imports from Belarus, Russia,[2] and Ukraine of urea ammonium nitrate solutions, provided for in subheading 3102.80.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce (Commerce) to be sold in the United States at less than fair value (LTFV).

Background

The Commission instituted these investigations effective April 19, 2002, following receipt of a petition filed with the Commission and Commerce by the Nitrogen Solutions Fair Trade Committee, an ad hoc coalition of U.S. urea ammonium nitrate solutions producers, consisting of CF Industries, Inc., Long Grove, IL; Mississippi Chemical Corp., Yazoo City, MS; and Terra Industries, Inc., Sioux City, IA. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of urea ammonium nitrate solutions from Belarus, Russia, and Ukraine were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of October 23, 2002 (67 FR 65143). Pursuant to Commerce's notice of extension of the time limits for its final antidumping determinations (67 FR 67823, November 7, 2002), the Commission published a notice of revised schedule in the **Federal Register** of November 20, 2002 (67 FR 70093). The hearing was held in Washington, DC, on February 20, 2003, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these reviews to the Secretary of Commerce on April 10, 2003. The views of the Commission are contained in USITC Publication 3591 (April 2003), entitled Urea Ammonium Nitrate Solutions from Belarus, Russia, and Ukraine: Investigations Nos. 731–TA–1006, 1008, and 1009 (Final).

By order of the Commission.
Issued: April 10, 2003.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 03–9334 Filed 4–15–03; 8:45 am]

BILLING CODE 7020–02–P

[2] On February 19, 2003, Commerce signed a suspension agreement concerning UAN from Russia; however, pursuant to petitioners' request on the following day, Commerce continued its investigation and published notices of suspension, continuance, and completion of the investigation in the **Federal Register** of March 3, 2003 (68 FR 9977–9984). The Commission thus continued its investigation of subject imports from Russia pursuant to 19 U.S.C. 1673c(g).

DEPARTMENT OF JUSTICE

Antitrust Division

U.S. v. Archer-Daniels-Midland Company and Minnesota Corn Processors, LLC; Public Comments and Plaintiff's Response

Notice is hereby given pursuant to section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(d), that the Public Comments and Plaintiff's Response thereto have been filed with the United States District Court of the District of Columbia in *United States* v. *Archer-Daniels-Midland Company,* Case Number: 1:02-cv-1768 (JDB).

On September 6, 2002, the United States filed a civil antitrust Complaint alleging that the proposed acquisition by Archer-Daniels-Midland Company (''ADM'') of Minnesota Corn Processors, LLC (''MCP'') would violate section 7 of the Clayton Act, 15 U.S.C. 18. The Complaint alleged that ADM and MCP are two of the largest corn wet millers in the United States, competing to manufacture and sell corn syrup and high fructose corn syrup (''HFCS'') to many of the same purchasers throughout the United States and Canada. ADM's acquisition of MCP would have eliminated this competition and increased concentration in the already highly concentrated corn syrup and HFCS markets, making anticompetitive coordination among the few remaining corn wet millers in these markets more likely. As as result, the proposed acquisition would have substantially lessened competition for the manufacture and sale of corn syrup and HFCS products in violation of section 7 of the Clayton Act.

Public comment was invited within the statutory 60-day comment period. The three comments received, and the response thereto, are hereby published in the **Federal Register** and filed with the Court. Copies of these materials are available for inspection at the U.S. Department of Justice, Antitrust Division, Suite 215 North, 325 7th Street, NW., Washington, DC 20530 (telephone: 202–514–2692), and at the Clerk's Office of the U.S. District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001.

Constance K. Robinson,

Director of Operations, Antitrust Division.

Response of the United States to Public Comments on the Proposed Final Judgment

Communications with respect to this document should be addressed to:

Roger W. Fones, Chief, Donna N. Kooperstein, Assistant Chief; Michael P. Harmonis, Jessica K. Delbaum, Attorneys.

Transportation, Energy & Agriculture Section, Antitrust Division, U.S. Department of Justice, 325 Seventh Street, NW., Washington, DC 20530. (202) 307–6357.

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b) (''Tunney Act''), plaintiff, the UNITED STATES OF AMERICA, acting under the direction of the Attorney General, hereby files comments received from members of the public concerning the proposed Final Judgment in this civil antitrust suit and the Response of the United States to those comments.

I. Factual Background

A. The Parties to the Transaction

Archer-Daniels-Midland Company (''AMD'') and Minnesota Corn Processors, LLC (''MCP'') were two of the largest corn wet millers in the United States, competing to manufacture and sell corn syrup, high fructose corn syrup (''HFCS'') and other wet-milled products principally to the food and beverage industries in the United States and Canada. In addition, both firms manufactured and sold fuel ethanol, and they also procured, transported, stored, manufactured, processed, and merchandised a wide variety of other agricultural commodities and products.

B. The Proposed Acquisition

On July 11, 2002, ADM entered into an agreement with MCP to acquire MCP's corn wet milling business, including MCP's two corn wet milling plants in Marshall, Minnesota and Columbus, Nebraska and its network of regional blending, storage, and distribution stations. As a result of the transaction, MCP has become a wholly-owned subsidiary of ADM.

C. The Complaint

On September 6, 2002, the United States Department of Justice (the ''Department'') filed a complaint with this Court alleging that ADM's acquisition of MCP substantially would lessen competition in the markets for

corn syrup and HFCS in the United States and Canada, in violation of section 7 of the Clayton Act (15 U.S.C. 18). The transaction would have eliminated the competition between ADM and MCP, making anticompetitive coordination among the few remaining corn wet millers more likely in those markets.

D. The Proposed Settlement

The Department, ADM, and MCP filed a joint stipulation for entry of a proposed Final Judgment settling this action on September 6, 2002. The proposed Final Judgment contains three principal provisions for relief. First, it requires ADM and MCP to have dissolved CornProductsMPC Sweeteners LLC (''CPMCP'') on or prior to December 31, 2002. CPMCP was the marketing and sales joint venture that MCP had formed with Corn Products International (''CPI'' to serve as the exclusive sales and distribution outlet in the United States, Canada, and Mexico for most corn syrup and HFCS products made by CPI and MCP in the United States. Second, prior to or simultaneously with the closing of ADM's acquisition of MCP, the proposed Final Judgment requires the defendants to have provided CPI written notice of their election to dissolve CPMCP. Upon written notice of their election to dissolve CPMCP, the defendants additionally were required to have provided CPI with written notice that CPI is permitted to conduct independent operations in competition with the defendants and CPMCP. Third, the proposed Final Judgment requires the defendants to compete independently of CPMCP and CPI. The proposed Final Judgment does not affect or alter any obligations of ADM and MCP to facilitate or ensure that CPMCP completes the performance of any existing contracts or commitments to its customers.

E. Compliance With The Tunney Act

To date, the parties have compiled with the provisions of the Tunney Act as follows:

(1) The Complaint and proposed Final Judgment were filed on September 6, 2002;

(2) The Competitive Impact Statement (''CIS'') was filed on September 13, 2002;

(3) Defendants filed statements pursuant to 15 U.S.C. 16(g) on September 17 and 18, and October 2, 2002;

(4) A summary of the terms of the proposed Final Judgment and CIS was published in the Washington Post, a newspaper of general circulation in the District of Columbia, for seven days during the period September 23, 2002, through September 29, 2002;

(5) The Complaint, proposed Final Judgment and CIS were published in the **Federal Register** on November 7, 2002, 67 FR 67,864 (2002); [1]

(6) The 60-day public comment period specified in 15 U.S.C. 16(b) commenced on November 7, 2002, and terminated on January 7, 2003; and

(7) The United States hereby files the comments of members of the public (attached as Appendix A) together with this Response of the United States to the comments, pursuant to 15 U.S.C. 16(b).

The United States will move this Court for entry of the proposed Final Judgment after the comments and the Response are published in the **Federal Register**. The proposed Final Judgment cannot be entered before that publication. 15 U.S.C. 16(d).

II. Legal Standard Governing the Court's Public Interest Determination

Upon the publication of the public comments and this Response, the United States will have fully complied with the Tunney Act. After receiving the United States' motion for entry of the proposed Final Judgment, the Court must determine whether it ''is in the public interest.'' 15 U.S.C. 16(e). In doing so, the Court must apply a deferential standard and should withhold its approval only under very limited conditions. *See, e.g., Mass. Sch. of Law at Andover, Inc.* v. *United States,* 118 F.3d 776, 783 (D.C. Cir. 1997). Specifically, the Court should review the proposed Final Judgment ''in light of the violations charged in the complaint and * * * without approval only [a] if any of the terms appear ambiguous, [b] if the enforcement mechanism is inadequate, [c] if third parties will be positively injured, or [d] if the decree otherwise makes 'a mockery of judicial power.''' *Id.* (quoting *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1462 (D.C. Cir. 1995)).

With this standard in mind, the Court should review the comments of members of the public concerning the proposed Final Judgment and the United States' Response to those comments. As this Response makes clear, entry of the proposed Final Judgment is in the public interest.

III. Summary of Public Comments

In a total of three comments, nine individuals and three organizations expressed their views on the proposed Final Judgment. Their comments are summarized below.

