeth Medical Center, to combine their operations to reduce costs and enhance the quality and availability of key healthcare services for patients in the greater Utica area. The settlement's provisions ensure that the hospitals will use their combination for the benefit of patients and not as a platform for exerting market power and imposing higher health care costs on patients. The settlement also ensures continued patient access to key reproductive health services.

"Residents of the greater Utica area, like all New Yorkers, deserve high quality health care at fair prices," said **Attorney General Schneiderman.** "This settlement allows Utica's two biggest hospitals to combine in order to survive in a challenging economic environment, while ensuring that the hospitals will fulfill their promise to use the partnership to improve patients' access to quality health care and not to increase prices."

Faxton-St. Luke's Healthcare and St. Elizabeth Medical Center operate in a challenging economic environment that includes an unusually high refugee population and some of the neediest patients in the state. The hospitals have suffered significant financial losses in recent years, and it is highly questionable that they can independently surmount these challenges without negatively impacting the availability of vital health care services in the Mohawk Valley. The hospitals directly compete with one another, but also face competition from nearby community hospitals and hospitals in nearby cities such as Cooperstown, Syracuse, and Albany. In addition, the scope of competition between the merging hospitals is limited – each hospital provides services that the other does not, and most of each hospital's patients are covered by Medicare or Medicaid, where rates are set by the federal government and not by competition between them.

The settlement allows the transaction to proceed but has various provisions to ensure that the hospitals will not abuse their new market position by foreclosing competing providers from the market or excessively increasing rates directly following the combination. For example:

- ***Prohibition on exclusionary conduct.*** The hospitals agree not to require independent physicians to work exclusively at the hospitals, or to require health plans to reimburse competing hospitals or health care providers at the same or lower rates than the health plans reimburse the hospitals.
- ***Temporary rate protection.*** The hospitals commit to negotiate in good faith with rate payers (including commercial insurers and governmental managed care insurers). If these payors believe that the hospitals are acting unfairly, the settlement gives the payors the right to continue their currently-existing relationships with the hospitals for five years at current prices, subjected to annual increases not to exceed historic levels.
- ***Continued monitoring.*** The settlement allows the Attorney General to ensure that the hospitals have implemented their promised efficiencies prior to termination of the rate-protection provisions.

Because the proposed affiliation agreement also involves the combination of a secular hospital (Faxton-St. Luke's Healthcare) with a Roman Catholic hospital, the settlement also takes steps to ensure that the secular hospital is able to continue its current level of reproductive health services after the transaction, and ensures that admitting privileges will continue to be available at Faxton-St. Luke's Healthcare for independent physicians and medical professionals providing reproductive health services outside of the hospitals.

This matter was handled by Assistant Attorneys General Amy McFarlane, Robert Hubbard and George Laevsky, under the supervision of Antitrust Bureau Chief Eric J. Stock and Executive Deputy Attorney General Karla G. Sanchez. Valuable assistance was also provided by Health Care Bureau Chief Lisa Landau, Civil Rights Bureau Chief Kristen Clarke and Assistant Attorney General Monica Iyer, and Charities Bureau Section Chief Paula Gellman.

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OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF NEW YORK

Assurance No. 13-489

In the Matter of the

Investigation by Eric T. Schneiderman, Attorney General of the State of New York, of the Proposed Combination of Faxton-St. Luke's Healthcare and St. Elizabeth Medical Center.

ASSURANCE OF DISCONTINUANCE PURSUANT TO EXECUTIVE LAW §63(15)

In January 2013, pursuant to Article 22 of the New York General Business Law, the Office of the Attorney General of the State of New York ("OAG") commenced an investigation concerning the competitive implications of the proposed affiliation, under a common active parent corporation, of Faxton-St. Luke's Healthcare ("FSL") and St. Elizabeth Medical Center ("SEMC") (collectively, the "Hospitals"). The OAG subsequently broadened the investigation to consider access to care issues pursuant to the New York Civil Rights Law. As part of its investigation, the OAG reviewed documentary evidence submitted by the Hospitals, conducted interviews of numerous commercial health insurers, and spoke with a number of other third parties potentially impacted by the affiliation (collectively, the activities discussed in this paragraph constitute the "Investigation").

This Assurance of Discontinuance ("Assurance") contains the OAG's findings and contentions, and the relief agreed to by the OAG and the Hospitals.

OAG'S FINDINGS

OVERVIEW

1. FSL is a New York not-for-profit corporation that operates general acute care hospitals at two campuses in Utica, New York; FSL is licensed to operate a total of 370 beds at these facilities. SEMC, a Catholic organization that pursues a "Catholic health care mission," is a New York not-for-profit general acute care hospital that is licensed to operate 201 beds in Utica. The Hospitals are the only general acute care hospitals in the city of Utica.

2. On June 15, 2012, it was announced that the Hospitals would each receive $7,135,500 in grants funded through the New York State Health Care Efficiency and Affordability Law ("HEAL"). Grants funded by these programs are intended to right-size and restructure health care delivery systems, and are allocated through the New York State Department of Health ("DOH") and the Dormitory Authority of the State of New York. New York State conditioned receipt of the HEAL grant monies on FSL and SEMC reaching agreement to affiliate under a common active parent corporation.

3. The DOH has stated that neither FSL nor SEMC, by itself, currently has sufficient licensed inpatient beds to accommodate the needs of the patient population in the greater Utica area.

4. On December 6, 2012, the Hospitals entered into a Memorandum of Understanding (the "MOU"), pursuant to which they agreed to affiliate under a common active parent corporation, Mohawk Valley Network, Inc. as reconstituted to become Mohawk Valley Health System (the "Combined Entity"). The OAG thereafter commenced its Investigation to assess the impact on competition of the transaction contemplated by the MOU (the

"Transaction").

THE HOSPITALS' FINANCIAL DIFFICULTIES

5. Each of the Hospitals has experienced significantly negative financial trends in recent years, which have accelerated throughout 2013. The many reasons for these negative financial trends include especially: (a) a shift in the Hospitals' patient mix away from commercially-insured patients towards Medicaid and self-pay (uninsured) patients; and (b) reductions in Medicare and Medicaid reimbursements provided to the Hospitals.

6. These severe financial trends are exacerbated by special circumstances in the greater Utica area that create an especially challenging financial and operating environment for the Hospitals. For example, FSL and SEMC are located within a geographic area that has a significantly lower wage index than most other hospitals in the region, resulting in FSL and SEMC receiving significantly lower reimbursement rates from Medicare than are received by hospitals in neighboring regions for the same services.

7. In addition, according to the Hospitals, Utica has one of the highest per-capita refugee populations in the country – almost 25% of its population. As a result, each Hospital serves a highly vulnerable and linguistically diverse patient population, including patients who may have received limited health care in their countries of origin. These patients frequently face significant health care issues, and the Hospitals incur significant costs for providing translation services to these patients – costs that are not always adequately reimbursed by payors.

8. The competitive environment in the greater Utica area has also seen the rise of physician-based clinics and ambulatory surgery centers, which draw commercially insured patients to their facilities. As a result of this competition, the Hospitals serve a patient population with an

increasingly high proportion of the more vulnerable, higher cost, and uninsured or government-pay patients.

9. Both Hospitals have recently been threatened with the loss of their directors and officers liability insurance coverage as a result of the ever worsening financial condition at each Hospital.

10. The Hospitals contend that they cannot independently surmount these negative financial trends and remain in operation.

POTENTIAL EFFICIENCIES FROM THE TRANSACTION

11. Both FSL and SEMC have, individually, undertaken steps over the last three years to cut significant expenses, including, but not limited to, undertaking lay-offs and eliminating positions. But the Hospitals contend that they are increasingly unable to make these cuts without eliminating or inappropriately compromising safety net services. The Hospitals contend that the Transaction will allow the Combined Entity to realize significant efficiencies and cost reductions, thereby improving the financial condition of the Hospitals without eliminating or compromising safety net services.

12. The Hospitals contend that they will be able to achieve cost efficiencies pursuant to the Transaction. They assert that service rationalization and clinical program coordination will provide the Hospitals with opportunities for enhanced operational efficiency. They further contend that the close physical proximity of the two Hospitals will allow them to achieve significant clinical and operational efficiencies that would not be available if the Hospitals sought instead to affiliate with two different hospital systems.

13. In a region where the number of physicians is limited, the Transaction is also

expected to enhance the Hospitals' ability to ensure patient access to qualified specialists in a timely manner. FSL and SEMC have had difficulty in recruiting specialists and sub-specialists to their service area due, among other things, to the economic environment in Utica, and the relatively small size of their specialty departments. As a result, there are days when certain specialty and sub-specialty services are available at both Hospitals and days when those same specialty and sub-specialty services are not available at either Hospital. One potential efficiency from the Transaction is that the Combined Entity will be able to establish a combined call coverage schedule, expanding the period during which the full range of specialty and sub-specialty services are available in the community and increasing the access to these services for the population served by the Combined Entity.

