Billing Code: 4410-11

DEPARTMENT OF JUSTICE
Antitrust Division

United States v. National Association for College Admission Counseling
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. National Association for College Admission Counseling*, Civil Action No. 1:19-cv-03706. On December 12, 2019, the United States filed a Complaint alleging that the National Association for College Admission Counseling ("NACAC") enacted certain mandatory rules (collectively referred to as the "Recruiting Rules") that unlawfully limited competition between its members in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The proposed Final Judgment, filed at the same time as the Complaint, prevents NACAC from re-imposing those or any similar rules. The proposed Final Judgment also requires NACAC to take specific compliance measures and to cooperate in any investigation or litigation examining whether or alleging that NACAC enacted a Recruiting Rule or any similar rule in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

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 should be directed to Aaron Hoag, Chief, Technology and Financial Services Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 7100, Washington, DC 20530 (telephone: 202-514-4890).

Amy Fitzpatrick,
Counsel to the Senior,
Director of Investigations and
Litigation.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Department of Justice, Antitrust Division
450 5th Street, NW, Suite 7100
Washington, DC 20530,

Plaintiff,

v.

NATIONAL ASSOCIATION FOR COLLEGE ADMISSION COUNSELING,
1050 North Highland St., Suite 400
Arlington, VA 22201,

Defendant.

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to obtain equitable relief against Defendant National Association for College Admission Counseling. The United States alleges as follows.

I. INTRODUCTION

1. This action challenges under Section 1 of the Sherman Act, 15 U.S.C. § 1, a number of rules that restrained competition between colleges and universities ("colleges") for the recruitment of first-year and transfer students.

2. Defendant National Association for College Admission Counseling ("NACAC") is the leading national trade association for college admissions. Defendant's members are divided roughly into two groups: non-profit colleges and

their admissions personnel, and high schools and their guidance counselors. NACAC's college members compete vigorously with each other for college students, both incoming freshmen and transfer students. These colleges compete in a variety of college services, including tuition cost, majors offered, ease and cost of application, campus amenities, quality of education, reputation of the institution, and prospects for employment following graduation.

3. One condition of membership in NACAC is adherence to NACAC's Code of Ethics and Professional Practices ("CEPP" or "Ethics Rules"), which sets forth mandatory rules for how member organizations engage in college admissions. These rules are drafted, voted on, and enforced by NACAC members.

4. As part of its CEPP, NACAC includes certain rules regarding the recruitment of students by colleges. Prior to September 2019, among these rules were ones that prevented, or severely limited, colleges from (1) directly recruiting transfer students from another college, (2) offering incentives of any kind to college applicants who applied via a process known as Early Decision, and (3) recruiting incoming college freshmen after May 1 (together, "Recruiting Rules").

5. The Recruiting Rules were not reasonably necessary to any separate, legitimate procompetitive collaboration between NACAC members. As part of its CEPP, NACAC establishes many rules and regulations for its members' conduct throughout the college admissions process, including, among others, when applications may open and close, the definitions of Early Decision and Early Access, and the use of paid agents in recruiting students. Many of these rules appear to strengthen the market for college admissions. The Recruiting Rules, however, were not reasonably necessary

to achieve the otherwise market-enhancing rules contained in the CEPP, and furthermore had the effect of unlawfully restraining competition among NACAC's college members, resulting in harm to college applicants and potential transfer students.

6. By establishing and enforcing the Recruiting Rules, NACAC substantially reduced competition among colleges for college applicants and potential transfer students and deprived these consumers of the benefits that result from colleges vigorously competing for students. These Recruiting Rules, which were horizontal agreements among the schools participating in NACAC, denied American college applicants and potential transfer students access to competitive financial aid packages and benefits and restricted their opportunities to move between colleges.

7. In September 2019, NACAC members voted to remove the Recruiting Rules from the CEPP. Removal of the Recruiting Rules became effective as of the time of the vote.

8. NACAC's Recruiting Rules were unlawful restraints of trade that violated Section 1 of the Sherman Act, 15 U.S.C. § 1. The United States seeks an order prohibiting such agreements and other relief.

II. JURISDICTION AND VENUE

9. Defendant NACAC is located in, and represents members that do business in, the United States. The rules at issue affected primarily the provision of college services in the United States. The colleges that provide these college services charge significant prices to students, many of whom legally reside outside the state. The sale of college services, and the NACAC rules that affect the sale, are therefore

in the flow of and substantially affect interstate commerce. The Court has subject matter jurisdiction under Section 4 of the Sherman Act, 15 U.S.C. § 4, and under 28 U.S.C. §§ 1331 and 1337, to prevent and restrain Defendant and its members from violating Section 1 of the Sherman Act, 15 U.S.C. § 1.

