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Transparency in Antitrust—Do What We Say and Not What We Do: Some Reflections on Professor Grimes's Quest

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As a former Antitrust Division (the "Division") attorney whose service pre-dated the Tunney Act, I can recall the penchant for non-disclosure that governed our settlements long ago. I have even claimed that we were forbidden to give out the time of day if we had to refer to a Department of Justice ("DOJ") clock because that information came from a government source. In my role as an occasional officious intermeddler in antitrust matters I have been struck by the continuity of that culture. Antitrust Division attorneys are usually willing to listen to what you have to say, but they are very unwilling to give out even the time of day with respect to their investigations. At the same time, both the Federal Trade Commission ("FTC") and the DOJ are very enthusiastic about "transparent" decision-making by competition authorities in other countries. The message appears to be: Do what we say, not what we do.

On the other hand, during my years at the Division (1968 to 1973), I spent a modest but consistent part of my time editing and writing bank merger review letters. Under the bank merger act, the Division had to make public comments on every bank merger regardless of the size of the transaction providing a competitive impact analysis and stating the Division's enforcement intentions.[1] My experience in doing that public review process convinced me that the Division and, by extension, the FTC could be much more open about their views without undue burden. Moreover, such openness would be very helpful both in shaping specific decisions and in bringing about a dialogue

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1. See 12 U.S.C. §1828(c)(4) (requiring banking agencies to seek evaluation from the Antitrust Division prior to deciding merits of mergers).

with interested private parties that would inform the enforcement process. Such transparency would also weaken the insider monopoly on antitrust representation that favors a select few District of Columbia ("D.C.") firms and practioners who, as repeat players, acquire a depth of knowledge about the theories, factual standards and strategies of the enforcers.

Professor Grimes's article is an important contribution to the discussion of transparency.[2] He is kinder and gentler with the agencies than he ought to have been. He credits their claims of burden far too much, but his analysis of the benefits of fuller and more consistent disclosure is very much on point. On the other hand, he may have understated one major cost of achieving transparency, which is the increased incentive to use a "fix-it-first" settlement strategy with its lack of information. Also, he is not sufficiently critical of the quality of disclosure that is being made currently. Finally, based on my own experience of commenting on a proposed settlement, there are potential problems in policing any enhanced disclosure obligation, especially if there must be much reliance on district court judges. I will elaborate a little on these five points.

A. *The Costs and Burdens of Disclosure Are Not Great*

Professor Grimes credits the claims of significant burden on antitrust law enforcers if they are asked to provide disclosure with respect to more decisions and to improve the quality of such disclosure. In addition, he credits the assertion that there would be real issues about confidentiality of information if there were greater disclosure. While both of these claimed burdens exist as a matter of theory, in reality the significance of the first with respect to major investigations is greatly exaggerated and the reality of confidentiality claims is largely (but perhaps not entirely) bogus.

In any major investigation, whether of a merger or any other significant antitrust matter, there is going to be a wide and deep internal paper trail. The staff attorneys will write up their interviews and depositions, they will prepare

2. *See generally* Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFF. LAW REV. 937 (2003).

analyses of issues, and, ultimately, they will draft recommendations for action or inaction. They will often provide opposing counsel with written statements of their factual and legal analysis as they develop their own understanding of the facts and related legal and economic analyses. Their supervisors will review these memoranda and recommendations and make their own recommendation and so on up the line to the decision-maker (the Assistant Attorney General in the case of the Antitrust Division or the members of the Federal Trade Commission). If this process is well done, the memoranda will contain a general analysis of the facts and legal standards that are applicable, supported by more specific references to documents, interviews, and depositions.

