Commission's rules; the deadline for filing is February 26, 2021. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.25 of the Commission's rules. The deadline for filing posthearing briefs is March 11, 2021. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before March 11, 2021. On March 25, 2021, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before March 29, 2021, but such final comments must not contain new factual information and must otherwise comply with § 207.30 of the Commission's rules. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

Additional written submissions to the Commission, including requests pursuant to § 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

**Authority:** These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.21 of the Commission's rules.

By order of the Commission.

Issued: December 28, 2020.

**William Bishop,**

*Supervisory Hearings and Information Officer.*

[FR Doc. 2020–28986 Filed 12–30–20; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Bureau of Alcohol, Tobacco, Firearms, and Explosives

**[Docket No. 2020R–10W]**

### Objective Factors for Classifying Weapons With "Stabilizing Braces"; Withdrawal of Guidance

**AGENCY:** Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

**ACTION:** Notice; withdrawal.

**SUMMARY:** The Bureau of Alcohol, Tobacco, Firearms, and Explosives (''ATF'') is announcing the withdrawal of a notice and request for comments entitled ''Objective Factors for Classifying Weapons with 'Stabilizing Braces','' that was published on December 18, 2020.

**DATES:** The withdrawal is effective December 31, 2020.

**ADDRESSES:** This Notice also will be made available on the ATF website (*www.atf.gov*).

**FOR FURTHER INFORMATION CONTACT:** Andrew Lange, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Ave. NE, Mail Stop 6N–518, Washington, DC 20226; telephone: (202) 648–7070 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** Upon further consultation with the Department of Justice and the Office of the Deputy Attorney General, ATF is withdrawing, pending further Department of Justice review, the notice and request for comments entitled ''Objective Factors for Classifying Weapons with 'Stabilizing Braces','' that was published on December 18, 2020. 85 FR 82516. As explained in the notice, the proposed guidance was not a regulation. The notice informed and invited comment from the industry and public on a proposed guidance prior to issuing a final guidance document.

The withdrawal of the guidance does not change any law, regulation, or other legally binding requirement.

**Marvin G. Richardson,**

*Associate Deputy Director.*

[FR Doc. 2020–28930 Filed 12–30–20; 8:45 am]

**BILLING CODE 4410–FY–P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### United States, et al. v. Harvard Pilgrim Health Care, Inc., et al.; 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 New Hampshire in *United States and State of New Hampshire* vs. *Harvard Pilgrim Health Care, Inc. and Health Plan Holdings, Inc.,* Civil Action No. 1:20–cv–01183. On December 14, 2020, the United States filed a Complaint alleging that the proposed merger of Harvard Pilgrim Health Care, Inc. and Health Plan Holdings, Inc. (f/k/a Tufts Health Plan, Inc.) 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 Health Plan Holdings to divest its New Hampshire subsidiary, Tufts Health Freedom Plans, Inc., along with certain tangible and intangible assets.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the District of New Hampshire. 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 website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Eric D. Welsh, Chief, Healthcare and Consumer Products Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite

4100, Washington, DC 20530 (telephone: 202–598–8681).

**Suzanne Morris,**

*Chief, Premerger and Division Statistics, Antitrust Division.*

**United States District Court for the District of New Hampshire**

*United States of America* and *State of New Hampshire,* Plaintiffs, vs. *Harvard Pilgrim Health Care, Inc.* and *Health Plan Holdings, Inc.,* Defendants.

Civil Action No.: 1:20–cv–01183–JL
Judge Joseph N. Laplante

**Complaint**

The United States of America and the State of New Hampshire bring this civil antitrust action to block the proposed merger of Harvard Pilgrim Health Care and Health Plan Holdings (f/k/a Tufts Health Plan). The combination of Harvard Pilgrim and Health Plan Holdings—two of the largest suppliers of health insurance in New Hampshire for certain employers purchasing group coverage for their employees—into one firm would likely lead to higher prices, lower quality, and reduced choice for consumers of commercial group health insurance in New Hampshire. To prevent this harm to consumers, the United States and the State of New Hampshire seek an injunction to stop the proposed merger. Plaintiffs allege as follows:

**I. Introduction**

1. Health insurance is an integral part of the American healthcare system. Americans collectively spend trillions of dollars on healthcare each year, and the cost of healthcare impacts almost every American. Consumers depend on health insurance to secure affordable access to doctors and hospitals and to protect themselves from the risk of medical expenses that could be financially devastating.

2. Half of all Americans obtain health insurance coverage through their employers. Employers purchase group health insurance plans for their employees from insurance companies such as Harvard Pilgrim and Health Plan Holdings. Competition between insurance companies like Harvard Pilgrim and Health Plan Holdings ensures that employers can purchase high-quality group health insurance plans for their employees at affordable prices.

3. Harvard Pilgrim sells commercial group health insurance plans to small and large employer groups in New Hampshire. Health Plan Holdings sells commercial group health insurance plans to small and large employer groups in New Hampshire through Tufts Health Freedom Plan, Inc. (''Tufts Freedom'').

4. In New Hampshire, Harvard Pilgrim and Tufts Freedom are two of the three top companies offering commercial group health insurance plans to (1) private small group employers with up to 50 full-time eligible employees (''small groups'') and (2) private large group employers with between 51 and 99 full-time eligible employees, a segment of commercial large group health insurance referred to as community rated by class or ''CRC'' by Defendants and others in the industry (''CRC groups''). Competition between Harvard Pilgrim and Tufts Freedom has resulted in lower premiums, richer (*i.e.,* more robust and comprehensive) plan benefits, and better service for small groups and CRC groups in New Hampshire.

5. Combining Harvard Pilgrim and Health Plan Holdings into one firm would eliminate this competition, likely raising the price and reducing the quality of commercial health insurance sold to small groups and to CRC groups in New Hampshire.

6. As a result, the proposed transaction is likely to substantially lessen competition for commercial health insurance sold to small groups and to CRC groups, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. The Court, therefore, should enjoin this transaction.

**II. Defendants and the Transaction**

7. Harvard Pilgrim sells commercial group health insurance to small and large employer groups in four states: New Hampshire, Massachusetts, Connecticut, and Maine. Harvard Pilgrim's annual revenue in 2019 was approximately $3 billion, and it has over one million members.

8. Health Plan Holdings sells commercial group health insurance to small and large employer groups in New Hampshire through Tufts Freedom, which until September 2020 was a joint venture with the Granite Healthcare consortium consisting of several large New Hampshire health systems and now is solely owned by Health Plan Holdings. It also sells commercial group health insurance in Massachusetts and Rhode Island. Health Plan Holdings' annual revenue in 2019 was over $5.5 billion, and it has over one million members.

9. Defendants have agreed to a ''merger of equals,'' which was memorialized in a Combination Agreement dated August 9, 2019 (the ''Transaction'').

**III. Jurisdiction and Venue**

10. This Court has subject-matter jurisdiction under Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

11. The State of New Hampshire brings this action in its sovereign capacity as *parens patriae* on behalf of and to protect the health and general welfare of its citizens and the general economy of the State under Section 16 of the Clayton Act, 15 U.S.C. 26 and under N.H. Rev. Stat. Ann. 356:4–a & 4–b, seeking injunctive and other relief from Defendants' violation of Section 7 of the Clayton Act, 15 U.S.C. 18 and state antitrust law.

12. Defendants are engaged in activities that substantially affect interstate commerce. Defendants sell health insurance and administrative services for which employers and consumers remit payments across state lines, and Defendants otherwise participate in interstate commerce.

13. Venue is proper under Section 12 of the Clayton Act, 15 U.S.C. 22, and under 28 U.S.C. 1391(b) and (c).

14. This Court has personal jurisdiction over each Defendant. Harvard Pilgrim is headquartered in Wellesley, Massachusetts and transacts business in this district. Health Plan Holdings is headquartered in Watertown, Massachusetts and transacts business in this district. Both Harvard Pilgrim and Health Plan Holdings have consented to personal jurisdiction and the acceptance of service of process in this district for purposes of this matter. The Transaction would also have effects on employers and consumers in this district.

**IV. The Relevant Markets**

15. Commercial group health insurance is sold by health insurance companies to employers to provide health insurance coverage to their employees and their employees' families. Employers cover at least a portion of the cost of the insurance for their employees, making it a cost-effective way for employees, and their families, to obtain health insurance.

16. Insurers offering commercial group health insurance plans to employers try to make them attractive by competing on price, product design, customer service, care management, wellness programs, and reputation. Insurers also compete based on the breadth of their network of healthcare providers, including doctors and hospitals, as employers seek an insurance plan that offers in-network access to medical providers that are close to where their employees live and

work. An insurer's ability to compete on price depends largely on medical costs, which are impacted significantly by the discounts the insurer obtains from medical providers.

17. In New Hampshire, Harvard Pilgrim and Health Plan Holdings compete vigorously with one another in the sale of commercial health insurance to small groups and to CRC groups.

18. The Transaction is likely to harm competition in two health insurance markets in New Hampshire: (1) The sale of commercial group health insurance to small groups and (2) the sale of commercial group health insurance to CRC groups. For both of these markets, employers tend to be local, with the majority of their employees based in New Hampshire, although some employers offer insurance to employees in multiple states. Competition to win small groups and CRC groups in New Hampshire is primarily driven by which insurer offers the lowest rates. Small groups and CRC groups, as defined in this complaint, do not include governmental employers (*e.g.,* municipalities, school districts) in New Hampshire with fewer than 100 employees, as historically almost all those employers have purchased health insurance through a trust instead of directly from an insurer.

*A. Commercial Health Insurance Sold to Small Groups*

19. The sale of commercial health insurance to small groups in New Hampshire is a relevant antitrust product market in which to analyze the effects of the Transaction. New Hampshire Insurance Department regulations define a ''small group'' as an employer with 50 or fewer full-time eligible employees. For small groups, health plans are typically fully insured, which means that the employer pays a premium to the insurance company and in return the company covers the employees' healthcare costs. Small groups tend to be local in nature, requiring a strong local provider network.

