IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
MICROSOFT CORPORATION,	)	**Civil Action No. 98-1232 (CKK)**
	)	
Defendant.	)	
	)	
AMERICAN ANTITRUST INSTITUTE, INC.,	)	
	)	
	)	
Amicus Curiae.	)	

AMICUS BRIEF OF THE AMERICAN ANTITRUST INSTITUTE, INC.

Pursuant to the Court's Memorandum and Order dated February 28, 2002, the American Antitrust Institute, Inc. ("AAI"), hereby submits this brief to assist the Court in its review of the proposed consent decree in this action.

I. INTRODUCTION

There was a time when the federal antitrust settlement process was secretive and courts routinely gave rubber stamp approval to settlement consent decrees proposed by the Justice Department and the defendant.[1] Congress found that such a lax approach was subject to abuse, negatively affected public confidence in government antitrust settlements, and was contrary to the public interest. The Tunney Act was enacted specifically to charge courts with a more active role within a new

[1] "One of the abuses sought to be remedied by the bill has been called 'judicial rubber stamping' by district courts of proposals submitted by the Justice Department." Report of the House Committee on the Judiciary, H.R. Rep. No. 93-1463, 93d Cong., 2d Sess., at 8 (1974) (hereinafter referred to as the "House Committee Report").

framework of transparency and public engagement.

Unfortunately, the Justice Department apparently resents this intrusion on its independence and judgment. Even more unfortunately, this attitude appears to underlie its institutional resistance to the disclosure requirements of the Tunney Act.

Both the Justice Department and Microsoft have failed to comply with their disclosure obligations under the Tunney Act, thereby depriving the public of its right to informed input and depriving the Court of the informed public engagement intended by the Act. Neither the Justice Department's response to the public comments[2] nor the parties' February 27, 2002 memoranda in support of entry of the proposed final judgment[3] can or do cure their disclosure violations. Therefore, this Court cannot even reach the merits determination of whether the proposed consent decree is in the public interest.

In contrast to the public interest determination on the merits, disclosure compliance is not a matter of discretion or deference. The Court has no discretion to waive a disclosure requirement of the

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[2] Response of the United States to Public Comments on the Revised Proposed Final Judgment (Feb. 27, 2002) (hereinafter referred to as the "Response to Comments").

[3] Memorandum of the United States in Support of Entry of the Proposed Final Judgment (Feb. 27, 2002) (hereinafter referred to as the "DOJ Memo"); Defendant Microsoft Corporation's Memorandum in Support of the Second Revised Proposed Final Judgment (Feb. 27, 2002) (hereinafter referred to as the "Microsoft Memo").

statute. In addition, whatever level of deference the Court might accord the government in determining whether the substance of the proposed settlement is in the public interest, the Court can give no deference to the government's asserted compliance with the Tunney Act's disclosure requirements. The Court must make that legal determination for itself. As this Court has stated, "the Court cannot approve the proposed consent decree without first addressing the sufficiency of [the Justice Department's and Microsoft's] Tunney Act disclosures. If the Court determines that the disclosures were insufficient, the proposed consent decree cannot be approved." *American Antitrust Institute, Inc. v. Microsoft Corp.*, Civil Action No. 02-138 (CKK) (Memorandum Opinion dated Feb. 20, 2002), at 20.

Thus, as a matter of law, the Court must either reject the settlement or permit the parties to cure their disclosure deficiencies and begin the Tunney Act process over again.[4] That may be a harsh result and the delay unfortunate, but the parties have only themselves to blame. In such a landmark and high-profile case as this, which undoubtedly will become a routinely-consulted and oft-cited antitrust authority, it is especially important not to set a precedent that would allow future parties effectively to preclude meaningful public disclosure and input by giving short shrift to the disclosure requirements of the Act. Such a ruling would be the death-knell for the Tunney Act.

II. THE JUSTICE DEPARTMENT HAS FAILED TO COMPLY WITH ITS DISCLOSURE OBLIGATIONS UNDER THE TUNNEY ACT

The CIS is deficient because it fails to include mandatory disclosures regarding alternative remedies and the effect of the proposed settlement on potential private litigation.

