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Comments on Warren Grimes: *Transparency in Federal Antitrust Enforcement*

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SYMPOSIUM

Transparency in Federal Antitrust Enforcement

WARREN S. GRIMES[†]

[T]he facts bearing on the merger are secret, including not only facts that businessmen normally keep confidential, but also facts readily available to the public through other sources; the law that emerges from the commission's decision is secret; the policy the commission declares is secret; the commission's legal analysis, if any, is secret; the political rewards to the commission's chairman, if any, are secret; and the commission's reasons, if any, for conducting the public's business in secret are secret.

—Kenneth Culp Davis¹

[†] Senior Research Fellow, American Antitrust Institute and Professor, Southwestern University School of Law. David Balto, Stephen Calkins, Albert Foer, Robert Lande, Douglas Rosenthal, Stephen Ross, Robert Skitol, and Lawrence Sullivan read an earlier draft of this paper and generously provided comments. Thomas Eilmansberger provided helpful insights and materials on transparency in the enforcement of EU competition law. Gabrielle Herderschee-Hunter gathered useful background data and materials from the antitrust agencies.

1. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 113-14 (1971). Professor Davis is describing the Federal Trade Commission's non-hearing premerger clearance process as it existed in the late 1960s. *See id.* at 70-74.

Introduction	939
I. The Need for Transparency	941
A. The Goals of Transparency	941
1. Improving Pre-Decision Process and Results	942
2. Fostering Agency Accountability After a Decision is Reached	942
3. Enhancing Knowledge of and Compliance with the Law	943
4. Fostering Fairness of and Public Confidence in the Institutions of Government	943
5. Avoiding Unfair Arbitrage Activity in the Stock Market	944
B. The Special Need for Transparency in Antitrust Enforcement Decisions	944
C. The Arguments Against Transparency	947
D. The House Judiciary Committee and Merger Enforcement Transparency (1986-88)	953
II. Current Law and Practice in Disclosure of Antitrust Enforcement Decisions	954
A. Merger Enforcement Transparency in Non- Antitrust Federal Agencies	954
B. Merger Enforcement Transparency in European Union Decisions	956
C. Transparency at The Federal Trade Commission and The Antitrust Division	959
1. Standards Governing Consent Settlements	960
a. Justice Department Settlements Under the Tunney Act	960
b. FTC Consent Settlements in Competition Cases	963
2. FTC Antitrust Enforcement Transparency ...	964
3. Justice Department Antitrust Civil Enforcement Transparency	969
4. Justice Department Antitrust Criminal Enforcement Transparency	974
III. Selected Case Studies in Enforcement Transparency	976
A. Cases Dropped After an Investigation	976
1. <i>Bell Atlantic / Nynex</i>	976
2. <i>Cruise Mergers</i>	978
3. <i>General Mills Acquisition of Pillsbury</i>	979

B. Justice Department Fix-It-First Resolutions of
 Merger Investigations 981

C. Cases Settled By Consent of The Parties 983

 1. *Archer Daniels Midland / Minnesota*
 Corn Processors 983

 2. *Wal-Mart / Supermercados Amigo* 986

IV. Recommendations and Conclusions..... 988

INTRODUCTION

Few would dispute the importance of openness for fair, responsive, and wise democratic government. Here, I examine the affirmative case for transparency in the antitrust enforcement decisions of the Justice Department's Antitrust Division and the Federal Trade Commission ("FTC"). Although both agencies disclose a great deal of information through guidelines, opinions, speeches, testimony, and public case filings, their record in publishing information about enforcement decisions is problematic. The system of premerger review has changed substantially since Professor Davis's criticism quoted above, but the disclosure problem remains largely unresolved. Although the FTC has recently made meaningful efforts to increase transparency, the results at both agencies remain unsatisfactory. Neither agency routinely provides any explanation of its decision not to challenge a proposed merger, even if genuine issues were raised, carefully studied, and decided by the agency. Similarly, when agency opposition to a proposed merger results in the would-be participants abandoning the transaction, there is typically no disclosure of the agency's analysis. In merger inquiries in which the agency reaches a negotiated settlement, agency public disclosure is often inadequate, particularly in the case of Justice Department fix-it-first resolutions.

After an overview of the costs and benefits of transparency in a law enforcement context, here I examine the two agencies' disclosure policies and the consequences of those policies. Deficiencies are not limited to merger enforcement, but the need for transparency is perhaps most evident in this area. Merger enforcement policy is increasingly a matter of administrative decision (and less a matter of judicial interpretation). Yet transparency for this vital area is lacking. For example, during the five fiscal

year period 1998-2002, the FTC provided minimally adequate disclosure in only 56% of its key merger enforcement decisions; the Antitrust Division's record was worse, providing minimally adequate disclosure in only 21% of its key merger decisions. This interpretation of the agency record is generous. Even within the category of "minimally adequate" disclosure, there was a consistent failure to identify and explain agency analysis of "near-miss" issues: non-trivial competitive concerns that were nonetheless deemed insufficiently weighty to require agency action.

