DEPARTMENT OF JUSTICE
Antitrust Division

UNTIED STATES v. HUMANA INC. and ARCADIAN MANAGEMENT SERVICES, INC.

Public Comment and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)-(h), the United States hereby publishes below the comment received on the proposed Final Judgment in United States v. Humana Inc. and Arcadian Management Services, Inc., Civil Action No: 12-cv-464-RBW, which was filed in the United States District Court for the District of Columbia on September 5, 2012 together with the Response of the United States to the comment.

Copies of the comment and the response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street, NW, Suite 4100, Washington, DC 20530 (telephone: 202-307-6456), on the Department of Justice'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, 333 Constitution Avenue NW, Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink
Director of Civil Enforcement

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNTIED STATES OF AMERICA,
Plaintiff,

v.

Case: 1:12-cv-00464 (RBW)

HUMANA INC.

and

ARCADIAN MANAGEMENT
SERVICES, INC.,

Defendants.

RESPONSE OF PLAINTIFF UNITED STATES TO
PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States hereby responds to the public comment received regarding the proposed Final Judgment in this case. The single comment received agrees that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the

proposed Final Judgment after the public comment and this response have been published in the Federal Register, pursuant to 15 U.S.C. § 16(d).

## I. PROCEDURAL HISTORY

On August 24, 2011, Humana Inc. ("Humana") and Arcadian Management Services, Inc. ("Arcadian") entered into a merger agreement whereby Humana agreed to acquire all of the outstanding shares of Arcadian for approximately $150 million. The United States filed a civil antitrust Complaint on March 27, 2012, seeking to enjoin Humana from acquiring Arcadian, alleging that the acquisition likely would substantially lessen competition in the sale of individual Medicare Advantage plans in forty-five counties and parishes in Arizona, Arkansas, Louisiana, Oklahoma, and Texas ("the relevant geographic markets"), in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. At the time the complaint was filed, Humana provided health insurance to approximately 35,000 Medicare Advantage enrollees in the relevant geographic markets, and Arcadian provided health insurance to over 14,700 Medicare Advantage enrollees in those markets. The loss of competition from the acquisition likely would have resulted in higher premiums and reduced benefits and services in the relevant geographic markets.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and Stipulation signed by the Plaintiffs and the Defendants consenting to entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. § 16. Pursuant to those requirements, the United States also filed its Competitive Impact Statement ("CIS") with the Court on March 27, 2012; published the proposed Final Judgment and CIS in the Federal Register on April 4, 2012, see 77 Fed. Reg. 20419; and had summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, published in The Washington Post on May 5, 7, 8, 9, 10, 11, and 12 of 2012. The sixty-day period for public comment ended on July 9, 2012. The United States received one comment, as described below and attached hereto.

## II. THE INVESTIGATION AND THE PROPOSED RESOLUTION

The proposed Final Judgment is the culmination of an investigation by the Antitrust Division of the United States Department of Justice ("Department") of the Agreement between defendants described above. As part of its investigation, the Department issued seven Civil Investigative Demands and conducted more than fifty-three interviews of health-insurance competitors, brokers, customers, and other individuals with knowledge of the health-insurance industry. The Department carefully analyzed the information obtained and thoroughly considered all of the issues presented.

The Department found that, in each relevant geographic market, the proposed acquisition would have eliminated substantial head-to-head competition between Humana and Arcadian in the provision of Medicare Advantage plans. This competition significantly benefited thousands of seniors. If Defendants had completed the proposed transaction as structured, the loss of competition likely would have resulted in higher premiums and reduced benefits for seniors enrolled in Medicare Advantage plans in the relevant geographic markets.

After reviewing the investigative materials, the Department determined that the proposed transaction violated Section 7 of the Clayton Act, 15. U.S.C. § 18. The proposed Final Judgment will eliminate the anticompetitive effects identified in the Complaint by requiring the Defendants to divest Arcadian's individual

Medicare Advantage business in 34 of the 45 relevant geographic markets, and Humana's individual Medicare Advantage business in 11 of them (collectively "the Divestiture Assets") to one or more acquirers approved by, and on terms acceptable to, the United States. Specifically, the divestitures will eliminate the anticompetitive effects alleged in the Complaint by requiring the Defendants to divest one or more Medicare Advantage plans in each relevant geographic market to an acquirer that will compete vigorously with the merged Humana-Arcadian. The divestitures are designed to allow the acquirers of the assets to offer uninterrupted care to members of Arcadian's and Humana's divested Medicare Advantage plans.

The Divestiture Assets include all of Arcadian's and Humana's rights and obligations under the relevant Arcadian or Humana contracts with the Center for Medicare and Medicaid Services ("CMS"). The lines of business to be divested cover approximately 12,700 individual Medicare Advantage beneficiaries.

