clearly marked ''PRIVACY ACT REQUEST FOR ACCESS.'' A request for access must meet the requirements of 43 CFR 2.238.

CONTESTING RECORD PROCEDURES:

DOI has exempted portions of this system from the amendment procedures of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). DOI will make amendment determinations on a case by case basis.

An individual requesting corrections or the removal of material from his or her records should send a signed, written request to the System Manager identified above. A request for corrections or removal must meet the requirements of 43 CFR 2.246.

NOTIFICATION PROCEDURES:

DOI has exempted portions of this system from the notification procedures of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). DOI will make notification determinations on a case by case basis.

An individual requesting notification of the existence of records on himself or herself should send a signed, written inquiry to the System Manager identified above. The request envelope and letter should both be clearly marked ''PRIVACY ACT INQUIRY.'' A request for notification must meet the requirements of 43 CFR 2.235.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

This system contains civil and administrative law enforcement investigatory records that are exempt from certain provisions of the Privacy Act, 5 U.S.C. 552a(k)(2). Pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act, DOI has exempted portions of this system from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f). In accordance with 5 U.S.C. 553(b), (c) and (e), DOI promulgated a rule, which was published in the **Federal Register** at 85 FR 1282 (January 10, 2020), to amend the DOI Privacy Act regulations at 43 CFR 2.254 to claim exemptions for this system.

Additionally, the CMS may contain records from numerous sources compiled for investigatory purposes. To the extent that copies of records from other source systems of records are exempt from certain provisions of the Privacy Act, DOI claims the same exemptions for those records that are claimed for the original primary systems of records from which they originated.

The exemptions from one or more provisions of the Privacy Act may be waived on a case-by-case basis where a release would not interfere with or adversely affect investigations or enforcement activities.

HISTORY:

81 FR 67386 (September 30, 2016).

Teri Barnett,

Departmental Privacy Officer, Department of the Interior.

[FR Doc. 2021–20094 Filed 9–16–21; 8:45 am]

BILLING CODE 4310–VH–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Richard D. Fairbank; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Richard D. Fairbank,* Civil Action 1:21–cv–02325. On September 2, 2021, the United States filed a Complaint alleging that Richard D. Fairbank violated the premerger notification and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a, in connection with the acquisition of voting securities of Capital One Financial Corporation. The proposed Final Judgment, filed at the same time as the Complaint, requires Richard D. Fairbank to pay a civil penalty of $637,950.

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 Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments in English should be directed to Maribeth Petrizzi, Special Attorney, United States, c/o Federal Trade Commission, 600 Pennsylvania Avenue NW, CC–8416, Washington, DC 20580 or by email to *bccompliance@ftc.gov.*

Suzanne Morris,

Chief, Premerger and Division Statistics.

United States District Court for the District of Columbia

United States of America, c/o Department of Justice, Washington, DC 20530, Plaintiff, v. *Richard D. Fairbank, c/o Capital One Financial Corporation, 1680 Capital One Drive, McLean, VA 22102,* Defendant.

Civil Action No. 1:21–cv–02325

Judge: Rudolph Contreas

Complaint for Civil Penalties for Failure To Comply With the Premerger Reporting and Waiting Requirements of the Hart-Scott Rodino Act

The United States of America, acting under the direction of the Attorney General of the United States and at the request of the United States Federal Trade Commission, brings this civil antitrust action to obtain monetary relief in the form of civil penalties against Defendant Richard D. Fairbank (''Fairbank''). The United States alleges as follows:

I. Nature of the Action

1. Fairbank violated the notice and waiting period requirements of Section 7A of the Clayton Act, (15 U.S.C. 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ''HSR Act'' or ''Act''), with respect to the acquisition of voting securities of Capital One Financial Corporation (''COF'') in 2018.

II. Jurisdiction and Venue

2. This Court has jurisdiction over the subject matter of this action pursuant to Section 7A(g) of the Clayton Act, 15 U.S.C. 18a(g), and 28 U.S.C. 1331, 1337(a), 1345, and 1355, and over Defendant by virtue of Defendant's consent, in the Stipulation relating hereto, to the maintenance of this action and entry of the Final Judgment in this District.

3. Venue is proper in this District by virtue of Defendant's consent, in the Stipulation relating hereto, to the maintenance of this action and entry of the Final Judgment in this District.

III. The Defendant

4. Defendant Fairbank is a natural person with his principal office and place of business at 1680 Capital One Drive, McLean, VA 22101. Fairbank is engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. 18a(a)(1). At all times relevant to this complaint,

Fairbank had sales or assets in excess of $16.9 million.