Where this process results in litigation, there will be substantial disclosure of the factual and legal premises on both sides. However, when the investigation is closed or the case is settled prior to any litigation, the only fully informed parties are the government staff and the legal representatives of the parties that were targets. Given that the public has paid the salaries and expenses of the public servants charged with the investigation and analysis, it is not unreasonable for the public to expect to know the results of those efforts beyond the bare conclusion. Moreover, there is at best a very modest burden involved in sifting out of the final memoranda those general statements concerning the legal and factual analysis necessary to explain the basis on which the decision rested. Indeed, if it is known in advance that there must be disclosure of the basis for decision, the drafting process can proceed even more efficiently. The assertion of a cost of $75,000[3] for each public report is the kind of creative accounting that might even embarrass an Enron executive.

If, as Messrs. Nannes and Pitofsky claim, the real burden lies in having the top decision maker review each report, then the solution is to make reports of closed investigations a staff statement akin to the no-action letters that the Securities and Exchange Commission staff issues.[4]

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3. *Id.* at 950 n.22.

4. For an example of such a letter including a statement of the limited value of such informal statements, see Cap Rock Energy Corp., 2003 WL 21831870 at 22-23 (S.E.C. No-Action Letter, May 27, 2003). For a description of the no action letter process, see Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations of SEC No-Action Letters: Current Problems and a Proposed*

This preserves the deniability of the ultimate decision maker ("I never said that") and more accurately reflects the institutional reality that it is the staff that is not enthusiastic about the potential case, given its analysis of the available information in light of the current state of the law and agency enforcement policy.

A second justification for keeping secret the basis for decisions is that it will pose a serious problem for confidentiality. The Hart-Scott-Rodino merger reporting statute is said to promise sweeping confidentiality for all information received in the process, although that claim is in fact not based on any clear statutory language.[5] No such statutory constraint governs other investigations. The stated rationales for the excessive concern for confidentiality are, first, that the parties will not otherwise provide information that is "sensitive" and, second, that complainants will fear retribution if their identities are disclosed. Obviously, the more willing the enforcers are to pander to such concerns, the greater the expectations of such treatment and more inclusive the material covered. Indeed, as Professor Grimes has shown the European Union ("EU") experience as well as that of the Federal Communications Commission and Federal Engergy Regulatory Commission demonstrate that the lack of secrecy is not a deterrent to active participation by affected parties. Certainly there is some internal corporate information that deserves confidential treatment. Similarly, it is probably helpful to preserve the anonymity of complainants in so far as is reasonably possible. But just how naive are targets about the likely attitude and role of their customers or competitors?

Confidentiality is a greatly exaggerated concern in contemporary business litigation. Having been involved in a

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Framework, 83 CORNELL L. REV. 921, 929-65 (1998). *See also* 17 C.F.R. § 200.81 (requiring public access to no-action letters absent special confidentiality considerations).

5. Section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h), provides: "[N]o such information or documentary material may be made public, *except as may be relevant to any administrative or judicial action or proceeding.*" (emphasis added). With appropriate deference to the DOJ and FTC, this language hardly mandates a refusal to provide information in connection with the resolution of merger cases whether before or after formal litigation is initiated. Nor should it preclude an informative statement following the initiation of a second request or the resolution of a matter under the "fix it first" approach of the DOJ. Such *proceedings* are at least informal administrative actions.

couple of matters where I was privy to what the parties claimed as "confidential" business information, I am convinced that the vast majority of such claims have no real validity with respect to any legitimate interest in concealing genuinely sensitive, competitively significant information. The information is old news, largely, if not entirely, known to competitors in any event. The label is used to keep the public, customers, legislators and the press from discovering the dubious (if not outright false) claims and exploitative goals of the targets. The ultimate irony in my experience was getting a document under the Freedom of Information Act for a research project that I was conducting and finding that the government officer had blocked out "confidential" market share information for the companies involved. Not only was the information "old" (i.e., it related to market positions of companies several of which were no longer in existence, and covered a period at least five years in the past), but, because it was in fact public information, I had the data already.