[4] As discussed *infra*, the Court could limit the subject matter of the new public comments to

A. The CIS Fails to Include an Evaluation of Alternative Remedies

the material the parties disclose to cure the Tunney Act deficiencies.

The Tunney Act requires the Justice Department to disclose only six items in the Competitive Impact Statement ("CIS"). 15 U.S.C. § 16(b)(1)-(6). The Justice Department has failed to disclose two of them. Under Section 16(b)(6) of the Tunney Act, the CIS must include a "description and evaluation" of the alternatives considered by the government. 15 U.S.C. § 16(b)(6) (emphasis added).[5] On pages 62-63 of the CIS, the Justice Department lists six alternative remedies it considered. But there is absolutely no evaluation of any of them. In fact, the entire discussion of all six alternative remedies consists of two sentences on page 63 of the CIS in which the government merely states that it weighed the alternatives and rejected them.[6]

As a matter of law, the CIS fails to provide an evaluation of alternative remedies. The statute does not require the Justice Department merely to assure the public that it evaluated alternatives; it requires the Justice Department to evaluate them. The term "evaluation" is not defined in the Tunney Act, but the simple statement that alternatives were considered and rejected cannot suffice as an "evaluation" of alternatives under any definition of the word.

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[5] This disclosure also is important to the Court's public interest determination. *See* 15 U.S.C. § 16(e) (in making public interest determination, Court may consider the "anticipated effects of alternative remedies actually considered").

[6] Contrary to the Justice Department's representation to the Court at the Tunney Act Hearing on March 6, 2002 (*see* Tunney Act Hearing Transcript, at 167), there is no other discussion of any of the six alternative remedies anywhere else in the CIS.

During Congressional hearings on the Tunney Act, Senator Tunney explained that if the Antitrust Division prepared a memorandum which discussed alternative remedies, that analysis would have to be described in the CIS. *See* Hearing on S.782 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., at 107 (March 15, 1973) (hereinafter referred to as the "Senate Hearings").[7] On page 63 of the CIS, the Justice Department states that it "carefully weighed the [six alternative remedies listed], as well as others received or conceived,

[7] Congress' intent to require at least a summary analysis of the alternative remedies also is supported by the legislative history, which demonstrates that Congress modeled the Tunney Act disclosure provisions on the environmental impact statement. *See* Senate Hearings, at 3, 8 (Senator Tunney stated: "In providing this mechanism which permits meaningful public comment, we have fashioned our proposed public impact statement upon the already existing environmental impact statement"); 119 Cong. Rec. 24600 (1973) (Senator Gurney stated: "[T]he Department [of Justice] would be required to file a 'public impact' statement analogous to that required under the national Environmental Protection Act"); Hearing on S.782 and Related Bills Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 93d Cong., 1st Sess., at 72 (Sept. 20, 1973) (hereinafter referred to as the "House Hearings") (CIS modeled on environmental impact statement). This Court is well aware of the scope of environmental impact statements: "The report itself is a detailed analysis and study conducted to determine if, or the extent to which, a particular agency action will impact the environment." *City of Williams v. Dombeck*, 151 F. Supp. 2d 9, 22-23 (D.D.C. 2001).

considering their potential to remedy the harms proven at trial and upheld by the Court of Appeals; their potential to impact the market beneficially or adversely; and the chances that they would be imposed promptly following a remedies hearing." Presumably, therefore, there were memoranda reflecting this analysis. At a minimum, then, the CIS should have included at least a summary of the analysis of the various alternative remedies sufficient to explain to the public why the Justice Department rejected the alternatives and concluded on page 63 of the CIS that the remedies it chose are "the most effective."

Notwithstanding the Justice Department's attempt to shrug off the issue of its disclosure compliance, this is not some trivial technicality. The government's description and evaluation of the alternative remedies it considered is among the most material public disclosures in the entire CIS. The government's evaluation of the remedies it considered as alternatives to the ones it ultimately agreed to settle for is critical to the public's ability to understand and assess the value of the settlement. It is critical to the public's ability to assess the comparative effectiveness of the proposed remedies and others that could have been pursued. It also is critical to the public's ability to determine whether the government has entered into a "sweetheart deal" or whether improper influences may have been at work.[8]

Approval of the consent decree despite the CIS's failure to include an evaluation of the alternative remedies would "make a mockery of judicial power" because it would sanction a clear