20. The commercial health insurance plans offered to small groups are governed by the New Hampshire Insurance Department and cannot be substituted with plans offered to New Hampshire employers with 51 or more full-time eligible employees, defined by statute as ''large group.'' Harvard Pilgrim and Health Plan Holdings also differentiate small group accounts separately from large group accounts internally and offer different pricing for small group accounts compared to large group accounts.

21. New Hampshire law does not require that an insurer offer a small group product statewide and therefore permits an insurer to offer small group plans only in certain counties. Accordingly, despite the fact that state law does not allow insurers to charge different prices for the same small group plans based on location, insurers can offer a more expensive set of small group plans in one part of the state, and a less expensive set of different small group plans in another part of the state. This allows insurers to charge different prices for different products to small groups based on where employees live and work. The Transaction is likely to substantially lessen competition for the sale of commercial health insurance to small groups in all seven of New Hampshire's Core Based Statistical Areas (''CBSA''): (1) The Manchester-Nashua CBSA, (2) the Concord CBSA, (3) the Laconia CBSA, (4) the Keene CBSA, (5) the Berlin CBSA, (6) the New Hampshire counties (Grafton and Sullivan) of the Lebanon NH–VT CBSA, and (7) the New Hampshire counties (Rockingham and Strafford) of the Boston-Cambridge-Newton MA–NH CBSA.

22. Each of these seven CBSAs is a relevant geographic market. A hypothetical monopolist over the sale of commercial health insurance to small groups in each of these markets would impose a small but significant and non-transitory increase in price, or SSNIP. A small group employer, faced with a significant price increase, cannot defeat the price increase by purchasing a large group product for which it is ineligible. This price increase would not be defeated by substitution outside the relevant market or by arbitrage (meaning a small group trying to repurchase insurance through another employer group).

*B. Commercial Health Insurance Sold to CRC Groups*

23. The sale of commercial health insurance to CRC groups is a relevant antitrust product market. In New Hampshire, employers with between 51 and 99 full-time eligible employees represent a distinct segment of large group and are referred to as CRC employers (or CRC groups). CRC groups have different needs and make different buying decisions than small groups or even larger employers. Harvard Pilgrim and Tufts Freedom employ different sales strategies for this segment than they do for other types of employers.

24. For CRC groups, similar to small groups, health plans are typically fully insured, which means that the employer pays a premium to the insurance company and in return the company covers the employees' healthcare costs. Insurers, including Harvard Pilgrim and Tufts Freedom, differentiate employers with 51 to 99 full-time eligible employees from other large group employers, and refer to these employers as the CRC segment. As with small groups, CRC groups also tend to be more local in nature than other large group employers, requiring a strong local provider network, as opposed to large group employers with more than 100 full-time eligible employees, which tend to require strong national provider networks.

25. Insurers offering commercial health insurance to CRC groups in New Hampshire can charge different prices to different employers. Group health plans for CRC groups, in contrast to larger group employers, are typically (although not exclusively) community rated by class, meaning that, when setting rates for CRC groups, the insurer first establishes a base rate determined by the medical costs of a class of similar groups, rather than upon the medical costs of the individual group seeking the plan. The insurer then uses this base rate, along with the individual employer's medical costs, to negotiate rates with the specific CRC group.

26. The Defendants target CRC groups directly through their sales efforts. For example, Tufts Freedom has focused its large group sales efforts on CRC groups since it began selling commercial health insurance in New Hampshire, and Harvard Pilgrim tracks CRC groups separately from other large group accounts. In addition, both Harvard Pilgrim and Tufts Freedom utilize specific pricing strategies for CRC groups. The Defendants have formulated these specific pricing strategies because CRC groups in New Hampshire are generally more price sensitive than large group employers with more than 100 full-time eligible employees.

27. As with commercial health insurance sold to small groups, New Hampshire law does not require that an insurer offer a CRC group product statewide and therefore permits an insurer to offer CRC plans only in certain counties. Accordingly, insurers can offer more expensive plans to CRC groups in one part of the state and less expensive plans in another part of the state. This allows insurers to charge different prices for different products to CRC groups based on where employees live and work. The Transaction is likely to substantially lessen competition for the sale of commercial health insurance to CRC groups in six separate CBSAs in New Hampshire: (1) The Manchester-Nashua CBSA, (2) the Concord CBSA,

(3) the Laconia CBSA, (4) the Keene CBSA, (5) the New Hampshire counties (Grafton and Sullivan) of the Lebanon NH–VT CBSA, and (6) the New Hampshire counties (Rockingham and Strafford) of the Boston-Cambridge-Newton MA–NH CBSA.

28. Each of these six CBSAs is a relevant geographic market. A hypothetical monopolist over the sale of commercial health insurance to CRC groups in each of these markets would impose a small but significant and non-transitory increase in price or SSNIP. This price increase would not be defeated by substitution outside the relevant market or by arbitrage.

**V. The Transaction Is Presumptively Illegal**

29. Mergers that significantly increase concentration in already concentrated markets are presumptively anticompetitive and therefore presumptively unlawful.

30. To measure market concentration, courts often use the Herfindahl-Hirschman Index (''HHI''). HHI is an accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30 percent, 30 percent, 20 percent, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI recognizes the relative size distribution of the firms in a market, ranging from 0 in markets with no concentration to 10,000 in markets where one firm has 100 percent market share. *See* Horizontal Merger Guidelines § 5.3. Courts have found that mergers that increase the HHI by more than 200 and result in an HHI above 2,500 in any relevant market or line of commerce are presumed to be anticompetitive.

*A. The Relevant Markets Are Highly Concentrated and the Transaction Would Significantly Increase Their Concentration*

31. In the small group market, based upon 2018 data, the combined market shares for Harvard Pilgrim and Tufts Freedom would range from over 45% to over 60% in each of the seven CBSAs. The Transaction would reduce the number of small group health insurers from four to three, with the two largest insurers—Anthem and the merged Harvard Pilgrim/Tufts Freedom—possessing over 95% share in each of the seven CBSAs. The Transaction would result in an HHI increase ranging from over 350 points to over 1,600 points with post-transaction HHIs of between 4,500 points and 7,500 points for commercial health insurance sold to small groups in New Hampshire. Thus, the Transaction is presumptively unlawful.

32. For the CRC group market, based upon 2018 data, the combined market shares for Harvard Pilgrim and Tufts Freedom would range from more than 40% to over 65% in each of the six CBSAs. The Transaction would reduce the number of CRC group health insurers from four to three, with the two largest insurers—Anthem and the merged Harvard Pilgrim/Tufts Freedom—possessing over 95% share in each of the six CBSAs. The Transaction would result in an HHI increase ranging from over 200 to over 2,000 points in the CRC group market with post-transaction HHIs of just under 5,000 to almost 7,000 for CRC groups in New Hampshire. Thus, the Transaction is presumptively unlawful.

*B. The Transaction Likely Would Harm Consumers in New Hampshire*

33. Harvard Pilgrim and Tufts Freedom are particularly close competitors for commercial health insurance sold to small groups and CRC groups in New Hampshire with competition between the two insurers more robust for certain types of groups than the market shares would predict. This is in part because Harvard Pilgrim and Tufts Freedom—two strong local health insurers that have not built national provider networks—are more attractive to small groups and CRC groups with higher percentages of employees resident in New Hampshire. Similarly, because Harvard Pilgrim and Tufts Freedom have priced aggressively, the two appeal to small groups and CRC groups that have greater price sensitivity.

34. Tufts Freedom's entry into New Hampshire in 2016 was backed by its Granite Healthcare provider partners, which formed the core of Tufts Freedom's provider network and extended it substantially below-market rates, enabling it to price aggressively. Using a combination of competitive pricing and a strong provider network, Tufts Freedom significantly grew its small group market share throughout New Hampshire after entering the state in 2016, with its share reaching almost 20% by 2019. Tufts Freedom achieved much of this growth at the expense of Harvard Pilgrim. As a result, and as Harvard Pilgrim recognized, the New Hampshire small group market became a three-player market, consisting of Harvard Pilgrim, Tufts Freedom, and Anthem.

35. Tufts Freedom's aggressive pricing and growth caused Harvard Pilgrim to respond by significantly lowering prices and improving plan features to be more competitive with Tufts Freedom. This response included a strategy of targeting its competitors' ''sweet spots,'' meaning lowering its rates on plans that competed with the most popular offerings of its competitors. Tufts Freedom observed this competitive reaction and in turn responded by announcing lower than expected rate increases. The Transaction would eliminate this fierce competition between Harvard Pilgrim and Tufts Freedom and its resulting benefits to consumers in New Hampshire.

36. Direct competition between Harvard Pilgrim and Tufts Freedom in New Hampshire also has benefitted CRC groups. Again, Tufts Freedom entered New Hampshire pursuing a targeted pricing strategy that allowed it to gain market share. Harvard Pilgrim reacted to this competitive pressure resulting in lower health insurance prices for CRC groups.

37. In addition to this price competition, New Hampshire consumers also have benefitted from competition between Harvard Pilgrim and Tufts Freedom on plan features and quality of service for commercial health insurance sold to CRC groups. For example, in 2019, Harvard Pilgrim developed four new no-coinsurance plans, which limited out-of-pocket expenses to insureds and offered different features, with the express purpose of making them more attractive to the insureds. Just this year, Tufts Freedom offered consumers a novel telehealth option that included zero copayment in fully insured plans in order to drive innovation around this new emerging platform.

38. Harvard Pilgrim and Tufts Freedom have engaged in head-to-head competition on price, plan features, and quality of service in the sale of commercial health insurance to small groups and to CRC groups in New Hampshire. Eliminating this competition would likely result in higher prices, lower quality, and less customer choice in the sale of commercial health insurance to small groups and to CRC groups in New Hampshire.

**VI. Absence of Countervailing Factors**

39. Other firms are unlikely to enter or expand into the relevant markets in a manner that would be timely, likely, or sufficient to replace the competition that would be lost as a result of the Transaction.