IV. Other Entity

5. COF is a corporation organized under the laws of Delaware with its principal place of business at 1680 Capital One Drive, McLean, VA 22101. COF is engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. 18a(a)(1). At all times relevant to this complaint, COF had sales or assets in excess of $168.8 million.

V. The Hart-Scott-Rodino Act and Rules

6. The HSR Act requires certain acquiring persons and certain persons whose voting securities or assets are acquired to file notifications with the United States Department of Justice and the Federal Trade Commission (collectively, the ''federal antitrust agencies'') and to observe a waiting period before consummating certain acquisitions of voting securities or assets. 15 U.S.C. 18a(a) and (b). These notification and waiting period requirements apply to acquisitions that meet the HSR Act's size of transaction and size of person thresholds, which have been adjusted annually since 2004. The size of transaction threshold is met for transactions valued over $50 million, as adjusted ($84.4 million for most of 2018). In addition, there is a separate filing requirement for transactions in which the acquirer will hold voting securities in excess of $100 million, as adjusted ($168.8 million in 2018), and for transactions in which the acquirer will hold voting securities in excess of $500 million, as adjusted ($843.9 million in 2018). With respect to the size of person thresholds, the HSR Act requires one person involved in the transaction to have sales or assets in excess of $10 million, as adjusted ($16.9 million in 2018), and the other person to have sales or assets in excess of $100 million, as adjusted ($168.8 million in 2018).

7. The HSR Act's notification and waiting period requirements are intended to give the federal antitrust agencies prior notice of, and information about, proposed transactions. The waiting period is also intended to provide the federal antitrust agencies with the opportunity to investigate a proposed transaction and to determine whether to seek an injunction to prevent the consummation of a transaction that may violate the antitrust laws.

8. Pursuant to Section (d)(2) of the HSR Act, 15 U.S.C. 18a(d)(2), rules were promulgated to carry out the purposes of the HSR Act. 16 CFR 801–03 (''HSR Rules''). The HSR Rules, among other things, define terms contained in the HSR Act.

9. Pursuant to Section 801.13(a)(1) of the HSR Rules, 16 CFR 801.13(a)(1), ''all voting securities of [an] issuer which will be held by the acquiring person after the consummation of an acquisition''—including any held before the acquisition—are deemed held ''as a result of'' the acquisition at issue.

10. Pursuant to Sections 801.13(a)(2) and 801.10(c)(1) of the HSR Rules, 16 CFR 801.13(a)(2) and § 801.10(c)(1), the value of voting securities already held is the market price, defined to be the lowest closing price within 45 days prior to the subsequent acquisition.

11. Section 802.21 of the HSR Rules, 16 CFR 802.21, provides that, once a person has filed under the HSR Act and the waiting period has expired, the person can acquire additional voting securities of the same issuer without filing a new notification for five years from the expiration of the waiting period, so long as the value of the person's holdings do not exceed a threshold higher than was indicated in the filing (''802.21 exemption'').

12. Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1), provides that any person, or any officer, director, or partner thereof, who fails to comply with any provision of the HSR Act is liable to the United States for a civil penalty for each day during which such person is in violation. Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, 701 (further amending the Federal Civil Penalties Inflation Adjustment Act of 1990), the dollar amounts of civil penalties listed in Federal Trade Commission Rule 1.98, 16 CFR 1.98, are adjusted annually for inflation; the maximum amount of civil penalty in effect at the time of Fairbank's corrective filing was $42,530 per day. 84 FR 3980 (February 14, 2019).

VI. Defendant's Prior Violation of the HSR Act

13. In 1999 and 2004, Fairbank acquired voting securities of COF that resulted in holdings exceeding the then applicable HSR notification thresholds. Although he was required to do so, Fairbank did not file under the HSR Act prior to acquiring COF voting securities in 1999 and 2004.

14. On February 12, 2008, Fairbank made a corrective filing under the HSR Act for the acquisitions of COF voting securities he had made in 1999 and 2004. In a letter accompanying the corrective filing, Fairbank acknowledged that the transactions were reportable under the HSR Act but asserted that the failure to file and observe the waiting period was inadvertent.

15. Fairbank outlined in his letter a system he would implement to ensure that future reportable acquisitions would be identified and the required HSR notifications filed. The Commission did not seek civil penalties against Fairbank for the 1999 and 2004 COF acquisitions.