Peter C. Carstensen, Professor of Law at the University of Wisconsin Law School, writing on behalf of himself, the National Farmers Union, the Organization for Competitive Markets, and Professors Paul Brietzke, John Connor, Thomas Greaney, Neil E. Harl, Delbert Robertson, Stephen Ross, and Kyle Stiegert, filed a comment that is critical of the Department's CIS in several respects. Professor Carstensen states that the Department's CIS failed to disclose or discuss: (1) MCP's and CPI's separate market shares in the corn syrup and HFCS markets identified in the complaint; (2) ADM's direct and indirect ownership interests in Tate & Lyle PLC (''Tate & Lyle''), the corporate parent of A.E. Staley Manufacturing Company (''Staley''); (3) a recent decision by the United States Court of Appeals for the Seventh Circuit, in the HFCS antitrust litigation; (4) additional relief that would go beyond the competitive harm from the merger; and (5) the impact of ADM's acquisition of MCP in the market for ethanol. Professor Carstensen concludes that the Department should file a revised CIS, one that provides additional factual and other information he requests.

The American Antitrust Institute (''AAI''), an independent education, research, and advocacy organization, filed a comment endorsing the comment filed by Professor Carstensen.

C. LeRoy Deichman, a former farmer-member of MCP and certified professional agronomist, complains that MCP may have manipulated the shareholder vote on ADM's proposal to acquire MCP. Mr. Deichman also is disappointed that the acquisition eliminates MCP as a positive role model for other farmer-cooperative organizations, and he is concerned that the transaction might lead to lower prices for farmers and higher prices to consumers of corn sweeteners and ethanol.

IV. The Department's Response To Specific Comments

We now turn to the comments that raise questions about our analysis or that suggest relief different or supplemental to that contained in the proposed Final Judgment. Copies of this Response, without the Appendix, are being mailed to those who filed comments.

A. Professor Carstensen's Comment

Congress enacted the Tunney Act, among other reasons, ''to encourage additional comment and response by providing more adequate notice [concerning a proposed consent judgment] to the public,'' S. REp. No.

[1] The Department also posted the Complaint, proposed Final Judgment and the CIS on its Web site, *http://www.usdoj.gov/atr/cases/indx358.htm.*

93–298, at 5 (1973); H.R. Rep. No. 93–1463, at 7 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6538. The CIS is the primary means by which Congress sought to provide more adequate notice to the public. The Tunney Act requires that the CIS recite:

(1) The nature and purpose of the proceeding;

(2) A description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) An explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) The remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) A description of the procedures available for modification of such proposal; and

(6) A description and evaluation of alternatives to such proposal actually considered by the United States.

15 U.S.C. 16(b). In this case, the Department has satisfied all of these requirements. See CIS at 1–3 (explaining the nature and purpose of the proceeding), 3–6 (describing events that gave rise to the alleged violation of the antitrust law), 6–7 (explaining the proposed Final Judgment), 7 (explaining remedies available to potential private plaintiffs), 7–8 (explaining procedures available for modifying the proposed Final Judgment), and 8 (describing and evaluating alternatives to the proposed Final Judgment).

Professor Carstensen's comments purport to challenge the content of the CIS but are in fact criticisms of the Department's enforcement decisions, specifically the scope of the Complaint and the substance of the proposed Final Judgment. As explained below, these criticisms are without merit.

1. The Department Is Not Required To Disclose in the Complaint or the CIS MCP's and CPI's Separate Market Shares in the Corn Syrup and HFCS Markets

The Complaint at, ¶¶ 19–20, sets out market concentration data, including individual capacity shares for ADM and CPMCP (the joint venture of MCP and CPI), in the relevant corn syrup and HFCS markets in the United States and Canada, alleging that these markets are highly concentrated and that the concentration levels will substantially increase after the transaction.[2] This is a sufficient allegation of market concentration in a Section 7 case. *See, e.g., United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 363–64 (1963) (noting that acquisition by a firm that would control 30% of the market after the acquisition threatens undue concentration and is presumptively unlawful). Professor Carstensen contends that the CIS should set forth separate market shares attributable to each of the CPMCP partners, MCP and CPI, so that the post-remedy change in the Herfindahl-Hirschman Index (''HHI'') can be calculated. See Professor Carstensen's Comment at 5.[3]

But such precise calculations are neither required by law nor very informative in assessing the effectiveness of the remedy in this case.[4] As the Complaint alleges and the CIS explains, the harm from ADM's acquisition of MCP was an increased likelihood of successful anticompetitive coordination among the remaining firms. The goal of the proposed Final Judgment, therefore, is to preserve the number of effective independent competitors. An independent competitor is effective if it has enough productive capacity to increase its output significantly in response to anticompetitive price increases. The proposed Final Judgment accomplishes this goal by requiring that ADM and MCP dissolve CPMCP by December 31, 2002, thus preserving the number of effective independent competitors, including CPI.

Professor Carstensen suggests without explanation that ADM and CPI may not compete after acquisition. *See* Professor Carstensen's Comment at 7. Based on the Department's investigation, both ADM and CPI will have the ability and incentive to compete to increase their sales at their rivals' expense. There is excess capacity throughout the corn wet milling industry, a condition that gives ADM, CPI, and their competitors the incentive to respond aggressively to any increase in price.

In summary, the Department found that ADM's acquisition of MCP, as originally structured, would have enhanced the prospects for coordination among the four remaining corn wet millers, likely raising domestic prices for corn syrup and HFCS above competitive levels. The Department has concluded that the restructuring of the acquisition as required by the proposed Final Judgment resolves these competitive concerns by preserving the pre-acquisition number of effective, competitive sellers of corn syrup and HFCS.

2. ADM's Ownership Interest in Tate & Lyle Does Not Threaten Competition

Professor Carstensen contends that ADM ''directly and indirectly'' has a 25% stake in Tate & Lyle, the corporate parent of Staley, which is one of the five corn wet milling operations in the United States. In Professor Carstensen's view, this stake in Staley threatens competition, and so it should have been discussed in the CIS. See Professor Carstensen's Comment at 5–7.

The Complaint and CIS appropriately focus on the potential anticompetitive effects of the acquisition being challenged, not pre-existing or prior transactions, such as ADM's acquisition of Tate & Lyle stock. The relevance of the ADM-Staley cross ownership to this case is limited to whether ADM's acquisition of MCP should be analyzed as reducing the number of competitors from five to four or from four to three. The Department's investigation revealed that ADM and Staley should be treated as independent competitors.

Professor Carstensen overstates ADM's equity interest in Tate & Lyle. His own citations reveal that ADM has a 41.5% interest in Compagnie Industrielle et Financiere des Produits Amylaces (''CIP''), a European firm with a 10% interest in Tate & Lyle.[5] ADM also has a direct 5.76% interest in Tate & Lyle. *See* Tate & Lyle, 2002 Annual Report 63 (2002). Thus, even assuming for purposes of analysis that ADM's 41.5% ownership of CIP gives ADM control of CIP's 10% interest in Tate & Lyle (and Staley), ADM's interest in Tate & Lyle is less than 16%, and its

[2] CPI and MCP were selling all of their corn syrup and HFCS products in the United States through the CPMCP joint venture, and so they effectively were competing as one firm.

[3] The Department uses the HHI to measure market concentration, and it is calculated by summing the squares of the individual shares of all firms in the market. *See* U.S. Department of Justice/Federal Trade Commission's *Horizontal Merger Guidelines* § 1.5 issued 1992, revised 1997, reprinted in 4 Trade Reg. Rep. (CCH) at ¶ 13,104, available at *http://www.atrnet.gov/policies/mergers.* A market is broadly characterized as being highly concentrated if its HHI is above 1800. *See id.*

[4] HHI statistics provide a useful framework, but they are only the starting point for merger analysis. See Horizontal Merger Guidelines at § 1.51(c). For the Court's information, however, the net effect of the acquisition and proposed relief is to decrease the relevant HHI in corn syrup by about 50 points, to increase the relevant HHI in HFCS 42 by about 300 points, and to increase the relevant HHI in HFCS 55 by about 100 points.

[5] *See* Archer-Daniels-Midland Co., 1998 Annual Report 5 (1998), *http://www.sec.gov/Archives/edgar/data/7084/0000007084–98–000029.txt*; Tate & Lyle, 2002 Annual Report 63 (2002), *http://www.tateandlyle.com/IR/financials/annual_reports/documents/2002_TL_AR_Full.pdf.*

share of Staley's profits is not quite 10% ((10% × 41.5%) + 5.76% = 9.91%).

Based on its investigation, the Department concluded that ADM's 16% stake in Tate & Lyle does not give ADM control or influence over Staley's business decisions, give ADM access to competitively sensitive information at Staley, or materially affect competition in more subtle ways; *e.g.*, by realigning incentives so that ADM is less inclined to compete aggressively against Staley because of its share of Staley's profits. Department staff thus determined that ADM's ownership interest in Tate & Lyle (and Staley) does not support treating ADM's acquisition of MCP as a four to three rather than a five to four situation, and so there was no reason to mention that interest in the CIS.