HEALTH CARE COMPETITION IN THE GREATER UTICA AREA

14. FSL and SEMC compete to provide basic acute care inpatient services in the greater Utica area. Following the Transaction, all other acute care hospitals in the greater Utica area will have significantly fewer beds than the Combined Entity. Entry of a new hospital into the greater Utica area is unlikely given current market conditions. The Combined Entity will accordingly have a very large share of inpatient hospital services in Utica.

15. Nonetheless, the effect on competition appears to be limited. The Hospitals will continue to face important competition from hospitals in nearby cities such as Cooperstown, Syracuse, and Albany, as well as from nearby community hospitals, such as Rome Memorial Hospital. The Hospitals will similarly continue to face significant competition from numerous local clinics and outpatient facilities.

16. Moreover, the scope of competition between the two Hospitals is currently

limited. The operating licenses issued by the Department of Health to the Hospitals limit the services available at each Hospital. Each of the Hospitals involved in the Transaction is licensed to provide a number of services that the other Hospital is not licensed to provide, thereby limiting the number of services in which the two Hospitals directly compete with one another. For example, only one of the Hospitals is currently licensed to provide obstetric services, only one Hospital has a state-designated inpatient stroke center, and only one Hospital has a state-designated Level II trauma center. Given the high rate of government-pay patients served by the two Hospitals and that neither Hospital is licensed to offer the full range of inpatient services needed to serve the greater Utica community, only a very limited portion of the each Hospital's revenue is derived from payments from commercial insurers for inpatient services that could be provided by either Hospital.

17. The Hospitals both contract with third-party payors offering commercial or governmental managed care insurance ("Health Plans") to furnish inpatient and outpatient health care services to Health Plan members.

18. Despite the mitigating factors noted above, the OAG remains concerned that the Transaction may substantially lessen competition in one or more relevant health services markets, especially with respect to competition in certain acute care inpatient services markets. The OAG is concerned that the Health Plans offering an insurance product to customers in the greater Utica area will need to include the Combined Entity in their provider network, and that the Transaction will therefore allow the Hospitals to gain leverage to demand higher reimbursement rates from Health Plans following the Transaction. Health Plan payment of higher reimbursement rates would ultimately harm New York State businesses and consumers, as the Health Plans are likely

to pass on those costs to customers in the form of higher insurance premium rates or deductibles.

19. The Hospitals contend that the efficiencies that will be generated by the proposed Transaction outweigh any potential anticompetitive effects. In evaluating the overall impact of the proposed Transaction, only efficiencies that are likely to be implemented and achieved by the Hospitals should be weighed against the Transaction's potential anticompetitive effects.

ACCESS TO REPRODUCTIVE HEALTH SERVICES

20. SEMC is a Catholic organization that provides services in accordance with the Ethical and Religious Directives for Catholic Healthcare Services (the "ERDs"). FSL is a secular organization without religious affiliation that currently provides health care services that are proscribed by the ERDs. The OAG therefore has also considered that the Transaction may result in the restrictions contained in the ERDs being imposed on FSL, thereby reducing the types of services that may be offered by FSL. The OAG is concerned that the Transaction may thereby harm residents of the greater Utica area by limiting their access to certain types of healthcare services, especially those that relate to reproductive health.

THIS ASSURANCE

21. The OAG has raised the aforementioned concerns with representatives of the Hospitals. To resolve those concerns, the Hospitals have agreed to abide by the stipulations set forth below. The OAG finds the agreements contained in the Assurance appropriate and in the public interest, and is therefore willing to accept this Assurance in lieu of continuing its Investigation into the matters detailed herein.

AGREEMENT

WHEREAS, the Hospitals admit the OAG's Findings (1)-(20) above;

WHEREAS, OAG is willing to accept the terms of this Assurance pursuant to New York Executive Law § 63(15) and to discontinue its Investigation; and

WHEREAS, the Hospitals and the OAG each believe that the obligations imposed by this Assurance are prudent and appropriate;

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Hospitals and the OAG, that:

22. This Assurance shall apply to FSL, SEMC, the Combined Entity, and any of their successor entities doing business in New York State, whether acting through their principals, directors, officers, shareholders, employees, representatives, agents, assigns, successors, parents, subsidiaries, affiliates, or other business entities, whose acts, practices, or policies are directed, in part or in whole, by either of the Hospitals or any successor combinations. This Assurance specifically governs the conduct of the Hospitals and their successors upon closing of the Transaction ("Closing"). By signing this Assurance, the Hospitals stipulate that they forego any legal defenses to, or assertions against, the enforceability of this Assurance.

RATE PROTECTION PERIOD

23. After the date of the Closing, the Combined Entity shall negotiate in good faith any and all reimbursement contracts it has with the Health Plans, including contracts covering reimbursements for both inpatient and outpatient services provided by the Combined Entity through any of its affiliates.

24. A "Commercial and Managed Care Rate Protection Period" shall be defined as the later of the following dates: (i) five (5) years following the Closing of the Transaction; or (ii) the date the Combined Entity secures the Certification described in paragraph 27 below. Following

the Closing, the Combined Entity may jointly negotiate reimbursement contracts, including the rates of payment included in such reimbursement contracts, with the Health Plans. If the Combined Entity is unable to reach agreement with any Health Plan on the reimbursement rates to be included in any such jointly negotiated reimbursement contract at any time during the Commercial and Managed Care Rate Protection Period, then within ninety (90) days prior to the expiration of the then current contract, the Combined Entity shall offer to the Health Plan to enter into separate reimbursement contracts for each of FSL and those entities affiliated with FSL prior to the Closing, and SEMC and those entities affiliated with SEMC prior to the Closing. The terms of each of these separate agreements may be jointly negotiated subject to the requirements of paragraph 23 above, provided that the rates of reimbursement negotiated for inclusion in any such separate contract shall not exceed the rate of reimbursement contained in that facility's reimbursement agreement with such Health Plan on the date that this Assurance is signed, plus a compounded annual increase equal to: (a) if the Health Plan has had a reimbursement contract with that facility for at least four years prior to the date on which this Assurance is signed, the average percentage rate increase over the four (4) contract years prior to the date that this Assurance is signed or, (b) if the Health Plan has not had a reimbursement contract with that facility for at least four (4) years prior to the date that this Assurance is signed, the average percentage rate increase over the number of years for which there has been an agreement with the Health Plan prior to the date that this Assurance is signed. The Health Plan must elect such rate extension within sixty (60) days of the Combined Entity's offer and each of the FSL and SEMC facilities must accept such rates if this offer is accepted. The Combined Entity shall maintain independent business identifiers for the legacy FSL and SEMC facilities to the extent necessary to

permit FSL and SEMC facilities to enter into independent contracts with the Health Plans. Notwithstanding the foregoing, to the extent that any current reimbursement contract with a Health Plan contains an automatic renewal provision and/or a provision requiring written notice of non-renewal effective at the end of the contract term, the applicable Hospitals shall be entitled to issue a written notice of non-renewal in accordance with the terms of such contract; any termination or non-renewal of any existing agreement either facility has with a Health Plan must be in compliance with Article 44 of the Public Health Law. If, after the issuance of such notice of non-renewal, the Combined Entity is unable to reach agreement with a Health Plan on reimbursement rates to be included in a jointly negotiated reimbursement contract and the Health Plan elects not to accept separate contracts with FSL and SEMC including the rates determined in accordance with this Paragraph 24, then the notice of non-renewal shall become effective as contemplated in the current contract. On each year by January 30, from the date of the Closing until the Commercial and Managed Care Rate Protection Period has concluded, the Combined Entity will provide the OAG with a sworn statement confirming that it has complied with this Paragraph.

25. The Combined Entity shall not unreasonably or without cause terminate any Health Plan's contract prior to the end of the term in effect as of the date of this Assurance or, with respect to any separate reimbursement contract entered into in accordance with Paragraph 24, during any term thereof.

CONFIRMATION OF IMPLEMENTATION OF EFFICIENCIES

26. FSL and SEMC have agreed to a process and timeline for the development of a statement of the proposed activities and goals of the Combined Entity (the "Statement of

Proposed Activities"), which is attached as Exhibit A. After Closing, the Combined Entity shall develop the Statement of Proposed Activities in accordance with the goals and timeline set forth in Exhibit A. Once completed, the Statement of Proposed Activities shall be submitted to the OAG which shall, in consultation with the DOH, review and either (a) approve such Statement of Proposed Activities or (b) provide notice to the Combined Entity of the deficiencies in the Statement of Proposed Activities and work with the Combined Entity to correct such deficiencies. The OAG shall not unreasonably withhold approval of the Statement of Proposed Activities, provided that any deficiencies identified by the OAG are corrected by the parties. The Statement of Proposed Activities shall include: (a) descriptions of proposed clinical integration; (b) proposed quality goals, including quantitative benchmarks that may be used to assess whether those quality goals have been met; (c) population health goals, including quantitative benchmarks that may be used to assess whether those goals have been met; (d) proposed measures by which the Combined Entity will prevent unwarranted price increases, achieve savings, and realize transactional efficiencies, including any anticipated participation by the Combined Entity in shared-risk arrangements with Health Plans; (e) proposed implementation of payment methodologies that control excess utilization and costs, while improving outcomes; and (f) a proposed timeline for implementation of the plan contained in the Statement of Proposed Activities.