40. Each of the relevant markets is characterized by high barriers to entry, including state licensing and regulatory

requirements, the cost of developing a comprehensive provider network where employees live and work, the inability of insurers without significant membership to obtain competitive discounts from providers, and the development of sufficient business to permit the spreading of risk.

41. The Transaction will not result in verifiable, transaction-specific efficiencies in the relevant markets sufficient to reverse the Transaction's likely anticompetitive effects.

**VII. Violation Alleged**

42. Plaintiffs allege and incorporate paragraphs 1 through 41 as if set forth fully herein.

43. Unless enjoined, the Transaction is likely to substantially lessen competition in the relevant markets, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

44. Among other things, the Transaction would:

(a) Eliminate present and future competition between Harvard Pilgrim and Health Plan Holdings in New Hampshire;

(b) likely cause prices for commercial health insurance sold to small groups and to CRC groups in New Hampshire to be higher than they would be otherwise; and

(c) likely reduce quality, service, choice, and innovation for commercial health insurance sold to small groups and to CRC groups in New Hampshire.

**VIII. Request for Relief**

45. Plaintiffs request that:

(a) The Transaction be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. 18;

(b) the Court permanently enjoin and restrain Defendants from entering into the Transaction contemplated in the Combination Agreement;

(c) Plaintiffs be awarded the costs of this action, including attorneys' fees to the State of New Hampshire; and

(d) Plaintiffs be awarded any other relief that the Court deems just and proper.

Dated: December 14, 2020.

Respectfully submitted,

For Plaintiff United States of America:

Makan Delrahim,

*Assistant Attorney General for Antitrust.*

Michael Murray,

*Principal Deputy Assistant, Attorney General.*

Kathleen S. O'Neill,

*Acting Deputy Assistant, Attorney General.*

Eric D. Welsh,

*Chief, Healthcare and Consumer Products Section.*

Jill C. Maguire,

*Assistant Chief, Healthcare and Consumer Products Section.*

For the Plaintiff State of New Hampshire.

By its attorney,

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*Attorney General of New Hampshire.*

Brandon H. Garod, NH Bar #21164,

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Scott W. Murray,

*United States Attorney.*

*By:*

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**United States District Court for the District of New Hampshire**

United States of America and State of New Hampshire, Plaintiffs, vs. Harvard Pilgrim Health Care, INC., and Health Plan Holdings, INC., Defendants.

Civil Action No. 1:20-cv-01183–JL
Judge Joseph N. Laplante

**[Proposed] Final Judgment**

*Whereas*, Plaintiffs, United States of America and the State of New Hampshire, filed their Complaint on December 14, 2020;

*And whereas*, Plaintiffs and Defendants, Harvard Pilgrim Health Care, Inc. and Health Plan Holdings, Inc. (f/k/a Tufts Health Plan, Inc.), have consented to entry of this Final Judgment without the taking of testimony, 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 make a divestiture to remedy the loss of competition alleged in the Complaint;

*And whereas*, Defendants represent that the divestiture and other relief required by this Final Judgment can and will be made and that Defendants will not later raise a claim of hardship or difficulty as grounds for asking the Court to modify any provision of this Final Judgment;

*And whereas*, the resolution of the interests of the State of New Hampshire through its Consumer Protection and Antitrust Bureau pursuant to Section 7 of the Clayton Act and the state antitrust law, N.H. Rev. Stat. Ann. Ch. 356, does not impact the jurisdiction or authority of the New Hampshire Insurance Department to pursue any interest authorized by law.

*Now therefore,* it is ordered, adjudged, and decreed:

**I. Jurisdiction**

The 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. ''Harvard Pilgrim'' means Defendant Harvard Pilgrim Health Care, Inc., a Massachusetts nonprofit corporation with its headquarters in Wellesley, Massachusetts, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. ''Health Plan Holdings'' means Defendant Health Plan Holdings, Inc. (f/k/a Tufts Health Plan, Inc.), a Massachusetts nonprofit corporation with its headquarters in Watertown, Massachusetts, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. ''Tufts Health Freedom Plan'' means Tufts Health Freedom Plans, Inc., its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint

ventures, and their directors, officers, managers, agents, and employees.

D. ''Acquirer'' means UnitedHealth Group, Inc. or another entity approved by the United States of America in its sole discretion to whom Defendants divest the Divestiture Assets.

E. ''CRC'' means community rating by class, which refers to the sale of commercial group health insurance to private employers with between 51 and 99 full-time eligible employees.

F. ''Divestiture Assets'' means:

1. All Healthcare Provider Contracts;

2. All of Defendants' rights, title, and interests in and to all property and assets, tangible and intangible, wherever located, of Tufts Health Freedom Plan, including:

a. All licenses, permits, certifications, approvals, consents, registrations, waivers, and authorizations issued or granted by any governmental organization, and all pending applications or renewals;

b. All real property interests, including leases; and

c. All contracts, other than Healthcare Provider Contracts, to which Tufts Health Freedom Plan is a party, including contractual rights, membership, customer contracts, and all other agreements, commitments, and understandings.

3. All current and historical member records for the health plans that Tufts Health Freedom Plan offers or has offered, including contact information, claims information, clinical information, all underlying electronic data, and all files that contain any current or historical member records for those health plans;

4. All provider-furnished data related to members of health plans that Tufts Health Freedom Plan offers or has offered and all files that contain any provider-furnished data related to those health plans; and

5. An exclusive license to use the ''Tufts Health Freedom,'' ''Tufts Health Freedom Insurance Company,'' and ''Tufts Health Freedom Plan(s)'' brand names, and all associated trademarks, service marks, and service names, in New Hampshire from the date on which the Divestiture Assets are divested to Acquirer through December 31, 2021.

G. ''Granite Healthcare'' means Granite Healthcare Asset Holding Company, LLC, its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures as of July 1, 2020, and their members, directors, officers, managers, agents, and employees. Its members include Catholic Medical Center, Concord Hospital, Southern New Hampshire Health System, Wentworth-Douglass Hospital, and Delta Dental Plan of New Hampshire, Inc. d/b/a Northeast Delta Dental.

H. ''Granite Healthcare Provider Contracts'' means the contracts with Catholic Medical Center, Concord Hospital, Southern New Hampshire Health System, and Wentworth-Douglass Hospital, and any other hospitals that had an ownership interest in Granite Healthcare as of July 1, 2020, to which Tufts Health Freedom Plan is a signatory.

I. ''Healthcare Provider Contracts'' means contracts with healthcare providers to which Tufts Health Freedom Plan is a signatory, including the Granite Healthcare Provider Contracts.

J. ''Including'' means including but not limited to.

K. ''Recruitment Period'' means the period of 60 calendar days from the date on which the Divestiture Assets are divested to Acquirer.

L. ''Regulatory Approvals'' means any approvals or clearances pursuant to Health Plan Holdings' November 16, 2020 Form A filed with the Massachusetts Division of Insurance that are required for the proposed combination of Health Plan Holdings and Harvard Pilgrim to proceed.

M. ''Relevant Personnel'' means every employee of Health Plan Holdings based in or assigned to New Hampshire in calendar year 2020 who (1) holds the title of President; Senior Executive Assistant; Public Policy Manager; Small and Large Group Account Executive; Senior Account Executive; Sales and Account Associate; Small Group Account Manager; Key Account Manager; Large Group Account Manager; Senior Manager, Strategic Marketing; Senior Provider Group Manager; or Small Group Account Manager; and (2) has responsibility for Small Group or CRC for Tufts Health Freedom Plan. The United States, in its sole discretion, will resolve any disagreement regarding which employees are Relevant Personnel.

N. ''Run-out Services'' means services that are customarily provided following an operational transfer of health insurance plans and that require Defendants' ongoing support, including claims processing, claims reporting, administrative support, and routine investigations necessary for claims processing.

O. ''Small Group'' means the sale of commercial group health insurance to private employers with between 1 and 50 full-time eligible employees.

P. ''United'' means UnitedHealth Group, Inc., a Delaware corporation with its headquarters in Minnetonka, Minnesota, its successors and assigns, and its subsidiaries, including its subsidiary United Healthcare Services, Inc., divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

## III. Applicability

A. This Final Judgment applies to Harvard Pilgrim and Health Plan Holdings, as defined above, and all other persons in active concert or participation with any Defendant who receive actual notice of this Final Judgment.

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

## IV. Divestiture

A. Defendants are ordered and directed, within 30 calendar days after the Court's entry of the Asset Preservation Stipulation and Order (''Stipulation and Order'') in this matter, to divest the Divestiture Assets in a manner consistent with this Final Judgment to United or to another Acquirer acceptable to the United States, in its sole discretion, after consultation with the State of New Hampshire.

B. If Defendants have not received all Regulatory Approvals within 30 calendar days after the Court's entry of the Stipulation and Order in this matter, the time period under Paragraph IV.A will be extended until 5 calendar days after all Regulatory Approvals are received. This extension allowed for securing Regulatory Approvals shall be no longer than 60 calendar days past the time period provided in Paragraph IV.A, unless the United States, in its sole discretion, consents to an additional extension.

C. Defendants must use their best efforts to divest the Divestiture Assets as expeditiously as possible and may not take any action to impede the permitting, operation, or divestiture of the Divestiture Assets.

D. Unless the United States otherwise consents in writing, divestiture pursuant to this Final Judgment must include the entire Divestiture Assets, and must 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 Acquirer as part of a viable, ongoing business to

compete effectively in Small Group and CRC in New Hampshire and that the divestiture to Acquirer will remedy the competitive harm alleged in the Complaint.

E. The divestiture must be made to an Acquirer that, in the United States' sole judgment, after consultation with the State of New Hampshire, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in Small Group and CRC in New Hampshire.

F. The divestiture must be accomplished so as to satisfy the United States, in its sole discretion, after consultation with the State of New Hampshire, that none of the terms of any agreement between Acquirer and Defendants gives Defendants the ability unreasonably to raise Acquirer's costs, to lower Acquirer's efficiency, or otherwise to interfere in the ability of Acquirer to compete effectively in Small Group and CRC in New Hampshire.