3. The Seventh Circuit's Decision in the High Fructose Corn Syrup Litigation Is Consistent With the Department's Complaint

Professor Carstensen contends that the Department's CIS should have discussed the Seventh Circuit's decision in *In re High Fructose Corn Syrup Litig.*, 295 F.3d 651, 653–54 (7th Cir. 2002), cert. denied, 71 U.S.L.W. 3352 (U.S. Feb. 24, 2003) (No. 02–692), 71 U.S.L.W. 3353 (U.S. Feb. 24, 2003) (No. 02–705), 71 U.S.L.W. 3367 (U.S. Feb. 24, 2003) (No. 02–736). *See, e.g.*, Professor Carstensen's Comment at 2. Professor Carstensen believes the decision is particularly relevant because it suggests to him that ADM should not be permitted to acquire MCP ''without any other change in the structure'' of the HFCS industry. *See id.* at 6–8.

Beyond what is said about how to decide summary judgment motions in antitrust cases, the HFCS decision suggests that the manufacturers of corn syrup and HFCS operate in concentrated markets under conditions that are conducive to coordinated interaction. The Department reached a similar conclusion and thus brought this case. That said, the Department had no reason, and certainly no obligation, to discuss the HFCS litigation in the CIS.

4. The Department Has Considered All Appropriate Forms of Relief

Professor Carstensen contends that the Department did not consider alternative remedies, including a remedy he proposes to dissolve the CPMCP joint venture, to divest ADM's interest in Tate & Lyle and to bar ADM's acquisition of MCP. Professor Carstensen would have the Department ''increase [ ] the number of separate firms from 5 to 6,'' *see* Professor Carstensen's Comment at 8, thereby increasing rather than preserving the existing competition. This remedy is inappropriate—the purpose of an antittrust remedy is to restore or protect competition, but not to enhance it. *See, e.g., Ford Motor Co.* v. *United States*, 405 U.S. 562, 573 (1972). Professor Carstensen's remedy is also inappropriate because it reaches beyond the Complaint. *See United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995). By proposing this remedy, Professor Carstensen improperly invites the Court to restructure an industry without legal basis and to intrude on the Department's prosecutorial role. *See id.*

The Department did consider the only appropriate relief raised by Professor Carstensen, barring the acquisition. See CIS at 8. However, that relief would have required a full trial on the merits against the defendants. The Department concluded that the proposed Final Judgment would preserve the existence of five independent competitors, while avoiding the time, expense, and uncertainty of trial. *Id.*

5. The Department Considered the Impact of the Acquisition in the Ethanol Market

Professor Carstensen also has asserted that ''this merger may create significant competitive issues'' and that there is ''a plausible basis for concern'' in the ethanol market. *See* Professor Carstensen's Comment at 10–11 (emphasis added). He goes on to construct his own hypothetical case, and now demands that the Court evaluate the proposed Final Judgment against that case. *Id.* at 8–15. Under the principles of Microsoft Corp., however, this demand is improper, for it too reaches far beyond the Complaint. *See* 56 F.3d at 1459. In any event, Department staff, in the course of its investigation, carefully considered the competitive implications of ADM's acquisition of MCP in the market for ethanol and found no evidence to support any credible theory of antitrust violation.

B. AAI's Comment

AAI's comment voices many of the same concerns expressed by Professor Carstensen, all of which were addressed supra.

C. C. LeRoy Deichman's Comment

C. LeRoy Deichman's principal concern appears to be the MCP manipulated the shareholder vote on ADM's acquisition of MCP. That concern, and Mr. Deichman's concern that MCP is being eliminated as a role model for other farmer cooperatives that might be interested in building their own ethanol producing facilities, do not raise antitrust issues, and it is inappropriate for the Department to respond to them in this memorandum. Mr. Deichman's concerns that the acquisition may lead to higher prices in ethanol and sweetener markets raise antitrust issues that we have already addressed. In short, consumers would be forced to pay ethanol and sweetener prices above competitive levels only if the acquisition enable makers of these products to behave in a noncompetitive manner, and it is highly unlikely that the acquisition will have that effect. See sections IV.A.1. and 5. Finally, Mr. Deichman's concern about farm prices (which we take to mean corn prices) is unwarranted. Having carefully reviewed the facts, the Department found no reason to believe that the acquisition would have an adverse impact on competition in markets other than the corn syrup and HFCS markets alleged in the Complaint. Indeed, in addition to the five corn wet millers preserved as a result of the proposed Final Judgment, there exist many other alternative buyers of corn to whom farmers can sell their crops. Therefore, the acquisition is highly unlikely to give corn wet millers monopsony power to depress the prices they pay farmers for corn.

Conclusion

The Competitive Impact Statement and this Response to Comments demonstrate that the proposed Final Judgment serves the public interest. Accordingly, after publication of the Response in the **Federal Register** pursuant to 15 U.S.C. 16(b), the United States will move this Court to enter the Final Judgment.

Dated this 1st day of April, 2003.

Michael P. Harmonis, Jessica K. Delbaum,
Attorneys; United States Department of Justice, Antitrust Division, 325 7th Street, NW., Suite 500, Washington, DC 20530. (202) 307–6371.

Certificate of Service

I hereby certify that on this 1st day of April, 2003, I have caused a copy of the foregoing Response of the United States to Public Comments on the Proposed Final Judgment and the attached Appendix to be served by first class mail, postage prepaid, and by facsimile on counsel for defendants in this manner:

David James Smith, Vice President, Secretary & General Counsel, Archer-Daniels-Midland Company, 4666 Faries Parkway, Decatur, IL 62526. Telephone: (217) 424–6183. Facsimile: (217) 424–6196. Counsel

for Defendant Archer-Daniels-Midland Company.

Paul B. Hewitt, Akin Gump Strauss Hauer & Feld L.L.P., 1333 New Hampshire Avenue, Northwest, Washington, DC 20036. Telephone: (202) 887–4000. Facsimile: (202) 887–4288. Counsel for Defendant Archer-Daniels-Midland Company.

Neil W. Imus, Vinson & Elkins L.L.P., 1455 Pennsylvania Avenue, Northwest, Washington, DC 20004. Telephone: (202) 639–6675. Facsimile: (202) 879–8875. Counsel for Defendant Minnesota Con Processors, LLC.

Jessica K. Delbaum,
Attorney, Antitrust Division, U.S. Department of Justice, 325 Seventh St., NW., Suite 500, Washington, DC 20530. Telephone: (20) 616–1636. Facsimile: (202) 616–2441.

Appendix A

University of Wisconsin Law School, 975 Bascom Mall, Madison, Wisconsin 53706.

December 27, 2002.

Roger W. Fones,
Chief, Transportation, Energy & Agriculture Section Antitrust Division, United States Department of Justice, 325 Seventh Street, NW., Suite 500, Washington, DC 20530.

Re: Proposed Settlement of *United States* v. *Archer-Daniels-Midland Co and Minnesota Corn Processors, LLC.*

Dear Mr. Fones: Enclosed is a Tunney Act comment on the proposed settlement of the suit challenging ADM's acquisition of Minnesota Corn Processors. The goals motivating this comment are to contribute to the improvement of antitrust analysis and enforcement. My work was entirely pro bono and uncompensated.

I am honored that seven distinguished scholars of antitrust and economics have agreed to support this statement. Their names are listed therein. In addition, two major organizations, the National Farmers Union and the Organization for Competitive Markets also support this statement.

If you or any of your staff have any questions about this comment, please feel free to contact me at the above address or by phone (608/263–7416). I can also be reached by email at *pccarste@facstaff.wisc.edu.*

Yours truly

Peter C. Carstensen,
Young-Bascom Professor of Law.

Tunney Act Comments on the Proposed Settlement of *United States* v. *Archer-Daniels-Midland Co and Minnesota Corn Processors, LLC,* Federal District Court, District of Columbia, Civil Case No. 02–1768

Submitted by Professor Peter C. Carstensen on behalf of himself and The National Farmers Union, The Organization for Competitive Markets, Professor Paul Brietzke, Professor John Connor, Professor Thomas Greaney, Professor Neil E. Hari, Professor Delbert Robertson, Professor Stephen Ross, Professor Kyle Stiegert

At a time when the U.S. government and the American public are demanding that private enterprises provide full and complete disclosure of essential information to avoid repetition of the scandals that have destroyed Enron, Worldcom, and Arthur Anderson, it is incumbent on the Department of Justice to make the same kind of full and complete disclosure of information and analysis in connection with its obligations under the Tunney Act. Only then, can the court and the public in fact judge the appropriateness of the proposed settlement of this or any other major antitrust case. The court should not grant approval to this proposed consent decree until the requirements of the Tunney Act are fully satisfied.

I am joined in these comments by two important organizations, the National Farmers Union and the Organization for Competitive Markets, concerned with competition policy and its impact on the markets for agricultural products as well as a group of seven scholars in the fields of economics and antitrust law. Appendix A provides additional background information about both the organizations and individuals supporting these comments.

The government is proposing to settle its challenge to Archer-Daniels-Midland's (ADM) acquisition of Minnesota Corn Processors (MCP) by allowing the acquisition on condition that MCP withdraw from a joint marketing arrangement with Corn Products International (Corn Products) concerning high fructose corn syrup (HFCS). As demonstrated below, the disclosure contained in the Competitive Impact Statement filed in connection with the proposed settlement of the government's does not satisfy the basic requirements of the Tunney Act.

The Competitive Impact Statement fails to disclose essential facts about the impact of this acquisition on the directly affected markets and ADM's status and role in those markets. Further it does not explain how the proposed decree, in light of those facts and an apparent failure to consider relevant relief options as well as the Antitrust Division's own Merger Guidelines, can successfully protect the identified markets from increased risks of anticompetitive conduct. Finally, the Competitive Impact Statement omits entirely any discussion of the impact of allowing this combination in the related ethanol markets in which ADM is by many orders of magnitude the largest firm and MCP is the second largest.