A further consideration is that in the context of many, if not all, major investigations, there is a substantial written exchange of ideas, theories and factual claims between the government attorneys and counsel for the parties. These exchanges often involve discussion of facts or ideas supplied by third parties with an interest in the matter. The problem is that these other interested parties are frozen out of the discussion and have little opportunity for effective participation. The claim of confidentiality obstructs the process of gathering and evaluating information relevant to good enforcement decision making. The current excessive obeisance to confidentiality serves neither the public's interest in knowing about law enforcement nor the law enforcers' interest in being well informed.

Indeed, as Professor Grimes describes in some detail, the FTC has done a better job of disclosing its decisions without any serious problem of confidentiality even under current standards.[6] Even more interestingly, the Division

6. *See* Grimes, *supra* note 2, at 964-68 n.70-75. As examples, see Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P & O Princess Cruises PLC and Carnival Corp/P & O Princess Cruises PLC, F.T.C. File No. 021 0041 (Oct. 4, 2002) *available at* http://www.ftc.gov/os/2002/10/cruisestatment.htm; Statement of Commissioners Sheila F. Anthony, Orson Swindle, and Thomas B. Leary, Concerning Western States Gasoline

has demonstrated that my experience in bank merger evaluation is not an artifact of that specific field. In the case of the Hawaiian airline merger, the Division was quite capable of filing a statement with the Department of Transportation that provided a fully adequate discussion of the competitive issues presented in that case without, in the Division's own view, trespassing on obligations of confidentiality.[7]

The bottom line is that the costs, either in an economic sense or the broader and more relevant sense of increasing the difficulty for investigation and access to information, are easily exaggerated. Professor Grimes, in his effort to be even handed, has, as a result, credited these claims far more than they deserve.

B. *The Benefits Are Substantial*

Professor Grimes has ably set forth the key arguments for fuller disclosure. No general elaboration is necessary. Two aspects deserve particular highlighting in the context of a national enforcement program. The current semi-secret process creates a local monopoly in the D.C. bar and a few select practitioners with respect to mergers and other investigations. Repeat players get a substantial informational advantage over the lawyer, knowledgeable about antitrust, whose practice does not focus extensively on representing clients before the enforcement agencies. The creation of such barriers to entry into this aspect of the practice is an unfortunate and easily avoided consequence of excessive secrecy. Fuller disclosure of the reasoning and consideration underlying decisions to enforce (and settle) matters, as well as determinations not to proceed after investigation, would ensure that attorneys outside those representing the parties would have a much better understanding of the focus of antitrust concern. This in turn would improve the ability of lawyers to counsel clients either to avoid problems or to identify the kinds of information and analysis that would be relevant to

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Pricing Investigation, F.T.C. File No. 981 0187 (May 2001) *available at* http://www.ftc. gov/os/2001/05/wsgpiswindle.htm.

7. *See* Public Comments of the Department of Justice, Joint Application of Aloha Airlines, Inc. and Hawaiian Airlines, Inc., No. OST-2002-13002 (D.O.T. Aug. 30, 2002), *available at* http://www.dmses.dot.gov/docimages/pdf1a/ 182242_web.pdf.

government decision makers if the client wanted to oppose a particular matter.

Transparency also creates a more open and accessible "two way street." Full disclosure makes it easier for those outside D.C. to comment usefully in earlier stages of investigations. Here, I refer to Professor Grimes's suggestion that there ought to be more disclosure of pending investigations once they have advanced to a stage of serious attention. Combined with fuller disclosure of the analysis underlying prior, comparable matters, this information will allow third parties to make much more focused and informative comments. In my limited experience, government lawyers in D.C., especially those dealing with some agricultural issues, are not fully informed about all the potential impacts of particular conduct or transactions. While they will listen to suggestions, the investigation process does not encourage or stimulate third party participation. Moreover, because of the current emphasis on confidentiality, government lawyers are not forthcoming about their own ideas nor do they promote productive dialogue about the underlying competitive issues. This makes it hard to engage in an informed discussion and to identify the kinds of information that might be relevant in proving (or disproving) a particular claim.

