

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 public 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.

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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 nonprofit education, research and advocacy organization, described in detail at [www.antitrustinstitute.org](http://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/indx358.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.A.N. at 6538. According to the Senate Report on the bill, "additional participation by interested parties in the