The lack of meaningful disclosure can mask errors of under enforcement or over enforcement. But the problem is more acute with respect to under enforcement because of the tendency of both agencies to neglect to reveal analysis of issues for cases that are not brought or claims that are not made. Indeed, even if the agency brings an action, the case is usually settled by a consent in which the agency discloses its thinking only with respect to issues that are addressed in the remedy. This leaves the public in the dark as to conduct deemed unlawful but not addressed in the remedy or conduct considered borderline but not challenged by the agency. The possibility that enforcement errors are undiscovered is most troublesome at the Antitrust Division because, unlike the FTC where any of five commissioners can release a statement when there is disagreement about an enforcement decision, the Antitrust Division has no existing mechanism for disclosing agency analysis of disputed or "near-miss" issues.

Reform of agency disclosure policies is needed, but cannot be achieved without a commitment at the highest level. FTC Chairman Muris has already made helpful initial steps. The dimensions of reform must be framed with an eye to the law of unintended consequences. A disclosure policy that is overly broad or unduly burdensome could lead to unnecessary costs on enforcers and targets alike, and circumvention that leads to concealment instead of disclosure. Congressional oversight would be helpful and some amendments to current law may be needed.

The major recommendations offered here are:

- (1) that web sites be reworked to make them more user friendly, including the use of coordinated subject matter indexes for each category of enforcement that allow

seamless cross references from one agency's web site to the other;

(2) that for all publicly traded firms, the agency issue prompt information at each critical step of an enforcement investigation to avoid any perception of unfair stock trading based on leaked information;

(3) that the agencies provide meaningful explanations when extended civil enforcement investigations are terminated, regardless of whether the agency decides to pursue or not to pursue enforcement action;

(4) with respect to merger enforcement, disclosure should operate at two levels: (i) for all reported transactions the agency should, promptly after receiving a Hart Scott Rodino ("HSR") filing, release summary information including the identity of the parties, the nature of the transaction, and the markets in which the parties are active; and (ii) for all transactions for which the agency issues a second request or for which an extended investigation is conducted, the agency should issue a more detailed explanation if and when it reaches a conclusion that the transaction is likely to, or is unlikely to, violate the antitrust laws;

(5) that steps be taken to minimize unnecessary burdens or obstacles to disclosure, including amendment of the HSR Act to clarify an agency's authority to issue explanatory opinions and of the Tunney Act to eliminate burdensome requirements that do not meaningfully further the goals of transparency; and

(6) that more meaningful and complete disclosure be made in settled cases, including information on near-miss issues or alternative remedies not pursued.

I. THE NEED FOR TRANSPARENCY

A. *The Goals of Transparency*

"Sunlight," Justice Brandeis wrote, "is said to be the best of disinfectants; electric light the most efficient

policeman."² Scholars of administrative law³ and, on various occasions, Congress have endorsed this theme.⁴ An international organization now promotes transparency as a critical deterrent to corruption in government.⁵ The benefits of transparency in antitrust enforcement have also long been recognized. Professor Turner stated in 1965 that "to the extent that the enforcement agency, be it the Department of Justice or the FTC, has been able to come to a firm conclusion, there are many advantages to be gained and little to be lost from publicizing what that position is."⁶ Here are five sets of interrelated goals that transparency serves.

1. *Improving Pre-Decision Process and Results.* Anticipation of a published decision creates an incentive for refinement and diligence in the agency's fact-gathering and deliberating process before a decision is reached. Decision-makers who operate knowing that their analysis will be open for all to question may exercise more diligence and achieve sounder results. In addition, if members of the public are informed about an agency inquiry before a decision is made, they are more likely to come forward with critical information or suggested analysis of the legality of the conduct at issue. This information can assist the agency in achieving a full and accurate understanding of the facts.

2. *Fostering Agency Accountability After a Decision is Reached.* After a decision is announced, an agency

2. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933).

3. See DAVIS, *supra* note 1, at 111 (concluding that opening administrative processes to public scrutiny would provide the best single protection against arbitrariness).