In addition, and of paramount consideration, fuller disclosure of the basis for decisions, after they are made, will allow critics to identify the premises which they might dispute in future cases. This is a very important function for disclosure. If the government has assumed that two products do not compete and so allowed a merger, informed customers can work to educate the government so that in the future similar transactions will be viewed more critically. To be sure, the government would have to abandon its prior position, but assuming its prior position was wrong, it ought to abandon it. The problem is bringing about change when the basis for a decision is not revealed.

Lastly, there is always suspicion of government. In particular, those of us with a preference for a more active antitrust enforcement policy are concerned that the issues we perceive have not been considered. Full disclosure of the basis for actions and inactions provides a way to create increased credibility with such skeptics. This is not a claim that our views will be embraced as the basis for action, but

rather, fuller disclosure will show that our concerns were taken seriously and rejected for stateable and stated reasons. The recent FTC settlement of the WalMart acquisition of the leading grocery chain in Puerto Rico is an example.[8] Here the FTC in several statements discussed the concern that WalMart would have monopsony power in the market for fresh food products produced in Puerto Rico. The FTC established its credibility by acknowledging the concern, explaining its policy with respect to monopsony (which is very conservative) and so explained its rejection of such concerns as a basis for action. While I disagree with the standard the FTC implies in its statement, I take comfort in the fact that it acknowledged the competitive issues. Moreover, those with comparable concerns now are better informed as to the kinds of factual and economic impact analysis that will be necessary to convince that agency.

C. *The Problem of "Fix it First" and Transparency*

The Antitrust Division has since the 1980s followed a policy of favoring "fix it first" resolutions to merger cases. In its pure form, the parties' initial proposal identifies the competitive problem and fixes it with a divestiture that occurs simultaneously with the merger. In such a case, the argument is that there is no violation because no anticompetitive acquisition has occurred. Hence, the merger is cleared without action. In theory, this is a faster and more efficient solution to merger cases where there is a partial but easily resolved anticompetitive overlap. The FTC has taken a different position on such proposals and requires the parties to enter into a consent decree.

In practice, "fix it first" has devolved into a pre-litigation negotiation strategy in which the Division reviews the initial "offer", conducts its investigation, indicates its concerns, and the parties make another offer. This process can go on for a number of rounds until either a deal is struck or the Division sues. The Dean-Suiza merger is an example where the process was visible. The parties initially proposed a modest divestiture of overlapping dairies.[9] The

8. *See* Grimes, *supra* note 2, at 985-87 nn. 100-02.

9. *See* Press Release, Suiza Foods Receives Second Request from Dept. of Justice, (May 10, 2001) *available at* http://www.deanfoods.com/ir/press.html,

government apparently rejected that proposal as inadequate although the reasons were never made public. Probably, there was a concern with implications of the relationship between Dairy Farmers of America (DFA) with both the merged firm and the proposed acquiror of the assets to be divested. DFA, the largest diary cooperative in the country, was to have exclusive supply relationships with both enterprises, which would have forced farmers to join DFA in order to sell their milk. This would in turn reduce the potential for alternative suppliers to compete for the business of the merged firm. It would also exclude many independent milk handlers from their existing business with the merged firm. Finally, in some regions there remained significant overlap between the Dean and Suiza operations even after the proposed divestiture.

After apparently extensive negotiations, the merged enterprise agreed to divest five more dairies and to limit the application of the exclusive dealing agreement with DFA to ensure more access to other producers to some (but not all) of the dairies being acquired.[10] All that is known about the competitive analysis underlying this "settlement" is the brief press release that the Division issued claiming "victory" without any further explanation.

The proposed settlement with General Electric concerning its acquisition of Honeywell demonstrates a second type of problem. It appears that this settlement did contemplate a consent decree.[11] Because the European Union vetoed the merger in its entirety, the DOJ never completed the consent process and never filed a competitive impact statement. Hence, there is no public record of the markets that the Division examined or its analysis of them. This makes it very difficult to analyze the debate between the United States and the EU over the EU's successful challenge to the merger. Despite various public statements

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Suiza indicated that it would divest six fluid milk plants in five states to resolve all antitrust problems.

