reproduction cost): $7.50 for the Partial Consent Decree (without attachments).

Henry S. Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

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DEPARTMENT OF JUSTICE

Antitrust Division

United States et al. v. Blue Cross and Blue Shield of Montana, Inc., et al.; Public Comments 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 comments received on the proposed Final Judgment in *United States et al.* v. *Blue Cross and Blue Shield of Montana, Inc. et al.,* Civil Action No. 1:11–CV–00123–RFC, which were filed in the United States District Court for the District of Montana on February 21, 2012, together with the response of the United States to the comments.

Copies of the comments and the response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Montana, 316 N. 26th Street, Billings, MT 59101. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Director of Civil Enforcement.

In the United States District Court for the District of Montana; Billings Division

United States of America and State of Montana, Plaintiffs, v. *Blue Cross and Blue Shield of Montana, Inc., et al., Defendants.*

Case No. 1:11–cv–00123–RFC.

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 November 8, 2011, the United States and the State of Montana filed a civil antitrust lawsuit challenging an agreement (the ''Agreement'') between defendant Blue Cross and Blue Shield of Montana, Inc. (''Blue Cross'') and defendants Billings Clinic; Bozeman Deaconess Health Services, Inc.; Community Medical Center, Inc.; Northern Montana Health Care, Inc.; and St. Peter's Hospital (collectively, the ''hospital defendants'').

The hospital defendants are five of the six hospitals that own defendant New West Health Services, Inc. (''New West''), a health insurer that competes against Blue Cross to provide commercial health insurance to Montana consumers. In the Agreement, Blue Cross agreed to pay $26.3 million to the hospital defendants in exchange for their collectively agreeing to stop purchasing health insurance for their own employees from New West and instead buy insurance for their employees from Blue Cross exclusively for six years. Blue Cross also agreed to provide the hospital defendants with two seats on Blue Cross's board of directors as long as the hospitals do not compete with Blue Cross in the sale of commercial health insurance.

The Complaint alleged that the Agreement would likely cause New West to exit the markets for commercial health insurance, eliminating an important competitor to Blue Cross and ultimately leading to higher prices and lower-quality service for consumers. Consequently, the Complaint alleged that the Agreement unreasonably restrained trade in the sale of commercial health insurance within Montana in the Billings Metropolitan Statistical Area (''MSA''), Bozeman Micropolitan Statistical Area (''MiSA''), Helena MiSA, and Missoula MSA, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1; and that the Agreement substantially lessened competition in the sale of commercial health insurance in those same areas, and would likely continue to do so, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and the Montana Unfair Trade Practices Act, Mont. Code Ann. § 30–14–205.

Simultaneously with the filing of the Complaint, the United States and the State of Montana 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 November 8, 2011; published the proposed Final Judgment and CIS in the **Federal Register** on November 18, 2011, see 76 FR 71355; 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 alternating days from November 17 to November 29, 2011, and in the Billings Gazette on November 14, 17, 19, 21, 23, 25, and 28. The sixty-day period for public comment ended on January 28, 2011. One comment was received, as described below and attached hereto.

II. The Investigation and 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 among defendants described above. As part of its investigation, the Department issued eight Civil Investigative Demands and conducted more than 30 interviews of health-insurance competitors, brokers, customers, and other individuals with knowledge of the health-insurance industry in Montana. The Department carefully analyzed the information obtained and thoroughly considered all of the issues presented.

The Department found that the Agreement would effectively eliminate New West as a viable competitor in the sale of commercial health insurance for several reasons. First, news that none of New West's owners would buy health insurance for their own employees from New West created a perception that New West was exiting the commercial health-insurance market, likely causing many existing and potential customers to stop purchasing (or decline to purchase) insurance from New West. Second, the Agreement would have led New West and its hospital owners to significantly reduce their support for and efforts to win commercial health-insurance customers, further hindering its ability to compete. Furthermore, because the hospital defendants agreed to act collectively, the Agreement with Blue Cross ensured that New West would lose the support of all its owners

and likely exit the market. The Agreement further deterred the hospitals from supporting New West by granting them two positions on Blue Cross's board of directors as long as the hospitals do not own or belong to a competing insurer.

By eliminating New West as an effective competitor, the Agreement would have significantly increased concentration in the markets for commercial health insurance in Montana. In the four relevant areas, Blue Cross's share of commercial health insurance ranged from approximately 43% to 75% at the time the Agreement was signed, and New West's share ranged from 7% to 12%.