G. Defendants must permit Acquirer to have reasonable access to personnel and access, subject to customary confidentiality assurances, to any and all financial, operational, or other documents and information regarding the Divestiture Assets customarily provided as part of a due diligence process.

H. In the event Defendants are attempting to divest the Divestiture Assets to an Acquirer other than United, Defendants promptly must make known, by usual and customary means, the availability of the Divestiture Assets. Defendants must inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that the Divestiture Assets are being divested in accordance with this Final Judgment and must provide that person with a copy of this Final Judgment. Defendants must offer to furnish and promptly provide to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets that are customarily provided in a due-diligence process, including all information and documents provided to United; *provided, however,* that Defendants need not provide information or documents subject to the attorney-client privilege or work-product doctrine. Defendants must make all information and documents available to the United States at the same time that the information and documents are made available to any other person.

I. Defendants must cooperate with and assist Acquirer in identifying Relevant Personnel and, at the option of Acquirer, in hiring any Relevant Personnel, including:

1. No later than five business days following the filing of the Complaint in this matter, Defendants must provide to Acquirer and Plaintiffs, a list of all Relevant Personnel.

2. Following the filing of the Complaint in this matter, within seven business days following receipt of a request by Acquirer or the United States, Defendants must provide to Acquirer and Plaintiffs, additional information related to Relevant Personnel, including name, job title, reporting relationships, past experience, responsibilities, training and educational history, relevant certifications, job performance evaluations. Defendants must also provide to Acquirer current, recent, and accrued compensation and benefits, including most recent bonuses paid, aggregate annual compensation, current target or guaranteed bonus, if any, any retention agreement or incentives, and any other payments due, compensation or benefits accrued, or promises made to Relevant Personnel. If Defendants are barred by any applicable laws from providing any of this information, Defendants must provide, within seven business days following receipt of the request, the requested information to the full extent permitted by law and also must provide a written explanation of Defendants' inability to provide the remaining information, including specifically identifying the provisions of the applicable laws.

3. At the request of Acquirer, Defendants must promptly make Relevant Personnel available for private interviews with Acquirer during normal business hours at a mutually agreeable location.

4. Defendants must not interfere with any effort by Acquirer to employ any Relevant Personnel. Interference includes offering to increase the compensation or benefits of Relevant Personnel unless the offer is part of a company-wide increase in compensation or benefits granted that was announced prior to May 1, 2020, or has been approved by the United States, in its sole discretion. Defendants' obligations under this Paragraph I.4. will expire after the Recruitment Period.

5. For Relevant Personnel who elect employment with Acquirer during the Recruitment Period, Defendants must waive all non-compete and non-disclosure agreements; vest and pay to the Relevant Personnel (or to Acquirer for payment to the employee) on a prorated basis any bonuses, incentives, other salary, benefits, or other compensation fully or partially accrued at the time of the transfer of the employee to Acquirer; vest any unvested pension and other equity rights; and provide all other benefits that those Relevant Personnel otherwise would have been provided had the Relevant Personnel continued employment with Defendants, including any retention bonuses or payments. Defendants may maintain reasonable restrictions on disclosure by Relevant Personnel of Defendants' proprietary non-public information that is unrelated to the Divestiture Assets and not otherwise required to be disclosed by this Final Judgment.

6. Acquirer's right to hire Relevant Personnel under Paragraph IV.I. lasts throughout the duration of the Recruitment Period.

7. For a period of one year from the date on which the Divestiture Assets are divested to Acquirer, Defendants may not solicit to rehire Relevant Personnel who were hired by Acquirer during the Recruitment Period, unless (a) an individual is terminated or laid off by Acquirer or (b) Acquirer agrees in writing that Defendants may solicit to rehire that individual. Nothing in this Paragraph prohibits Defendants from advertising employment openings using general solicitations or advertisements and rehiring Relevant Personnel who apply for an employment opening through a general solicitation or advertisement.

J. Defendants must warrant to Acquirer that (1) the Divestiture Assets will be operational and without material defect on the date of their transfer to Acquirer; (2) there are no material defects in any permits pertaining to the operation of the Divestiture Assets; and (3) Defendants have disclosed all encumbrances on any part of the Divestiture Assets, including on intangible property. Following the sale of the Divestiture Assets, Defendants must not undertake, directly or indirectly, challenges to any permits pertaining to the operation of the Divestiture Assets.

K. Defendants must make best efforts to assist Acquirer to obtain all necessary licenses, registrations, and permits to operate the Divestiture Assets. Until Acquirer obtains the necessary licenses, registrations, and permits, Defendants must provide Acquirer with the benefit of Defendants' licenses, registrations, and permits to the full extent permissible by law.

L. Defendants must make best efforts to transition customers from the Health Plan Holdings operating platform to Acquirer's operating platform beginning July 1, 2021, and ending by December 31, 2021.

M. At the option of Acquirer, and subject to approval by the United States, in its sole discretion, on or before the date on which the Divestiture Assets are divested to Acquirer, Defendants must enter into one or more agreements to provide transition services for a period ending no later than December 31, 2021, or, if Acquirer is not United, for a period of one year from the date of divestiture, on terms and conditions reasonably related to market conditions and must fully perform the duties and obligations of such agreements. The transition services to be provided by Defendants to Acquirer under such agreements must encompass all services necessary for the Acquirer to operate the Divestiture Assets, including: (1) Providing the operational platform and systems infrastructure to run the Divestiture Assets, including appropriate hardware and software; (2) preparing regulatory plan submissions, including filing and securing regulatory approval, for product, rate, and other required submissions; (3) handling member services and enrollment, the processing and administration of claims, routine investigations, and member appeals and grievances; (4) providing and preparing claims reports; (5) performing accounting and billing, finance support, and payment integrity maintenance; (6) providing care management services; (7) providing regulatory compliance; (8) processing vendor costs; (9) providing benefits configuration; (10) providing broker and employer services; (11) handling provider services and appeals; (12) processing provider demographic, contract, and fee schedules updates; (13) maintaining coordination of benefits programs; (14) providing underwriting support services; and (15) making personnel available to assist Acquirer with operational questions and issues. Any amendments to or modifications of any provision of a transition services agreement are subject to approval by the United States, in its sole discretion. Acquirer may terminate a transition services agreement, or any portion of a transition services agreement, without cost or penalty at any time upon commercially reasonable notice. The employee(s) of Defendants tasked with providing transition services must not share any competitively sensitive information of Acquirer with any other employee of Defendants, unless such sharing is for the sole purpose of providing transition services to Acquirer.

N. At the option of Acquirer, and subject to approval by the United States in its sole discretion, on or before the date on which the Divestiture Assets are divested to Acquirer, Defendants must enter into one or more agreements to provide Run-out Services to Acquirer from the date of each customer's transition to Acquirer's operating platform to June 30, 2022. At Acquirer's option, after written notice to the United States, Defendants must extend any contract for Run-out Services for a total of up to an additional 90 days. Defendants must provide Run-out Services on terms and conditions reasonably related to market conditions. Any amendments to or modifications of any provision of a Run-out Services agreement are subject to approval by the United States, in its sole discretion. Acquirer may terminate a Run-out Services agreement, or any portion of a Run-out Services agreement, without cost or penalty at any time upon commercially reasonable notice. The employee(s) of Defendants tasked with providing Run-out Services must not share any competitively sensitive information of Acquirer with any other employee of Defendants, unless such sharing is for the sole purpose of providing Run-out Services to Acquirer.

O. Except for Healthcare Provider Contracts, Defendants must make any required notifications and use best efforts to obtain all necessary consents of the contracting party to the change of control of Tufts Health Freedom Plan to Acquirer. Defendants must not interfere with any negotiations between Acquirer and a contracting party.

P. Defendants warrant that as of the date on which the Divestiture Assets are divested to Acquirer, the Granite Healthcare Provider Contracts have not expired or terminated, will run through at least December 31, 2021, and will be on the same rates and terms that were in effect as of October 1, 2020, except for any increase in rates that is (a) no greater than a rate increase imposed on Health Plan Holdings between October 1, 2020 and April 1, 2021, and (b) reasonably related to market conditions.

Q. Defendants must make best efforts and must cooperate with and assist Acquirer to ensure that Acquirer will retain all of the Healthcare Provider Contracts. Best efforts includes the following:

1. For Healthcare Provider Contracts with Tufts Health Freedom Plan's fifteen largest healthcare providers in New Hampshire, as measured by Tufts Health Freedom Plan's 2019 claims volume, that do not require notification of a change in ownership or control of Tufts Health Freedom Plan, Defendants must ensure that as of the date on which the Divestiture Assets are divested to Acquirer, the contracts have not expired or terminated and include the same rates and terms that were in effect as of October 1, 2020, except for any increase in rates that is (a) no greater than a rate increase imposed on Health Plan Holdings between October 1, 2020 and April 1, 2021, and (b) reasonably related to market conditions.

2. For all Healthcare Provider Contracts that require a provider's consent to a change in ownership or control of Tufts Health Freedom Plan, or that allow a provider to terminate the contract upon notice of a change in ownership or control, Defendants must notify each such provider of the change in ownership or control within 30 calendar days of entering into an agreement to divest the Divestiture Assets to Acquirer. Except for Healthcare Provider Contracts for which the time to exercise any termination rights has expired without the provider terminating the contract or giving Defendants written notice of an intent to terminate, Defendants must use best efforts to obtain any necessary consent to a change in ownership or control or written acknowledgment that a provider will not terminate because of a change in ownership or control.

3. For any Healthcare Provider Contract that is terminated or for which a provider gives written notice of its intent to terminate within 90 days from the date on which the Divestiture Assets are divested to Acquirer, at Acquirer's request, Defendants must assist Acquirer to secure a new contract with that provider as expeditiously as possible by sharing information with Acquirer concerning the history of the provider's participation in the Tufts Health Freedom Plan, including the performance of the contract and any material disputes relating to the contract, and assisting Acquirer in developing strategies to retain or bring the provider in-network and on the same rates and terms that were in effect as of October 1, 2020, except for any increase in rates that is (a) no greater than a rate increase imposed on Health Plan Holdings between October 1, 2020 and April 1, 2021, and (b) reasonably related to market conditions.