[8] The House Committee Report on the Tunney Act emphasized that Congress "intend[ed] to provide affirmative legislative action supporting the fundamental principle restated by the Supreme Court . . . that 'it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" House Committee Report, at 12.

violation of the plain language of the statute and because it would conflict with the purposes of the Tunney Act.[9] The CIS gave the public no basis to understand why the Justice Department concluded that the proposed remedies are "the most effective." The Tunney Act does not oblige the public to simply take the government's assurance on faith. That is the whole point of the Tunney Act.[10]

At the Tunney Act Hearing and in its response to public comments, the government has made the rather absurd argument that the public must have had enough disclosure about alternative remedies because 30,000 public comments were submitted and some complaining commenters filed hundreds of pages of comments. Response to Comments, at 19; Tunney Act Hearing Transcript, at 168-69. This

[9] A proposed antitrust consent decree is in the public interest only if: (1) none of the terms appear ambiguous; (2) the enforcement mechanism is adequate; (3) third parties are not positively injured; and (4) the decree does not otherwise make a mockery of judicial power. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995); *Massachusetts School of Law v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997).

[10] As Senator Tunney stated upon introducing his legislation: "Regardless of the ability and negotiating skill of the Government's attorneys, they are neither omniscient nor infallible. The increasing expertise of so-called public interest advocates and for that matter the more immediate concern of a defendant's competitors, employees, or antitrust victims may well serve to provide additional data, analysis, or alternatives which could improve the outcome." 119 Cong. Rec. 3452, 93d Cong., 1st Sess. (1973).

argument hardly merits a response. Suffice to say, 30,000 people submitted comments without the benefit of the disclosures the statute requires the government to make to them. Compliance with the statute is not determined by how many comments or how many pages of comments are filed.

The government also attempted to justify its non-compliance at the Tunney Act Hearing by noting that the settlement was widely reported in the media. Tunney Act Hearing Transcript, at 168. This also is irrelevant. The statute does not relieve the Justice Department of its disclosure obligations under the Tunney Act if the settlement receives a certain quantum of media coverage. It also is irrelevant whether some members of the public may be able to read judicial decisions and ferret out the relative advantages or disadvantages of various alternative remedies and the prospects of attaining them in litigation. The statute also does not relieve the Justice Department of its disclosure obligations on these bases either.

At the Tunney Act Hearing, the Justice Department argued that its disclosure was sufficient because it later provided an evaluation of the alternative remedies to the Court in its February 27 memorandum in support of the entry of final judgment. Tunney Act Hearing Transcript, at 166. Such after-the-fact disclosure may be relevant to the Court's public interest determination but it is completely irrelevant to the government's compliance with the Tunney Act requirements for the CIS. The fact remains that the public was unlawfully deprived of the opportunity to comment with the benefit of the required disclosures. The Justice Department does not have the luxury of casually casting off its statutory disclosure obligations.

B. The CIS Fails to Disclose the Effect on Private Litigation

The CIS also is deficient because it fails to disclose whether the proposed consent decree is

intended to have an effect on private remedies. Under section 16(b)(4) of the Tunney Act, the CIS must disclose "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." In purported compliance with this requirement, the Justice Department states, in one sentence, that Section 4 of the Clayton Act provides for treble damages, costs, and attorneys' fees. CIS, at 63.

As a matter of law, merely quoting a federal antitrust law is not sufficient compliance with the disclosure requirement. The Justice Department merely recites federal antitrust law, not how the settlement is expected to impact private remedies. The statute does not require the government merely to tell the public what section 4 of the Clayton Act provides. If that were what Congress intended, it could easily have required the CIS to recite the statute. The statute also does not require the government merely to tell the public all the remedies that are available to private plaintiffs. Rather, it requires the government to tell the public the remedies that would be available to potential private plaintiffs, "in the event the settlement is approved." In other words, the CIS must disclose the impact the proposed settlement might have or is intended to have on the relief that would otherwise be available to potential private plaintiffs?[11]

There is a multitude of pending cases against Microsoft. If the Justice Department intends to

[11] This disclosure also is important to the Court's public interest determination. *See* 15 U.S.C. § 16(e) (in making public interest determination, Court may consider "the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint").

impact them, or anticipates that they may be impacted, or has an understanding with Microsoft about their impact, or knows that Microsoft intends to argue that they are impacted, then such a matter is of vital relevance to the public's evaluation of the settlement and its comments and must be disclosed in the CIS.