10. Defendants have consented to venue and personal jurisdiction in this district. Venue is proper in this district under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391.

III. DEFENDANT

11. Defendant NACAC is a trade association comprised of college admissions personnel and high school guidance counselors and their respective institutions. Although NACAC does have members around the world, its principal focus is on college admissions in the United States. NACAC currently has in excess of 15,000 members, representing several thousand colleges and high schools. In addition to maintaining and enforcing the CEPP, NACAC provides educational training to members, engages in lobbying and other public outreach, and holds dozens of popular college fairs that allow colleges to meet and recruit prospective students.

IV. TRADE AND COMMERCE

12. NACAC is the largest trade association focused on college admissions in the United States.

13. There is significant competition among colleges for college students, especially incoming freshmen. Colleges compete on a number of different dimensions of college services, including tuition cost, majors offered, ease and cost

of application, campus amenities, quality of education, reputation of the institution, and prospects for employment following graduation. The focal point for that competition is the college admissions process.

14. Colleges employ a number of competitive tactics to encourage students to apply for admission to, and ultimately attend, their institutions. Colleges typically heavily advertise to prospective applicants, including by sending physical and electronic mailings, by participating in college fairs, and by direct solicitation on high school campuses. Competition, however, does not end there. If a prospective student is accepted by more than one college, there is typically a competitive negotiation between the student and each college over the financial aid package offered to the student. Additionally, if a college has not met its enrollment goals by the summer before school begins, it often will reach back out to prospective students to make a competitive pitch to entice the student to commit to enrolling at the college in the fall. Finally, even after classes begin, many colleges advertise college transfer programs that allow students to move from one college to another between semesters.

15. In competitive circumstances, colleges would compete vigorously for students to purchase their college services. This competition benefits students because it lowers the cost of attendance and increases the incentive that the colleges have to provide high quality or innovative services. Competition also improves an applicant's ability to negotiate for a better financial aid package with the college. Defendant's Recruiting Rules, however, blunted several avenues of competition for students and disrupted the normal competitive mechanisms that would otherwise apply.

V. THE UNLAWFUL RULES

16. For decades, NACAC has had a set of rules governing the college admissions process for its members. Historically, some of the rules were mandatory for all members, and others were voluntary "best practices." In 2017, NACAC members voted to reformulate the mandatory rules into the 2017 CEPP. The CEPP rules are mandatory for all NACAC members, which includes most non-profit colleges and universities in the United States, and also for any non-member institutions that participate in NACAC's college fairs. Accordingly, agreeing to NACAC membership, or agreeing to participate in a NACAC college fair, is equivalent to agreeing with other members or college fair participants to execute on the restrictions in the CEPP. The 2017 CEPP governs many aspects of the college admissions process for its members, including, most relevant to this action, the recruitment of students.

17. The 2017 CEPP included several rules that unreasonably restricted some of the ways in which colleges recruited incoming freshmen and transfer students. The three Recruiting Rules at issue in this case are (1) the Transfer Student Recruiting Rule, (2) the Early Decision Incentives Rule, and (3) the First-Year Undergraduate Recruiting Rule. While the CEPP certainly included rules and regulations that were aimed at, and actually do, increase competitiveness between schools and ease the burden of students applying to college, these Recruiting Rules were not reasonably necessary to those procompetitive rules or any other separate, legitimate business transaction or collaboration between NACAC's members. Prior to the 2017 CEPP, virtually identical rules were voted on and included in earlier NACAC rules and have been in place for years.

A. Transfer Student Recruiting Rule

18. The Transfer Student Recruiting Rule was codified at paragraph II.D.5 of the 2017 CEPP and instructed that, "[c]olleges must not solicit transfer applications from a previous year's applicant or prospect pool unless the students have themselves initiated a transfer inquiry or the college has verified prior to contacting the students that they are either enrolled at a college that allows transfer recruitment from other colleges or are not currently enrolled in a college."

19. The Transfer Student Recruiting Rule acted as a ban on affirmatively recruiting transfer students, unduly restraining competition for transfer students amongst colleges. Without this opportunity for colleges to compe

20. te, potential transfer students may be unaware of transfer opportunities that may provide them lower priced or higher quality college services.

21. Absent the Transfer Student Recruiting Rule, colleges can engage in significantly more recruitment of transfer students through direct solicitation or otherwise. Furthermore, colleges will likely seek to provide better experiences to their existing student base in order to retain them in the face of increased competition for transfers.

B. Early Decision Incentives Rule

22. The Early Decision Incentives Rule was codified at paragraph II.A.3.a.vi of the 2017 CEPP and provided that "[c]olleges must not offer incentives exclusive to students applying or admitted under an Early Decision application plan. Examples of incentives include the promise of special housing, enhanced financial aid packages, and special scholarships for Early Decision admits."

