

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.

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>.

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.