10. Press Release, Dept. of Justice, Justice Dept. Requires Suiza Foods and Dean Foods to Divest 11 Dairy Processing Plants (Dec. 18, 2001), *available at* http://www.usdoj.gov/opa/pr/2001/December/01_at_652.htm (stating that Suiza would divest 11 fluid milk plants in eight states and would limit the scope of the D.F.A. exclusive dealing contract with respect to its acquired dairies).

11. *See* Press Release, Dept. of Justice, Justice Dept. Requires Divestitures in Merger bewteen General Electric and Honeywell (May 2, 2001) *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm.

about the facts and their analysis, it is not clear whether the disagreement between the Division and the EU arose from different market analyses, from different perspectives on the possible competitive effects of the merger, or because the EU considered markets and market effects that the Division had not evaluated.[12]

Increased transparency, where cases are filed or formal investigations are undertaken, is likely to make it more attractive to secretive government enforcers and private parties to employ "fix it first" strategies. Unless the transparency policy applies to such deals as well, the incentive to have less well informed and even less well documented settlements will be substantial. The difficulty on the other side is that a genuine "fixed before submitted" transaction really is one that warrants quick clearance without substantial investigation. Moreover, it is hard to distinguish such proposals from the substantial number of mergers that involve no serious antitrust issues despite their large size. Thus, the challenge for a new transparency policy is to ensure that all "settlements" (i.e., matters where the parties make changes in the transaction or business practice *after* an initial submission or initiation of investigation) are subject to a disclosure requirement.

D. *The Quality of Existing Disclosure*

Professor Grimes contends that there is already minimally acceptable disclosure in a substantial percentage of cases. I question his measure, which is a crude quantitative statement based on cases for which some statement was provided. The disclosures called for by the Tunney Act seem to me to involve potentially frequent failures to disclose essential information. Indeed, Professor Grimes documents that in some of the cases he examines. A central problem in achieving better disclosure is the failure of federal district court judges to insist upon it as a condition of approving settlements.

My modest contribution to this aspect of the discussion is to reflect on my involvement in an effort to get the Division to be more forthcoming with respect to its proposed

12. *See* Association of the Bar of the City of New York, Committee on Antitrust and Trade Regulation, *Supplement to the 2002 Milton Handler Antitrust Reviews Proceedings,* 2003 COLUM. BUS. L. REV. 451, 486-491 (2003).

settlement of the Archer-Daniels Midland Co.'s ("ADM") acquisition of Minnesota Corn Processors ("MCP").[13] These two firms are leading producers of high fructose corn syrup ("HFCS") and ethanol. The Division proposed a settlement that allowed ADM to acquire MCP's facilities provided it ended a joint marketing arrangement between MCP and another major HFCS producer (something which ADM would almost certainly have done in any event).

The initial competitive impact statement omitted essential information. It did not reveal that ADM held a 15% voting interest in another major competitor in HFCS that was by far the largest single holding in that company; it failed to disclose MCP's share of HFCS capacity making it impossible to tell how much concentration would change in the relevant markets following this combination; and it did not even mention that ADM and MCP were the first and second largest producers of ethanol in the United States having in combination between 30 and 40% of all productive capacity. In addition, ADM acts as the exclusive marketing agent for an unknown number of other plants under apparently long term contracts, thus conferring even more power in the market for distributing ethanol. Our comments highlighted these factual omissions as well as the failure to explain why, given the high barriers to entry and the unresponsiveness of demand in the HFCS markets to price change, this combination would not create substantial anticompetitive risks even after breaking the joint marketing venture.