It is our position that the government must file a revised Competitive Impact Statement that discloses all relevant information and analysis relating to the competitive implications of this settlement. Without such disclosure, the record will not disclose ''the competitive impact of such judgment'' nor its ''impact . . . upon the public generally. . . .'' Clayton Act, Section 5(e)(1) and (2); 15 USC sec. 16(e)(1) and (2).; As result, the District Court can not perform its obligation to ''determine that the entry of such judgment is in the public interest.'' Section 5(e); 15 USC sec. 16(e).

Summary

In order to determine whether the proposed settlement of this merger case will serve the public interest in preserving competition in all the markets in which the combining enterprises both compete, it is essential that all relevant facts be fully disclosed. This acquisition will cause a substantial change in the market structure of the corn syrup, HFCS and ethanol markets. In all of these markets the effect of this transaction will or may be to increase concentration.

The initial focus of concern should be the analysis of the corn syrup and HFCS markets. Yet, the Competitive Impact Statement fails to disclose certain essential facts about those markets, ADM's position in them, and the government's basis for believing that the remedy proposed would eliminate the anticompetitive risks posed by the disclosed as well as undisclosed facts about those markets. First, there is no disclosure of MCP's separate market share in corn syrup or either of the two HFCS markets that the complaint and Competitive Impact Statement focus on. Hence, it is not possible to tell what impact this acquisition will have on concentration in these already concentrated markets where entry of new competitors is unlikely. Second, the Competitive Impact Statement does not disclose or discuss ADM's ownership directly and indirectly of 25% of the stock of the corporate parent of one of its major, putative competitors in these markets. Third, the Competitive Impact Statement does not report the decision of the 7th Circuit that examined the risks of anticompetitive, interdependent conduct in the HFCS markets and found them to be real and substantial. Fourth, the Competitive Impact Statement discussion of alternative remedies implies that the government did not consider obvious additional relief that would have both allowed this merger and reduced the ownership linkages among ostensible competitors within both the HFCS and ethanol markets. Finally, and most seriously, the Competitive Impact Statement does not explain why, in light of the foregoing facts, the proposed remedy, separating MCP from Corn Products but allowing its combination with ADM, is likely to achieve the goal of preserving and enhancing competition in these markets. Because of these omissions of facts and explanations of essential analysis, it is not possible for a court, under even the most lax version of the government's self-serving standard for review, to approve this proposed decree.

In respect to the markets involving ethanol, the Competitive Impact Statement is totally silent. The facts are that ADM is the largest producer of ethanol with a very large market share, and MCP is the second largest producer. In addition, ADM is one of an apparently limited number of firms that have the resources to market and distribute ethanol to end users. Thus, this combination will substantially increase ADM's share of the ethanol production market and may further entrench its position in the marketing of ethanol. It is possible that there are good reasons why, despite these prima facie anticompetitive implications of this acquisition, it is unlikely to have such

effects. Given that the government has chosen to challenge the combination of these two firms, and their respective position in the ethanol market is well known, it is incumbent on the government to explain why this aspect of the combination does not raise any antitrust concerns. The government, as is evident from its statement of its interpretation of the standard for review, takes an unjustifiedly narrow view of its obligation to the court and the public in explaining its enforcement decisions. It is notable that the Antitrust Division in other contexts and the FTC in the context of announcing a decision not to challenge a merger have been able to make informative statements about the merits of their decisions.

I. The Facts in the Case

ADM is a very large diversified company with extensive activities in a variety of markets. Among its major activities are the production of corn syrup, HFCS and ethanol. In the corn syrup and HFCS markets, ADM is a major producer. According to the government's complaint, it has 10% of the relevant production capacity for corn syrup, 33% for HFCS 42 and 25% for HFCS 55, the two distinct types of HFCS. The markets for all three of these products are, according to the government, highly concentrated and not amenable to entry even if prices are increased substantially above cost.

ADM is also the leading producer of ethanol.[1] Various estimates of its productive capacity and production exist. Its present share of production is unlikely to be less than 30% of all domestic production and may exceed 50%. In addition it is one of a relatively few firms with the specialized skills, equipment and volume to engage in the distribution and marketing of ethanol. As will be discussed infra, this may involve substantially more economies of scale and scope than actual production of ethanol. It also appears to be the case that ADM like the handful of other major marketers acts as a marketing agent for a number of producers who lack the skill, volume and specialized equipment to market their own production.

MCP was originally a cooperative that operated two plants engaged in the ''wet'' milling of corn. From the wet milling process, it produced corn syrup, HFCS and ethanol. Its market share in the corn syrup and HFCS markets is not known. Prior to the conclusion of this merger, MCP sold its corn syrup and HFCS production through a joint venture with Corn Products. In combination, those two firms had productive capacity of 20% of corn syrup, 15% of HFCS 42 and 15% of HFCS 55. In production of ethanol, MCP was the second largest producer with 6% of total production capacity and one of only four firms, including ADM, with productive capacity exceeding 100 million gallons a year.[2]

The Antitrust Division's challenge to this acquisition focused only on the corn syrup and HFCS markets. The Division proposes to settle its suit against this merger by obtaining termination of MCP's joint venture with Corn Products concerning the marketing of HFCS and corn syrup. The settlement would then allow ADM to acquire MCP's two facilities.

Although for litigation purposes a focus primarily on the HFCS markets is sensible because those are the best markets in which to challenge this merger, once the government has decided to settle the HFCS element based on a partial divestiture of unrelated facilities, then it becomes essential to examine the impact of the merger not only in the HFCS markets but also in the other markets where MCP and ADM have substantial, competitive market positions.

II. The HFCS Market

The government's objection to this merger was based only on its impact on the HFCS market and the more general corn syrup market. HFCS comes in two varieties—HFCS 42 and HFCS 55 (signifying the percentage of fructose in each type). The government contends that each type has unique uses and no good substitutes, given current prices for alternative sweeteners. These markets are concentrated with a limited number of competitors. The government also contends that there are substantial barriers to entry into the production of corn syrup or either type of HFCS. Hence, normal market forces are unlikely to reverse any increase in concentration. For these reasons, a substantial merger within these markets creates significant risks of anticompetitive harms. Those risks are, first, the danger of tacit or explicit coordination among competitors to impose higher prices on buyers and, second, that a sufficiently dominant firm can engage in unilateral, anticompetitive acts that exclude new competition and/or exploit existing buyers.

Prior to this merger, there were 5 producers of HFCS, treating the MCP-Corn Products combination as a single firm because of the joint marketing arrangement. It appears from the Competitive Impact Statement and complaint that MCP has substantial corn syrup and HFCS production capacity. Neither the complaint nor the Competitive Impact Statement provides the breakdown in capacity between MCP and Corn Products.[3] As a direct result of that omission, neither the public nor the court can determine the impact of acquisition of MCP's facilities on the concentration levels in any of these markets.

Tate & Lyle, based in the U.K., is a processor of corn products operating on a global basis. Its American subsidiary, A.E. Staley, is among the five leaders in the HFCS market. Staley also has an ethanol plant in Tennessee with a capacity of 60 million gallons. ADM is the largest single shareholder in Tate & Lyle with 15.8% of its voting stock.[4] In addition, ADM owns 41% of Compagnie Industrielle et Financiere des Produits Amylaces SA (CIP) and refers to it as an ''affiliate'' in its most recent 10–K.[5] CIP in turn holds 10% of Tate & Lyle's stock.[6] Thus, directly and indirectly ADM has a 25% stake in its ostensible competitor. While neither its direct nor its total stake gives ADM and absolutely controlling position, a block this size confers substantial leverage. It is obvious that Tate & Lyle's management would be foolish indeed to initiate vigorous competition in the corn syrup, HFCS or ethanol markets with its largest shareholder.

Given the dissolution of the MCP-Corn Products deal, there will remain five separate producers in the corn syrup and HFCS markets, but one, ADM, will be larger and another, Corn Products, will be smaller. Unfortunately, the Competitive Impact Statement does not say how much larger ADM will be. Although current theories of merger enforcement emphasize the examination of the likely competitive effects of a merger, it is still the case that the initial, prima facie, case rests on a change in the HHI statistic. Where there is a partial transfer of market share, the resulting change in the HHI requires comparing the sum of the buyer's share and acquired share to the share retained by the seller (or former joint venturer). If the sum from the merger is greater than the retained share, the result will be an increase in the HHI; if the sum is less, then the HHI will decline. Thus to determine the likely HHI effect of the combination of MCP's position with ADM's given the reduction in Corn Products's share it is essential to know the relative shares of MCP and Corn Products.