The Justice Department has conspicuously avoided addressing this issue. Instead, it takes the disingenuous position that this is a "legal" issue that need not concern this Court. Whether the disclosure required by the Tunney Act may be characterized as legal, non-legal, or quasi legal is irrelevant. Moreover, whether the government has complied with section 16(b)(4) of the Tunney Act is a matter for determination by this Court, not by future courts dealing with collateral estoppel motions.

C. Neither Purported Policy Considerations Nor Untimely Supplemental Disclosures After the Public Comment Period Excuse Non-Compliance With the Disclosure Requirements of the Tunney Act

The statutory obligations of the Justice Department to make certain disclosures to the public about a proposed antitrust consent decree are not optional. They cannot be waived. They are not excused because of the resultant delay involved in re-starting the 60-day public comment period. They are not forgiven because of the resultant burden involved in having to consider and respond to the new public comments. They are not overlooked because it would not be "sensible," as suggested by the Justice Department. They are not outweighed by other considerations relating to the substantive merits of the proposed settlement; if the disclosures are insufficient, the settlement cannot be approved regardless of whether the decree is otherwise in the public interest. They are not cured by supplemental disclosures made by the Justice Department directly to the Court after the public comment period is over. They are mandatory.

The Justice Department cannot cure its disclosure violations by providing supplemental disclosures to the Court after the public comment period. Nothing in the language of the statute allows the government to meet its disclosure requirements by providing additional information to the Court after the public comment period.[12] The Justice Department's attempt to satisfy its disclosure obligations by making after-the-fact disclosures is an attempt to make an end-run around public disclosure and input. If allowed by this Court, this practice would permit the government to keep the public in the dark about key matters relating to the settlement in order to reduce the public's ability to effectively challenge the settlement.

The government raised the argument at the Tunney Act Hearing that it would not be "sensible" to re-start the Tunney Act process because of a deficient disclosure. Tunney Act Hearing Transcript, at 169. This view betrays the underlying government resentment of and resistance to the Tunney Act. It is little more than an annoyance to the Justice Department. After all, it did not promulgate a regulation or even administrative guidelines to provide for the types of public disclosures required by the Act. It believes it always acts in the public interest and therefore no disclosure to the public is necessary. In any event, whether or not a statute's requirements appear "sensible" to the Justice Department is of no consequence. They were "sensible" to Congress. Moreover, it was not "sensible" for the Justice

[12] Courts may request and parties may provide supplemental disclosures after the public comment period for purposes of the public interest determination, but such disclosures cannot cure a failure to provide disclosures that are required to be made to the public before the public interest determination.

Department to decide not to comply with the statute.

The Court cannot settle for disclosure of four out of six, or two-thirds, of the required CIS disclosures by the government. A finding that this disclosure is sufficient effectively would gut the Tunney Act. The Justice Department would know that, in the future, it could keep the public in the dark without consequence. "The judge is never going to make us start the whole process over again," would be the clear lesson to the government.

III. MICROSOFT HAS FAILED TO COMPLY WITH ITS DISCLOSURE OBLIGATIONS UNDER THE TUNNEY ACT

Microsoft also has failed to comply with the disclosure requirements of the Tunney Act.

A. Microsoft Has Failed to Comply With the Broad Disclosure Requirements of the Tunney Act

One of the primary purposes of the Act was to expose lobbying contacts to sunlight to discourage improper influences and strengthen public confidence in antitrust consent decrees.[13] Toward this goal, Section 16(g) of the Tunney Act is extremely broad. In contrast to a single narrowly-defined exception for settlement negotiations between "counsel of record" and "the Attorney General or