In its response to these comments, the Division did acknowledge ADM's substantial stock interest in a competitor in the HFCS markets, but claimed, without explanation, that the 15% voting interest would not keep these firms from competing. On its face, this is a profoundly naive assertion, as anyone versed in corporate law and economics would know. Of course, there might be good reason for such a claim based on contractual or other

13. *See* United States v. Archer-Daniels-Midland Co., Civ. No. 02-1768, 2003 WL 21976063 (D.D.C. Sept. 6, 2002) (mem.). The competitive impact statement, the comments, and the reply from the DOJ can be found at the Antitrust Division Web site at http://www.usdoj.gov/atr/casses/index358.htm. The letter to Judge Bates of April 17, 2003, see Grimes, *supra* note 2, 984 n.97, replying to the Division's "response" is available on file with the author (and presumably the court).

constraints on ADM's power, but such a non-obvious explanation needs to be set forth.

The Division also reluctantly disclosed that the level of concentration in the HFCS markets would increase by 100 to 300 points to levels that its own guidelines suggest create a presumption of anticompetitive effect. But the government's reply declared that the guideline presumption was weak. Instead, the reply asserted that competition was assured because there is "excess capacity throughout the corn wet milling industry" and that makes collusive pricing impossible.[14] But in a contemporaneous court opinion examining these same HFCS markets, Chief Judge Richard Posner, no antitrust hawk, but a very perceptive analyst, noted that "defendants [HFCS manufacturers] had a lot of excess capacity, a condition that makes price competition more than usually risky and collusion more than usually attractive. . . . The defendants continued to add to their capacity. . . . Maintenance of excess capacity discourages new entry . . . and also shores up a cartel by increasing the risk that its collapse will lead to a devastating price war . . . ."[15] Thus the same industrial fact, excess capacity, in the same industry, has lead two observers to exactly opposite conclusions. The difference is that Judge Posner has explained the economic and factual basis for his conclusion while the Antitrust Division only asserted a conclusion.

I am not prepared to claim that the distribution of excess capacity after ADM's acquisition of MCP can not result in a workably competitive market. Judge Posner's analysis focused on a period prior to the acquisition, and it is possible that the excess capacity is in the hands of a firm or firms with incentives inconsistent with collusion—tacit or express—to raise prices. But it requires some careful and potentially complex economic analysis to justify the conclusion that such capacity will stimulate price competition and deter tacit collusion.

With respect to ethanol, publicly available facts indicate that there were few barriers to entry into production of

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14. Dept. of Justice, Response of the United States to Public Comments on the Proposed Final Judgment, No. 1:02CV01768, at *9 (D.D.C. Apr. 1, 2003), *available at* http://www.usdoj.gov/atr/cases/f200900/200905.htm.

15. *In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 657 (7th Cir. 2002).

ethanol, but it also appeared that there may be more substantial barriers to effective competition in marketing. It appears probable that the Division investigated these aspects of the merger and concluded, on some undisclosed basis, that there were no substantial risks of anticompetitive effect. It did not, however, explain the basis for this conclusion to the court in its statement. Indeed, until the comments raised the issue, the Division failed even to acknowledge that ADM and MCP competed in the ethanol markets.

In sum, the disclosure of both relevant factual information and the legal-economic analysis that would justify the resulting consent decree were not present. It would be entirely inaccurate in this context to label the disclosure by the government as even "minimally acceptable." This is not to say that there might not be a fully satisfactory rational for the government's settlement. But the goal of the Tunney Act was to bring into the light of day the basis for action and not merely the assertion of conclusions.

E. *The Problem of Improving Disclosure*

Although it is hard to see how a judge could ratify the proposed ADM decree intended to protect competition without a better and more convincing explanation for the government's optimism, the judge in this case did exactly that.[16] He copied, in large measure, the government's declarations and failed to question its key unsupported claims. He accepted the assertion that 15% voting interest created no risks to competition[17] and that excess HFCS capacity would induce price competition without any further information about the basis for either claim.[18] The failure of the opinion to get the first initial of my first name correct and its erroneous assertion that the comments focused primarily on ethanol provide further demonstration of the superficial quality of this review. [19]

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16. United States v. Archer-Daniels-Midland Co., No. 02-1768, 2003 WL 21706543 (mem.) (D.D.C. July 22, 2003).