The Agreement also would have eliminated vigorous head-to-head competition between Blue Cross and New West. For the past several years, New West had been one of only two significant alternatives to Blue Cross for commercial health insurance in the relevant areas. Many consumers viewed Blue Cross and New West as the two most significant insurers in the relevant areas and each other's main competitor. Without New West as an effective competitor, Blue Cross would likely have increased prices and reduced the quality and service of commercial health-insurance plans to employers and individuals in the relevant areas.

After reviewing the investigative materials, the Department determined that the defendants' conduct violated Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 7 of the Clayton Act, 15 U.S.C. 18, as alleged in the Complaint. The proposed Final Judgment will eliminate the anticompetitive effects identified in the Complaint by requiring New West and the hospital defendants to divest New West's commercial health-insurance business, including its administrative-services-only contracts and its fully-insured business, but excluding the contracts that cover the hospital defendants' employees and their dependents.

Other provisions of the proposed Final Judgment will enable the acquirer of the divested assets to compete promptly and effectively in the market for commercial health insurance. Most importantly, Sections IV(G)–(I) ensure that the acquirer has a cost-competitive health-care provider network. Section IV(G) requires the hospital defendants to sign three-year contracts with the acquirer on terms that are substantially similar to their existing contractual terms with New West. To address health-care provider contracts that are not under the hospital defendants' control, Sections IV(H) and IV(I) require New West and the hospital defendants—at the acquirer's option—to (1) use their best efforts to assign the contracts that are not under their control to the acquirer, or (2) lease New West's provider network to the acquirer for up to three years, using their best efforts to maintain the network, including maintaining contracts with substantially similar terms.

New West and the hospital defendants proposed to sell the Divestiture Assets to PacificSource Health Plans, and the United States, after consulting with the State of Montana, has approved PacificSource as the acquirer. New West and PacificSource have entered into a definitive sale agreement and filed the necessary notification and request for approval with the Montana Commissioner of Securities and Insurance.

III. Standard of Judicial Review

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.,* No. 08–1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.'').

As the United States Court of Appeals for the District of Columbia Circuit has held, a court considers under the APPA, 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

[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' '').

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'').

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 COMMCTIS, 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: ''[the] 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]

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 January 13, 2012 comment, the AMA expressed its support for the United States' and the State of Montana's analysis as well as the remedy articulated in the proposed Final Judgment, stating that the action against the defendants ''represents an important step towards reining in health insurers and hospitals whose actions conspire to restrain competition and maintain monopolized health insurance markets.'' 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 the AMA ''applauds the DOJ for its vigilance in recognizing the anticompetitive conduct'' of the defendants and for ''fashioning a remedy that holds the promise of nurturing competition in Montana.'' Id. The AMA views the proposed Final Judgment as creating a ''pro-competitive remedy that addresses the entry barriers faced by small Blue Cross rivals such as New West.'' Id. The comment concludes that ''the proposed consent decree will reverse the anticompetitive effects of the challenged Agreement.'' 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: February 10, 2012

Respectfully submitted,

/s/ Scott I. Fitzgerald

Scott I. Fitzgerald (WA Bar #39716),
Claudia H. Dulmage.

Attorneys for the United States, U.S. Department of Justice, Antitrust Division, Litigation I Section, 450 Fifth Street NW., Suite 4100, Washington, DC 20530.

CERTIFICATE OF SERVICE

I hereby certify that, on February 10, 2012, a copy of the foregoing document was served on the following persons by the following means:

1, 2, 3 CM/ECF

_____ Hand Delivery

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_____ Overnight Delivery Service

_____ Fax

_____ E-Mail

1. Clerk, U.S. District Court
2. Counsel for Defendant Blue Cross and Blue Shield of Montana:
David C. Lundsgaard
Graham & Dunn PC

[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) (if 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.'').

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/s/ Scott I. Fitzgerald

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January 13, 2012

Mr. Joshua H. Soven,
Chief, Litigation I Section,
Antitrust Division,
United States Department of Justice,
450 5th Street, N, Suite 4700,
Washington, DC 20530.