[13] When Senator Tunney first introduced his bill, he focused on the significance of this disclosure provision. "Sunlight is the best of disinfectants," he explained, quoting Supreme Court Justice Louis Brandeis, and, therefore, "sunlight . . . is required in the case of lobbying activities attempting to influence the enforcement of the antitrust laws." 119 Cong. Rec. 3449, 3453 (1973). Senator Tunney continued: "[T]here is a great deal to be gained by having a corporate official who seeks to influence a pending antitrust case through congressional pressure, know that this activity is subject to public view." *Id*. (emphasis added). The House Committee Report also emphasized the public's interest in the integrity of the contacts between the government and the antitrust defendant: "Your Committee wishes to emphasize, in addition, that (1) the public does have an interest in the integrity of judicial procedures incident to the filing of a proposed consent decree by the Justice Department. . . ." House Committee Report, at 8.

employees of the Department of Justice alone," the statute requires public disclosure of "a description of any and all written or oral communications by or on behalf of [the] defendant . . . with any officer or employee of the United States concerning or relevant to [the] proposal." 15 U.S.C. § 16(g) (emphasis added). In addition, the statute requires the defendant to certify that the descriptions of these communications are both "true and complete." *Id*.

As a preliminary matter, Microsoft violated the statute by making untimely disclosure of its lobbying contacts. Section 16(g) required Microsoft to file its disclosure "[n]ot later than 10 days following the date of the filing" of the proposed consent decree. The proposed consent decree was filed on November 6, 2001. Therefore, Microsoft's disclosure was due by November 16. However, Microsoft did not file its disclosure until December 10, 2001, more than three weeks after the deadline. Nothing in the language of the Tunney Act allows Microsoft to disclose its lobbying contacts at some later date, much less disclose them even now, as it apparently intends to do in response to the Court's inquiries during the Tunney Act Hearing. Nor can the Court disregard the specific deadlines imposed by the statute.

Microsoft purports to comply with Section 16(g) by a statement that essentially says that some unnamed counsel for Microsoft met often with some unnamed counsel for the United States to discuss some unspecified subjects, and that various named and unnamed Microsoft people met with unidentified "representatives of the United States" for unspecified purposes. *See* Defendant Microsoft Corporation's Description of Written or Oral Communications Concerning the Revised Proposed Final

Judgment and Certification of Compliance Under 15 U.S.C. § 16(g) (Dec. 10, 2001).[14] In fact, there is no description of the subject matter of any communication whatsoever. As a matter of law, therefore, Microsoft's disclosure fails to comply with the Tunney Act and its certification that its disclosure was "true and complete" is a sham.

[14] At the Tunney Act Hearing, Microsoft's counsel argued that it did not make a more specific disclosure because the nature of the communications was obviously related to settlement negotiations. Tunney Act Hearing Transcript, at 183. But what may have been obvious to Microsoft was not necessarily obvious to the public. The requirement of a "description" is intended to give the public and the Court enough information to understand the nature of the communication and assess whether improper influences may have taken place.

In addition, in its memorandum in support of entry of the proposed final judgment, filed after the public comment period, Microsoft reveals that it did not disclose any contacts with any employees of the United States except those in the Executive Branch. Microsoft Memo, at 42-43.[15] Microsoft has simply unilaterally decided to interpret the statutory words "the United States" to mean only "the Executive Branch." *See id*.; Tunney Act Hearing Transcript, at 88. There is no support for such a limitation. In fact, Congress knows precisely how to specify a part of the federal government when it wants to do so. Indeed, in the same sentence of the Act in which Congress referred to contacts with "employees of the United States," it referred to the exception for contacts with "employees of the Department of Justice." 15 U.S.C. § 16(g). Moreover, Senator Tunney stated explicitly, when he first introduced this legislation, that this provision "would include contacts with Members of Congress or staff." 119 Cong. Rec. 3453 (1973); *see also* House Report, at 12.[16]

[15] Microsoft's extensive lobbying of Congress apparently resulted in a letter signed by 88 members of Congress urging a swift settlement.

[16] Case law pre-dating the Tunney Act also makes clear that members of Congress are "officers of the United States." *See, e.g., Williams v. Brooks*, 945 F.2d 1322, 1325 n.2 (5th Cir. 1991); *Nebraska v. Finch*, 339 F. Supp. 528, 531 (D. Neb. 1972); *United States v. Meyers*, 75 F. Supp. 486, 487 (D.D.C. 1948).