Even without that information, some general conclusions exist. Concentration is well above the 1800 level, pre-merger, in all three markets. It is highest in the ''42'' market where the pre-merger HHI exceeds 3000; in corn syrup and HFCS 55, it is about 2600, pre-merger. In the syrup market, unless the capacity transferred exceeds 10% (*i.e.,* ADM's new position exceeds 20% in total) the HHI will remain the same or decline. In the case of the HFCS markets, the HHI is certain to increase because market share is moving from a smaller factor to a larger one. The only question in those markets is how much the HHI will increase. In the ''42'' market where concentration is higher and ADM's share is large, the transfer of 3% or more will result in a net increase of HHI by ore than 100 points. In the ''55'' market, a transfer of more than 4% would also yield an increase of 100 or more points. As MCP's share increases in the two HFCS markets, there would be an even greater increase in the HHI. Without capacity information on MCP, the net effect on the HHI in corn syrup

[1] The Renewable Fuels Association (RFA) web site lists ADM with total capacity of 950 million gallons. *www.ethanolrfa.org/eth_prod_fac.html* (visited on Oct. 9, 2002).

[2] The RFA site, see note 1 supra, reports that MCP has a capacity of 140 million gallons. Williams Bio-Energy (135 million) and Cargill (110 million) are the only other producers with a capacity over 100 million gallons according to this source.

[3] ADM and probably Corn Products act as agents for the sale of HFCS and corn syrup produced by smaller local plants including cooperatives. Presumably, given the contractual control over such output, it has been included in the market share totals that the government has identified for the major market participants. If such controlled production has not been included, it would increase the market share of ADM in particular and so only make the structural impact of this acquisition more significant.

[4] Tate & Lyle Annual Report, 2002, at page 63.

[5] The stock ownership in CIP is reported in ADM's 1998, 10–K at Item 1, page 5; Exhibit 13, of ADM's 10–K for 2002, describes CIP is an ''unconsolidated affiliate'' of ADM.

[6] Tate & Lyle Annual Report, 2002, at page 63.

or the extent of the increase in the HFCS markets is unknown. But it appears substantially likely that there will be a more than 100 point increase in the HHI in one or both of the HFCS markets. Further, if ADM has influence over A.E. Staley's competition in these markets because of ADM's stake in Tate & Lyle, the implications of resulting change in the HHI would be even more pronounced because the disparity between ADM/Staley/MCP and Corn Products will be even greater.

This merger will thus increase the level of concentration in both HFCS markets. Section 1.51(c) of the Merger Guidelines states that: ''Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise. The presumption may be overcome by a showing that factors set forth in sections 2–5 of the Guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise. . . .'' (Emphasis added.) Moreover, the HFCS markets are ones that, on objective criteria of the sort set forth in sections 2–5 of the Guidelines, are vulnerable to collective action by competitors. The products are homogeneous, the entry barriers are high, and there is excess capacity that can be used to discipline competitors who break ranks. While some buyers are very large, *e.g.,* Coke and Pepsi, the vast majority of sales are to smaller businesses with little bargaining power. A further reason for concern is that the key players, notably ADM, have a history of unlawful collusion in other comparable product markets. See, *e.g., U.S.* v. *Andreas,* 216 F3d 645 (7th Cir. 2000)(affirming conviction of ADM executives for pricing fixing of lysine). To allow ADM to increase its direct ownership of HFCS capacity while retaining its substantial stake in Tate & Lyle would seem to exacerbate the risks of tacit or express collusion.

Even more directly relevant, ADM and its ''competitors'' (A.E. Staley, Cargill, American Maize-Products, and Corn Products) have been charged in a buyer class action with overt price fixing in HFCS (Corn Products has actually settled with the plaintiffs already) from 1988 to 1995. Although the trial court dismissed the suit on summary judgment, the 7th Circuit in an opinion written by Chief Judge Posner in June of this year reversed. *In re* High Fructose Corn Syrup Antitrust Litigation, 295 F3d 651 (7th Cir. 2002). Judge Posner's analysis of industry structure and context is that this is an industry with characteristics and incentives to engage in collusive behavior. ''[D]efendants pretty much conceded that the structure of the HFCS market, far from being inimical to secret price fixing, is favorable to it.'' *Id.* at 656. The opinion pointed out a number of factors that demonstrated the capacity and incentive to engage in collusive conduct. However, the opinion focused on the claim that there was express agreement and not merely tacit, interdependent price setting. On that issue, it found that the HFCS markets are ones where ''the overall evidence of conspiracy . . . was abundant although not conclusive.'' *Id.* at 655. Despite the manifest relevance of this detailed analysis of the nature of the HFCS markets, pre-merger, to the likely effect of this acquisition on competition in those markets, the Competitive Impact Statement makes no reference whatsoever to it.

The anticompetitive conduct at issue in the 7th Circuit decision occurred in the context of five firm competition in these markets with a lower HHI than will exist after ADM acquires MCP. Thus, it would seem that allowing this acquisition without any other change in the structure, *e.g.,* terminating ADM's stake in Tate & Lyle, will continue and potentially make more likely interdependent conduct among the producers of HFCS.

The Competitive Impact Statement fails to reference or discuss MCP's share of the corn syrup, HFCS 42 or HFCS 55 markets; it makes no mention of ADM's continuing stake in Tate & Lyle or the option of requiring divestiture of this stake as an added element of remedy; it does not refer to the 7th Circuit decision; nor does it discuss the Guideline factors that make collective anticompetitive conduct likely. It focuses on the dissolution of the MCP-Corn Products joint venture and the obligation of ADM to compete independently of Corn Products. The essential national is that ''the decree will ensure that there are at least five independent (sic) competitors in the corn syrup and HFCS markets, and will preserve and encourage ongoing competition between ADM and Corn Products.'' (Emphasis added.)

The government's implicit contention is that because the number of legally distinct firms with separate marketing capacity will remain the same, competition will not be harmed. But it was that number of competitors that created the conditions for collusion. No basis is given for the optimistic assessment that ADM will not influence the competition of Tate & Lyle. Indeed, the statement provides no clue as to incentives or economically rational motivations that would bring about competition given the history of these specific markets and ADM. Hence, some additional rational should exist to justify continuing the present number of competitors and increasing the HHI.[7] In fact, it would seem that under the Guidelines, this merger remains presumptively illegal. *See,* Guidelines 1.51(C), *supra.* It is imaginable that the government's lawyers have some logical and plausible explanation for allowing this acquisition despite all these negative implications. But their duty under the Tunney Act is to make a public statement of those reasons so that the public and the court can determine whether those claims are in fact plausible.

On the other hand, given the 7th Circuit decision, it seems possible to argue that the Corn Products—MCP agreement together with ADM's stake in Tate & Lyle should have been the target of antitrust enforcement together with barring the acquisition of MCP by ADM. Such a strategy would have increased the number of separate firms from 5 to 6 and ensured that each was economically independent of all the others.

The discussion of alternative remedies in the Competitive Impact Statement implies by its silence that the government did not consider the foregoing alternative.[8] This raises a separate but very important issue in this case. It would seem to be a serious failure in basic enforcement if the government elected to settle a case involving markets with high concentration, serious risks of anticompetitive conduct, and cross ownership of stock among major competitors without considering whether a more comprehensive review of the relationship among industry participants was necessary and whether further separation of those ties would be appropriate.

In sum, the Competitive Impact Statement is so flawed that it does not provide the court or the public with a basis to determine whether the increase in concentration resulting from this merger is substantial (the MCP market shares must be given as must those of Corn Products to allow any kind of evaluation of the structural claims of the government) or why the acquisition will not increase the already significant risk of anticompetitive collaboration within the HFCS markets.[9] Before the public can effectively comment on the proposed decree, it is essential for the government to revise the Competitive Impact Statement to make full disclosure of necessary factual information and its reasoning. Similarly, it is impossible for a court to determine, based on this submission, whether or not the proposed judgment is in the public interest.

II. Ethanol

Neither the settlement nor the Competitive Impact Statement address the apparently high and increased concentration in ethanol production resulting from this combination. Even more troubling, there is no analysis of the impact of this acquisition on the marketing and distribution of ethanol. It is true, as the government emphasizes in its filing, that the D.C. Court of Appeals in U.S. v. Microsoft, 56 F3d 1448 (D.C. Cir. 1995), took the position that in reviewing a consent decree under the Tunney Act, a district could not consider alleged anticompetitive conduct not included in the complaint. In that case,

[7] It deserves emphasis here that the antitrust authorities moved to the use of the HHI index to measure market power because of the conclusion the firms with larger market shares present greater risks of anticompetitive conduct. Unlike simple concentration ratios, the HHI is sensitive to the allocation of market share among firms within a market.

[8] Section 5(e) calls for the court in reviewing the proposed decree to have the opportunity to consider 'alternative remedies actually considered'' by the government. In order to accomplish that goal, the government in section VI of the Competitive Impact Statement reported the only alternative that it actually ''considered'' consisted of taking this case to trial.

[9] It is undoubtedly the case that the firms engaged in the HFCS market have very good information about the market positions of their competitors. Hence, this information is not competitively sensitive nor is its disclosure going to threaten the business strategy of any firm in this market. The only real effect of concealing this information is to impose a significant handicap on the public in commenting on the proposed settlement. It ought to be axiomatic that the government must disclose the post-transaction HHI shares of any merger or acquisition which it proposes a court approve under the Tunney Act.

the additional issues that the district court wanted considered were not directly related to the specific competitive practices challenged in that case.[10] In the present case, in contrast, the ethanol production and distribution capacity of both firms is inextricably linked with their HFCS production capacity. Therefore, approving this decree allowing the acquisition of MCP necessarily affects directly this related market. Hence, in order to perform its obligation to ''determine that the entry of such judgment is in the public interest''. Section 5(e); 15 U.S.C. sec. 16(e), the court must be informed about the other competitive effects of the merger. This is necessary even if the court's ultimate standard may only be whether the ''settlement is within the reaches of the public interest.'' 56 F3d at 1460 (internal quatations omitted).