27. The Combined Entity shall report each year by January 30 to the OAG, with a copy to the DOH, on implementation of the Statement of Proposed Activities. Once the Combined Entity believes it has substantially achieved the integration and other efficiencies set forth in the Statement of Proposed Activities, the Combined Entity shall, at the Combined Entity's

expense, retain an independent healthcare consultant to assess whether the Combined Entity has substantially achieved the integration and other efficiencies set forth in the Statement of Proposed Activities. The consultant shall report his or her findings to the OAG with a copy to DOH. Prior to retention of such independent healthcare consultant, the Combined Entity shall identify the consultant to the OAG, for OAG approval, and the OAG shall approve such consultant if the consultant is qualified and independent. After receiving the report and consulting with the DOH, the OAG may certify that the Combined Entity has substantially achieved the integration and other efficiencies set forth in the Statement of Proposed Activities (the "Certification"). If the Certification has not been issued five (5) years following the Closing of the Transaction, the Commercial and Managed Care Rate Protection Period, as set forth in Paragraph 24, will be extended until such date as the Certification is issued.

28. If, at any time during the implementation of the Statement of Proposed Activities, the Combined Entity believes a material modification to the Statement of Proposed Activities is needed or desirable, the Combined Entity shall submit the proposed material modification to the OAG, with a copy to the DOH, together with an explanation of the reasons that such modification is deemed to be necessary or desirable. The OAG, in consultation with the DOH, shall review the proposed modification and the reason expressed therefor and shall either (a) issue a letter accepting the modification, or (b) notify the Combined Entity that the modification has not been accepted and indicating the reasons for the rejection. Thereafter, the Combined Entity shall be free to submit a revised proposed material modification to the Statement of Proposed Activities that attempts to address the concerns expressed by the OAG in the letter of rejection.

PROHIBITION OF EXCLUSIONARY CONDUCT

29. If the Combined Entity does not reach agreement with a Health Plan during the Commercial and Managed Care Rate Protection Period, the Combined Entity shall not require, as a condition of entering into separate reimbursement contracts with the FSL or SEMC facilities in accordance with Paragraph 24 of this Assurance, that the Health Plan have a contract with the FSL or the SEMC facility for all services offered by the facility or its affiliated entities, including but not limited to skilled nursing facilities, laboratories, physicians, or physician networks.

30. The Combined Entity shall not enter into any agreement with any Health Plan that includes a most favored nation clause ("MFN") in favor of the Hospitals. The Combined Entity may not renew or extend any agreement that currently contains an MFN without abandoning any term or provision that constitutes an MFN.

31. The Combined Entity shall not enter into any exclusive contracts with any health care provider by which it requires that provider to render services only at a facility owned or affiliated with the Combined Entity; provided, however, that nothing shall preclude the Combined Entity or any of its affiliates from: (a) requiring employees who are employed at a level of 80% of a full-time equivalent or greater to work exclusively for the Combined Entity or its affiliates or (b) entering into any exclusive hospital-based service contract that requires the contracted group of providers to work exclusively for the Combined Entity or its affiliates, provided that such exclusivity is necessary for the Combined Entity to ensure adequate coverage of the services to be provided under the contract.

ACCESS TO REPRODUCTIVE SERVICES

32. FSL, SEMC, and the OAG acknowledge and agree that FSL currently provides

health care services that are proscribed by the Catholic ERDs, including sterilization procedures, such as tubal litigations and vasectomies. FSL, SEMC, and the OAG further acknowledge and agree that, if complications arise during the course of an abortion, or during the course of another service being performed on a pregnant woman, at another facility, FSL currently provides emergency care services, which services might include the performance of an abortion if necessary to preserve the health or life of the woman. All parties agree that, after Closing, the legacy FSL facilities may continue to perform such services, regardless of whether such service is proscribed by the Catholic ERDs.

33. The Combined Entity shall not prohibit, or otherwise restrict or limit, legacy FSL facilities from providing admitting privileges to medical professionals or physicians who perform abortions at other facilities within the demographic areas served by the Combined Entity, provided that they meet the credentialing criteria established by FSL or such legacy FSL facility. Prior to Closing, FSL shall inform in writing all medical professionals or physicians employed by or affiliated with the Utica Center of Planned Parenthood Federation of America, Inc. who currently have admitting privileges at FSL that those privileges shall continue without interruption after the Closing, provided such medical professionals or physicians continue to meet the credentialing criteria established by FSL or the applicable legacy FSL facility.

34. If, on a permanent basis, no other qualified, New York State licensed facility provides abortions within the geographic areas served by the Combined Entity, then FSL has and will reserve the right to withdraw from the Combined Entity for purposes of being able to provide abortions and SEMC agrees to reasonably cooperate with such withdrawal. If FSL does not exercise its right to withdraw from the Combined Entity in order to perform abortions, then FSL

will use commercially reasonable efforts to arrange for such services to be available through another provider located in the geographic area served by the Combined Entity.

OTHER PROVISIONS

35. Nothing contained herein shall be construed to alter, change, modify, or enhance any existing legal rights of any consumer or to deprive any person or entity of any existing private right under the law. Nothing in this Assurance shall in any way affect, restrict, or otherwise govern any rights of recourse the Hospitals or the Combined Entity may have or seek to assert against any third party.

36. Nothing contained herein shall be construed as relieving the Hospitals or their successor entities of the obligation to comply with all state and federal laws, regulations, or rules, nor shall any of the provisions of this Assurance be deemed permission to engage in any act or practice prohibited by such law, regulation, or rule.

37. Acceptance of this Assurance by the OAG shall not be deemed approval by the OAG of any of the Hospitals' business practices, and the Hospitals shall make no representation to the contrary.

38. This Assurance is contingent upon and relies on the truthfulness and accuracy of all representations made by the Hospitals during the Investigation. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

39. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by the Hospitals in agreeing to this Assurance.

40. FSL and SEMC represent and warrant, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized. The Hospitals shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects the Hospitals' (i) testimonial obligations or (ii) right to take legal or factual positions in defense of litigation or other legal proceedings to which OAG is not a party. This Assurance is not intended for use by any third party in any other proceeding and is not intended, and should not be construed, as an admission of liability by the Hospitals.

41. This Assurance may not be amended except by an instrument in writing signed on behalf of all the parties to this Assurance.

42. This Assurance shall be binding on and inure to the benefit of the parties to this Assurance and their respective agents, representatives, employees, successors and assigns, including any corporation, subsidiary or division through which they act or hereafter act, provided that no party, other than OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of OAG.

43. If any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, the OAG may decide, in its sole discretion, that such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

44. To the extent not already provided under this Assurance, the Hospitals shall, upon request by OAG, provide all documentation and information necessary for OAG to verify

compliance with this Assurance.

45. All notices, reports, requests, and other communications to any party pursuant to this Assurance shall be in writing, and all notices directed to the OAG should be sent to the Antitrust Bureau Chief at 120 Broadway, 26th Floor, New York, NY 10271-0332.

46. Pursuant to Executive Law § 63(15), evidence of a violation of this Assurance shall constitute prima facie proof of violation of the applicable law in any action or proceeding thereafter commenced by OAG.

47. If a court of competent jurisdiction determines that the Combined Entity has breached this Assurance, the Combined Entity shall pay to OAG the cost, if any, of such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

48. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

IN WITNESS WHEREOF, this Assurance is executed by the parties hereto on December 11, 2013.

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: _____
Eric Stock, Esq.
Chief, Antitrust Bureau

ST. ELIZABETH MEDICAL CENTER

By: _____
Richard Ketcham
President and Chief Executive Officer

By: _____
Traci Boris, Esq.
General Counsel

FAXTON-ST. LUKE'S HEALTHCARE

By: _____
Scott Perra
President and Chief Executive Officer

By: _____
Thomas Soja, Esq.
General Counsel

ERIC T. SCHNEIDERMAN
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General Counsel

FAXTON-ST. LUKE'S HEALTHCARE

By: _____
Scott Perra
President and Chief Executive Officer

By: _____
Thomas Soja, Esq.
General Counsel

Exhibit A
Process and Timeline for Development of Statement of Proposed Activities

FSL and SEMC have agreed to a process and timeline for the development of a statement of proposed activities and goals of the Combined Entity (the "Statement of Proposed Activities"). The parties shall undertake the following activities within the timeframes designated.