Certainly, in a statute that is intended to preclude improper influences, it would be antithetical to allow, hypothetically, an owner of a defendant to secretly call up a powerful member of Congress and tell him that he will donate $1 million to him or his political party if he can get the Justice Department to settle an antitrust case against his company on easy terms. If the Tunney Act is interpreted to shield from disclosure settlement-related lobbying contacts with Congress, it will open a hole in the Tunney Act big enough to drive an army of lobbyists through.[17]

Microsoft has attempted to defend its non-disclosure by pointing to other consent decree defendants in the past that did not disclose contacts with Congress. Microsoft Memo, at 43, n.38. This is yet another irrelevant point. There may not have been any such contacts to disclose in those cases. It also is possible that the disclosure requirement was misapplied in those cases but not challenged. In any event, no court has ever ruled that an antitrust defendant need not disclose lobbying contacts with Congress.

[17] The lobbying disclosure provision applies equally to all branches of the federal government. *See* 15 U.S.C. § 16(g); 119 Cong. Rec. 3453 (1973). Even settlement-related contacts with the Judiciary need be disclosed. For example, if, hypothetically, an owner of a defendant had contacted the presiding judge seeking to pressure approval of a settlement, that contact would have to be disclosed. Of course, the other routine contacts between counsel and the Court related to official legal proceedings could be disclosed with a brief description sufficient to indicate their routine nature.

Microsoft demonstrated at the Tunney Act Hearing that it has misapplied Section 16(f). Counsel for Microsoft indicated that Microsoft reviewed its contacts with the federal government only to determine if there were any communications regarding a "term" in the final settlement agreement. Tunney Act Hearing Transcript, at 90. This hyperliteral application of the requirement to disclose lobbying contacts is improper. If the requirement were limited solely to the disclosure of contacts concerning a "term" of the final agreement between the parties, it would eviscerate the statute's goal of exposing to sunlight untoward attempts to influence the government.[18] Microsoft improperly has shielded from disclosure any discussions with the government that concerned or were relevant to a settlement other than those in which a specific term in the final settlement document was discussed.

By adopting its stultifying interpretation, Microsoft also has read the intentionally broad words "relevant to" out of the statute.[19] In order for the term "relevant to" in the phrase "concerning or relevant to" not to be mere surplusage, it must encompass communications less focused on the settlement than those "concerning" the settlement. For example, "the provision would require disclosure . . . of a meeting between a corporate official and a Cabinet officer discussing 'antitrust policy' during the pendency of antitrust litigation against that corporation." 119 Cong. Rec. 3453

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[18] Section 16(g) was designed "to insure that no loopholes exist in the obligation to disclose all lobbying contacts made by defendants in antitrust cases culminating in a proposal for a consent decree." H.R. Rep. No. 93-1463, at 12.

[19] Even the title of Microsoft's Section 16(g) statement indicates that it ignores the "relevant to" language of the statute. *See* Defendant Microsoft Corporation's Description of Written or Oral Communications Concerning the Revised Proposed Final Judgment and Certification of Compliance Under 15 U.S.C. § 16(g). In addition, Microsoft's memorandum in support of final judgment also omits the "relevant to" language of the statute. Microsoft Memo, at 39 ("Under Section 16(g) of the Tunney Act, a defendant is required to file with the court descriptions of all written and oral

(1973). Microsoft also must disclose communications that are plainly relevant to a settlement, such as discussions of the decision to settle rather than litigate, or discussions of proposals, counterproposals, modifications, previous non-adopted versions of the settlement agreement or any of its provisions, or antitrust policy. Microsoft did not consider itself bound to disclose any such communications.

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communications on its behalf concerning the proposed consent decree. . . .") (emphasis added).

Microsoft also has used the "counsel of record" exception to hide from disclosure communications with the government concerning or relevant to the settlement. Microsoft has interpreted the term "counsel of record" to apply to any lawyer who is not a counsel of record at the time of the communication but who is later deemed by Microsoft to be a counsel of record. Microsoft Memo, at 41 n.34. In addition, Microsoft appears to be putting the "counsel of record" tag on any of its attorneys. For example, at the Tunney Act Hearing, Microsoft counsel indicated that Rick Rule was a "counsel of record" merely because he was a lawyer representing Microsoft. Tunney Act Hearing Transcript, at 92-93.[20] Also, Microsoft's memorandum in support of final judgment calls Mr. Rule a "counsel of record" because "he was acting as Microsoft's counsel." Microsoft Memo, at 40.