Prior to the acquisition, ADM was, by a very large margin, the leading producer of ethanol. Its share ranged from something over 30% to more than 50% depending on whether the base is capacity including that under construction or actual production. MCP had about 6% of current capacity. Thus the pre-merger HHI was at least mildly concentrated around the 1600 level, and this merger will increase that level by 350 to 600 points resulting in a post-merger concentration of 2000 to as much as 2300. This falls well into the highly concentrated level.[11]

It appears that ethanol is a distinct product both because it has distinct production technology and because it is an ingredient in gasoline intended to reduce its pollution effects.[12] There was another product, methy tertiary butyl ether (MTBE), that has recently been banned in California, one of the largest areas of consumption, because of its polluting effects on ground water. Thus, a firm able to control the production or marketing of all ethanol would have significant power over price. The geographic market seems to be national.

There are two methods of producing ethanol. The ''dry'' method involves grinding corn into a mash and fermenting it to create ethanol which must then be separated from the water and the residual solids. The ethanol is concentrated to achieve 100% purity and then ''denatured'' by the addition of some gasoline making it unfit for human consumption. The remaining solids are dried and sold as cattle feed (this is a high protein feed that appears to have significant commercial value). All new ethanol plants under construction apparently use the dry process.

The ''wet'' process involves a similar production of mash which is then treated to convert the carbohydrates to sugar from which various products are produced: corn syrup, high fructose syrup, and ethanol by subsequent fermentation of the sugar. Based on some comments on a couple of web sites, it appears that there is flexibility in the wet process to choose among the types of products that will be extracted. Most of MDM's facilities and MCP's two plants are wet.

In 2001, total American production of ethanol was about 1.77 billion gallons; it is expected to rise to 2 billion in 2002 and may exceed 5 billion within a few years especially if the Senate version of the energy bill is ultimately adopted because it strongly favors ethanol. Although this section of the Senate bill was adopted in conference, no final legislation emerged from Congress this session.

With respect to the production of ethanol, the barriers to new entry seem to be low. An efficient, modern plant with a capacity of 40 million gallons costs about $55 million to build and construction takes about a year and a half after regulatory and zoning approval. It seems easy to expand to 80 million gallons, but after that there can be serious input constraints caused by the need to buy very large volumes of corn. Also, the market for the cattle feed solids may be saturated in the immediate area. There are as many as ten or more plants under construction; most of these have a capacity of 40 million gallons, and a significant additional number are in the planning stage. This means that efficient entry can occur with a capacity that represents about 2% of present total production and less than 1% of expected production in the next few years. This suggests that adding a new plant will not disrupt the market and so entry should not be difficult. Hence, while ADM is and will remain for the foreseeable future, by a very substantial margin, the largest ethanol producer in the market, it does not appear that its acquisition of MCP will significantly alter its market power in the ethanol production market. Presumably this is the view of the government as well.

However, this merger may create significant competitive issues in the distribution and marketing of ethanol. Marketing involves both specialized equipment and skills that are subject to economies of scale and scope. Ethanol is shipped in railroad tanker cars, barges and tanker trucks from various places of production in the Midwest to California or the east coast, for example. Ethanol is often added to gasoline at the point when a tanker truck is picking up a load of gas for delivery to service stations. For this reason, access to terminal tank farms is very important in the marketing process. If a firm can not get space in the farm, the marketing of ethanol in this context is more costly (separate location means two stops and delay). A key issue can be getting such access. While the costs of specialized equipment including a dedicated tank may not be substantial, getting access in the first place may be difficult given limited space and the potential that established ethanol suppliers may have or obtain exclusionary rights in their contracts.

It appears, therefore, that there are significant economics of scale and scope in the marketing process. The high volume marketer can get discounts and preferred service from railroads. It can afford to operate or lease barges, develop terminal storage facilities to concentrate the quantity of product for its delivery to refiners or gasoline terminal locations. Finally a major trader can get access to terminal facilities when small dealers might be excluded and/or get access on more favorable terms.

ADM is undoubtedly the largest marketer of ethanol. ADM has volume, special equipment (barges and rail cars) as well as good access to terminals and pipelines. There are two other major integrated marketers: Cargill (number 4 in ethanol production) and Williams Companies (number 3 in production) a major pipeline operator and dealer in petroleum products. Cargill and Williams have overall marketing resources comparable to ADM because of their multiple lines of business and their substantial ethanol production capacity. All three of these companies use marketing agreements to obtain additional supplies of ethanol.[13] Although presumable the government's lawyers have examined these marketing agreements, they are not available to the public. The impression is that they usually entail exclusive dealing commitments involving a 5 year or longer obligation (early termination terms unknown) which may provide economically questionable compensation terms for the marketer in that the contracts do not provide appropriate incentives for effective and efficient marketing. Thus, such contracts are likely to confer substantial control over the marketing of ethanol on a limited group of firms.

There also appears to be a few unintegrated or less integrated firms offering distribution services as well. One such firm is Murex NA.[14] Another trader—Ethanol Products—is associated with Broin Engineering, an ethanol plant builder, that represents 10 production facilities with 300 million gallons of capacity and claims another 115 million in development. There may be one or two additional marketers, but no other web sites provided very much information.

There is a plausible basis for concern that the impact of this merger in the marketing and distribution of ethanol is likely to be anticompetitive: ADM has a record of conspiring to cartelize various markets;[15] Cargill the second or third largest marketer of ethanol is also in the group of defendants in the HFCS litigation; and the Williams Companies, the other large marketer of

[10] Subsequent history has in fact vindicated the district court's concerns. *U.S.* v. *Microsoft,* 253 F3d 34 (DC Cir. 2001) cert. den. _U.S._, 122 S. Ct. 350.

[11] It has been suggested that ADM might actually control 55% of existing production capacity. In that case, the level of concentration would be significantly higher (a 55% share is an HHI of 3025; and the post merger HHI would increase by 660 to 3685).

[12] The following market analysis is based on interviews, web materials and newspaper articles available to Professor Carstensen.

[13] Williams' web site claims that it markets for 14 production facilities. Cargill's cite did not provide specific information, but clearly it is seeking to act as a marketer.

[14] The brief Web site description of this company (*http://www.murexltd.com/Homel.htm*) suggests that it markets ethanol and other products. Its Web site reports that the company provides marketing, owns specialized railcars for transporting ethanol, and has storage facilities in key locations to hold supplies until they can be delivered. It claims to represent 60 million gallons of capacity currently but to have contracts covering 200 million gallons in place for production in 2003. This is about 10% of the 2002/3 national production capacity.

[15] A.E. Staley in whose parent ADM holds a 25% stake is another ethanol producer and coconspirator in the HFCS litigation.

ethanol has recently settled claims that it overcharged California energy customers with a payment of more than $400 million and a restructuring of its supply contracts that may save customers another 1$1 billion.[16] Thus, all three major marketers of ethanol have recent histories of anticompetitive conduct and exploitation of consumers. The acquisition of MCP will increase concentration of control over distribution which will make both tacit collusion among these leading marketers more likely and increase the potential for unilateral anticompetitive conduct by ADM which remains the overwhelming dominant marketer in this business.

To determine the seriousness of these risks, it is important to have a good estimate of the volume needed to achieve minimum efficient scale for marketing ethanol. Assuming Murex with a 200 million gallon share is an efficient competitor,[17] then additional entry into distribution may occur as the volume expands. Other middle-sized petroleum marketing organizations might exist that have substantial volumes of goods going to market through the same networks. Entry into ethanol marketing may not be difficult for such firms if they exist and can easily add ethanol sales to their existing marketing efforts. Key here is the minimum size needed to make effective use of dedicated facilities such as terminal tanks, railcars, etc., that must be used in an ethanol specific way. Thus, the question is what are the product specific economies of scale and scope.

Given the foregoing market information, it would be possible to determine whether ADM's control over the marketing of ethanol, including its own production, that of MCP, and that under contract to the resulting firm, together with the market shares of the other two major, integrated marketers, would have an adverse effect on entry or expansion by independents in the marketing arena. If it takes 200 million gallons of volume for product-specific economies, then the current set of 5 or 6 marketers may be all that can be accommodated given ADM's dominance. Even with substantial growth in the total volume,[18] it may be difficult to make entry into marketing because the increments of new plants—circa 40 to 80 million gallons—will be insufficient to warrant entry into marketing unless the entrant can get additional clients. But from the perspective of the owner of a new plant, the question will be whether to select an established marketer or affiliate with a new entrant that needs additional volume to be efficient.

If economies of scale with ethanol marketing are significant, entry is difficult, and a few firms control the majority of product being marketed, it becomes possible to withhold some product as the new energy requirements kick in and drive up price (compare Enron or El Paso in California electric markets). In addition, because both ADM and MCP use the wet process, it is possible to manipulate ethanol supplies by shifting plant output to other products, *e.g.,* HFCS. This means that as the dominant firm, ADM may be able to have unilateral, anticompetitive effect in the marketing of ethanol by manipulating supply. On the other hand, ethanol is a uniform product with growing demand. Moreover, that demand is unlikely to be very price elastic (10% of a gallon of gas is not going to effect the price at the pump very much).[19] So, assuming limits on effective entry in the marketing level, existing marketers may engage in interdependent price setting to the detriment of the competitive market. The history of ADM's conduct in comparable markets and the presence in ethanol of some of its co-conspirators from other cartelistic efforts, strongly reinforces the proposition that there is a risk of such conduct if it is economically feasible.

