

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

*Plaintiff,*

v.

RYAN COHEN

*Defendant.*

Civil Action No.

COMPETITIVE IMPACT STATEMENT

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

**I. NATURE AND PURPOSE OF THE PROCEEDING**

On September 18, 2024, the United States filed a Complaint against Defendant Ryan Cohen (“Cohen” or “Defendant”), relating to Cohen’s acquisitions of voting securities of Wells Fargo & Company (“WF”) from March 2018 through September 2020. The Complaint alleges that Cohen violated Section 7A of the Clayton Act, 15 U.S.C. § 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HSR Act”). The HSR Act requires certain acquiring persons and certain persons whose voting securities or assets are acquired to file notifications with the Department of Justice and the Federal Trade Commission (collectively, the “

These notification and waiting period requirements apply to acquisitions that meet the HSR Act's size of transaction and size of person thresholds, which have been adjusted annually since 2004. The size of transaction threshold is met for transactions valued over \$50 million, as adjusted (\$84.4 million in 2018). In addition, there is a separate filing requirement for transactions in which the acquirer will hold voting securities in excess of \$100 million, as adjusted (\$168.8 million in 2018).

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

An exemption from HSR Act filings may apply under certain circumstances. Section (c)(9) of the HSR Act, 15 U.S.C. § 18a(c)(9), exempts from the requirements of the HSR Act acquisitions of voting securities "solely for the purpose of investment" if, as a result of the acquisition, the securities held do not exceed 10 percent of the outstanding voting securities of the issuer. Section 801.1(i)(1) of the HSR Rules, 16 C.F.R. § 801.1(i)(1), defines the term "solely for the purpose of investment" as follows:

Voting securities are held or acquired "solely for the purpose of investment" if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer ("Investment-Only Exemption").

The Complaint alleges that Cohen acquired voting securities of WF without filing the required pre-acquisition HSR Act notifications with the federal antitrust agencies and without observing the waiting period. Cohen's acquisitions of WF voting securities exceeded the \$100-million statutory threshold, as adjusted, and Cohen and WF met the then-applicable adjusted statutory size of person thresholds. Moreover, none of Cohen's acquisitions were exempt from HSR Act notification and waiting period requirements under the Investment-Only Exemption.

At the same time the Complaint was filed in the present action, the United States also filed a Stipulation and Consent to Dismiss with Prejudice and Costs, which is attached as an exhibit to the Complaint.



acquire voting securities; in particular for very large open market acquisitions, it is not excusable negligence to be unaware of HSR Act legal requirements.

On January 14, 2021, Cohen made a corrective filing under the HSR Act for the acquisition he made on March 22, 2018, which resulted in Cohen's aggregated holdings of WF voting securities to exceed the \$100 million threshold, as adjusted. Cohen was in continuous violation of the HSR Act from March 22, 2018, when he acquired the WF voting securities valued in excess of the HSR Act's \$100 million filing threshold, as adjusted, through February 16, 2021, when the waiting period expired on his corrective filing.

### **III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT**

The proposed Final Judgment imposes a \$985,320 civil penalty designed to address the violation alleged in the Complaint, penalize the Defendant, and deter others from violating the HSR Act. The United States adjusted the penalty downward from the maximum permitted under the HSR Act because the violation was inadvertent and the Defendant is willing to resolve the matter by proposed final judgment and thereby avoid prolonged investigation and litigation. However, the penalty amount reflects that Defendant was seeking a board seat during the period in which he was making acquisitions of WF voting securities and could no longer rely on the Investment-Only Exemption. In addition, many of these acquisitions were large, open market acquisitions, such that he should have been aware of his obligations under the HSR Act. Open market acquisitions require an acquirer to affirmatively and actively decide to acquire voting securities; in particular for very large open market acquisitions, it is not excusable negligence to be unaware of HSR Act legal requirements. The penalty will not have any adverse effect on competition; instead, the relief should have a beneficial effect on competition because it will



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

#### **VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT**

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the Defendant. The United States is satisfied, however, that the proposed relief is an appropriate remedy in this matter. Given the facts of this case, including the Defendant's self-reporting of the violations

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 proposed Final Judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft v. Bond*



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

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

(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

## VIII. DETERMINATIVE DOCUMENTS

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

Date: September 18, 2024

Respectfully submitted,

/s/ Kenneth A. Libby  
Kenneth A. Libby