[20] During this part of the Tunney Act Hearing, the Court seemed to be interested in whether Mr. Rule was a registered lobbyist. Whether or not a lawyer is a registered lobbyist has no significance under the Tunney Act. Lawyers who are not registered lobbyists can lobby and lawyers who are registered lobbyists can practice in court. Moreover, lobbyist registration pertains only to federal legislation, not litigation. The Tunney Act makes no distinction between lawyers who are registered lobbyists and those who are not. The only distinction made this provision of the Act is between contacts concerning or relevant to the settlement by anyone on behalf of the defendant with the Attorney General or employees of the Justice Department alone and any other contacts concerning or relevant to the settlement by anyone on behalf of the defendant with any other officer or employee of the federal government.

"Counsel of record" is a very specific term. Congress did not simply use the word "counsel" or "attorney." The use of the more specific term is consistent with Congress' intent to carefully limit the exception from disclosure of lobbying contacts so that it would not be abused to hide communications from the public.[21] If Microsoft's interpretations are condoned, it could send any lawyers it wants to lobby the government and then withhold disclosure of those contacts on the ground that the company later put those lawyers on a pleading, had them officially designated as "counsel of record," or otherwise deemed them to be their counsel of record.[22] Microsoft cannot be permitted to retroactively shield from disclosure contacts by its attorneys who were not designated as counsel of record at the time. *See* House Committee Report, at 9 (contacts by "[a]ttorneys not counsel of record" must be disclosed).

Microsoft's interpretations of the statute effectively permit it to hide any lobbying contact it wants. Although "counsel of record" is not defined in the Tunney Act, it cannot mean what Microsoft

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[21] The carefully drawn exception to disclosure for settlement negotiations between "counsel of record" and the "Attorney General or the employees of the Department of Justice alone" "is not intended as a loophole for extensive lobbying activities by a horde of 'counsel of record.'" 119 Cong. Rec. 3453.

[22] There were many reported meetings between Assistant Attorney General Charles James and Microsoft representative (and former Assistant Attorney General for Antitrust) Rick Rule that occurred at a time before Mr. Rule was designated counsel of record for Microsoft. Under Microsoft's interpretation of the statute, Mr. Rule's contacts could have been blatant lobbying contacts that Microsoft purposely has shielded from disclosure by designating Mr. Rule its counsel of record as late as November 15, 2001! This is an extremely suspicious designation, since it was long after the settlement agreement had been entered into between the parties and the day before Microsoft's Section 16(g) disclosures were due. But rather than disclose Mr. Rule's contacts with the government on November 16 as required, Microsoft instead secured Mr. Rule's official designation as "counsel of record" on November 15 and then waited another 25 days to file its Section 16(g) statement. Mr. Rule's counsel of record designation appears to have had only one purpose -- to throw a blanket of

has interpreted it to mean. In fact, Microsoft's interpretations strip the term of any meaning and allow it to manipulate its contacts with the government so as to hide any lobbying communications in which it engages.

B. Microsoft Cannot Cure its Disclosure Deficiencies After the Public Comment Period

As a matter of law, Microsoft cannot cure its disclosure deficiencies simply by making supplemental disclosures to the Court at this late juncture. Rather, the statute required Microsoft to make its disclosure at the start of the public comment period so that the public could comment on the disclosure.

Despite the fact that promoting public confidence in federal antitrust settlements is a major goal of the Act, both the Justice Department and Microsoft argue that the public is not "entitled" or even "authorized" to comment on lobbying contacts. DOJ Memo, at 39-40; Microsoft Memo, at 44-45. This argument falls flat. The parties rely for their position solely on the fact that subsection (g) of the statute, which relates to lobbying contacts, is separate from and follows after subsection (b), which relates to public comments. This reliance is misguided for several reasons.

First, the language of the statute plainly requires Microsoft to make its disclosure of lobbying contacts "[n]ot later than ten days following the date of the filing of the proposal for a consent judgment." 15 U.S.C. § 16(g). Nothing in the language of the statute allows Microsoft to disclose lobbying contacts at some later date, period.

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secrecy over his contacts on behalf of Microsoft.