23. NACAC defined Early Decision in the 2017 CEPP as an application plan where "[s]tudents commit to a first-choice college and, if admitted, agree to enroll and withdraw their other college applications." The Early Decision application plan is akin to an exclusive contract in any other industry. In this case, the student foregoes the opportunity to consider the competitive offers of other institutions in exchange for an early decision on acceptance. Colleges thus stand as direct competitors for Early Decision applicants, because those applicants are far more likely, if accepted, to attend the college. This results in an increased yield, which is the percentage of accepted applicants that choose to attend the college. Yield is critically important to colleges—overestimating expected yield can lead to less students attending than anticipated (thus lowering total tuition received), which could force the college to cut classes or layoff staff. The increased yield from Early Decision applicants is financially significant to colleges.

24. The Early Decision Incentives Rule explicitly limited the scope of competition for Early Decision students by removing the ability of colleges to incent students financially or otherwise. At base, the only form of payment an institution may provide in exchange for the exclusive contract with an applicant is the early decision itself. The rule prohibited all other forms of competition specifically targeted at particular Early Decision applicants.

25. Absent the Early Decision Incentives Rule, colleges are free to use any number of competitive levers to more aggressively recruit students. Some institutions may prefer to offer only the early decision, while others might compete more aggressively, such as by offering scholarships, preferential housing, or early

course registration for those admitted under Early Decision.

C. First-Year Undergraduate Recruiting Rule

26. The First-Year Undergraduate Recruiting Rule was codified at paragraph II.B.5 of the 2017 CEPP and required that, among other things, "[c]olleges will not knowingly recruit or offer enrollment incentives to students who are already enrolled, registered, have declared their intent, or submitted contractual deposits to other institutions." Furthermore, while the rule allowed colleges to "contact students who have neither deposited nor withdrawn their applications to let them know that they have not received a response from them," it also commanded that schools could "neither offer nor imply additional financial aid or other incentives" were available unless the student had "affirmed that they [had] not deposited elsewhere and [were] still interested in discussing fall enrollment."

27. The First-Year Undergraduate Recruiting Rule imposed significant restraints on a college's ability to recruit students. The rule created an arbitrary deadline of May 1 for all colleges to cease improving their recruitment offers to students, even though many students do not decide on a college until well after May 1 and many colleges therefore can reallocate resources to make better offers after May 1. Furthermore, the rule imposed significant hurdles before a college could improve its offer to a prospective student, requiring that the student first affirm both that they "[had] not deposited elsewhere" and were "still interested in discussing fall enrollment." By directly limiting the ability of colleges to improve their offers to students, the First-Year Undergraduate Recruiting Rule operated as a significant restraint on competition.

28. The arbitrariness of the May 1 deadline was fully highlighted by the recognized exception to the rule "when students are admitted from a wait list." Section II.C of the CEPP regulates institutions' use of wait lists and explicitly authorizes schools to accept students off of a wait list as late as August 1, even when those students have already committed to attend another school. NACAC thus allows for vigorous competition over a student already committed to another school when a change in circumstances frees up a spot for a student on the wait list. The change in circumstances that free up additional resources to make a better offer is not conceptually distinct, but the rules explicitly allowed the former and prohibited the latter, restricting an opportunity for students to benefit from the sorting process.

29. Absent the First-Year Undergraduate Recruiting Rule, institutions are free to continue to improve their offers to students after May 1, to the benefit of those students. If students have made up their minds about their school of choice, or are otherwise insensitive to the change in circumstances, they can simply reject any further offers received from other schools. For students who may change their minds due to a more beneficial offer, continued recruitment can only work to their benefit.

VI. VIOLATION ALLEGED

30. Defendant's college members are direct competitors in college services and compete vigorously for students. Defendant coordinated and enforced an anticompetitive

agreement that restrained colleges from improving their offers or otherwise competing vigorously to be selected by students in the college admissions process.

31. Defendant's Recruiting Rules eliminated significant forms of

competition to attract students. These rules, which were horizontal agreements between NACAC's college members, denied college applicants and potential transfer students access to potentially better financial aid packages and benefits and restricted their opportunities to move between colleges that offered superior services.

32. Accordingly, Defendant's Recruiting Rules constituted unreasonable restraints of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

VII. REQUEST FOR RELIEF

33. The United States requests that this Court:

(a) adjudge and decree that Defendant's Recruiting Rules are unreasonable restraints of trade and interstate commerce in violation of Section 1 of the Sherman Act;

(b) enjoin and restrain Defendant from enforcing or adhering to any Recruiting Rules that unreasonably restrict competition for students;

(c) permanently enjoin and restrain Defendant from establishing similar rules in the future, except as prescribed by the Court;

(d) award the United States such other relief as the Court may deem just and proper to redress and prevent recurrence of the alleged violations and to dissipate the anticompetitive effects of the illegal agreements entered into by Defendant; and

(e) award the United States the costs of this action.