4. If a provider terminates or gives written notice of its intent to terminate any Healthcare Provider Contract within 90 days from the date on which the Divestiture Assets are divested to Acquirer and Acquirer is unable to secure a contract with the provider before the contract terminates, and either (1) the provider is one of Tufts Health Freedom Plan's fifteen largest healthcare providers in New Hampshire, as measured by Tufts Health Freedom Plan's 2019 claims volume, or (2) the termination would result in Tufts

Health Freedom Plan not meeting provider network adequacy standards required by applicable law or regulation, at Acquirer's request, Defendants must, to the full extent permitted by the terms of Defendants' provider contracts, immediately enter into a rental, lease, or similar contract to provide Acquirer with in-network access to the relevant healthcare provider(s) for a period of 12 months from the date on which the Divestiture Assets are divested to Acquirer. Defendants may charge Acquirer no more than Defendants' costs paid to the relevant healthcare provider(s), without adding any mark-up, for the provision of such rental, lease, or similar contract.

5. For all Healthcare Provider Contracts that will expire between the filing of the Complaint in this matter and 90 days after the date on which the Divestiture Assets are divested to Acquirer, Defendants must use best efforts to expeditiously renew each contract to avoid a termination and out-of-network status for that provider, on the same rates and terms that were in effect as of October 1, 2020, except for any increase in rates that is (a) no greater than a rate increase imposed on Health Plan Holdings between October 1, 2020 and April 1, 2021, and (b) reasonably related to market conditions.

R. From the date on which the Divestiture Assets are divested to Acquirer through December 31, 2021, Defendants must not sell any commercial health insurance products in New Hampshire that use the ''Tufts Health'' or ''Tufts Health Plan'' brand(s) (and all associated trademarks, service marks, and service names). This Paragraph does not prohibit Defendants from using the ''Tufts Health'' or ''Tufts Health Plan'' brand(s) for group retiree plans, Medicaid plans, or Medicare plans in New Hampshire.

S. Beginning on the date on which the Divestiture Assets are divested to Acquirer, Defendants must not use the terms ''Health Freedom Plan(s),'' ''Freedom,'' and/or ''Freedom Plan(s)'' for any business name or to identify, market, or promote any products or services in New Hampshire.

T. If any term of an agreement between Defendants and Acquirer to effectuate the divestiture required by this Final Judgment varies from a term of this Final Judgment, to the extent that Defendants cannot fully comply with both, this Final Judgment determines Defendants' obligations.

**V. Appointment of Divestiture Trustee**

A. If Defendants have not divested the Divestiture Assets within the period specified in Paragraphs IV.A. and IV.B., Defendants must immediately notify Plaintiffs of that fact in writing. Upon application of the United States, the Court will appoint a divestiture trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a divestiture trustee by the Court, only the divestiture trustee will have the right to sell the Divestiture Assets. The divestiture trustee will have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States, in its sole discretion, after consultation with the State of New Hampshire, at a price and on 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 will have other powers as the Court deems appropriate. The divestiture trustee must sell the Divestiture Assets as quickly as possible.

C. Defendants may not object to a sale by the divestiture trustee on any ground other than malfeasance by the divestiture trustee. Objections by Defendants must be conveyed in writing to Plaintiffs and the divestiture trustee within ten calendar days after the divestiture trustee has provided the notice of proposed divestiture required under Section VI.

D. The divestiture trustee will serve at the cost and expense of Defendants pursuant to a written agreement, on terms and conditions, including confidentiality requirements and conflict of interest certifications, that are approved by the United States.

E. The divestiture trustee may hire at the cost and expense of Defendants any agents or consultants, including, but not limited to, investment bankers, attorneys, and accountants, that are reasonably necessary in the divestiture trustee's judgment to assist with the divestiture trustee's duties. These agents or consultants will be accountable solely to the divestiture trustee and will serve on terms and conditions, including terms and conditions governing confidentiality requirements and conflict-of-interest certifications, that are approved by the United States.

F. The compensation of the divestiture trustee and agents or consultants hired by the divestiture trustee must be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement that provides the divestiture trustee with incentives based on the price and terms of the divestiture and the speed with which it is accomplished. If the divestiture trustee and Defendants are unable to reach agreement on the divestiture trustee's compensation or other terms and conditions of engagement within 14 calendar days of the appointment of the divestiture trustee by the Court, the United States may, in its sole discretion, take appropriate action, including by making a recommendation to the Court. Within three business days of hiring an agent or consultant, the divestiture trustee must provide written notice of the hiring and rate of compensation to Defendants and the United States.

G. The divestiture trustee must account for all monies derived from the sale of the Divestiture Assets sold by the divestiture trustee and all costs and expenses incurred. Within 30 calendar days of the date of the sale of the Divestiture Assets, the divestiture trustee must submit that accounting to the Court for approval. After approval by the Court of the divestiture trustee's accounting, including fees for unpaid services and those of agents or consultants hired by the divestiture trustee, all remaining money must be paid to Defendants and the trust will then be terminated.

H. Defendants must use their best efforts to assist the divestiture trustee to accomplish the required divestiture. Subject to reasonable protection for trade secrets, other confidential research, development, or commercial information, or any applicable privileges, Defendants must provide the divestiture trustee and agents or consultants retained by the divestiture trustee with full and complete access to all personnel, books, records, and facilities of the Divestiture Assets. Defendants also must provide or develop financial and other information relevant to the Divestiture Assets that the divestiture trustee may reasonably request. Defendants may not take any action to interfere with or to impede the divestiture trustee's accomplishment of the divestiture.

I. The divestiture trustee must maintain complete records of all efforts made to sell the Divestiture Assets, including by filing monthly reports with Plaintiffs setting forth the divestiture trustee's efforts to accomplish the divestiture ordered by this Final Judgment. The reports must 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 must describe in detail each contact with any such person.

J. If the divestiture trustee has not accomplished the divestiture ordered by

this Final Judgment within six months of appointment, the divestiture trustee must promptly provide Plaintiffs with 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 for completing the divestiture. Following receipt of that report, the United States may make additional recommendations consistent with the purpose of the trust to the Court. The Court thereafter may enter such orders as it deems appropriate to carry out the purpose of this Final Judgment, which may include extending the trust and the term of the divestiture trustee's appointment by a period requested by the United States.

K. The divestiture trustee will serve until divestiture of all Divestiture Assets is completed or for a term otherwise ordered by the Court.

L. If the United States determines that the divestiture trustee is not acting diligently or in a reasonably cost-effective manner, the United States may recommend that the Court appoint a substitute divestiture trustee.

**VI. Notice of Proposed Divestiture**

A. Within two business days following execution of a definitive divestiture agreement with a proposed Acquirer other than United, Defendants or the divestiture trustee, whichever is then responsible for effecting the divestiture, must notify Plaintiffs of a proposed divestiture required by this Final Judgment. If the divestiture trustee is responsible for completing the divestiture, the divestiture trustee also must notify Defendants. The notice must 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.

B. Within 15 calendar days of receipt by the United States of this notice, the United States, in its sole discretion, may request from Defendants, the proposed Acquirer, other third parties, or the divestiture trustee additional information concerning the proposed divestiture, the proposed Acquirer, and other prospective Acquirers. Defendants and the divestiture trustee must furnish the additional information requested within 15 calendar days of the receipt of the request unless the United States provides written agreement to a different period.

C. Within 45 calendar days after receipt of the notice required by Paragraph VI.A. or within 20 calendar days after the United States has been provided the additional information requested pursuant to Paragraph VI.B., whichever is later, the United States will provide written notice to Defendants and any divestiture trustee that states whether or not the United States, in its sole discretion, after consultation with the State of New Hampshire, objects to Acquirer or any other aspect of the proposed divestiture. Without written notice that the United States does not object, a divestiture may not be consummated. 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 Paragraph V.C. of this Final Judgment. Upon objection by Defendants pursuant to Paragraph V.C., a divestiture by the divestiture trustee may not be consummated unless approved by the Court.

D. No information or documents obtained pursuant to this Section VI may be divulged by Plaintiffs to any person other than an authorized representative of the executive branch of the United States or an authorized representative of the State of New Hampshire, except in the course of legal proceedings to which the United States is a party, including grand-jury proceedings, for the purpose of evaluating a proposed Acquirer or securing compliance with this Final Judgment, or as otherwise required by law.

E. In the event of a request by a third party for disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 CFR part 16, including the provision on confidential commercial information, at 28 CFR 16.7. Persons submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 CFR 16.7. Designations of confidentiality expire ten years after submission, ''unless the submitter requests and provides justification for a longer designation period.'' *See* 28 CFR 16.7(b).

F. If at the time that a person furnishes information or documents to the United States or the State of New Hampshire pursuant to this Section VI, that person represents and identifies in writing information or documents for which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' the United States and the State of New Hampshire must give that person ten calendar days' notice before divulging the material in any legal proceeding (other than a grand-jury proceeding).

**VII. Financing**

Defendants may not finance all or any part of Acquirer's purchase of all or part of the Divestiture Assets made pursuant this Final Judgment.

**VIII. Asset Preservation Obligations**

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

**IX. Affidavits**

A. Within 20 calendar days of the filing of the Complaint in this matter, and every 30 calendar days thereafter until the divestiture required by this Final Judgment has been completed, Defendant Health Plan Holdings must deliver to Plaintiffs an affidavit, signed by its Chief Financial Officer and Chief Legal Officer, describing the fact and manner of Defendants' compliance with this Final Judgment. The United States, in its sole discretion, may approve different signatories for the affidavits.

B. Each affidavit must include: (1) The name, address, and telephone number of each person who, during the preceding 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, an interest in the Divestiture Assets and describe in detail each contact with such persons during that period; (2) a description of the efforts Defendants have taken to solicit buyers for and complete the sale of the Divestiture Assets and to provide required information to prospective Acquirers; and (3) a description of any limitations placed by Defendants on information provided to prospective Acquirers. Objection by the United States to information provided by Defendants to prospective Acquirers must be made within 14 calendar days of receipt of the affidavit.