Second, the structure of the statute demonstrates that Microsoft cannot cure its Tunney Act violation by supplemental disclosures after the public comment period. As just discussed, Section 16(g) requires Microsoft to publicly file its lobbying contacts within ten days of the filing of the proposal – in other words, at the start of the public comment period.[23] This is in sharp contrast to the required certification (that the disclosure is "true and complete"), which can be made after the public comment period, during the public interest determination phase of the proceedings. 15 U.S.C. § 16(g). This structure demonstrates Congress' intent to afford the public the opportunity to comment on the lobbying contacts. Otherwise, Congress could simply have required defendants to make the lobbying disclosures and related certification together, at the same time, after the public comment period and during the public interest determination phase of the proceedings. If Congress had intended lobbying disclosures to solely be a matter for the Court's public interest determination, it would not have separated the disclosure requirement from the certification requirement and specifically required the former to be made at the start of the comment period while allowing the latter to be made at anytime before final judgment.

In addition, the fact that the statute is designed to make lobbying disclosures a subject of public scrutiny through a public filing requirement is indicated by the similar requirement with respect to the government's determinative documents. Section 16(b) requires determinative documents to "be made available to the public at the district court." Thus, just as Congress intended determinative documents

[23] In this case, the proposed consent decree was filed on November 6, 2001. Microsoft's Section 16(g) disclosure was due ten days later, on November 16, 2001. The publication of the CIS, starting the 60-day public comment period, did not occur until November 28, 2001.

to be made available to the public for purposes of public comment through a public filing with the court, Congress intended lobbying contacts to be made available to the public for purposes of public comment through the same requirement.[24] And just as Congress required the Justice Department to disclose determinative documents at the start of the public comment period so that they could be a subject of public scrutiny and comment, Congress required the defendant to disclose its lobbying contacts at the start of the public comment period for the same reason.[25]

Third, the purposes of the statute are to expose lobbying contacts to sunlight and foster public confidence in the consent decree process. The requirement that the lobbying contacts be disclosed at the start of the public comment period is consistent with these purposes, whereas disclosure after the public comment period undermines such purposes. After-the-fact disclosure would allow Microsoft to do an end-run around the public disclosure and input requirements of the Tunney Act.

Fourth, the legislative history supports the view that Congress intended to make lobbying contacts subject to public scrutiny. *See supra* n.13.

IV. CONCLUSION

[24] The Justice Department acknowledges that determinative documents are a proper subject of public comment. *See* Response to Comments, at 39.

[25] Moreover, subsections (b) and (g) are merely two subsections of the same section of the same statute that were enacted at the same time by the same Congress – hardly a structure that evidences two completely different purposes.

In light of the failures of the parties to comply with their disclosure obligations under the Tunney Act, the Court must either reject the proposed consent decree or require the parties to cure the disclosure deficiencies and start the Tunney Act process over again. As this Court has stated, if "the disclosures were insufficient, the proposed consent decree cannot be approved."

In ordering a new Tunney Act process, it is our view that the Court would not have the discretion to: (1) reduce the length of the 60-day public comment period, since there is no provision in the statute for shortening the period; or (2) limit the commenters only to those who submitted comments during the first comment period, since some members of the public who did not comment before may wish to comment in light of the new disclosures. However, it is our view that the Court would have the discretion to: (1) require the parties to make only the supplemental or revised disclosures while directing the public where to find the previous disclosures, since the remainder of the parties' original disclosures was legally sufficient; (2) require that the new comments be limited to discussing the impact of the new disclosures, since the public already has had the opportunity to comment on the legally sufficient disclosures; and (3) impose a reasonable page limit to the comments, since that would seem to be a matter of inherent judicial authority.

The delay of a new Tunney Act process in this case would have two important collateral benefits. First, it would afford the Court the opportunity to hear evidence in the Non-Settling States case related to the significance of alternative remedies, which the Justice Department improperly failed to disclose in this case. This would greatly assist the Court in determining whether the proposed settlement is in the public interest. Second, it would remove the very real risk that the Court will <u>appear</u> to be biased in the Non-Settling States case by whatever ruling it made on whether the proposed

settlement in this case is in the public interest.

Respectfully submitted this 11th day of March, 2002.

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