Dated: December 12, 2019

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

NATIONAL ASSOCIATION FOR COLLEGE ADMISSION COUNSELING,

Defendant.

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on [DATE], alleging that Defendant National Association for College Admission Counseling violated Section 1 of the Sherman Act, 15 U.S.C. § 1, the United States and the Defendant, by its attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

AND WHEREAS, this Final Judgment does not constitute any evidence against or admission by any party regarding any issue of fact or law;

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

AND WHEREAS, the Defendant agrees to undertake certain actions and refrain from certain conduct for the purpose of remedying the anticompetitive effects alleged in the Complaint;

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

I. JURISDICTION

This Court has jurisdiction over the subject matter and each of the parties to this action. The Complaint states a claim upon which relief may be granted against the Defendant under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

II. DEFINITIONS

As used in this Final Judgment:

A. "NACAC" and "Defendant" mean the National Association for College Admission Counseling, a non-profit trade association with its headquarters in Arlington, Virginia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. "Agreement" means any agreement, understanding, pact, contract, or arrangement, formal or informal, oral or written, between two or more persons.

C. "Early Decision" means the college application plan as defined and used by the Ethics Rules.

D. "Early Decision Incentives Rule" means any Rule or Agreement, or part of a Rule or Agreement, including, but not limited to, Section II.A.3.a.vi of the Ethics Rules, that restrains any person from offering incentives to students applying under an Early Decision application plan that are not available to

students applying under a different application plan.

E. "First-Year Undergraduate Recruiting Rule" means any Rule or Agreement, or part of a Rule or Agreement, including, but not limited to, Section II.B.5 of the Ethics Rules, that restrains any college or university from recruiting or offering enrollment incentives to first-year college applicants on the basis that (a) a particular date has passed; (b) the applicants have either declined admission or not affirmatively indicated that they are still interested in attending that institution; or (c) the applicants have already enrolled in, registered at, declared their intent to enroll in or register at, or submitted contractual deposits to other institutions.

F. "Transfer Student Recruiting Rule" means any Rule or Agreement, or part of a Rule or Agreement, including, but not limited to, Section II.D.5 of the Ethics Rules, that restrains any person from recruiting or offering enrollment incentives to transfer students.

G. "Ethics Rules" means NACAC's Code of Ethics and Professional Practices.

H. "Rule" means an enforceable regulation governing particular conduct or activities.

I. "Person" means any natural person, college or university, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

J. "Management" means all officers, directors, committee chairs, and board members of NACAC, or any other person with management or supervisory

responsibilities for NACAC's operations.

III. APPLICABILITY

This Final Judgment applies to NACAC, and to all other persons in active concert or participation with NACAC who receive actual notice of this Final Judgment by personal service or otherwise.

IV. PROHIBITED CONDUCT

Defendant shall not establish, attempt to establish, maintain, or enforce any Early Decision Incentives Rule, Transfer Student Recruiting Rule, or First-Year Undergraduate Recruiting Rule. To the extent such prohibited rules currently exist in the Ethics Rules, Defendant must promptly abolish them.

V. CONDUCT NOT PROHIBITED

Nothing in Section IV shall prohibit Defendant from maintaining or enforcing any current provisions in the Ethics Rules other than those specifically enumerated in Paragraphs II.D, E, and F.

VI. REQUIRED CONDUCT

A. Within ten (10) days of entry of this Final Judgment, Defendant shall appoint an Antitrust Compliance Officer and identify to United States the Antitrust Compliance Officer's name, business address, and telephone number. Within forty-give (45) days of a vacancy in the Defendant's Antitrust Compliance Officer position, the Defendant shall appoint a replacement, and shall identify to the United States the replacement Antitrust Compliance Officer's name, business address, telephone number, and email address. The Defendant's initial or replacement appointment of an Antitrust Compliance Officer is subject to the approval of the United States in its sole

discretion.