4. See Freedom of Information Act, 5 U.S.C. § 552 (2000); Government in the Sunshine Act, 5 U.S.C. § 552(b) (2000).

5. Transparency International was founded in 1993 and now has chapters in many countries throughout the world. See Transparency International, at http://www.transparency.org/about_ti/history.html (last visited Sept. 19, 2003). The World Bank has also stressed the importance of transparency in the administration of bank-funded projects throughout the world. See Susan Rose-Ackerman, *Redesigning the State to Fight Corruption*, PUBLIC POLICY FOR THE PRIVATE SECTOR NO. 75, April 1996, at 1 ("[F]ighting corruption involves introducing more competition, privatizing government activities, and introducing greater transparency.").

6. Donald F. Turner, Address before the Antitrust Section of the American Bar Association 6-7 (Aug. 10, 1965), in Robert D. Joffe, *Guidelines—Past, Present and Future*, 50 ANTITRUST L.J. 187, 189 (1982).

explanation of its decision fosters oversight by interested and informed outsiders, a meaningful performance check on the agency. This post-decisional oversight can be pivotal in shaping future agency enforcement policy. An agency insulated from outside scrutiny may blindly pursue misguided or mistaken policies for a prolonged period.

3. *Enhancing Knowledge of and Compliance with the Law.* Announcing an agency decision increases understanding of the agency's policy and will likely increase voluntary compliance with that policy. If knowledge of the law is scattered or incomplete, well-intentioned citizens may act in ignorance of the law. An agency can also use an announced decision in precatory fashion, suggesting the boundaries of its decision and indicating which factors, had they been present in greater or lesser strength, might have produced a different result. Without this information, attorneys may offer vague or incomplete counsel because they lack a detailed understanding of agency policy. In addition, if knowledge of a particular matter is confined to agency insiders and the few outsiders who happen to have been involved in a particular transaction, a barrier to knowledge is created that can foster an elitist and difficult-to-enter specialty within the private bar.⁷

4. *Fostering Fairness of and Public Confidence in the Institutions of Government.* Pre-decisional transparency can be a form of due process, allowing affected parties an opportunity to offer submissions that can avoid unfair or unjust results. Affected parties include not only the target of an investigation but others enriched or injured by the target's conduct, such as a rival, a customer, or a supplier. Post-decisional transparency can also increase public confidence in a government agency. If the agency has offered cogent reasons for its decision, the public is more likely to accept the rectitude of the policy. If the policy is sound but ill-communicated, oversight can discipline the agency to refine its public explanations to garner public support. If the policy is misguided, disclosure can increase

7. See Thomas M. Jorde, *Coping with the Merger Guidelines and the Government's "Fix-it-first" Approach: A Modest Appeal for More Information*, 32 ANTITRUST BULLETIN 579, 594 (1987) (The lack of information about merger decisions "fosters 'privatization' of information in specialized law firms.").

the public's opportunity to understand shortcomings and work for a change.

5. *Avoiding Unfair Arbitrage Activity in the Stock Market.* Law enforcement decisions change the value of an affected firm's stock. If there is no timely public disclosure as an investigation moves through critical phases, high value is placed on leaked information that gives the possessor a significant advantage in stock market trades. Timely disclosure avoids actual or perceived unfairness in market trading.

B. *The Special Need for Transparency in Antitrust Enforcement Decisions*

As a general rule, the need for transparency increases as an agency's actions take on a law-making role. An individual decision to grant or deny a license or benefit may have little impact on the underlying rules that govern an agency's actions. More traditional law enforcement decisions, i.e., whether or not to prosecute common criminal conduct, usually are not explained at the time the decision is made. This is consistent with the distinction drawn in administrative law between law enforcement and rule-making, the latter being subject to greater disclosure and openness requirements.⁸ But the distinction is not a clear one. As law enforcement decisions become common-law markers that guide future decisions, they take on a "rulemaking" mantel. The need for disclosure grows. A decision becomes a vital part of the fabric of the law and those subject to that law have a greater need for access to the decision.

The importance of transparency in antitrust enforcement has been recognized by others.⁹ During the 1980s, the House Judiciary Committee explored the issue in oversight hearings and, on an experimental basis, asked the agencies to provide additional information about merger enforcement decisions.¹⁰ In 1989, the ABA Task Force on the Antitrust Division recommended that the Division commence

8. See BERNARD SCHWARTZ, *ADMINISTRATIVE LAW*, § 4.2 (3d ed. 1991) (distinguishing administrative orders from rulemaking).