Time Period: Date of Transaction to 6 months Post-Transaction

During the six months following the closing of the transaction, the Combined Entity will necessarily be focused on the development of its initial strategic plan and the implementation of the Business Plan of Operational Efficiencies ("BPOE"). Beginning the process of implementing the BPOE promptly following the closing will provide the opportunity for the Combined Entity to begin to realize the cost efficiencies necessary to stabilize its finances. Additionally, it is necessary for the board, management, and the medical staff to collaborate in the development of the Combined Entity's initial strategic plan to attain organizational commitment to that plan.

Time Period: 6 Months to 24 Months Post-Transaction

- The Combined Entity will continue the refinement and implementation of the inaugural strategic plan for Mohawk Valley Health System.
- The Combined Entity will initiate a process to develop the Statement of Proposed Activities. The Statement of Proposed Activities will be constructed to best position MVHS for population health management and will include:
  - Detailed descriptions of clinical integration models and approaches
  - Quality goals, including quantitative benchmarks to be used to assess achievement of quality goals
  - Population health goals, including quantitative benchmarks to be used to assess achievement of population health goals
  - Measures to prevent unwarranted price increases, achieve savings and realize transactional efficiencies, including identification of potential shared risk arrangements
  - Potential payment methodologies that control excess utilization and costs while improving outcomes

Exhibit A
Process and Timeline for Development of Statement of Proposed Activities

- Goals and objectives for clinical integration in alignment with the corporate mission and vision set forth in the initial strategic plan
- An evaluation of the Combined Entity's service offerings, redundant services and service gaps
- Possible provider alignment models that best serve the needs of the community, the Combined Entity, and local/regional medical staff
- Potential clinical programmatic alignment plans for the Combined Entity in preparation for population health management
- An information technology plan for the Combined Entity that aims to securely manage and transfer patient information in a manner that allows for optimal patient care, including the study and recommendation of a common electronic medical record platform and related information technology systems to serve the health system and physician practices
- Timeline for implementation, including milestones for tracking implementation progress

- To develop the Statement of Proposed Activities, the Combined Entity will create a committee consisting of representatives of the Board of Directors, senior management, and medical staff leaders. This committee will be tasked with identifying and consulting with community stakeholders and other individuals from inside and outside of the Combined Entity on the development of the specific elements to be included in the Statement of Proposed Activities. Upon completion, the Statement of Proposed Activities will be submitted to the President and Chief Executive Officer of the Combined Entity for approval. Upon approval of the President and Chief Executive Officer, the Statement of Proposed Activities will be recommended to the Board of Directors of the Combined Entity for adoption. Following adoption by the Board of Directors of the Combined Entity, the Statement of Proposed Activities will be submitted to the Office of the Attorney General for review and approval in accordance with the Assurance to which this Exhibit A is attached.

Exhibit A

Process and Timeline for Development of Statement of Proposed Activities

- Ongoing implementation of the BPOE for the Combined Entity including achievement of previously identified opportunities, as well as the identification, quantification, and achievement of additional opportunities.

24 Months to 36, 48 and 60 Months Post-Transaction

- Continued implementation of the initial strategic plan
- Continued implementation of Statement of Proposed Activities
- Continued implementation of the plan of operational efficiencies

CVS/Aetna

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, ET AL.,	)	
	)	CV No. 18-2340
Plaintiffs,	)	
	)	Washington, D.C.
vs.	)	November 29, 2018
	)	12:39 p.m.
CVS HEALTH CORPORATION, ET AL.,	)	
	)	
Defendants.	)	
_____	)	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

P R O C E E D I N G S

DEPUTY CLERK: All rise. The United States District Court for the District of Columbia is now in session, the Honorable Richard J. Leon presiding. God save the United States and this Honorable Court. Please be seated and come to order.

Your Honor, this afternoon we have Civil Case No. 18-2340, the United States of America, et al., versus CVS Health Corporation, et al.

Will counsel for the parties please approach the lectern and identify yourself for the record and name the party or parties that you represent, please.

MR. OWEN: Good afternoon, Your Honor.

Jay Owen representing the United States.

Also, I'd like to note that we have with us in the room Julie Myers Wood of Guidepost Solutions, our candidate for monitoring trustee.

THE COURT: Who's this here?

Come on up.

MR. MUCCHETTI: Good afternoon, Your Honor. I'm Peter Mucchetti, counsel for the United States.

THE COURT: Are you in the Antitrust Division?

MR. MUCCHETTI: Yes, Your Honor, I'm with the Antitrust Division.

THE COURT: All right.

Welcome.

MR. HABASH: Good morning, Your Honor. Rani Habash from Dechert on behalf of CVS Health.

THE COURT: Welcome.

MR. HABASH: Thank you.

MR. SOLOMON: Good morning, Your Honor. I'm Jesse Solomon from Davis Polk for Aetna.

THE COURT: Welcome.

MR. SOLOMON: Thank you.

MR. SHELANSKI: Hello, Your Honor. I'm Howard Shelanski of Davis Polk, Counsel for Aetna.

THE COURT: Welcome.

Mr. Owen.

So I was reviewing your motion, which, of course, is not opposed.

MR. OWEN: Yes, Your Honor.

THE COURT: Not surprising.

And I kind of got this uneasy feeling that I was being kept in the dark, kind of like a mushroom.

So I've got some questions for you about this --

MR. OWEN: Yes, Your Honor.

THE COURT: -- allegedly imminent transaction.

What's the practical consequences of the merger that you say is going to be consummated in the next few weeks going forward?

MR. OWEN: The merger between CVS and Aetna?

THE COURT: Uh-huh.

MR. OWEN: Well, one thing I'd like to bring to the attention of the Court: The merger between CVS and Aetna actually consummated yesterday morning. The parties finished that.

THE COURT: Thanks for telling me.

MR. OWEN: I apologize, Your Honor. We'll make sure that you're aware of future developments.

THE COURT: Like I said, I'm like a mushroom being kept in the dark. Just keep shoveling.

What's the practical consequences?

MR. OWEN: Of the closure of the merger between CVS and Aetna?

THE COURT: Uh-huh.

Is that just a paper transaction?

MR. OWEN: No. The two companies, as I understand it, will -- have closed their merger and will begin to integrate their operations.

THE COURT: Well, that's where the rubber is going to hit the road, Mr. Owen.

Are you familiar with the *AT&T* case?

MR. OWEN: Yes, sir, I am.

THE COURT: Are you familiar with the arrangement that was worked out in that case pending appeal?

MR. OWEN: No, Your Honor, I'm not.

THE COURT: You're not.

You need to talk to your colleagues more frequently, Mr. Owen.

CVS and Aetna know.

The deal closed pending my ruling, but the parties agreed that the companies wouldn't be integrated until after the appeal was resolved by the D.C. Circuit. They know that, and I can't believe you don't.

What are you, a mushroom yourself over in the Antitrust Division?

Mr. Owen, do you know why that agreement was made?

MR. OWEN: No, Your Honor.

THE COURT: Do you want to take a guess?

Take a guess. Come on now.

MR. OWEN: To allow for --

THE COURT: How long have you been in the Antitrust Division, Mr. Owen?

MR. OWEN: I've been at the Division for 11 years.

THE COURT: Look at that.

Then you should be able to take a really educated guess.

Go ahead.

MR. OWEN: My guess would be to allow for the Court to review that decision.

THE COURT: No, that's not a good guess.

Do you want to try again?

Why would you wait for the Court of Appeals's decision?

MR. OWEN: I'm sorry, Your Honor, I don't know.

THE COURT: Well, how about I help you.

What if the merger has to be unwound? Will it not be easier to unwind it if the companies haven't been integrated?

What do you think?

I'm not hearing you.

MR. OWEN: Yes, Your Honor.

THE COURT: Yes, of course.

Common sense, Mr. Owen.

Now, we have a situation here where we haven't even heard the public's comments.

The reporting period has still got two or three weeks to go, does it not, December 18th, does it not?

MR. OWEN: Yes, Your Honor.

THE COURT: There you go.

And then when those comments come in, you, on behalf of the Department of Justice, have to respond to all of them, do you not?

MR. OWEN: Yes, Your Honor.

THE COURT: Yes, you do.

And then I'm going to get copies of all that, the responses and the comments, right?

MR. OWEN: Yes, Your Honor.

THE COURT: And we know already, at least I know already, because it's public record, that organizations such as the AMA, not exactly an insignificant organization, has published a 140-page opposition to this merger.

MR. OWEN: Yes, Your Honor.

THE COURT: Even with the divestiture, right?

MR. OWEN: Yes, Your Honor, I've reviewed the AMA's --

THE COURT: And the Court, under the Tunny Act, has to take into consideration, in order to protect fairness for the public, all of the comments, hold hearings, take evidence, if necessary, before entering a final judgment, right?

MR. OWEN: Yes, Your Honor, that's correct.

THE COURT: Yes.