The Merger Guidelines speak to these risks. ''Where products are relatively undifferentiated and capacity primarily distinguishes firms . . . the merger firm may find it profitable unilaterally to raise price and suppress output. . . . Where the merging firms have a combined market share of at least thirty-five percent, the merged firms may find it profitable to raise price and reduce joint output. . . .'' Guidelines 2.21. While this statement creates no presumption, it identifies the unilateral effect that is a possible consequence of this acquisition in addition to the potential for collusive reductions in output based on control of the marketing-distribution process. Recent news reports, after the filing of the Competitive Impact Statement, indicate that traders believe that ADM has the capacity and incentive to withhold supplies and drive up prices.[20] This is exactly the anticompetitive risk that this market structure posses.

The Competitive Impact Statement filed by the government explaining its analysis of the ADM–MCP merger does not even advert to the fact of ADM's leading position in ethanol production and marketing or MCP's substantial market share. As a result, it is not possible to tell whether the government has examined both the marketing and production aspects of ethanol. While it is probable that the government lawyers have in fact investigated at least some of the ethanol aspects of this merger, there is no public record of what aspects they examined or what conclusions they reached. If the government had simply sued the merger, the ethanol issues would have been subsumed under the corn syrup and HFCS issues because of the unitary nature of the production process. Once the government has elected to settle the case by allowing the acquisition, the impact of the acquisition in the related market where the parties have such large market shares becomes a very important aspect of a public interest analysis: ''the court may consider . . . any other considerations bearing upon the adequacy of such judgment. . . .'' Clayton Act, sec. 5(e); 15 U.S.C. sec. 16(e).

The government's failure to report the conclusions of its investigation of the ethanol market is, therefore, another serious flaw in this case. Given ADM's market position and its history, the government ought to have explained why it did not believe that there was any serious anticompetitive risk in these markets given its willingness to allow ADM to acquire the second largest producer of ethanol.

It can be argued that disclosure concerning the ethanol market is inconsistent with the confidentiality requirements imposed on merger filings. As the DOJ's comments to the DOT in the Hawaiian airlines case demonstrates, it is possible for the DOJ to report not only its conclusions about competitive effects but also explain in some detail its reasoning on the public record even when it has ''confidential'' information. *See,* PUBLIC COMMENTS OF THE DEPARTMENT OF JUSTICE, Joint Application of ALOHA AIRLINES, INC. and HAWAIIAN AIRLINES, INC., DOT Docket No. OST–2002–13002, filed Aug. 30, 2002. Indeed, the FTC has recently demonstrated exactly such a responsible approach in connection with the cruise line merger investigation. *See*, Statement of the Federal Trade Commission, Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc, FTC File No. 021 0041, October 4, 2002; Dissenting Statement of Commissioners Sheila F. Anthony and Mozelle W. Thompson, *id.*

The public information about the ethanol markets—both production and marketing—does not demonstrate the kind of obvious anticompetitive risks that are manifest in the case of HFCS and corn syrup. Nevertheless, this acquisition will work a very substantial change in those markets that will increase concentration and so will necessarily tend to reinforce any anticompetitive potentials that may exist. Thus, another serious deficiency in the present Competitive Impact Statement is that it totally ignores the impact of this acquisition on ethanol. If it were in fact that case the government has completely failed to consider the competitive implications of that aspect of this merger, then it would also be clear that the government had failed in the most basic obligations of its responsibility to analyze the competitive implications of the transaction. It seems more likely that the government has examined at least some of the ethanol related issues and satisfied itself that this acquisition will not result in a significant risk of a ''substantial[ ] lessen[ing] of competition'' of the sort prohibited by section 7 of the Clayton Act. But if that is so, it owes it to the court and the public to explain what markets it considered (did it review both the production and the marketing components of ethanol?) and what its conclusions were on the

[16] See David Barboza, *A big Victory by California in Energy Case,* New York Times, Nov. 12, 2002, at C1.

[17] Murex markets other petroleum products and so in terms of dealing with railroads, barges, terminals or pipeline has more relevant volume than just its ethanol.

[18] 200 million gallons is 10% of current volume estimates but only 4% of the projected 5 billion gallon volume of the future.

[19] The price of corn which is largely a function of broader demand considerations will influence the supply side of the market significantly as will the market price for animal feed products that ethanol production also yields.

[20] ''Ethanol prices have risen 20 percent in the past six months. . . . Todd Kruggel, a broker . . . [said:] ''ADM and the other big boys may be storing what they're making until California demand gears up some more.'' Bloomberg News Service, Price of gas additive ethanol keeps rising, Wisconsin State Journal (Madison, Wisconsin), Nov. 12, 2002 at C9.

questions of entry, economies of scale and scope in distribution, and the potential for either unilateral or collusive conduct in this important, developing market.

This is not a situation where the government has conducted an investigation and concluded that no action was required. Here it has elected to object to the acquisition and highlighted, for purposes of that litigation, the most troublesome aspects of the merger. But its settlement, by failing to block the acquisition, necessarily has an effect in other markets in which these firms compete. A complete Competitive Impact Statement must advise the court and the public of the implications of the settlement for competition in those other markets. Without such disclosure, the record will not disclose ''the competitive impact of such judgment'' nor its ''impact. . . upon the pulic generally . . .'' Clayton Act, section 5(e)(1) and (2); 15 U.S.C. 16(e)(1) and (2). As result, the District Court can not perform its obligation to ''determine that the entry of such judgment is in the public interest.'' section 5(e); 15 U.S.C. 16(e).

Conclusion

In Philadelphia Bank, the Court stated that ''. . . if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.'' *U.S.* v. *Philadelphia National Bank,* 374 US 321, 365, n. 42 (1963). The HFCS markets are such markets, characterized by substantial risks of anticompetitive conduct. The ethanol market as it presently exists is also concentrated and the forces of deconcentration might well be frustrated if the leading firm can retain a dominant position in production and that reinforces and entrenches its dominance in marketing. It would appear that blocking this merger and critically reviewing the MCP-Corn Products marketing agreement in HFCS as well as ADM's links to Tate & Lyle would have been a much more appropriate enforcement strategy based on the observable facts.

The Antitrust Division may have more information that might possibly negate the apparent anticompetitive risks in both the HFCS and ethanol markets that this acquisition would seem to create. It is the duty of the government to explain and justify its actions under the Tunney Act. It has not done so. In the absence of such information, the District Court should not approve this settlement because it lacks the basis on which to make the essential public interest determination that Congress has required.

Peter C. Carstensen,
Young-Bascom Professor of Law, University of Wisconsin Law School, 975 Bascom Mall, Madison, WI 53706.
Ph. (608) 263–7416.

December 27, 2002.

Background information concerning the supporters of this information:

Organizations

The National Farmers Union

The National Farmers Union is Officially called the Farmers Educational and cooperative Union of America. It was founded in 1902 and is a general farm organization with membership of nearly 3000,000 farm and ranch families throughout the United States.

The Organization for Competitive Markets

The Organization for Competitive Markets is a multidisciplinary nonprofit group made up of farmers, ranchers, academics, attorneys, political leaders and business people. OCM provides research, information and advocacy towards a goal of increasing competition in the agricultural marketplace and protecting those markets from abuses of corporate power. OCM views the current consolidation of agriculture as market failure resulting in misallocation of resources and the destruction of rural economies and culture.

Scholars (faculty positions given for informational purposes only)

Peter C. Carstensen, Young Bascom Professor of Law, University of Wisconsin Law School
Paul Brietzke, Professor of Law, Valparaiso University School of Law
John Connor, Professor of Agricultural Economics, Purdue University
Thomas Greaney, Professor of Law, St. Louis University School of Law
Neil E. Harl, Charles E. Curtiss Distinguished Professor of Agriculture and Professor of Economics, Iowa State University
Delbert Robertson, Associate Professor of Law, Suffolk University School of Law
Stephen Ross, Professor of Law, University of Illinois, College of Law
Kyle Stiegert, Associate Professor of Agricultural and Applied Economics and Director, Food System Research Group, College of Agriculture, University of Wisconsin-Madison

The American Antitrust Institute

December 27, 2002.

Roger W. Fones, Chief,
Transportation, Energy & Agriculture Section Antitrust Division, United States Department of Justice, 325 Seventh Street, NW., Suite 500, Washington, DC 20530.

Re: Tunney Act Comments *re U.S.* v.*Archer-Daniels-Midland Co. and Minnesota Com Processors, LLC.* Civil Case No. 02–1768

Dear Mr. Fones: The American Antitrust Institute (''AAI'') is an independent non-profit education, research and advocacy organization, described in detail at www.antitrustinstitute.org. The mission of the AAI is to support the laws and institutions of antitrust. We write to endorse the thrust of the Tunney Act comments submitted by Professor Peter C. Carstensen of the University of Wisconsin Law School. Professor Carstensen, a member of the AAI Advisory Board, has shared with us his analysis of the Archer-Daniels-Midland (''ADM'') acquisition of Minnesota Com Processors (''MCP'') and his concern that the Justice Department's Competitive Impact Statement (''CIS'') does not provide an adequate explanation of the consent decree.