B. The Antitrust Compliance Officer shall:

1. within sixty (60) days of entry of the Final Judgment, furnish to all of the Defendant's Management a copy of this Final Judgment, the Competitive Impact Statement, and a cover letter in a form attached as Exhibit 1;

2. within sixty (60) days of entry of the Final Judgment, in a manner to be devised by Defendant and approved by the United States, provide the Defendant's Management and employees reasonable notice of the meaning and requirements of this Final Judgment;

3. annually brief the Defendant's Management on the meaning and requirements of this Final Judgment and the antitrust laws;

4. brief any person who succeeds a person in any position identified in Paragraph II(J), within sixty (60) days of such succession;

5. obtain from each member of Management, within sixty (60) days of that person's receipt of the Final Judgment, a certification that he or she (i) has read and, to the best of his or her ability, understands and agrees to abide by the terms of this Final Judgment; (ii) is not aware of any violation of the Final Judgment that has not been reported to the Defendant; and (iii)

understands that any person's failure to comply with this Final Judgment may result in an enforcement action for civil or criminal contempt of court against the Defendant and/or any person who violates this Final Judgment;

6. maintain a record of certifications received pursuant to this Section; and

7. annually communicate to the Defendant's Management and employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of this Final Judgment or the antitrust laws.

C. Within sixty (60) days of entry of the Final Judgment, Defendant shall furnish notice of this action to its members through (1) direct communication, in a form approved by the United States prior to communication and containing the text of Exhibit 2 and (2) the creation of website pages linked to the Defendant website, to be posted for no less than one (1) year after the date of entry of the Final Judgment, containing the text of Exhibit 2 and links to the Final Judgment, Competitive Impact Statement, and Complaint on the Antitrust Division's website.

D. Defendant shall:

1. upon Management's or the Antitrust Compliance Officer's learning of any violation or potential violation of any of the terms and conditions contained in this Final Judgment,

promptly take appropriate action to investigate, and in the event of a violation, terminate or modify the activity so as to comply with this Final Judgment and maintain all documents related to any violation or potential violation of this Final Judgment;

2. within sixty (60) days of Management's or the Antitrust Compliance Officer's learning of any violation or potential violation of any of the terms and conditions contained in this Final Judgment, file with the United States a statement describing any violation or potential violation, which shall include a description of any communications constituting the violation or potential violation, including the date and place of the communication, the persons involved, and the subject matter of the communication, and steps taken to remedy any violation; and

3. have its CEO or CFO, and its General Counsel, certify in writing to the United States annually on the anniversary date of the entry of this Final Judgment that the Defendant has complied with the provisions of this Final Judgment.

VII. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized

representatives of the United States, including agents retained by the United States, shall, upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendant be permitted:

1. access during Defendant's office hours to inspect and copy, or at the option of the United States, to require Defendant to provide electronic or hard copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of NACAC, relating to any matters contained in this Final Judgment; and

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

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

C. No information or documents obtained by the means provided in this Section VII shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury

proceedings), or for the purpose of securing compliance with this Final Judgment, or for law enforcement purposes, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendant to the United States, Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendant 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," then the United States shall give Defendant ten (10) calendar days' notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VIII. RETENTION OF JURISDICTION

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

IX. 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 any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the Final Judgment and the appropriateness of any 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 and to restore all competition the United States alleged was harmed by the challenged conduct. Defendant agrees that it 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 any 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 as may be appropriate. In connection with any 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 any 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 (4) years following the expiration of the Final Judgment, if the United States has evidence that Defendant violated this Final Judgment before it expired, the United States may file an action against 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 under this Section, (2) any appropriate contempt remedies, (3) any additional relief needed to ensure the Defendant complies with the terms of the Final Judgment, and (4) fees or expenses as called for in Paragraph IX(C).

X. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire seven (7) years from the date of its entry, except that after five (5) years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendant that the continuation of the Final Judgment no longer is necessary or in the public interest.

XI. NOTICE

For purposes of this Final Judgment, any notice or other communication required to be provided to the United States shall be sent to the person at the address set forth below (or such other addresses as the United States may specify in writing to Defendant):

Chief
Technology and Financial Services Section
U.S. Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 7100
Washington, D.C. 20530

XII. PUBLIC INTEREST DETERMINATION

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

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

Date: _____

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

_____
United States District Judge

EXHIBIT 1

[Company Letterhead]

[Name and Address of Antitrust Compliance Officer]

Re: *Early Decision Incentives Rule, Transfer Student Recruiting Rule, or First-Year Undergraduate Recruiting Rule*

Dear [XX]:

I am providing you this notice regarding a judgment recently entered by a federal judge in Washington, D.C. affecting rulemaking practices. The judgment applies to our association and all of its employees, including you, so it is important that you understand the obligations it imposes on us. [CEO Name] has asked me to let each of you know that [s/he] expects you to take these obligations seriously and abide by them.

The judgment prohibits us from establishing rules that restrict the ability of colleges to recruit early decision applicants, incoming freshmen, and transfer students. There are limited exceptions to this restriction. You must consult me before determining whether a particular recruiting rule is subject to an exception under the judgment.

A copy of the court order is attached. Please read it carefully and familiarize yourself with its terms. The judgment, rather than the above description, is controlling. If you have any questions about the judgment or how it affects your activities, please contact me as soon as possible.