So let's make it clear, Mr. Owen. This Court is not a rubber stamp.

MR. OWEN: No, Your Honor, I don't believe this Court is a rubber stamp.

THE COURT: Yeah, I understand you don't.

God knows if the Antitrust Division has learned anything, they know that this Court is not a rubber stamp.

But these folks over here need to understand that too, because it's their clients who think I am a rubber stamp, and that's not going to be tolerated.

Now, you need to figure out a way, now that your merger is closed, that the parties stay unintegrated. And do you know why?

MR. OWEN: Why, Your Honor?

THE COURT: Use your common sense.

What if I were to conclude, after reading all the comments, taking evidence, that I wouldn't enter the final judgment, because it would be unfair to the public to do so. How do we unwind it then?

MR. OWEN: Yes, Your Honor, I understand.

THE COURT: Yeah.

That's a practical problem, isn't it? A very practical problem.

And I'm very concerned, very concerned, that you all are proceeding on a rubber-stamp approach to this; that the Court is -- we don't even have the comments in yet -- that you are going to start integrating these companies -- which, by the way, will have immediate reaction within the marketplace, immediate consequences in the marketplace, immediate.

How do I unwind those consequences in the marketplace, if it should come to pass? And the word "if"

is in there, and it's an important word. If it should come to pass that the Court concludes it is not fair to the public to allow this.

And, by the way, this company that you're selling off, what are the provisions in the sales agreement that the company will be returned to Aetna in the event that the Court doesn't enter final judgment? Is that provided for?

MR. OWEN: No, Your Honor.

THE COURT: It's not.

Isn't that wonderful?

So what happens then?

What happens if this Court doesn't enter final judgment in favor of the deal? For whatever reason.

Obviously, you could appeal it. I could be upheld. Theoretically if that were to happen; I'm talking now all hypothetical.

You haven't made any arrangements so that it can be resold back to Aetna if there's no deal?

MR. OWEN: Your Honor, that is a business risk that CVS and Aetna -- or Aetna is bearing. If the divestiture assets are sold to WellCare, that transaction will be completed.

And if Your Honor does not approve the proposed final judgment and does not enter that, that is a risk that the parties are bearing in this situation.

THE COURT: It's a pretty expensive risk.

What was the sales price?

Don't tell me you don't know.

Don't tell me you don't know, Mr. Owen. Come on, this is your case; you're the lead lawyer.

What was the amount of the sale?

MR. OWEN: The sales price was a significant sales price, Your Honor.

THE COURT: You didn't answer my question.

MR. OWEN: I believe --

THE COURT: What was the amount of the sales price?

MR. OWEN: The sales price is -- it's actually hard to articulate the exact price because it is based on a per-member fee that will be determined.

THE COURT: Well, give me a ballpark.

MR. OWEN: I believe a ballpark would be around -- between 50 and $100 million.

THE COURT: 350- and 100 million?

MR. OWEN: 50 and 100 million.

THE COURT: 50 and 100 million?

MR. OWEN: Yes, sir.

THE COURT: That's not an insignificant number.

MR. OWEN: No, Your Honor.

THE COURT: Even though the merger is a much

larger number --

MR. OWEN: Yes, Your Honor.

THE COURT: -- to say the least.

That's my problem, and I need you and them to sit down and talk it through. They need to talk to their clients first.

But I'm not just signing off on this motion that you filed until I get some input from you all as to what you're going to do about this integration issue.

At a point in time -- it's going to take months; you understand that, right?

We're going to have a briefing schedule.

You know how this works.

Eleven years, you know how this works.

MR. OWEN: Yes, Your Honor.

THE COURT: You could spit it out right now.

I'm not going to get the comments, with your responses to them, until January, roughly, sometime in January, maybe February because of the holidays, but, say, February or January.

MR. OWEN: Correct, Your Honor.

THE COURT: And then each side is going to have briefings as to why the deal should go forward, notwithstanding the comments, right?

And then I'm going to review the briefings and

I'm going to review all the comments and your responses to them.

And then I have to decide to hold hearings or not.

Well, I have to hold a hearing. Excuse me. I at least have to hold one hearing under the Tunney Act, right?

But I have to decide whether to take evidence, and taking evidence might take days or weeks.

And then I have to issue an opinion, and that takes at least weeks.

I mean, I did a 172-page opinion in *AT&T* in six weeks, so that gives you some idea of what can be done. But, believe me, that wasn't exactly an ideal set of circumstances, but I did it because of the penalty that AT&T was facing, which was $500 million. You know that much --

MR. OWEN: Yes, Your Honor.

THE COURT: -- even though you weren't on that case.

It's going to be next summer, at the earliest, before I can rule on your motion, which you have to file, for the entry of a final judgment.

That means if this entity is merged in the next month or so, it's going to be six, seven months into that merged entity before I'm in a position to rule.

And if I rule against it, how do you untangle seven months of integration? Very difficult. Maybe

impossible.

And how do you recoup the impact that that merged entity has on the public? How do you even calculate it? How difficult would that be to do?

Now, the solution, as far as I can see right now is -- and this is what you two need to talk about, meaning both sides -- is you've got your merger closed -- thanks for at least reminding me or telling me about that -- but you haven't started integrating yet.

MR. OWEN: No, Your Honor, I don't believe so.

THE COURT: And you need to discuss that with them, just the way AT&T and Time Warner discussed it with the Antitrust Division in regards to the pending appeal in that case.

Who knows where this is going? No one knows.

But you all are treating this like this is some rubber-stamp operation, and that's not what this is. God knows you should have known that from before this case even started.

MR. OWEN: Yes, Your Honor.

If I may?

THE COURT: Go right ahead.

MR. OWEN: I would just like to point out that, even with the closed merger, this Court still has the complete discretion and opportunity to review the proposed

final judgment during the Tunney Act period. Your ability to find that that proposed final judgment is in the public interest is not impacted by the closure. You still maintain the ability to accept or reject that order.

And if you reject the proposed final judgment, the United States, the plaintiff states and the parties, would, of course, consider your reasons for rejecting that order and would re-negotiate or consider re-negotiating in a way such that you could find that the proposed final judgment is in the public's interest.

THE COURT: Well, the problem right now is, you're putting the risk -- just like you're doing in that divestiture deal, you're putting the risk on the parties.

The problem I have is, you are ineffectively, if you integrate this merger, putting the risk on the public, and it's my job to make sure the public doesn't bear that risk.

That's not -- that's -- I'm here to ensure that this is a fair proceeding and in the public interest, right, under the Tunney Act, that's my job.

MR. OWEN: Yes, Your Honor.

THE COURT: Of course. That's my job.

And if these two companies are integrated and it's seven months from now when I issue that decision, if it should come out the other way, the problem, the risk is on

the public that I can unwind it and that we can recoup whatever negative consequences there were on the public in that interim seven months, and that's going to be a big problem for me, if it should come out that way.

Now, I have cause right now already to at least be concerned as to how this is all going to play out, at a minimum, because of the AMA situation. We'll see what they say in their commentaries there's three weeks left to put on the record, and you all are going -- you guys are all going to respond to them, I understand that.

MR. OWEN: Right.

THE COURT: I understand you think it's still a good deal anyway.

MR. OWEN: If I may?

THE COURT: So I'll tell you what. I'm going to set a hearing for Monday, and I'm going to give you between now and Monday to talk among yourselves.

I'm hoping that there will be some good judgment on both sides and you'll decide to hold off on the integration. If not, then I'll have to decide what my options are.

But between now and Monday, I'm not ruling on your motion, I'm not ruling on it.

You need to slow this down. You're like a freight train out of control. And you're operating as if this is

just some rubber-stamp operation. It is not, and it will not be.

And the parties need to think this through with their clients, and you need to think it through with your leadership.

Do you read me?

MR. OWEN: Yes, Your Honor.

If I may?

THE COURT: I'll set a time Monday, I haven't picked a time yet, but you'll be getting a notice of it from Mr. Haley.

MR. OWEN: If I may on one additional point, Your Honor?

THE COURT: Yes. What is it?

MR. OWEN: I would just like to raise that, regardless of the integration between the parties, I would ask Your Honor to consider the motion to appoint the monitoring trustee.

Right now, there is a plan to divest the assets to WellCare in the very near future. Such a divestiture would not impact the parties' integration plans but would allow the remedy to --

THE COURT: You're going to divest -- my understanding is you're going to divest it under circumstances where there isn't even a provision for it to

be re-provided to Aetna in the event that the Court denies the motion to enter final judgment, right? That's my understanding.

MR. OWEN: Yes, Your Honor.

THE COURT: You need to think about that as well, frankly.

See you Monday. We'll stand in recess.

DEPUTY CLERK: All rise.

This Honorable Court will stand in recess until the return of court.

(Proceedings concluded at 12:57 p.m.)