C. Defendants must keep all records of any efforts made to divest the Divestiture Assets until one year after the divestiture has been completed.

D. Within 20 calendar days of the filing of the Complaint in this matter, Defendant Health Plan Holdings also

must deliver to Plaintiffs 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. The United States, in its sole discretion, may approve different signatories for the affidavits.

E. If Defendants make any changes to the efforts and actions outlined in any earlier affidavits provided pursuant to Paragraph IX.D., Defendants must, within 15 calendar days after any change is implemented, deliver to Plaintiffs an affidavit describing those changes.

F. Defendants must keep all records of any efforts made to preserve the Divestiture Assets until one year after the divestiture has been completed.

**X. Compliance Inspection**

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders such as the Stipulation and Order or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, and reasonable notice to Defendants, Defendants must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by the United States:

1. To have access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide 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 must 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 for the Antitrust Division, Defendants must submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the United States pursuant to this Section X may be divulged by Plaintiffs to any person other than an authorized representative of the executive branch of the United States or an authorized representative of the State of New Hampshire, except in the course of legal proceedings to which the United States is a party, including grand jury proceedings, for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. In the event of a request by a third party for disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 CFR part 16, including the provision on confidential commercial information, at 28 CFR 16.7. Defendants submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 CFR 16.7. Designations of confidentiality expire ten years after submission, ''unless the submitter requests and provides justification for a longer designation period.'' See 28 CFR 16.7(b).

E. If at the time that Defendants furnish information or documents to the United States pursuant to this Section X, Defendants represent and identify in writing information or documents for 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,'' the United States must give Defendants ten calendar days' notice before divulging the material in any legal proceeding (other than a grand jury proceeding).

**XI. No Reacquisition**

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

**XII. Retention of Jurisdiction**

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the 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.

**XIII. Enforcement of Final Judgment**

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendants agree that in a civil contempt action, a motion to show cause, or a similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendants waive any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition Plaintiffs alleged was harmed by the challenged conduct. Defendants agree that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendants have violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with other relief that may be appropriate. In connection with a successful effort by the United States to enforce this Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as all other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

D. For a period of four years following the expiration of this Final Judgment, if the United States has evidence that a Defendant violated this Final Judgment before it expired, the United States may file an action against that Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional term of at least four years following the filing of the enforcement action; (2) all appropriate contempt remedies; (3) additional relief needed to ensure the Defendant complies with the terms of this Final Judgment; and (4) fees or expenses as called for by this Section XIII.

**XIV. Expiration of Final Judgment**

Unless the Court grants an extension, this Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, this Final Judgment may be terminated upon notice by the United

States to the Court and Defendants the divestiture has been completed and that the continuation of this Final Judgment is no longer necessary or in the public interest.

**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 by making available to the public copies of this Final Judgment and the Competitive Impact Statement, public comments thereon, and the United States' response 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

**United States District Court for the District of New Hampshire**

United States of Americaand State of New Hampshire, Plaintiffs, vs. Harvard Pilgrim Health Care, INC. and Health Plan Holdings, INC., Defendants.

Civil Action No.:1:20–cv–01183–JL
Judge Joseph N. Laplante

**Competitive Impact Statement**

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

**I. Nature and Purpose of the Proceeding**

On August 9, 2019, Defendants Harvard Pilgrim and Health Plan Holdings (f/k/a Tufts Health Plan) agreed to a ''merger of equals'' (the ''Transaction''). The United States, along with the State of New Hampshire, filed a civil antitrust complaint on December 14, 2020, seeking to enjoin the proposed Transaction. The Complaint alleges that the likely effect of the Transaction would be to substantially lessen competition in (1) the sale of commercial group health insurance to private employers with up to 50 full-time eligible employees (''small groups'') in all seven New Hampshire Core Based Statistical Areas (''CBSAs''), and (2) the sale of commercial group health insurance to private employers with between 51 and 99 full-time eligible employees (''CRC groups'') in six New Hampshire CBSAs, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

At the same time the Complaint was filed, the United States filed an Asset Preservation Stipulation and Order (''Stipulation and Order'') and proposed Final Judgment, which are designed to remedy the loss of competition alleged in the Complaint. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest Health Plan Holdings' New Hampshire subsidiary, Tufts Health Freedom Plans, Inc. (''Tufts Freedom''). The United States has approved UnitedHealth Group, Inc. (''United'') as the acquirer of Tufts Freedom. Under the terms of the Stipulation and Order, Defendants will take certain steps to ensure that Tufts Freedom is operated as a competitively independent, economically viable, and ongoing business concern, which will remain independent and uninfluenced by Defendants, and that competition is maintained during the pendency of the required divestiture.

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

**II. Decription of the Events Giving Rise to the Alleged Violation**

*A. Defendants and the Proposed Transaction*

Harvard Pilgrim is a nonprofit corporation organized and existing under the laws of the Commonwealth of Massachusetts with its headquarters in Wellesley, Massachusetts. Harvard Pilgrim sells commercial group health insurance plans to small and large employer groups in New Hampshire, Massachusetts, Connecticut, and Maine. Harvard Pilgrim's annual revenue in 2019 was approximately $3 billion, with the vast majority of this revenue coming from commercial insurance products, and it has over one million members across all its insurance products.

Health Plan Holdings is a nonprofit corporation organized and existing under the laws of the Commonwealth of Massachusetts with its headquarters in Watertown, Massachusetts. Prior to October 7, 2020, Health Plan Holdings was known as Tufts Health Plan, Inc. Health Plan Holdings sells commercial group health insurance plans to small and large employer groups in New Hampshire, Massachusetts, and Rhode Island. In New Hampshire, Health Plan Holdings sells health insurance through Tufts Freedom. Tufts Freedom was a joint venture with Granite Healthcare, a consortium of New Hampshire hospitals, until September 2020, when Health Plan Holdings purchased the hospitals' interests and became the sole owner. Health Plan Holdings' annual revenue in 2019 was over $5.5 billion, with roughly one-third of this revenue coming from commercial insurance products, and it has over one million members across all its insurance products.

On August 9, 2019, Defendants entered into an agreement entitled ''Combination Agreement'' pursuant to which Health Plan Holdings will acquire Harvard Pilgrim. No money is exchanging hands and Defendants have described the transaction as a ''merger of equals.''

*B. The Competitive Effects of the Transaction*

Health insurance companies sell commercial group health insurance to employers so employers can provide their employees and their employees' families with health insurance coverage. Harvard Pilgrim and Health Plan Holdings are two of the largest suppliers of commercial health insurance in New Hampshire to employers with less than 100 employees. Harvard Pilgrim and Health Plan Holdings compete vigorously with one another in the sale of commercial health insurance to these employers. As alleged in the Complaint, combining Harvard Pilgrim and Health Plan Holdings into one firm would likely lead to higher prices, lower quality, and reduced choice in New Hampshire.

1. The Relevant Markets

(a) Commercial Health Insurance Sold to Small Groups

As alleged in the Complaint, the sale of commercial health insurance to small groups is a relevant antitrust product market in which to analyze the effects of the Transaction. New Hampshire Insurance Department regulations define a ''small group'' as an employer with 50 or fewer full-time eligible employees. *See* N.H. Rev. Stat. Ann. § 420–G:2, XVI. For small groups, health plans are typically fully insured, which means that the employer pays a premium to the insurance company and in return the company covers the employees' healthcare costs. Small groups tend to be local in nature, requiring a strong local provider

network of doctors and hospitals that are contracted to provide medical care to the group's employees. The relevant market for small groups alleged in the Complaint does not include governmental employers (*e.g.,* municipalities, school districts) in New Hampshire with 50 or fewer employees, as historically almost all of these employers have purchased health insurance through a multi-employer trust instead of directly from an insurer.

The commercial health insurance plans offered to small groups are governed by the New Hampshire Insurance Department. The small group plans cannot be substituted with plans offered to New Hampshire employers with 51 or more full-time eligible employees, defined by statute in New Hampshire as ''large group.'' Harvard Pilgrim and Health Plan Holdings also differentiate small group accounts separately from large group accounts internally and offer different pricing for small group products compared to large group products.

New Hampshire law does not require that an insurer offer a small group product statewide and instead permits an insurer to offer small group plans only in certain counties. Accordingly, despite the fact that state law does not allow insurers to charge different prices for the same small group plans based on location, insurers can offer a more expensive set of small group plans in one part of the state, and a less expensive set of different small group plans in another part of the state. This allows insurers to charge different prices for different products to small groups based on where employees live and work.

There are seven Core Based Statistical Areas (CBSA) in New Hampshire: (1) The Manchester-Nashua CBSA, (2) the Concord CBSA, (3) the Laconia CBSA, (4) the Keene CBSA, (5) the Berlin CBSA, (6) the New Hampshire counties (Grafton and Sullivan) of the Lebanon NH–VT CBSA, and (7) the New Hampshire counties (Rockingham and Strafford) of the Boston-Cambridge-Newton MA–NH CBSA. As alleged in the Complaint, the Transaction is likely to substantially lessen competition for the sale of commercial health insurance to small groups in all seven of New Hampshire's CBSAs.

Each of these seven CBSAs is a relevant geographic market. A hypothetical monopolist over the sale of commercial health insurance to small groups in each of these markets would impose a small but significant and non-transitory increase in price (*e.g.* five percent). A small group employer, faced with a significant price increase, cannot defeat the price increase by purchasing a large group product for which it is ineligible. This price increase also would not be defeated by substitution outside the relevant market or by a small group employer trying to repurchase insurance through another employer group (*i.e.* arbitrage).

(b) Commercial Health Insurance Sold to CRC Groups

As alleged in the Complaint, the sale of commercial health insurance to CRC groups is a relevant antitrust product market. In New Hampshire, employers with between 51 and 99 full-time eligible employees represent a distinct segment of large group and are referred to as CRC employers (or CRC groups). CRC groups have different needs and make different buying decisions than small groups or even larger employers. Harvard Pilgrim and Tufts Freedom employ different sales strategies for this segment than they do for other types of employers.