VII. Defendant's Violation of the HSR Act

16. Fairbank is the Chief Executive Officer of COF and, as a result of holding this position, receives stock options as well as performance stock units (''PSUs'') as a part of his compensation package. On February 5, 2013, due to vesting PSUs, Fairbank filed an HSR Notification for an acquisition of COF voting securities that would result in holdings exceeding the $100 million threshold as adjusted. The HSR Act's waiting period on this filing expired on March 7, 2013. Fairbank was permitted under the HSR Act to acquire additional voting securities of COF until five years after the 2013 filing waiting period expired (*i.e.,* March 6, 2018) without making another HSR Act filing so long as he did not exceed the next highest threshold, $500 million, as adjusted.

17. On March 8, 2018, over five years after expiration of the waiting period for the February 5, 2013 filing, Fairbank acquired 101,148 shares of COF due to vesting PSUs. Even though this acquisition did not bring Fairbank's holdings over the next highest threshold ($500 million, as adjusted), he was required to make an HSR Act filing because the five-year exemption period of his 2013 filing had ended. As a result of this acquisition, Fairbank held voting securities of COF valued in excess of the $100 million threshold, as adjusted, which in 2018 was $168.8 million.

18. Although required to do so, Fairbank did not file under the HSR Act or observe the HSR Act's waiting period prior to completing the March 8, 2018, transaction.

19. On December 18, 2019, Fairbank made a corrective filing and the waiting period expired on January 17, 2020. Fairbank was in continuous violation of the HSR Act from March 8, 2018, when he acquired the COF voting securities valued in excess of the HSR Act's then applicable $100 million filing threshold, as adjusted ($168.8 million), through January 17, 2020, when the waiting period expired on his corrective filing.

VIII. Requested Relief

Wherefore, the United States requests:

a. That the Court adjudge and decree that Defendant's acquisition of COF voting securities on March 8, 2018, was a violation of the HSR Act, 15 U.S.C. 18a; and that Defendant was in violation of the HSR Act each day from March 8, 2018, through January 17, 2020;

b. that the Court order Defendant to pay to the United States an appropriate civil penalty as provided by the Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1), the Debt Collection Improvement Act of 1996, Public Law 104 134 § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461), and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, 701 (further amending the Federal Civil Penalties Inflation Adjustment Act of 1990), and Federal Trade Commission Rule 1.98, 16 CFR 1.98, 84 FR 3980 (February 14, 2019);

c. that the Court order such other and further relief as the Court may deem just and proper; and

d. that the Court award the United States its costs of this suit.

Dated:

FOR THE PLAINTIFF UNITED STATES OF AMERICA:

Richard A. Powers,

Acting Assistant Attorney General, Department of Justice, Antitrust Division, Washington, DC 20530.

Maribeth Petrizzi,

DC Bar No. 435204, Special Attorney.

Kenneth A. Libby,

Special Attorney.

Kelly Horne,

Special Attorney.

Jennifer Lee,

Special Attorney.
Federal Trade Commission, Washington, DC 20580, (202) 326–2694.

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *Richard D. Fairbank,* Defendant.

Civil Action No. 1:21–cv–02325

[Proposed] Final Judgment

Whereas, the United States of America filed its Complaint on September 2, 2021, alleging that Defendant Richard D. Fairbank violated Section 7A of the Clayton Act (15 U.S.C. 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the ''HSR Act'')), and the United States and Defendant, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against, or any admission by, any party regarding any such issue of fact or law;

And whereas Defendant agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

Now, therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law, and upon the consent of the parties, it is hereby *ordered, adjudged, and decreed*:

I. Jurisdiction

The Court has jurisdiction of the subject matter of this action and Defendant consents solely for the purpose of this action and the entry of this Final Judgment that this Court has jurisdiction over each of the parties to this action and that the Complaint states a claim upon which relief can be granted against Defendant under Section 7A of the Clayton Act, 15 U.S.C. 18a.

II. Civil Penalty

Judgment is hereby entered in this matter in favor of Plaintiff and against Defendant, and, pursuant to Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1), the Debt Collection Improvement Act of 1996, Public Law 104–134 § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461), the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74 § 701 (further amending the Federal Civil Penalties Inflation Adjustment Act of 1990), and Federal Trade Commission Rule 1.98, 16 CFR 1.98, 84 FR 3980 (February 14, 2019), Defendant is hereby ordered to pay a civil penalty in the amount of six hundred thirty-seven thousand nine hundred and fifty dollars ($637,950). Payment of the civil penalty ordered hereby must be made by wire transfer of funds or cashier's check. If the payment is made by wire transfer, prior to making the transfer Defendant will contact the Budget and Fiscal Section of the Antitrust Division's Executive Office at *ATR.EXO-Fiscal-Inquiries@usdoj.gov* for instructions. If the payment is made by cashier's check, the check must be made payable to the United States Department of Justice and delivered to: Chief, Budget & Fiscal Section, Executive Office, Antitrust Division, United States Department of Justice, Liberty Square Building, 450 5th Street NW, Room 3016, Washington, DC 20530.