Thank you for your cooperation.

Sincerely,
[Defendant's Antitrust Compliance Officer]

EXHIBIT 2

Please take notice that National Association for College Admission Counseling ("NACAC") has entered into a settlement with the United States Department of Justice relating to its rulemaking practices.

On December 12th, 2019, the United States filed a federal civil antitrust Complaint alleging that NACAC established rules that restricted its members' ability to recruit college applicants and transfer students in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. At the same time, the United States filed a proposed settlement that prohibits NACAC from entering into, maintaining, or enforcing such rules.

As part of its settlement with the United States, NACAC confirmed that it has withdrawn any offending rule already in place.

The Final Judgment, which was recently entered by a federal district court, is effective for seven years. Copies of the Complaint, Final Judgment, and Competitive Impact Statement are available at:

[Link to Complaint]

[Link to Final Judgment]

[Link to Competitive Impact Statement]

UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. NATIONAL ASSOCIATION FOR COLLEGE ADMISSION COUNSELING, *Defendant*.

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THE PROCEEDING

On December 12, 2019, the United States filed a civil antitrust Complaint alleging that Defendant National Association for College Admission Counseling ("NACAC") enacted certain mandatory rules (collectively referred to as the "Recruiting Rules") that unlawfully limited competition between its members in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

NACAC members include colleges and their admissions personnel and high schools and their guidance counselors. NACAC's college members compete with each other for college students, both college applicants and potential transfer students.

Colleges compete on a number of different dimensions, including tuition cost, majors offered, ease and cost of application, campus amenities, quality of education, reputation of the institution, and prospects for employment following graduation. The Complaint, however, alleges that NACAC, through its rulemaking authority, established three mandatory rules that limited the manner in which its college members could compete for college applicants and potential transfer students.

The first rule, the Transfer Student Recruiting Rule, expressly prevented colleges from affirmatively recruiting potential transfer students from other schools. The second rule, the Early Decision Incentives Rule, forbade colleges from offering incentives, financial or otherwise, to Early Decision applicants. The third rule, the First-Year Undergraduate Recruiting Rule, limited the ability of colleges to recruit incoming first-year students after May 1. These three rules— collectively "the Recruiting Rules"—were not reasonably necessary to any separate, legitimate business transaction or collaboration among NACAC and its members. According to the Complaint, the Defendant's Recruiting Rules unlawfully restricted competition between NACAC's members and were unreasonable restraints of trade that violated Section 1 of the Sherman Act, 15 U.S.C. § 1.

At the same time the Complaint was filed, the United States filed a Stipulation and Order and proposed Final Judgment, which would remedy the violation by enjoining the Defendant from enacting, maintaining, or enforcing the Recruiting Rules, subject to limited exceptions.

NACAC members voted in September of 2019 to repeal the Recruiting Rules, effective as of that time, and the Final Judgment seeks to prevent NACAC from re-imposing

those or any similar rules. The proposed Final Judgment also requires NACAC to take specific compliance measures and to cooperate in any investigation or litigation examining whether or alleging that NACAC enacted a Recruiting Rule or any similar rule in violation of Section 1 of the Sherman Act, 15
U.S.C. § 1.

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

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

A. The Defendant

NACAC is a nonstock corporation organized in the State of Delaware and headquartered in Arlington, Virginia. Beyond establishing ethics rules that govern its members, NACAC holds dozens of college fairs that allow prospective students to interact with a number of regional and national colleges.

B. Defendant-Established Anticompetitive Recruiting Rules

The Complaint alleges that NACAC, through the version of its Code of Ethics and Professional Practices ("CEPP" or "Ethics Rules") that was effective during and prior to 2018, established three rules that unreasonably restrained competition between its member colleges for college applicants and potential transfer students. These rules, described in more detail below, were voted on by NACAC's members and were mandatory not only for NACAC's members but also for any non-members that

participated in NACAC's college fairs. Failure to abide by the rules embodied in the CEPP could have resulted in disciplinary actions by NACAC, including but not limited to exclusion from its college fairs or expulsion from NACAC.

1. Transfer Student Recruiting Rule

The first rule at issue is the Transfer Student Recruiting Rule, originally embodied at Section II.D.5 of the CEPP. That rule provided that:

> Colleges must not solicit transfer applications from a previous year's applicant or prospect pool unless the students have themselves initiated a transfer inquiry or the college has verified prior to contacting the students that they are either enrolled at a college that allows transfer recruitment from other colleges or are not currently enrolled in a college.

As described in the Complaint, this rule acted as a substantial impediment to competition between colleges for potential transfer students, and provided only limited exceptions that allowed for transfer recruitment. Absent this restriction, colleges will be free to recruit potential transfer students more aggressively, which will lead to colleges to making more attractive offers, like lower tuition costs or higher quality admissions packages.