Similar to small groups, CRC group health plans are typically fully insured, which means that the employer pays a premium to the insurance company and in return the company covers the employees' healthcare costs. Insurers offering commercial health insurance in New Hampshire, including Harvard Pilgrim and Tufts Freedom, differentiate employers with 51 to 99 full-time eligible employees from other large group employers, and refer to these employers as the CRC segment. As with small groups, CRC groups also tend to be more local in nature than other large group employers, requiring a strong local provider network, as opposed to large group employers with 100 or more full-time eligible employees, which, due to a more geographically dispersed employee base, are more likely to require strong national provider networks. As with small groups, the relevant market for CRC groups alleged in the Complaint does not include governmental employers (*e.g.,* municipalities, school districts) in New Hampshire with 51–99 employees, as historically almost all of these employers have purchased health insurance through a multi-employer trust instead of directly from an insurer.

Group health plans for CRC groups, in contrast to larger group employers, are typically (although not exclusively) community rated by class, meaning that, when setting rates for CRC groups, the insurer first establishes a base rate determined by the medical costs of a class of similar groups, rather than upon the medical costs of the individual group seeking the plan. The insurer then uses this base rate, along with the individual employer's medical costs, to negotiate rates with the specific CRC group.

Defendants target CRC groups directly through their sales efforts. For example, Tufts Freedom has focused its large group sales efforts on CRC groups since it began selling commercial health insurance in New Hampshire, while Harvard Pilgrim tracks CRC groups separately from other large group accounts. In addition, both Harvard Pilgrim and Tufts Freedom utilize specific pricing strategies for CRC groups. Defendants have formulated these specific pricing strategies because CRC groups in New Hampshire are generally more price sensitive than large group employers with 100 or more full-time eligible employees.

Unlike commercial health insurance sold to small groups, insurers offering commercial health insurance to CRC groups in New Hampshire can charge different prices to different employers. Thus, insurers may charge different prices to CRC groups based on where employees live and work. The Transaction is likely to substantially lessen competition for the sale of commercial health insurance to CRC groups in six separate CBSAs in New Hampshire: (1) the Manchester-Nashua CBSA, (2) the Concord CBSA, (3) the Laconia CBSA, (4) the Keene CBSA, (5) the New Hampshire counties (Grafton and Sullivan) of the Lebanon NH–VT CBSA, and (6) the New Hampshire counties (Rockingham and Strafford) of the Boston-Cambridge-Newton MA–NH CBSA.

As alleged in the Complaint, each of these six CBSAs is a relevant geographic market. A hypothetical monopolist over the sale of commercial health insurance to CRC groups in each of these markets would impose a small but significant (*e.g.,* five percent) and non-transitory increase in price. This price increase would not be defeated by substitution outside the relevant market or by arbitrage.

2. The Transaction Would Result in Large Combined Market Shares

Harvard Pilgrim and Tufts Freedom are two of the largest providers of small group and CRC group insurance in New Hampshire. The Transaction would result in a substantial increase in concentration of insurers that compete to offer commercial health insurance to small groups and CRC groups in New Hampshire.

The Supreme Court has held that mergers that significantly increase concentration in already concentrated markets are presumptively anticompetitive and therefore

presumptively unlawful. To measure market concentration, courts often use the Herfindahl-Hirschman Index (''HHI'') as described in the *Horizontal Merger Guidelines.* HHIs range from 0 in markets with no concentration to 10,000 in markets where one firm has a 100% market share. According to the *Horizontal Merger Guidelines,* mergers that increase the HHI by more than 200 and result in an HHI above 2,500 in any market are presumed to be anticompetitive and, therefore, unlawful.

The Complaint alleges that the Transaction is presumptively unlawful in the small group market. Based upon 2018 data, the combined market shares for Harvard Pilgrim and Tufts Freedom range from over 45% to over 60% in each of the seven CBSAs. As alleged in the Complaint, the Transaction would reduce the number of small group health insurers from four to three, with the two largest insurers—Anthem Blue Cross and Blue Shield (''Anthem'') and the merged Harvard Pilgrim/Tufts Freedom—possessing over 95% share in each of the seven CBSAs. The result is highly concentrated markets with HHIs of between 4,500 and 7,500 and increases in HHIs from over 350 to over 1,600.

As alleged in the Complaint, the Transaction is also presumptively unlawful in the CRC group market. Based upon 2018 data, the combined market shares for Harvard Pilgrim and Tufts Freedom range from more than 40% to over 65% in each of the six CBSAs. Similar to the small group market, the Transaction would reduce the number of CRC group health insurers from four to three, with the two largest insurers—Anthem and the merged Harvard Pilgrim/Tufts Freedom—possessing over 95% share in each of the six CBSAs. The result is highly concentrated markets with HHIs of between just under 5,000 to almost 7,000 and increases in HHIs from over 200 to over 2,000.

3. The Transaction Would Eliminate Head-to-Head Competition Between Two Close Competitors

As alleged in the Complaint, Harvard Pilgrim and Tufts Freedom are particularly close competitors for commercial health insurance sold to small groups and CRC groups in New Hampshire. The competition between the two insurers is more robust for certain types of groups than the market shares would predict. This is in part because Harvard Pilgrim and Tufts Freedom—two strong local health insurers that have not built national provider networks—are more attractive to small groups and CRC groups with higher percentages of employees residing in New Hampshire. Similarly, because Harvard Pilgrim and Tufts Freedom have priced aggressively, the two appeal to small groups and CRC groups that have greater price sensitivity.

Harvard Pilgrim and Tufts Freedom have engaged in head-to-head competition on price, plan features, and quality of service in the sale of commercial health insurance to small groups and to CRC groups in New Hampshire. For example, as the Complaint alleges, upon entering the New Hampshire market in 2016, Tufts Freedom priced aggressively, and gained significant market share, largely at the expense of Harvard Pilgrim. Additionally, in 2019, Harvard Pilgrim developed four new no-coinsurance plans, which limited out-of-pocket expenses to members and offered different features, with the express purpose of making them more attractive to members. Just this year, Tufts Freedom offered consumers a novel telehealth option that included zero copayment in fully insured plans in order to drive innovation around this emerging platform. Eliminating competition between Harvard Pilgrim and Tufts Freedom would likely result in higher prices, lower quality, less innovation, and less customer choice in the sale of commercial health insurance to small groups and to CRC groups in New Hampshire.

4. Difficulty of Entry or Expansion

As alleged in the Complaint, new entry and expansion by competitors will likely neither be timely nor sufficient in scope to prevent the likely anticompetitive effects of the proposed Transaction. Barriers to entry and expansion include state licensing and regulatory requirements, the cost of developing a comprehensive provider network where employees live and work, the inability of insurers without significant membership to obtain competitive discounts from providers, and the development of sufficient business to permit the spreading of risk.

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

## III. Explanation of the Proposed Final Judgment

The relief required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor in the markets for the sale of commercial group health insurance to small groups and CRC groups in New Hampshire. Paragraph IV.A of the Proposed Final Judgment requires Defendants, within 30 days after entry of the Stipulation and Order by the Court, to divest Tufts Freedom, Health Plan Holdings' New Hampshire subsidiary, to United, or an alternative acquirer, acceptable to the United States, in its sole discretion, after consultation with the State of New Hampshire (''Acquirer''). Paragraph IV.B allows for this 30-day period to be extended until 5 calendar days after Harvard Pilgrim and Health Plan Holdings receive the required regulatory approvals from the Massachusetts Division of Insurance. Any extension for securing regulatory approvals shall be no longer than 60 calendar days after the 30-day time period provided in Paragraph IV.A, unless the United States, in its sole discretion, consents to an additional extension. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with Acquirer.

*A. Divestiture Assets*

The proposed Final Judgment requires Defendants to divest all assets and rights that an Acquirer needs to compete against Defendants and other commercial health insurers in New Hampshire for the sale of commercial group health insurance to small groups and CRC groups. The Divestiture Assets, which are defined in Paragraph II.F of the proposed Final Judgment, include all tangible and intangible assets of Tufts Freedom, including insurance licenses and real property interests, such as leases, membership, and customer contracts; all contracts with healthcare providers to which Tufts Freedom is a signatory; all current and historical member records for the health plans that Tufts Freedom offers or has offered, all underlying electronic data, and all files that contain any current or historical member records for those health plans; and all provider-furnished data related to members of health plans that Tufts Freedom offers or has offered and all files that contain any provider-furnished data related to those health plans.

The Divestiture Assets also include an exclusive license for Acquirer to use the ''Tufts Health Freedom,'' ''Tufts Health Freedom Insurance Company,'' and ''Tufts Health Freedom Plan(s)'' brand names, and all associated trademarks, service marks, and service names, in New Hampshire from the date on which the Divestiture Assets are divested to Acquirer through December 31, 2021. This license will assist Acquirer in

maintaining plan membership during the period immediately after the divestiture. Related to the license included in the Divestiture Assets, Paragraphs IV.R and IV.S of the proposed Final Judgment prohibit Defendants from selling commercial health insurance products in New Hampshire that use the ''Tufts Health'' or ''Tufts Health Plan'' brand(s) through December 31, 2021, and prohibit Defendants from using the terms ''Health Freedom Plan(s),'' ''Freedom,'' or ''Freedom Plan(s)'' for any business name or to identify, market, or promote any products or services in New Hampshire. This prohibition will protect against consumer confusion between Defendants' commercial health insurance plans and Tufts Freedom's commercial health insurance plans.