17. *Id.*

18. *Id.* (retaining five competitors, "the government's proposed remedy directly addresses the dangers of increase anticompetitive coordination").

19. At page eight, Judge Bates makes his initial reference to our comment as being one from "Professor C. Carstensen of the University of Wisconsin . . . ."

To increase the incentives for the Antitrust Division to provide more transparency, it is essential that the courts insist on fuller disclosure. The unfortunate language of the D.C. Circuit in the 1995 Microsoft consent decree case haunts the process.[20] If, indeed, a judge is only to consider whether a settlement "makes a mockery" of the antitrust laws,[21] then perhaps the judge can with impunity commit the court to ratifying anything the government presents. A decree, even if consented to, is an act of the court and so necessarily involves judicial ratification of the deal. Self respecting judges ought to be uncomfortable with ratification based on the limited information that the government currently provides.

It may be argued that most federal judges have scant knowledge of antitrust in general and merger law in particular. Hence, it is also possible to excuse excessive, even slavish, reliance on the Antitrust Division's assertions even when they contradict common sense. But if that is so, then it raises a fundamental concern for implementing reform with respect to transparency: who can police the quality of disclosure? The Tunney Act does provide that a judge may name a special master or request the "views, evaluations, or advice of any individual . . ." to assist in reviewing the proposed settlement.[22] Judges, who lack experience in the field, when confronted with plausible claims that the competitive impact statement is incomplete or inadequate, could invoke this provision to seek expert advice. There are a number of academics in both law and economics who are both experienced and highly capable of

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Id. At page twelve, he claims that the comment's "most fervent challenge to the proposed Final Judgment" related to "the ethanol market." *Id.* In fact, of the 15 pages of the comment, less than five addressed the ethanol market and those comments acknowledged that there appeared to be no basis to challenge the merger in the market for ethanol production, but suggested the need for greater information about ethanol distribution because of the greater possibility that entry into that aspect of the business might be constrained. *See* Public Comments of Peter C. Carstensen, Proposed Settlement of United States v. Archer-Daniels-Midland Co., No. 02-1768, 8-14 (D.D.C. Dec. 27, 2002), *available at* http://www.usdoj.gov/atr/cases/f200900/200905a.pdf. Only a very casual reader would think that this commentary on the ethanol issues was "fervent" especially in comparison to the very serious prima facie competitive issues raised by this merger in the HFCS markets. *See id.* at 4-8.

20. *See* United States v. Microsoft, 56 F.3d 1448 (D.C. Cir. 1995).

21. *Id.* at 1462.

22. 15 U.S.C. § 16(f)(2).

making such reviews. To date, no judge has used this mechanism, but it is one way for judges to get a better understanding of whether there are serious deficiencies in disclosures made by the government. Such review does not require the judge to reject the proposed decree eventhough the judge might well demand fuller disclosure before consenting. Use of such an expert review mechanism could also create effective pressure on the government to be more forthcoming in its disclosures.

Beyond the problem of enhancing standards of review, the key issues, as Professor Grimes, states are in finding the right ways to communicate information at the lowest practical cost and simplify the process within reason. I largely agree with his suggestions.

CONCLUSION

The greatest obstacle to improving transparency is the culture of the enforcers. The FTC has always been somewhat more open because of the ability of individual commissioners to dissent from decisions either to act or not to act. Moreover, I have been impressed with the willingness of its current leadership to continue to develop fuller transparency about both settlements and at least key decisions not to challenge mergers or other practices. The Antitrust Division culture, however, still wants to keep the time on Division clocks secret. A real commitment to openness by the leadership of that agency could bring about the kind of change that is essential. Regrettably, only pressure from the courts or congress is likely to cause such a change, and then only with the greatest reluctance.

Professor Grimes is to be commended for bringing this issue to the table in his forceful article. He is kinder and gentler than he needs to be in his review, but his essential point stands out nevertheless: the public interest demands more, much more, transparency in antitrust enforcement.