C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: November 29, 2018_____ /S/__William P. Zaremba_____

William P. Zaremba, RMR, CRR

A Coda

UNITED STATES OF AMERICA
Federal Trade Commission

Prepared Remarks

DISPARATE IMPACT: WINNERS AND LOSERS FROM THE NEW M&A POLICY

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Thanks, Jan, for the kind introduction, and our hosts, Berkeley Law's Center for Law and Business and Freshfields, for the invitation to be here. My last work trip before the pandemic was to the Bay Area, and it's good to be back.

This year's Berkeley Forum comes at a critical time, just over one year into an administration as hostile to mergers and acquisitions (M&A) as any in my lifetime. This is perhaps a good place to remind all of you that my remarks are my own and do not necessarily reflect the view of the Federal Trade Commission (FTC) or my fellow commissioners.

But back to M&A policy. The traditional view of M&A (to which I subscribe) is that it is part of the way that companies grow (or shrink) and evolve, as assets move to the users that value them most highly. This market, which Henry Manne dubbed the "market for corporate control", also disciplines management and encourages competition.[1] Under this framework, the role of the antitrust enforcer is to determine which deals present threats to

[1] Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965); Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Competing for Companies: How M&A Drives Competition and Consumer Welfare, Opening Keynote at The Global Antitrust Economics Conference (May 31, 2019), https://www.ftc.gov/system/files/documents/public_statements/1524321/phillips_-_competing_for_companies_5-31-19_0.pdf.

competition, block or remedy them, and—in keeping with Ronald Coase[2]—otherwise reduce transaction costs and minimize distortions to the market.

But to the new leadership at the antitrust agencies and their fellow travelers, that view is anathema. Their view of M&A boils down to three ideas. *First*, M&A generally produces little social value and a great deal of social cost.[3] *Second*, the costs include a wide swath of ills including lessened competition but also disadvantaged labor,[4] inflation,[5] and undermined democracy.[6] You name the problem, and there's a good chance some prominent

[2] R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[3] *See*, *e.g.*, Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks Regarding the Request for Information on Merger Enforcement 2 (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf ("While the current merger boom has delivered massive fees for investment banks, evidence suggests that many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation."); U.S. Dep't of Justice & Fed. Trade Comm'n, Request for Information on Merger Enforcement 2 (Jan. 18, 2022), https://www.regulations.gov/document/FTC-2022-0003-0001 ("Finally, the agencies seek specific examples of mergers that have harmed competition, with descriptions of how the merger harmed competition, including how those mergers made it more difficult for customers, workers, or suppliers to work with the merged firm or competitors of the merged firm or made it more difficult for rivals to compete with the merged firm."); Sandeep Vaheesan, *Merger Policy for a Fair Economy*, LPE PROJECT BLOG (Apr. 5, 2022), https://lpeproject.org/blog/merger-policy-for-a-fair-economy/; Sanjukta Paul, *A Democratic Vision for Antitrust*, DISSENT (Winter 2022), https://www.dissentmagazine.org/article/a-democratic-vision-for-antitrust.

[4] *See*, *e.g.*, Marshall Steinbaum, *A Missing Link: The Role of Antitrust Law in Rectifying Employer Power in Our High-Profit, Low-Wage Economy*, ROOSEVELT INST. (Apr. 16, 2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Missing-Link-Monopsony-brief-201804.pdf; BARRY C. LYNN, ANTITRUST: A MISSING KEY TO PROSPERITY, OPPORTUNITY, AND DEMOCRACY 13 (New Am. Oct. 2, 2013), https://d1y8sb8igg2f8e.cloudfront.net/documents/Antitrust.pdf.

[5] *See*, *e.g.*, Elizabeth Warren (@SenWarren), TWITTER (Mar. 1, 2022, 9:47 PM), https://twitter.com/senwarren/status/1498852508487331850; Elizabeth Warren (@SenWarren), TWITTER (Jan. 3, 2022, 12:13 PM), https://twitter.com/SenWarren/status/1478051819255382022; *CNBC Transcript: Federal Trade Commission Chair Lina Khan Speaks Exclusively with Andrew Ross Sorkin and Kara Swisher Live from Washington, D.C. Today*, CNBC (Jan. 19, 2022, 12:30 PM), https://www.cnbc.com/2022/01/19/cnbc-transcript-federal-trade-commission-chair-lina-khan-speaks-exclusively-with-andrew-ross-sorkin-and-kara-swisher-live-from-washington-dc-today.html.

[6] *See*, *e.g.*, Zephyr Teachout, *Mega-mergers like AT&T and Time Warner crush American democracy*, GUARDIAN (Jun. 13, 2018, 6:00 AM EDT), https://www.theguardian.com/commentisfree/2018/jun/13/mega-mergers-att-time-warner-crush-american-democracy.

antitrust-reform Progressive has blamed it on M&A.[7] *Third*, M&A is a privilege granted to companies by the government, rather than a natural part of commerce.[8]

Much of the change to merger policy over the last fifteen months is taking place in the context of merger review under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976. If you share the hostile view of mergers to which antitrust reformers subscribe, then HSR—a process Congress designed to help agencies spot and address ahead of time deals that lessen competition—looks more like an opportunity to slow or stop M&A activity in general. And the latter, what I've called elsewhere the "repeal of Hart-Scott-Rodino,"[9] is exactly what we are seeing. Using HSR this way has several benefits:

> *First*, it allows you to talk about it, broadcasting hostility to M&A that has a positive branding effect for enforcers and may also have some deterrent effect for M&A;
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> *Second*, you can sow uncertainty and run up the cost of getting deals done, taxing M&A and making the market for corporate control less efficient;
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> *Third*, these strategies can be accomplished without courts; and
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> *Fourth*, it shields enforcers from political accountability for enabling M&A.

These "features" explain the merger control policies adopted over the last fifteen months that together constitute the only real novelty thus far in the Biden Administration's approach to M&A. The changes are not particularly well-calibrated to make antitrust enforcement more efficient or effective, and indeed—as Jan's faithful reporting on Twitter of actual merger enforcement statistics shows—it has not been.[10]

Like all policy, the new M&A policies being deployed by the agencies include tradeoffs. And one such tradeoff, I think, deserves particular notice. *Contra* the professed

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[7] *See*, *e.g.*, Tim Wu, Opinion, *A Corporate Merger Cost Us Ventilators*, N.Y. TIMES, Apr. 12, 2020, at A23.

[8] *See*, *e.g.*, Sandeep Vaheesan, *Two-and-a-Half Cheers for 1960s Merger Policy*, HARV. L. SCH. ANTITRUST ASSOC. BLOG (Dec. 12, 2019), https://orgs.law.harvard.edu/antitrust/2019/12/12/two-and-a-half-cheers-for-1960s-merger-policy/.

[9] Noah Joshua Phillips, *The Repeal of Hart-Scott-Rodino*, GLOB. COMPETITION REV. (Oct. 6, 2021), https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/the-repeal-of-hart-scott-rodino.

[10] *See* Jan Rybnicek (@jmrybnicek), TWITTER (Apr. 22, 2022, 10:25 AM), https://twitter.com/jmrybnicek/status/1517509986787672065 (showing that the rate of merger challenges under the Biden Administration is the same as or lower than the rate under the Trump Administration); *see also* Noah J. Phillips (@FTCPhillips), TWITTER (Sep. 30, 2021, 3:00 PM), https://twitter.com/FTCPhillips/status/1443652046893223938 (showing the dramatic drop in merger enforcement after Biden Administration came into office).

goals of Progressive antitrust reformers, to rein in the biggest companies, the gratuitous taxes on M&A being imposed by the antitrust agencies are regressive, hitting smaller companies the hardest. Policies designed in the name of "anti-monopoly" are disproportionately taxing companies that few would consider monopolies, making it harder for them to compete.

Taxing M&A

How are the agencies taxing M&A? Antitrust enforcement over the last fifteen months has been anything but vigorous—indeed, it has been sclerotic. By that I mean not just fewer cases being brought, but a longer process with fewer decisions being made.[11]

The merger review process is already expensive. Merging parties typically end up paying hefty sums in attorney and consultant fees, not to mention the time spent internally to comply with agencies demands. One study estimated the median cost of Second Request compliance at $4.3 million.[12] That is separate and apart from the up-front expense of negotiating deals and conducting due diligence. Full-phase merger investigations can last from several months to a year or more. Unanticipated delays can impose costs beyond fees and distraction, like having to extend deal financing or losing key employees and customers—or even losing out on the deal.