*B. Hiring of Personnel*

The proposed Final Judgment contains provisions intended to facilitate Acquirer's efforts to hire certain employees of Health Plan Holdings who have responsibilities for the Tufts Freedom business. These provisions will help ensure that Acquirer will be able to retain qualified employees to operate Tufts Freedom. Paragraph IV.I of the proposed Final Judgment requires Defendants to assist Acquirer in identifying and hiring employees based in New Hampshire or assigned to New Hampshire business and to make them available for interviews. It also provides that Defendants must not interfere with any negotiations by Acquirer to hire these employees. In addition, for employees who elect employment with Acquirer, Defendants must waive all non-compete and non-disclosure agreements; vest and pay (or provide to Acquirer for payment to the employee) on a prorated basis any bonuses, incentives, other salary, benefits, or other compensation fully or partially accrued at the time of the transfer of the employee to Acquirer; vest any unvested pension and other equity rights; and provide all other benefits that those employees otherwise would have been provided had they continued employment with Defendants, including any retention bonuses or payments. Paragraph IV.I further provides that Defendants may not solicit to rehire any employees who elect employment with Acquirer, unless an employee is terminated or laid off by Acquirer or Acquirer agrees in writing that Defendants may solicit to rehire that individual. The non-solicitation period runs for 12 months from the date of the divestiture.

*C. Transition and Run-Out Services*

The proposed Final Judgment also contains several provisions to facilitate the transition of the Divestiture Assets to Acquirer. These provisions will facilitate a smooth transition for Tufts Freedom members from Health Plan Holdings to Acquirer so that Acquirer can compete effectively in the markets for health insurance sold to small groups and CRC groups in New Hampshire. For example, Paragraph IV.L of the proposed Final Judgment requires Defendants to make best efforts to transition customers from the Health Plan Holdings operating platform to Acquirer's operating platform beginning July 1, 2021, and ending by December 31, 2021. This transition will not begin until July 2021 in order to give Acquirer enough time to prepare its own operating platform for the Tufts Freedom business. In addition, Paragraph IV.M requires Defendants, at Acquirer's option, to enter into one or more agreements to provide transition services to Acquirer for a period running until December 31, 2021, or if Acquirer is not United, one year from the date of the divestiture. Transition services must encompass all services necessary for Acquirer to operate the Divestiture Assets. Among other things, the proposed Final Judgment allows Health Plan Holdings to provide the operational platform and systems infrastructure to run the Divestiture Assets, prepare regulatory filings, and handle member services for Acquirer for a time-limited period. Acquirer may terminate a transition services agreement, or any portion of it, without cost or penalty at any time upon commercially reasonable notice. Paragraph IV.M also provides that employees of Defendants tasked with supporting this agreement must not share any competitively sensitive information of Acquirer with any other employee of Defendants, unless such sharing is for the sole purpose of providing transition services to Acquirer.

Paragraph IV.N of the proposed Final Judgment further requires Defendants, at Acquirer's option, to provide Run-out Services to Acquirer to cover the period from the date of a customer's transition to Acquirer's operating platform, until June 30, 2022, and at Acquirer's option, for up to an additional 90 days. Run-out Services are services that are customarily provided to an acquirer by a seller following an operational transfer of a health insurance plan. Run-out services include, among other things, claims processing, claims reporting, administrative support, and routine investigations necessary for claims processing. These services are provided by a seller of an insurance plan for a period of time after an operational transfer because the services relate to claims that were incurred prior to the transfer but have not been resolved. For example, a claim that occurred during the transition period might not be processed or investigated until after the transition period has ended. Requiring Defendants to provide these Run-out Services will help to smooth the transfer of the Divestiture Assets to Acquirer and ensure that Acquirer can immediately and successfully operate Tufts Freedom. The United States, in its sole discretion, may approve one or more extensions of Run-out Services. Acquirer may terminate a Run-out Services agreement, or any portion of it, without cost or penalty at any time upon commercially reasonable notice. Paragraph IV.N also provides that employees of Defendants tasked with supporting this agreement must not share any competitively sensitive information of Acquirer with any other employee of Defendants, unless such sharing is for the sole purpose of providing Run-out Services to Acquirer.

*D. Healthcare Provider Contracts*

An insurer's ability to compete on price depends largely on medical costs, which are impacted significantly by the discounts the insurer obtains from healthcare providers through its contracts with those providers. The proposed Final Judgment contains several provisions to help ensure that Tufts Freedom will maintain contracts with New Hampshire healthcare providers at competitive rates following the divestiture. Keeping contracts with local providers at competitive rates will better position Tufts Freedom to be competitive in the small group and CRC group markets in New Hampshire.

1. Contracts With Granite Healthcare Providers

Paragraph IV.P of the proposed Final Judgment requires that Defendants warrant that as of the date of divestiture, Tufts Freedom's contracts with Catholic Medical Center, Concord Hospital, Southern New Hampshire Health System, and Wentworth-Douglass Hospital, and any other hospitals that had an ownership interest in Granite Healthcare as of July 1, 2020, have not expired or terminated, will run through at least December 31, 2021, and will be on the same rates and terms that were in effect as of October 1, 2020, subject to certain permitted rate increases.

2. Contracts With Other Healthcare Providers

Paragraph IV.Q of the proposed Final Judgment requires that Defendants make best efforts and cooperate with and assist Acquirer to ensure that, following the divestiture, Acquirer will retain Tufts Freedom's current contracts with healthcare providers in New Hampshire. Defendants' obligations under Paragraphs IV.Q.1–5 of the proposed Final Judgment vary depending upon whether a Healthcare Provider Contract includes change in control provisions, terminates, or expires.

(a) Healthcare Provider Contracts Without Change in Control Provisions

Some Healthcare Provider Contracts have no requirement that Tufts Freedom notify the provider of a change in ownership or control of Tufts Freedom and do not include provisions allowing the provider to terminate the contract in the event of a change in ownership or control. Under Paragraph IV.Q.1, Defendants must make best efforts to ensure that contracts with Tufts Freedom's fifteen largest providers in New Hampshire (as measured by 2019 claims volume) that do not require a notice of change in ownership or control (1) have not expired or terminated and (2) include the same rates and terms that were in effect as of October 1, 2020, subject to certain permitted rate increases.

(b) Healthcare Provider Contracts With Change in Control Provisions

Other Healthcare Provider Contracts require the provider's consent to a change in Tufts Freedom's ownership or control, or allow the provider to terminate the contract upon notice of a change in ownership or control. Paragraph IV.Q.2 of the proposed Final Judgment requires Defendants to notify those providers of the change in ownership or control within 30 calendar days of entering into an agreement to divest the Divestiture Assets to Acquirer. Paragraph IV.Q.2 further requires Defendants to use best efforts to obtain consent to the change in ownership or control from these providers or written acknowledgement that the provider will not terminate its contract with Tufts Freedom because of the change in ownership or control. The preceding requirement does not apply in the event that a provider's deadline to exercise any termination rights has already expired without the provider terminating the contract or giving Defendants written notice of an intent to terminate.

(c) Healthcare Provider Contracts That Terminate

The proposed Final Judgment places additional obligations on Defendants if a healthcare provider terminates or gives notice of an intent to terminate within 90 days from the date of the divestiture. Paragraph IV.Q.3 requires Defendants to assist Acquirer, at Acquirer's request, to secure new contracts with those terminating healthcare providers. The assistance required includes sharing information with Acquirer concerning the history of the provider's participation in Tufts Freedom and aiding Acquirer in developing strategies to retain or bring the provider in-network, on the same rates and terms that were in effect as of October 1, 2020, subject to certain permitted increases. Paragraph IV.Q.4 further requires that if the terminating provider is one of Tufts Freedom's fifteen largest healthcare providers in New Hampshire (as measured by 2019 claims volume), or the termination would result in Tufts Freedom not meeting provider network adequacy standards required by applicable law or regulation, at Acquirer's request, Defendants must enter into a rental, lease, or similar contract to provide Acquirer with in-network access to the relevant healthcare provider(s) for a period of 12 months from the date of the divestiture.

(d) Expiring Healthcare Provider Contracts

Finally, Paragraph IV.Q.5 of the proposed Final Judgment requires Defendants to use best efforts to renew all Healthcare Provider Contracts that will expire between the filing of the Complaint in this matter and 90 days after the date of the divestiture, on the same rates and terms that were in effect as of October 1, 2020, subject to certain permitted rate increases.

*E. Divestiture Trustee*

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

*F. Compliance*

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

Paragraph XIII.B of the proposed Final Judgment provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy the loss of competition the United States alleges would otherwise be harmed by the transaction. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIII.C of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that a Defendant has violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with

investigating and enforcing violations of the Final Judgment, Paragraph XIII.C provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendant will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

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

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

## IV. Remedies Available to Potential Private Litigants

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

## V. Procedures Available for Modification of the Proposed Final Judgment

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

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, comments and the United States' response will be published in the **Federal Register** unless the Court agrees that the United States instead may publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted to: Eric D. Welsh, Chief, Healthcare and Consumer Products Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW, Suite 4100, Washington, DC 20530.

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

## VI. Alternatives to the Proposed Final Judgment

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against the combination of Harvard Pilgrim and Health Plan Holdings. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the sale of commercial health insurance to small groups and CRC groups in each of the geographic markets alleged in the Complaint. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

## VII. Standard of Review Under the APPA for the Proposed Final Judgment

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

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

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

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

antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable'').

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

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

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also U.S. Airways,* 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60.

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

## VIII. Determinative Documents

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

Dated: December 23, 2020.

Respectfully submitted,

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## DEPARTMENT OF JUSTICE

### Notice of Lodging of Proposed Consent Decree Under the Clean Water Act

On December 23, 2020, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Central District of Illinois in the lawsuit entitled *United States and Illinois* v. *Peoria City of Illinois and the Greater Peoria Sanitary and Sewage Disposal District,* Civil Action No. 20–1444.

The United States and State of Illinois filed this lawsuit under the Clean Water Act. The complaint seeks civil penalties and injunctive relief for violations of the Act and related permits addressing the sewer system that serves the City of Peoria and is operated by the Defendants. Among other things, the consent decree requires Peoria to significantly reduce sewage overflows from the system by performing a series of improvement projects over 18 years that meet final criteria and satisfy interim milestones. The Greater Peoria Sanitary and Sewage Disposal District (''GPSD'') is required to perform additional system improvements that