The Defendants must satisfy the United States that a viable competitor will replace Arcadian's competitive presence in the sale of individual Medicare Advantage plans in each of the forty-five relevant geographic markets identified in the Complaint. The divestitures must be (1) made to an acquirer that has the intent and capability - including the necessary managerial, operational, technical, and financial capability - to compete effectively in the sale of Medicare Advantage products in the market, or markets, in question, and (2) accomplished so as to satisfy the United States that none of the terms of any agreement between Humana and any acquirer gives Humana the ability to interfere with the acquirer's ability to compete effectively. The proposed Final Judgment also provides that the divestiture of the Divestiture Assets may be made to one or more acquirers, provided that in each instance the United States is satisfied that the Divestiture Assets will remain viable and the divestitures will remedy the anticompetitive harm alleged in the Complaint.

Humana completed its acquisition of Arcadian on March 31, 2012. Since then, Humana has notified the United States of three proposed divestitures: (1) HealthSpring Life and Health Insurance Company, Inc., with respect to the Longview-Marshall, Amarillo, and Texarkana Plans; (2) Vantage Health Plan Inc., with respect to the Shreveport and Lake Charles Plans; and (3) WellCare of Texas, Inc., with respect to the Arizona Plans. The United States reviewed and approved the acquirer of each noticed divestiture upon concluding that each acquirer would be a long-term, viable competitor capable of preserving competition in the relevant markets that would otherwise have been lost as a result of the merger.

## III. STANDARD OF JUDICIAL REVIEW

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

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

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

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

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

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

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

\1\ Cf BNS, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in

this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"); see generally Microsoft, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

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

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." Microsoft, 56 F.3d at 1459; see also InBev, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. Microsoft, 56 F.3d at 1459-60. As the United States District Court for the District of Columbia confirmed in SBC Communications, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." SBC Commc'ns, 489 F. Supp. 2d at 15.

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

\2\The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. Compare 15 U.S.C. § 16(e) (2004), with 15 U.S.C. § 16(e)(1) (2006); see also SBC

Commc'ns, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

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

## IV. SUMMARY OF PUBLIC COMMENT AND THE UNITED STATES' RESPONSE

During the sixty-day comment period, the United States received only one comment, submitted by the American Medical Association ("AMA"), which is attached to this Response. In its June 4, 2012 comment, the AMA expressed its support for the United States' analysis as well as the remedy articulated in the proposed Final Judgment, stating that the action against the defendants "address[es] the important issue of health insurer consolidation." AMA Comment at 1. The United States has carefully reviewed the comment and has determined that the proposed Final Judgment remains in the public interest.

The AMA is the largest association of physicians and medical students in the United States. The AMA's comment states that:

MA [Medicare Advantage] plans in competitive markets have incentives to submit lower premium bids to the Centers for Medicare and Medicaid Services (CMS), have more robust physician networks, and seek high patient satisfaction and quality in order to retain members. In contrast, less competition between MA plans may decrease the plans' incentives to maintain seniors' access to health care providers and minimize out-of-pocket costs.

Id. The comment concludes that "[t]he AMA supports the DOJ's proposed final judgment regarding the acquisition of Arcadian by Humana and the DOJ's continued work to ensure that competition among insurers is sufficient to protect consumers." Id.

## V. CONCLUSION

After reviewing the AMA's public comment, the United States continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the AMA's comment and this response are published in the Federal Register.

Dated this 5th day of September 2012.

Respectfully submitted,

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June 4, 2012
Joshua H. Soven
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Re: United States v. Humana Inc. and Arcadian Management Services, Inc.; Proposed Final Judgment and Competitive Impact Statement (1:12-cv-00464)

Dear Mr. Soven:
On behalf of the physician and medical student members of the American Medical Association (AMA), I write in regard to the complaint and proposed final judgment filed by the Department of Justice (DOJ) regarding the acquisition of Arcadian Management Services, Inc. ("Arcadian") by Humana Inc. ("Humana"). The AMA files these comments pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b-e) (the "Tunney Act"), because the DOJ' s complaint and proposed final judgment address the important issue of health insurer consolidation. The consolidation of health insurance markets seriously impedes the proper functioning of health care markets overall, and oftentimes results in less care for patients, higher premiums, and interference with patient-physician relationships. The AMA supports the DOJ's careful review of health insurer mergers and the DOJ's proposed final judgment on the acquisition of Arcadian by Humana.

The DOJ's complaint asserts that the transaction would end the substantial "head-to-head" competition between Humana and Arcadian Medicare Advantage (MA) plans and impair competition in 45 counties located in Arizona, Arkansas, Louisiana, Oklahoma, and Texas. According to the DOJ's estimate, the acquisition would give Humana market shares ranging from 40 percent to 100 percent with respect to MA plans. These high market shares create a significant risk that the acquisition, if allowed to proceed unaltered, would give Humana anti-competitive market power in those 45 counties. MA plans in competitive markets have incentives to submit lower premium bids to the Centers for Medicare and Medicaid Services (CMS), have more robust physician networks, and seek high patient satisfaction and quality in order to retain members. In contrast, less

competition between MA plans may decrease the plans' incentives to maintain seniors' access to health care providers and minimize out-of-pocket costs.

The AMA supports the DOJ's proposed final judgment regarding the acquisition of Arcadian by Humana and the DOJ's continued work to ensure that competition among insurers is sufficient to protect consumers.

Sincerely,
/s/
James L. Madara, MD

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