While supporters of agency leadership cheer what they hope will be a deterrent to merging generally, these kinds of costs are felt more heavily by smaller firms. And that disadvantages them relative to larger ones, to whom the costs look more like a rounding error. The fact is that mergers are a way for smaller firms to join forces to compete more effectively and efficiently against larger rivals. Combining can put financially struggling firms on firmer footing, or improve the terms on which they can borrow to grow their business. Advisers to traditional retail grocers on M&A made a recent submission detailing how competition from the Amazons and Wal-Marts of the world was leading investors to

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[11] *Compare* DECHERT LLP, DAMITT Q1 2022: SIGNIFICANT MERGER INVESTIGATIONS FACE STEEPER HURDLES TO SETTLEMENT (Apr. 21, 2022), https://www.dechert.com/knowledge/publication/2022/4/damitt-q1-2022--significant-merger-investigations-face-steeper-h.html (reporting the average duration of significant U.S. antitrust merger investigations as 12.9 months in Q1 2022), *with* DECHERT LLP, DAMITT Q1 2020: NO COVID-19 IMPACT ON MERGER INVESTIGATIONS . . . YET (Apr. 21, 2020), https://www.dechert.com/knowledge/publication/2020/4/damitt-q1-2020--no-impact-from-covid-19---yet.html (average duration of 11.1 months in Q1 2020).

[12] Peter Boberg & Andrew Dick, *Findings From the Second Request Compliance Burden Survey*, THRESHOLD: NEWSLETTER OF THE MERGERS & ACQUISITIONS COMM. (Am. Bar Assoc. Section on Antitrust L.), Summer 2014, at 26, 33, https://media.crai.com/wp-content/uploads/2020/09/16164357/Threshold-Summer-2014-Issue.pdf. Granted, some of the deals in the sample were quite large, but even half the median—$2 million—is a big outlay for a small-to-medium-sized business. And the smaller you are, the harder it is to spend that kind of money.

flee traditional grocers, resulting in lessened investment, store closing, and bankruptcy.[13] While those hostile to M&A might discount this narrative, antitrust reformers have not been shy about basing their criticism of Amazon and Wal-Mart on the challenges faced by precisely these smaller kinds of companies.[14] If growth by M&A is deterred substantially, why would anyone believe that the giants would be the most hamstrung?

Beyond the drawn-out process, the Commission has adopted several policies openly taxing M&A in a way that does nothing for competition and also disparately impacts smaller players.

Early Termination

In the early days of the Biden Administration, FTC leadership suspended early termination ("ET") of the initial HSR waiting period. ET is reserved for transactions that raise no apparent competitive concerns. The FTC told the public that it expected the suspension to be "temporary" and "brief", and justified it by citing the change in administrations and an "unprecedented volume of HSR filings for the start of a fiscal year".[15] That didn't make sense then. The uptick in filings had started long before, and the agency had not only managed it but prosecuted—under Chair Joe Simons—the most prolific merger enforcement in decades.[16] And presidential transition was nothing new. The justifications make even less sense now, over a year since the "temporary" and "brief" termination began. The number of HSR filings had *already dropped* 70% from the 2020

[13] Letter from Scott Moses, Head of Grocery, Pharmacy & Rest. Inv. Banking, Solomon Partners, and Scott Sher, Member, Wilson Sonsini Goodrich & Rosati PC, to U.S. Dep't of Justice and Fed. Trade Comm'n 6-22 (Apr. 19, 2022) (on file with author).

[14] *See*, *e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 773-74, 780 (2017); Luke Gannon & Stacy Mitchell, *On Pitchfork Economics: How Walmart Gutted Communities*, INST. FOR LOCAL SELF-RELIANCE (Oct. 28, 2021), https://ilsr.org/monopolies-and-the-policies-that-favor-them-have-gutted-rural-and-urban-communities/.

[15] Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.

[16] *Reviving Competition Part 3: Strengthening the Laws to Address Monopoly Power Before the H. Subcomm. on Antitrust, Com., and Admin L.*, 117th Cong. 1 (Mar. 18, 2021) (prepared statement of Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/1588324/final_formatted_prepared_statement_of_ftc_commissioner_noah_joshua_phillips_march_18_2021_hearing.pdf.

peak when the suspension went into effect,[17] and the Administration came into office more than a year ago.

The suspension of ET continues to delay what are, *by definition*, competitively innocuous deals. It is using the HSR process not to protect competition but rather just to tax M&A. These deals can help Americans, even save lives. The day before announcing the suspension, the Commission granted ET to Thermo Fisher's acquisition of Mesa Biotech.[18] The small biotech company had developed an innovative rapid-PCR-testing platform for the novel coronavirus, and combining it with Thermo Fisher's resources, scale, and distribution would better meet then-exploding demand for testing.[19] With America and the world struggling through the pandemic, the grant of ET just 24 hours before the suspension took effect was good for the public—and awfully convenient for the FTC when one considers the negative PR from holding up a deal that stood to improve COVID screening. This incident not only belies the misguided assumption that M&A offers nothing of value, it demonstrates that those impacted by anti-M&A policies are not just giant monopolies, but often small companies . . . and people who need help.

Ending ET accomplishes nothing for competition and nothing good for M&A. But there is another thing worth noting. By never granting ET, we, as enforcers, cannot be accused of "permitting" the deal. More on that soon.

Prior Approval

Another example of gratuitously taxing M&A is the new Commission policy on prior approvals, adopted in October with the zombie vote of former Commissioner Rohit Chopra.[20] Under this policy, all consents require Commission prior approval for future

[17] Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Indefinite Suspension of Early Terminations 1 (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

[18] Fed. Trade Comm'n, Notice of Early Termination, 20210958: Thermo Fisher Scientific Inc.; Mesa Biotech, Inc. (Feb. 3, 2021), https://www.ftc.gov/legal-library/browse/early-termination-notices/20210958.

[19] Bruce Japsen, *Thermo Fisher To Buy Covid-19 Test Maker Mesa Biotech For $450 Million*, FORBES (Jan. 19, 2021, 8:52 AM), https://www.forbes.com/sites/brucejapsen/2021/01/19/thermo-fisher-to-buy-covid-19-test-maker-mesa-biotech-for-450-million/?sh=556735535d82; Joe C. Matthew, *COVID-19: Thermo Fisher to introduce point-of-care RT-PCR test in India*, BUSINESS TODAY (Jun. 15, 2021, 7:34 PM), https://www.businesstoday.in/latest/economy-politics/story/covid-19-thermo-fisher-to-introduce-point-of-care-rtpcr-test-in-india-298757-2021-06-15.

[20] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders 1 (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

transactions both by merging parties and divestiture buyers for 10 years. The Commission also threatens to impose restrictions for markets not at issue in the transaction.[21] The new policy warns merging parties that they are more likely to be slapped with prior approval provisions if they substantially comply with the FTC's compulsory requests in a full phase investigation. In marginally less ominous language, the Commission is saying: give up and don't make us investigate your merger, or we'll make you pay.[22] The Commission also holds out the prospect of pursuing prior approval remedies even after parties drop the offending deal, the precise embarrassing and wasteful conduct that led the agency to adopt a policy limiting prior approval requests in 1995.[23]

Giving the Commission a veto over future M&A and all the time it wants to render it imposes significant obligations on merging parties, and innocent divestiture buyers. It slows and chills future M&A activity whether it lessens competition or not. Perhaps those hostile to M&A rest easier now that Hikma Pharmaceuticals, a $2 billion generic drug manufacturer, cannot buy another injectable skin steroid without permission.[24] They are surely relieved that 30-employee XCL Energy cannot buy more land to drill in Utah without government approval.[25] But these two are hardly Pfizer and ExxonMobil. And say what you will, but requiring Price Chopper and Tops to obtain the FTC's permission before acquiring a supermarket in Vermont or upstate New York for the next 10 years is probably not keeping Amazon executives up at night.[26]

Meanwhile, after years of rhetoric claiming that antitrust enforcers are falling down on the job by insinuating that every large pharmaceutical deal or purchase by a large tech company must, somehow, be anticompetitive and unresolvable, are we not supposed to notice AstraZeneca's $39 billion acquisition of Alexion Pharmaceuticals,[27] Merck's $11.5

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[21] Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[22] *Id.* at 2 ("This should signal to parties that it is more beneficial to them to abandon an anticompetitive transaction before the Commission staff has to expend significant resources investigating the matter.")

[23] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips, *supra* note 20, at 4 n. 14.

[24] Decision & Order at 6, Hikma Pharmaceuticals/Custopharm, File No. 221-0001, Docket No. C-4762 (F.T.C. Apr. 18, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2210002C4762HikmaCustopharmOrder.pdf.

[25] Decision & Order at 19, EnCap/EP Energy, File No. 211-0158, Docket No. C-4760 (F.T.C. Mar. 25, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110158-encapep-energy-matter.

[26] Decision & Order at 19, Price Chopper/Tops Markets, File No. 211-0002, Docket No. C-4753 (F.T.C. Jan. 24, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0002-price-choppertops-markets-matter.