Re: Comments to Proposed Consent Judgment in *U.S.* v. *Blue Cross and Blue Shield of Montana, Inc., et al.* [FR Doc. 2011–29656]

Dear Mr. Soven:

On behalf of the physician and medical student members of the American Medical Association (AMA), I appreciate the opportunity to provide comments in response to the action by the Antitrust Division of the Department of Justice (DOJ) in the matter of Blue Cross and Blue Shield of Montana, Inc. (Blue Cross) and several Montana-area hospitals (the Hospital Defendants) in *U.S.* v. *Blue Cross and Blue Shield of Montana, Inc., et al.,* Civil Action No. 1:11–cv–00123–RFC. This action represents an important step towards reining in health insurers and hospitals whose actions conspire to restrain competition and maintain monopolized health insurance markets.

Accordingly, the DOJ has acted in the public interest with the proposed decree, and the AMA submits the following comments in support. According to the DOJ's complaint, Blue Cross agreed to pay $26.3 million to the Hospital Defendants in exchange for their agreement to collectively stop purchasing health insurance from New West Health Services, an insurer owned by the Hospital Defendants, and instead buy from Blue Cross exclusively for six years (the Agreement). The Agreement, it is alleged, would likely cause New West to exit the relevant Montana markets for commercial health insurance. Because New West is Blue Cross's only viable competitor, the Agreement would have eliminated all competition. Accordingly, as the Complaint alleges, the Agreement would have led to higher prices and lower quality service for consumers.

The AMA applauds the DOJ for its vigilance in recognizing the anticompetitive conduct described above and for fashioning a remedy that holds the promise of nurturing competition in Montana. For years, the AMA has been expressing its concern over the lack of competition in health insurance markets nationally. In its most recent study of health insurance markets, the AMA found that 83% of the 368 metropolitan areas studied qualify as highly concentrated areas, while in 95% of these markets, at least one insurer has a market share of 30% or greater. See, ''Competition in Health Insurance: A Comprehensive Study of U.S. Markets,'' American Medical Association (AMA) (2011 update). Health insurance markets that are monopolized not only hurt consumers directly, they also enable health insurers to exercise monopsony power in physician markets, eventually leading to reductions in service levels and quality of care. The market conditions in Montana are consistent with what the AMA has found nationally.

Blue Cross' dominance in Montana health insurance markets presents a significant barrier to the market success of smaller rivals such as New West, even assuming the absence of exclusionary conduct such as that alleged in this case. In 2010, then Assistant Attorney General Christine Varney reported that the DOJ found that new health insurer entrants cannot compete with incumbents for potential purchasers of their products unless the new entrants can offer similar provider discounts to their enrollees—but they cannot offer these competitive discounts without being able to promise providers a significant number of enrollees to make such an arrangement viable. In turn, these barriers of entry create an anticompetitive environment in which the dominant insurer can achieve lower input prices by demanding lower rates from providers (who face a significant loss of revenue if they refuse such demands), without having to lower their consumer output prices (the cost of their premiums).[1]

In the instant case, the DOJ has fashioned a pro-competitive remedy that addresses the entry barriers faced by small Blue Cross rivals such as New West. First, the proposed final judgment would eliminate the anticompetitive effects of the challenged Agreement by requiring New West and the Hospital Defendants to divest New West's commercial health insurance business. Tentative arrangements call for the acquiring entity to be PacificSource, which is an established health insurer in the Pacific Northwest. To overcome Blue Cross' advantage in obtaining discounts from the Hospital Defendants because of its size, the proposed consent decree creatively requires New West and the Hospital Defendants to help provide PacificSource with a cost-competitive provider network. The Hospital Defendants are required to sign three-year hospital contracts with PacificSource on terms substantially similar to the existing contractual terms with New West. The decree also requires Blue Cross to provide thirty days' written notice to the DOJ before entering into any exclusive contracts with health insurance brokers—contracts that might hinder important health insurer access to brokers. These provisions will help ensure that PacificSource will be able to compete as effectively as New West before the parties entered the Agreement.

In sum, the divestiture of New West mandated in the proposed consent decree will reverse the anticompetitive effects of the challenged Agreement, while the additional provisions may foster an even more robust competition within the market than existed before the Agreement. Given the weak state of health insurer competition in Montana, we applaud the DOJ for creating this remedy in the public interest.

Sincerely,
James L. Madara, MD.

[FR Doc. 2012–4862 Filed 2–29–12; 8:45 am]
BILLING CODE M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances, Notice of Application, Mylan Pharmaceuticals, Inc.

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing

[1] See, Speech by Christine Varney, Assistant Attorney General Antitrust Division, U.S. Department of Justice at American Bar Association/American Health Lawyers Association Antitrust in Healthcare Conference, May 24, 2010.