2. Early Decision Incentives Rule

The second rule at issue is the Early Decision Incentives Rule, which was at Section II.A.3.a.vi of the CEPP. This rule stated that:

> Colleges must not offer incentives exclusive to students applying or admitted under an Early Decision application plan. Examples of incentives include the promise of special housing, enhanced financial aid packages, and special scholarships for Early Decision admits. Colleges may, however, disclose how admission rates for Early Decision differ from those for other admission plans.

This rule, as alleged in the Complaint, unreasonably limited the competition for Early Decision applicants. In the current admissions ecosystem, some colleges allow students

to apply via Early Decision, which provides students with an accelerated decision on admission to that school but also requires from the student a binding commitment to attend if admitted. The Early Decision Incentives Rule forbade colleges from offering incentives (beyond the accelerated decision) to those students. This was an unreasonable restraint on competition. Absent this restriction, colleges will be free to offer a set of incentives for Early Decision applicants that best serves the college and its applicant base, including special scholarships, preferred housing, or other discounts on tuition. Over time, this will lead to more aggressive recruitment of students through more attractive offers of admission.

3. First-Year Undergraduate Recruiting Rule

The final rule at issue is the First-Year Undergraduate Recruiting Rule, which was at Section II.B.5 of the CEPP. This rule required that:

> Colleges will not knowingly recruit or offer enrollment incentives to students who are already enrolled, registered, have declared their intent, or submitted contractual deposits to other institutions. May 1 is the point at which commitments to enroll become final, and colleges must respect that. The recognized exceptions are when students are admitted from a wait list, students initiate inquiries themselves, or cooperation is sought by institutions that provide transfer programs. These statements capture the spirit and intent of this requirement:
>
> > a. Whether before or after May 1, colleges may at any time respond to a student- initiated request to reconsider an offer or reinstate an application.
> >
> > b. Once students have declined an offer of admission, colleges may no longer offer them incentives to change or revisit their college decision. Before May 1, however, colleges may ask whether candidates would like a review of their financial aid package or other incentives before their admission is canceled, so long as the question is asked at the time that the admitted students first notify them of their intent to cancel their admission.
> >
> > c. After May 1, colleges may contact students who have neither

> deposited nor withdrawn their applications to let them know that they have not received a response from them. Colleges may neither offer nor imply additional financial aid or other incentives unless students have affirmed that they have not deposited elsewhere and are still interested in discussing fall enrollment.

This rule imposed several limits on the ability of colleges to recruit incoming first-year students. First, it prevented colleges from recruiting students who the colleges knew had declared their intent, through making a deposit or otherwise, to attend another institution. Second, it prevented colleges from offering incentives to students who had declined an offer of admission (with the limited exception set forth in II.B.5.b. of the CEPP). Third, it limited the ability of colleges, after May 1, to recruit students who had neither made a deposit nor withdrawn their application.

The First-Year Undergraduate Recruiting Rule imposed significant restrictions on competition between colleges for first-year students. It limited the ability of colleges to continue to compete for students who had declined an offer of admission and significantly restricted the ability of colleges to compete for students after May 1. Absent these restrictions, colleges will be free to offer more aggressive financial aid packages or other inducements to students to entice them to enroll. Due to this enhanced competition, students will receive more attractive offers of admission.

C. NACAC's Recruiting Rules Were Unlawful Agreements under Section 1 of the Sherman Act

Horizontal restraints that are not reasonably necessary to any separate, legitimate business transaction or collaboration are unlawful under Section 1 of the Sherman Act. Section 1 outlaws any "contract, combination . . . , or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Courts have long interpreted this language to prohibit only "unreasonable" restraints of trade. *Bus. Elecs. Corp. v. Sharp*

Elecs. Corp., 485 U.S. 717, 723 (1988). Courts have consistently found that trade association rules are no different than horizontal agreements entered into between the association's members. For example, in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the Supreme Court upheld a challenge to a trade association's ban on competitive bidding as a horizontal agreement between its members. Other Supreme Court precedent is consistent with this outcome.[1] Additionally, when a trade association works to enforce a stated policy, it faces "more rigorous antitrust scrutiny." *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 n.6 (1988) (citing Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941)).*

[1] See, generally, *Fed. Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447

(1986);
California Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756 (1999)

The United States has historically challenged the actions of trade associations or other membership organizations where they advance unreasonable restraints among their memberships. In addition to the *Professional Engineers* case cited above, on June 27, 1995, the United States challenged several accreditation practices of the American Bar Association as violative of Section 1.[2] The United States has also challenged association rules in the chiropractic,[3] nursing,[4] and realty[5] industries, among others.