Defendant must pay the full amount of the civil penalty within thirty (30) days of entry of this Final Judgment. In the event of a default or delay in payment, interest at the rate of eighteen (18) percent per annum will accrue thereon from the date of the default or delay to the date of payment.

III. Costs

Each party will bear its own costs of this action, except as otherwise provided in Paragraph IV.C.

IV. 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. Defendant agrees 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 Defendant waives 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, including Section 7A of the Clayton Act and Regulations promulgated thereunder. Defendant agrees that he 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 Defendant has 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 Defendant, whether litigated or resolved before litigation, 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.

V. Expiration of Final Judgment

This Final Judgment will expire upon payment in full by the Defendant of the civil penalty required by Section II of this Final Judgment.

VI. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated:

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

United States District Judge.

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *Richard D. Fairbank,* Defendant.

Civil Action No. 1:21–cv–02325

Competitive Impact Statement

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

I. Nature and Purpose of the Proceeding

On September 2, 2021, the United States filed a Complaint against Defendant Richard D. Fairbank (''Fairbank''), related to Fairbank's acquisitions of voting securities of Capital One Financial Corporation (''COF'') in March 2018. The Complaint alleges that Fairbank violated Section 7A of the Clayton Act, 15 U.S.C. 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the ''HSR Act''). The HSR Act requires certain acquiring persons and certain persons whose voting securities or assets are acquired to file notifications with the United States Department of Justice and the Federal Trade Commission (collectively, the ''federal antitrust agencies'') and to observe a waiting period before consummating certain acquisitions of voting securities or assets. 15 U.S.C. 18a (a) and (b). These notification and waiting period requirements apply to acquisitions that meet the HSR Act's size of transaction and size of person thresholds, which have been adjusted annually since 2004. The size of transaction threshold is met for transactions valued over $50 million, as adjusted ($84.4 million for most of 2018). In addition, there is a separate filing requirement for transactions in which the acquirer will hold voting securities in excess of $100 million, as adjusted ($168.8 million in 2018), and for transactions in which the acquirer will hold voting securities in excess of $500 million, as adjusted ($843.9 million in 2018).

With respect to the size of person thresholds, the HSR Act requires one person involved in the transaction to have sales or assets in excess of $10 million, as adjusted ($16.9 million in 2018), and the other person to have sales or assets in excess of $100 million, as adjusted ($168.8 million in 2018). A key purpose of the notification and waiting period requirements is to protect consumers and competition from potentially anticompetitive transactions by providing the federal antitrust agencies an opportunity to conduct an antitrust review of proposed transactions before they are consummated.

Section 802.21 of the HSR Rules, 16 CFR 802.21, provides that, once a person has filed under the HSR Act and the waiting period has expired, the person can acquire additional voting securities of the same issuer without filing a new notification for five years from the expiration of the waiting period, so long as the value of the person's holdings do not exceed a threshold higher than was indicated in the filing (''802.21 exemption'').

The Complaint alleges that Fairbank acquired voting securities of COF without filing the required pre-acquisition HSR Act notifications with the federal antitrust agencies and without observing the waiting period. Fairbank's acquisition of COF voting securities exceeded the $100-million statutory threshold, as adjusted, ($168.8 million at the time of the acquisition) and Fairbank and COF met the then-applicable statutory size of person thresholds (which were $16.9 and $168.8 million, respectively). Moreover, although Fairbank was not a new investor in COF voting securities at the time of the acquisition, his transaction did not satisfy the requirements of the 802.21 exemption.

At the same time the Complaint was filed in the present action, the United States also filed a Stipulation and proposed Final Judgment that resolves the allegations stated in the complaint. The proposed Final Judgment is designed to address the violation alleged in the Complaint and penalize Fairbank's HSR Act violations. Under the proposed Final Judgment, Fairbank must pay a civil penalty to the United States in the amount of $637,950.

The United States and the Defendant have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States first withdraws its consent. 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 punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

The crux of Fairbank's violation is that he failed to submit an HSR notification even though his acquisition of COF voting securities as part of his compensation package satisfied the HSR filing requirements and he was not eligible to take advantage of the 802.21 exemption. At all times relevant to the Complaint, Fairbank had sales or assets in excess of $16.9 million. At all times relevant to the Complaint, COF had sales or assets in excess of $168.8 million.

