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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 Corn 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 Corn 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]

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…(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 "encourag[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).
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> The House Report echoes this concern:
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> 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. sec. 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

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1 See http://www.ftc.gov/os/caselist/0210041.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 (2000) and Kurt Eichenwald, The Informant (2000).