As described in the Complaint, NACAC's Recruiting Rules were horizontal agreements restricting competition between colleges for college applicants and potential transfer students. The Recruiting Rules suppressed and eliminated competition to the detriment of college applicants and potential transfer students by restraining the ability of NACAC's college members to recruit them. They were not reasonably necessary to achieve the otherwise market-enhancing rules contained in the CEPP. Accordingly, they were unlawful agreements under Section 1 of the Sherman Act.

[2] Complaint, *United States v. American Bar Association*, No. 95-cv-1211 (D.D.C. June 27, 1995).

[3] Complaint, *United States v. Oklahoma State Chiropractic Independent Physicians Association*, No 13-CV-21-TCK-TLW (N.D.Okla. January 10, 2013).

[4] Complaint, *United States v. Arizona Hospital and Healthcare Association*, No. CV07- 1030-PHX (D.Ariz. May 22, 2007).

[5] Complaint, *United States v. National Association of Realtors*, No. 05C-5140 (N.D. Ill. Sept. 8, 2005).

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment sets forth (1) conduct in which the Defendant may not engage; (2) certain actions the Defendant is required to take to ensure compliance with the terms of the proposed Final Judgment; (3) the Defendant's obligations to cooperate with the United States in its investigations of the promulgation of any future rules similar to the Recruiting Rules; and (4) oversight procedures the United States may use to ensure compliance with the proposed Final Judgment.

A. Prohibited Conduct

Section IV of the proposed Final Judgment prevents the Defendant from establishing, maintaining, or enforcing any "Transfer Student Recruiting Rule," "Early Decision Incentives Rule," or "First-Year Undergraduate Recruiting Rule" or any similar rules. The proposed Final Judgment defines each of those terms in Section II, and the definitions are intended to correspond with the rules described in Section II.B of this Competitive Impact Statement.

Furthermore, Section IV of the proposed Final Judgment requires that the Defendant abolish any "Transfer Student Recruiting Rule," "Early Decision Incentives Rule," or "First-Year Undergraduate Recruiting Rule" currently within its ethics rules.

B. Required Conduct

Section VI of the proposed Final Judgment sets forth various mandatory procedures to ensure the Defendant's compliance with the proposed Final Judgment, including a requirement to provide officers, directors, and management with copies of the proposed Final Judgment and annual briefings about its terms. Additionally,

Section VI requires the Defendant to provide notice to its members about this action that includes a description of the terms of the proposed Final Judgment, the Competitive Impact Statement, and the Complaint. Finally, Section VI requires the Defendant's Antitrust Compliance Officer to promptly notify the United States upon receipt of any complaint that the terms of the proposed Final Judgment have been violated.

C. Compliance

To facilitate monitoring of the Defendant's compliance with the proposed Final Judgment, Section VII permits the United States, upon reasonable notice and a written request:

(1) access during the Defendant's office hours to inspect and copy, or at the option of the United States, to require the Defendant to provide electronic or hard copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of the Defendant, relating to any matters contained in the proposed Final Judgment; and (2) to interview, either informally or on the record, the Defendant's officers, employees, or agents.

Additionally, Section VII requires the Defendant, upon written request of the United States, to submit written reports or responses to interrogatories relating to any of the matters contained in the proposed Final Judgment.

D. Enforcement and Expiration of the Final Judgment

The proposed Final Judgment contains provisions designed to promote compliance and make the enforcement of the Final Judgment as effective as possible. Paragraph IX(A) provides that the United States retains and reserves all rights to

enforce the provisions of the proposed Final Judgment, including its rights to seek an order of contempt from the Court. Under the terms of this paragraph, the Defendant has 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 the Defendant has waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph IX(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment was drafted to restore the competition the United States alleged was harmed by the Defendant's challenged conduct. The Defendant agrees that it will abide by the proposed Final Judgment, and that it 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 IX(C) of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that the 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 proposed Final Judgment, Paragraph IX(C) provides that, in

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

Paragraph IX(D) states that the United States may file an action against the 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 X of the proposed Final Judgment provides that the Final Judgment will expire seven 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 the Defendant that the 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 the Defendant.

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 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 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:

Chief, Technology and Financial
Services Section Antitrust Division
United States Department of
Justice 450 Fifth Street, NW,
Suite 7100
Washington, DC 20530

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against NACAC. The United States could have continued the litigation and sought preliminary and permanent injunctions against NACAC. The United States is satisfied, however, that the requirements of the proposed Final Judgment will preserve competition among colleges for the provision of college services to college applicants and potential transfer students in the United States. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day

comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

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

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

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may "not to 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). 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 ("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.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 1

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 20, 2019

Respectfully submitted,

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