Fairbank is Chief Executive Officer of COF and in that capacity, he frequently receives performance stock units (''PSUs'') as a part of his compensation package. On February 5, 2013, due to the imminent vesting of PSUs, Fairbank made an HSR filing for an acquisition of COF voting securities that would result in holdings exceeding the adjusted $100 million threshold then in effect of $168.8 million. The waiting period for the filing expired on March 7, 2013, and Fairbank commenced the acquisition four days later. For a period of five years, until March 6, 2018, Fairbank was permitted under the 802.21 exemption to acquire additional voting securities of COF without making another HSR Act filing so long as he did not exceed the $500 million threshold, as adjusted.

On March 8, 2018, more than five years after expiration of the waiting period for the February 5, 2013 filing, Fairbank acquired 101,148 voting securities of COF due to vesting PSUs. Even though this acquisition did not bring Fairbank's holdings over the next highest threshold ($500 million, as adjusted), he was required to make an HSR Act filing because the five-year exemption period of his 2013 filing had ended. As a result of the March 2018

acquisition, Fairbank held voting securities of COF valued in excess of the $100 million threshold, as adjusted, which in 2018 was $168.8 million. Although required to do so, Fairbank did not file under the HSR Act or observe the HSR Act's waiting period prior to completing the March 8, 2018 transaction.

Fairbank made a corrective HSR Act filing on December 18, 2019, promptly after learning that this acquisition was subject to the HSR Act's requirements and that he was obligated to file. The waiting period for that corrective filing expired on January 17, 2020.

The Complaint further alleges that Fairbank's March 2018 HSR Act violation was not the first time Fairbank had failed to observe the HSR Act's notification and waiting period requirements. In 1999 and 2004, Fairbank acquired voting securities of COF that resulted in his holdings exceeding the then-applicable HSR notification thresholds. Although he was required to do so, Fairbank did not file under the HSR Act prior to acquiring COF voting securities in 1999 and 2004. On February 12, 2008, Fairbank made a corrective filing under the HSR Act for the acquisitions of COF voting securities he had made in 1999 and 2004. In a letter accompanying the corrective filing, Fairbank acknowledged that the transactions were reportable under the HSR Act, but asserted that the failure to file and observe the waiting period was inadvertent. Fairbank outlined in his letter a system he would implement to ensure that all future reportable acquisitions would be identified and the required HSR notifications filed. The Federal Trade Commission did not seek civil penalties against Fairbank for the 1999 and 2004 COF acquisitions.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment imposes a $637,950 civil penalty designed to address the violation alleged in the Complaint, penalize the Defendant, and deter others from violating the HSR Act. The United States adjusted the penalty downward from the maximum permitted under the HSR Act because the violation was inadvertent, the Defendant promptly self-reported the violation after discovery, and the Defendant is willing to resolve the matter by consent decree and thereby avoid prolonged investigation and litigation. The penalty will not have any adverse effect on competition; instead, the relief will have a beneficial effect on competition because the federal antitrust agencies will be properly notified of future acquisitions, in accordance with the law.

IV. Remedies Available to Potential Private Litigants

There is no private antitrust action for HSR Act violations; therefore, entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust action.

V. Procedures Available for Modification of the Proposed Final Judgment

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

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, 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 will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the **Federal Register**. Written comments should be submitted to: Maribeth Petrizzi, Special Attorney, United States, c/o Federal Trade Commission, 600 Pennsylvania Avenue NW, CC–8416, Washington, DC 20580, Email: *bccompliance@ftc.gov*.

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

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the Defendant. The United States is satisfied, however, that the proposed relief is an appropriate remedy in this matter. Given the facts of this case, including the Defendant's self-reporting of the violation and willingness to promptly settle this matter, the United States is satisfied that the proposed civil penalty is sufficient to address the violation alleged in the Complaint and to deter violations by similarly situated entities in the future, without the time, expense, and uncertainty of a full trial on the merits.

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

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

Date: September 2, 2021.

Respectfully submitted,

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[FR Doc. 2021–20149 Filed 9–16–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On September 13, 2021, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Southern District of Texas in the lawsuit entitled *United States of America* v. *Formosa Plastics Corporation, Texas,* Civil Action No. 21–00043.

In this action, the United States, on behalf of the U.S. Environmental Protection Agency, filed a Complaint and proposed Consent Decree pertaining to Clean Air Act (''CAA'') violations at the petrochemical manufacturing plant (''Facility'') owned and operated by Formosa Plastics Corporation, Texas (''Defendant'') in Point Comfort, Texas. This case stems in part from a May 2, 2013 accidental release of an extremely hazardous substance that caused a fire and explosion at the Facility that resulted in multiple injuries to workers. In the Complaint, the United States alleged that the Defendant violated Section 112(r)(1) of the CAA, 42 U.S.C.