A substantial purpose of the Antitrust Penalties and Procedures Act, 15 U.S.C. section 16(b)–(h), commonly referred to as the Tunney Act, is to facilitate public comments and thereby to assist the Court in making its determination of whether a proposed decree is in the public interest. The Tunney Act requires the Department to make public a CIS, which, in this case is available at *http://www.usdoj.gov/atr/cases/indx 358.htm.* Section (b)(3) of the Act requires that the CIS recite:

(1) The nature and purpose of the proceeding;

(2) A description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) An explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief; [and]

(6) A description and evaluation of alternatives to such proposal actually considered by the United States.

We recognize that it is difficult, if not impossible, for a member of the public to have the same facts before it that influenced the Department's investigation and its negotiated outcome. Professor Carstensen's efforts to learn about the ADM merger have nonetheless succeeded in raising what appear to be important questions about the possible competitive effects of the merger that are not considered in the CIS. He writes,

The Competitive Impact Statement fails to disclose essential facts about the impact of this acquisition on the directly affected markets and ADM's status and role in those markets. Further, it does not explain how the proposed decree, in light of those facts and an apparent failure to consider relevant relief options as well as the Antitrust Division's own Merger Guidelines, can successfully protect the identified markets from increased risks of anticompetitive conduct. Finally, the Competitive Impact Statement omits entirely any discussion of the impact of allowing this combination in the related ethanol markets in which ADM is by many orders of magnitude the largest firm and MCP is the second largest.

Even when the Tunney Act is interpreted rather narrowly, it is recognized that Congress intended to encourage public comment. As Judge Kollar-Kotelly noted in the recent *U.S.* v. *Microsoft Corp.,* Civ. Act. No. 98–1232, Memorandum Opinion at 20 (July 1, 2002):

The legislative history explains that the purpose of requiring the United States to provide this information is to ''encourage[e], and in some cases, solicit, additional information and public comment that will assist the court in deciding whether the relief should be granted.'' 119 Cong. Rec. at 24,600. The reports from both houses of Congress agree that the purpose of this portion of the Act, in conjunction with sections (c) and (d), is to encourage comment and response by providing more adequate notice to the public. S. Rep. 93–278, H.R. Rep. 93–298 at 5 (1973); H.R. Rept. 93–1463 at 7 (1974), reprinted in 1974 U.S.C.C.A.N. at 6538. According to the Senate Report on the bill, ''additional participation by interested parties in the

approval of consent decrees'' serves as a public means to counterbalance the ''great influence and economic power'' available to antitrust violators. Sen. Rept. No. 93–298, at 5 (1973).

The House Report echoes this concern:

Given the high rate of settlement in public antitrust cases, it is imperative that the integrity of and public confidence in procedures relating to settlements via consent decree procedures be assured. Your Committee agrees with S. Rept. No. 93–298, 'The bill seeks to encourage additional comment and response by providing more adequate notice to the public,' (p. 5) but stresses that effective and meaningful public comment is also a goal.'' H.R. Rept. No. 93–1463, at 6–7.

It is not possible for the public to play the role envisioned by the statute unless adequate information is presented in the CIS, with the result that the Court cannot fulfill its own role of determining whether the proposed decree will serve the public interest. 15 U.S.C. 16(e). With respect to the corn syrup and HFCS markets, the CIS fails to disclose essential facts necessary to an understanding of either the competitive problem or the selected remedy. With respect to the ethanol market, the CIS is totally silent, despite the apparent fact that ADM is the leading producer and MCP is the second leading producer. We recognize that the Department may have been aware of all the relevant facts and may have carried out a perfectly designed and perfectly executed investigation, reaching a perfectly understandable compromise. Nevertheless, neither the public nor the Court can evaluate whether the proposed decree is in the public interest because there is too little disclosure for an evaluation to be made.

The Department has traditionally been reluctant to say a great deal in its CIS disclosures, presumably because it risks disclosure of confidential information, adds to the staff's workload, and opens up the door to additional inquiry. We urge the Department to look to the example of the Federal Trade Commission in its handling of the recent cruise case, in which it permitted two possible mergers to go forward, without condition, but (without the requirements of a Tunney Act hanging over its head) provided a detailed explanation of its reasoning, accompanied by a minority statement.[1] After the Enron and related scandals, we operate in a new age where transparency of government regulation is of even greater importance. ADM is a company that has had more than its share of scandal and illegal activity.[2] In order to sustain the public's confidence in the antitrust settlement process, we urge the Department and the Court to give the Tunney Act the benefit of any doubt by revising the CIS so as to meet Professor Carstensen's objections.

Sincerely.

Albert A. Foer,
President.
433 Hager Drive, Gibson City, IL, 60936.
(217) 784–4425.

Send by Express Mail.

Mr. Roger W. Fones,
Chief, Transportation, Energy & Agriculture, Division, Antitrust, Justice Department, Suite 500, Washington, DC 20530.

Gentlemen (& women); I am thankful for this opportunity to offer my brief comment to you on the proposed ADM–MCP purchase transaction.

I will try not to duplicate the obvious facts and data that you no doubt have indicating the anticompetitive effect this transaction could have on:

(1) The market price the farmer receives (and *growth of same*)

(2) The ethanol and

(3) Sweetener industry market prices.

I will instead attempt to offer some of the not so obvious that you may not have but are never the less, just as important.

I am hopeful that you can provide evidence that this public comment opportunity *does have meaning* instead of [being 'cut & dried' or a 'done deal' that ADM has under control], the well grounded perception that most have expressed to me. This perception plus (1) the extended corn harvest in SW MN, (2) most stakeholders being unaware of this public comment forum and (3) many of us who are (aware of), being poor writers and cramped for time means relatively few comments from those who would otherwise do so, which is unfortunate. So I hope you can bear with us and receive what we (I) intended to convey on this very important issue. To provide *all* of the important details is beyond the scope of this comment writing, but please if u do want more detail, I'd be most honored to respond with the full impact & detail that you need (if I know it not redundant) to make your most important decisions and conveyance of same!

I have personal knowledge that many of the new coops that have formed & now producing ethanol did so with the knowledge that MCP was a positive role model. This transaction not only erases that positive role model but becomes a *very* negative factor. (MCP was the largest by a factor of 5X, the oldest & relied on by others in many respects) If you need I'd love to give details showing the 'chilling' net impact on new producer equity formation.

The superior third party acquisition proposal (p.pg 48) that was in the MCP office on August 31, could have & indeed perhaps should have been handled differently *i.e.,* at least let the board or voting members know of its existence. (The vote would've been different)

The implementation of that proposal offers to

(1) Retain the more competitive environment for corn markets, ethanol, sweeteners, etc.

(2) Retain each members freedom to sell or not to sell.

(3) ''The new CP MCP development opportunity.

(4) The producer (corngrower) processor opportunity, that was conceived in the mid '70's.

(5) Be less likely to be challenged, changed, *delayed* or terminated on grounds posed by the Antitrust Division of the US Justice Department (p, pg 43).

I'd sure love to give details on this if u need some.

Then I have many questions regarding how the information was A. Presented to the members at the 'information' meetings. In consideration our limited time at this point & hoping most of these questions have been submitted by others I'll bring up only one question I had as follows:

I asked specific questions about the probability of regulatory delays or indeed a Department of Justice complaint challenging the merger. The answer I receive was—*No way. ADM has that under control.* If the Department of Justice does anything it will be a mere formality of no consequence! Vote for this transaction & you'll have your money 'very soon' after the vote on Sept. 5. Clarification of 'very soon' was given as before the end of the month (September). Each of the questions (answers) were (superbly) handled in a similar tone.

And B. How the vote was handled.

(i) Was it true that the company (MCP) wouldn't allow one of the board members who voted No to look at the ballot talley?

Ref. Dean Buesing

(2) Was it true that one of the no votes cast early at the Marshall office couldn't be found when the member asked for it back before the final tally was to be tabulated?

Same referense.

Thanks,

C. LeRoy Deichman, CPAg.,
433 Hager Drive, Gibson City, IL 60936, (217) 784–4425.

P.S.

If every component of this transaction was legal (I'm not saying it wasn't)—then I'd like to meet with the people who make the laws.—To see that this injustice never happens again!

I wish my appraisal of the growth that could've occurred would be asked for by the decision makers.

I repeat, since I don't know which of what else I had to say would be redundant & other reasons listed herin I defer for now pending your request for more. (Including any resume in this field)

I *out of time!*

Thanking you again for this opportunity.

[FR Doc. 03–9290 Filed 4–15–03; 8:45 am]
BILLING CODE 4410–11–M

[1] *See http://www.ftc.gov/os/caselist/021004.htm.* Also *see* Warren Grimes, Norman Hawker, John Kwoka, Robert Lande, and Diana Moss, ''The FTC's Cruise Lines Decisions: Three Cheers for Transparency, *http//www.antitrustinstitute.org/recent2/217.cfm.*

[2] *See, e.g.,* James B. Lieber, Rats in the Grain, the Dirty Tricks and Trials of Archer Daniels Midland (200) and Kurt Eichenwald, The Informant (2000).

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Mico-Optio-Electro-Mechnical Systems

Notice is hereby given that, on January 31, 2003, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act)'',