[27] Noah Higgins-Dunn, *AstraZeneca closes mega $39B Alexion buyout despite antitrust fears, making a splash in rare diseases*, FIERCE PHARMA (July 21, 2021), https://www.fiercepharma.com/pharma/astrazeneca-closes-mega-

billion acquisition of Acceleron Pharma,[28] and Facebook's $1 billion acquisition of Kustomer,[29] each of which went through without any prior approval or other kind of obligation?[30]

Smaller companies are more likely to accede to prior approval requirements because they have less leverage and often need the deal more, and with a prior approval obligation their ability to engage in M&A will be less than their larger competitors. That is a competitive disadvantage to larger rivals.

And let's not forget the divestiture buyers. We are punishing the companies (often smaller ones) that have done nothing but step up to help resolve a competitive concern. This is what Commissioner Wilson and I dubbed "bonkers crazy".[31]

Who does all of this help? One answer, as with the termination of ET, is agency heads who do not wish to be associated with "clearing" mergers. Prior approval requirements deter consents, not mergers. Among other things, they scare off better buyers of assets. Without a consent, there is nothing for enforcers to approve. Sure, this strategy probably will push a few otherwise settleable matters into expensive, uncertain litigation and force staff to review prior approval applications for transactions that would not otherwise merit investigation. Fine, companies will fix it first. And, yes, the agencies will be

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39b-alexion-buyout-despite-antitrust-fears-making-a-splash-rare; Charley Grant, *Post Covid-19, Don't Forget About Healthcare Stocks*, WALL ST. J. (Apr. 19, 2021), https://www.wsj.com/articles/post-covid-19-dont-forget-about-healthcare-stocks-11618830180 ("U.S. regulators gave the green light to drugmaker AstraZeneca's AZN 1.29% planned acquisition of Alexion Pharmaceuticals, which was earlier than investors had expected. Alexion shares shot higher in response.").

[28] CNBC, *Merck to buy Acceleron for about $11.5 billion in rare-disease drugs push* (Sept. 30, 2021), https://www.cnbc.com/2021/09/30/merck-to-buy-drugmaker-acceleron-for-about-11point5-billion.html ("Merck is buying Acceleron Pharma for about $11.5 billion, broadening its portfolio beyond aging cancer drug Keytruda with potential treatments that could bring in fresh revenue. The deal gives Merck access to Acceleron's rare disease drug candidate, sotatercept, which the company expects to be a multi-billion dollar peak sales opportunity, and comes as Keytruda moves toward the loss of market exclusivity in 2028."); Press Release, Merck & Co., Merck Completes Acquisition of Acceleron Pharma Inc. (Nov. 22, 2021), https://www.merck.com/news/merck-completes-acquisition-of-acceleron-pharma-inc/.

[29] Kurt Wagner, *Meta Closes $1 Billion Kustomer Deal After Regulatory Review*, BLOOMBERG (Feb. 15, 2022, 4:30 PM), https://www.bloomberg.com/news/articles/2022-02-15/meta-closes-1-billion-kustomer-deal-after-regulatory-review ("What followed was a lengthy review process, showing that Meta can still complete big acquisitions, just not quickly. The company passed an FTC review and a separate approval by antitrust authorities in the U.K.").

[30] I take no position on whether any of these deals warranted action by the antitrust agencies. I only note them to illustrate the gulf between the Progressives' strong words and their subsequent deeds.

[31] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips, *supra* note 20, at 6.

less effective and efficient as a result. But at least the leadership will be able to dodge some difficult and unpopular decisions. This is a political benefit, not a policy.

I am very concerned we are going to start seeing deals with divestitures but without consents. There are today murmurings in the private bar that the agencies are refusing to engage on remedies, and instead are conveying their competitive concerns and leaving it up to the merging parties to attempt a resolution. This is fixing it first with a wink and a nod—and no enforceable agreement with the government. As a result, the public loses out on the protections that a consent agreement provides—including, ironically, prior approval policy. Only agency heads, who get to avoid the appearance of blessing mergers, gain. Reading strident dissents about failed remedies for years, it never occurred to me that one solution might be neither blocking nor remediating deals at all.

Pre-Consummation Warning Letters

The final change to merger control I'll highlight is the promiscuous use of pre-consummation warning letters, sometimes called "close-at-your-own-peril letters". The point of HSR is to enable the antitrust agencies to review transactions, and block or remedy the anticompetitive ones, before they are consummated.[32] That is not always possible, of course. If the agencies do not expect to complete their review before the merging parties are free to consummate their deal, they will sometimes issue pre-consummation warning letters that typically inform the parties that the investigation is ongoing, may ultimately find that the merger is illegal, and the parties cannot avoid an enforcement action by consummating now.

When a merger presents legitimate competitive concerns and there is a good reason why the investigation will not be completed in time, I have no objection to issuing such letters. But last August, the Director of the FTC's Bureau of Competition announced a new practice of issuing these letters far more liberally.[33] By my count, of late, the FTC has sent warning letters in at least 60 investigations. Some of those are in matters where we haven't even begun to conduct an investigation. In others, the real investigation is over and we lack

[32] *See* PREMERGER NOTIFICATION OFF., FED. TRADE COMM'N, INTRODUCTORY GUIDE I: WHAT IS THE PREMERGER NOTIFICATION PROGRAM? 1 (Mar. 2009), https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf.

[33] Holly Vedova, Dir., Bureau of Competition, *Adjusting merger review to deal with the surge in merger filings*, FED. TRADE COMM'N COMPETITION MATTERS BLOG (Aug. 3, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

a reasonable basis to conclude the merger violates the law. But the letters say we're still investigating.

There is a bad government aspect to this. For those matters where we've decided there isn't a competitive issue to address, one of two things must be true. Either we are wasting staff's time and taxpayer dollars on needless investigation, or we are misrepresenting to parties what is really happening.

But to parties trying to make and implement M&A decisions, the result—and, I fear, the goal—is to sow uncertainty about the future. Uncertainty, in turn, discourages post-merger integration and investment. This effect is particularly harmful for small companies, which are more likely than larger firms to need M&A to become more efficient and competitive, and which will have a harder time remaining viable should their merger be unwound. How is that a good thing? Once again, there is a critical benefit to agency heads: because investigations never end, we can never be seen as approving the deals we are investigating.

How is the M&A Tax Working?

If these various M&A taxes have borne fruit as strategies to stop more anticompetitive mergers, those fruit are not apparent. But the disproportionate burdens already are.

Are the big guys running scared? The New York Times' DealBook recently reported that while global M&A is down overall from last year—a natural and predictable corollary of plummeting equity values and rising interest rates—there has been a sharp *increase* in the value and volume of very large deals—i.e., $10 billion or more—"despite increased scrutiny from antitrust regulators and other factors that dampened enthusiasm for smaller deals".[34] If that was the goal in the first place, it is very different from the rhetoric.

Conclusion

Policy involves tradeoffs. In their zeal to tax M&A however they can, especially in ways that courts cannot police, those running the antitrust agencies and their supporters are already inviting perverse consequences. They are driving up costs and sowing uncertainty that disparately impact smaller players, putting them at a competitive

[34] Michael J. de la Merced, *Deal-making took a hit in the first quarter of 2022*, N.Y. TIMES (Apr. 15, 2022, 2:15 PM), https://www.nytimes.com/live/2022/04/01/business/economy-news-inflation-russia#deal-making-took-a-hit-in-the-first-quarter-of-2022.

disadvantage to the biggest companies. And, apart from press releases and avoiding political accountability, what's the payoff?

Everything I have described today involves the process for merger control. But substantive changes are surely coming, as the Antitrust Division of the Department of Justice ("DOJ") and FTC undertake revisions of the merger guidelines. I am not opposed to this project in principle, and I am open to exploring well-supported, administrable changes to the 2010 Guidelines.

But the hostile mentality about M&A responsible for recent process reforms is a bad place to start, and I am concerned that bias is already skewing the Guidelines revisions. The January 18 Request for Information issued jointly by the DOJ and FTC solicits "specific examples of mergers that have harmed competition" but not of mergers that benefited competition. Or consider the "listening forums" undertaken by FTC Chair Lina Khan and Assistant Attorney General Jonathan Kanter, with the ostensible purpose of "hear[ing] from those who have experienced firsthand the effects of mergers and acquisitions beyond antitrust experts." Public sessions are great, but there is no transparency to me or the public about how the presenters—who have uniformly negative things to say—are being selected. This stands in stark contrast to countless past public hearings, where commissioners besides the Chair got input into who would speak.

Even well-crafted policy has unintended consequences. The reforms to the merger process already in place are not well-crafted, so it's little surprise the consequences have not been good. They are doing little for competition, weakening small companies vis-à-vis larger competitors, and serving only to support personal branding and lack of accountability at the agencies. While the RFI process thus far has left much to be desired, the antitrust agencies still have a choice.

Prudence dictates that any new approach to merger enforcement should be warranted by developments in legal and economic analysis, and only after a thorough evaluation of both the administrability and likely impact of that new approach. The process should be transparent. I urge my colleagues and DOJ leadership to proceed with care, and I encourage the public to participate. We've seen too many mistakes already.

Thank you.