9. See DAVIS, *supra* note 1, at 113-14; Jorde, *supra* note 7, at 594; Turner, *supra* note 6, at 189.

10. See *infra* Part II.D.

"generic" annual reporting of merger enforcement decisions.¹¹ Nothing came of this recommendation. In 2000, the Final Report of the International Competition Policy Advisory Committee (ICPAC) stressed the need for transparency in merger reporting standards, albeit without urging greater disclosure for the substantive decisions themselves.¹²

The federal antitrust agency's treatment of merger enforcement decisions has remained largely unchanged since the introduction of the HSR premerger program in 1978. Today, the agencies review several thousand corporate merger transactions every year. Most of these reviews are perfunctory—in fiscal year 2001, almost 97% of reported transactions were cleared without a request for additional information.¹³ Individually, most clearance decisions have relatively little disclosure value. A small percentage of these clearances, however, may result in careful agency scrutiny that may last for months, whether or not the transaction is ultimately challenged. One guide to determining the weight that an agency gives to a particular merger investigation is whether or not the agency has made a request for additional information ("a second request"). In recent years, a high percentage of the transactions in which second requests were issued have resulted in enforcement action.¹⁴ Agency disposition of these investigations, whether the agency pursues enforcement or drops the investigation, has guidance value within the agency itself and among the cadre of specialized attorneys who handle such merger transactions. If these decisions are

11. Report of the American Bar Association Section of Antitrust Law Task Force on the Antitrust Division of the U.S. Department of Justice 32 (July 1989), reprinted in 58 ANTITRUST L.J. 747, 763 (1989).

12. See *Final Report*, INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE 87-163 (2000), available at <http://www.usdoj.gov/atr/ipac/chapter3.htm> (last visited Sept. 20, 2003).

13. For fiscal year 2001, the percentage of premerger filings that generated additional requests for information was 3.2%. HART SCOTT RODINO ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2001, at 5 (2002), available at <http://www.ftc.gov/os/2002/09/hsrarfy2001.pdf> (last visited Sept. 20, 2003). For an overview of merger enforcement since the adoption of premerger reporting, see Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 137-142 (2002).

14. For the fiscal year 2000, enforcement actions represented over 80% of the number of second requests filed. Leary, *supra* note 13, at 137. That figure appears to have gone down slightly for fiscal years 2001 and 2002. See *infra* Tables 1 and 4.

not explained to the public, knowledge of the decision will remain the province of the agency itself (and privileged outsiders involved in the particular transaction).

The need for increased disclosure in merger matters is highlighted because of the contrast between current disclosure and the disclosure that occurred before the HSR premerger clearance was in effect. The old system was one that relied heavily on post-merger complaints filed by the two agencies. Many of these cases were litigated—the defendants usually had already consummated the merger and were in a strong position to contest the agency's challenge in litigation. The result was a steady flow of court opinions that invited oversight and criticism. This oversight probably played a significant role in steering the agencies toward more permissive merger policies by the mid 1970s.¹⁵

The premerger clearance process implemented in the late 1970s fixed a great deal of what was wrong with merger enforcement.¹⁶ In particular, it gave the agencies advance notice of a pending merger and an opportunity to seek an injunction before the merger was consummated. One consequence of granting the agencies this power, however, is that it greatly decreased the incentive and ability of merging parties to litigate an agency challenge. Rather than endure a prolonged period of uncertainty while a proposed merger is contested in court, most parties either choose to negotiate with the agency to resolve competition issues or to abandon the transaction. This has greatly reduced the flow of judicial opinions in merger cases. Indeed, after a quarter Century of experience with premerger clearance, we have yet to see a single substantive Supreme Court case generated through the premerger clearance procedure.¹⁷ The stifled flow of judicial opinions is a loss for transparency because the abandoned transactions

15. See Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S L. REV. 1, 15-22 (1998) (explaining how judicial decisions, even when they make bad law, attract criticism and tend to be eroded or overturned in subsequent decisions).

16. See Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. ECON. 43 (1969) (describing inadequacies in pre-HSR government merger enforcement).

17. *California v. Am. Stores Co.*, 495 U.S. 271 (1990), was a Supreme Court case that arose after the FTC settled a merger challenge on terms unacceptable to the State of California. The Court's opinion addressed the authority of the State to obtain injunctive relief under the Clayton Act.

and settlements usually do not provide disclosure comparable to that provided by a court opinion.

For Section 7 of the Clayton Act, what was judicially made law has now become much more administrative law—law that is determined by the enforcement decisions of the two federal agencies.¹⁸ The relative lack of disclosure for these enforcement decisions could be addressed if the agencies offered public statements explaining a decision in any case likely to have a significant guidance value, regardless of whether the agency decides to challenge the transaction.

C. *The Arguments Against Transparency*

To align oneself for secrecy and against open government is to risk ridicule, calumny, or worse. Yet, if transparency in government is fundamental for responsive, democratic government, it is a value that government agencies often embrace reluctantly. An agency may resist disclosure or seek to thwart law or regulation designed to ensure openness. To their credit, the antitrust agencies have attempted to offer information in a number of ways. Agency merger guidelines are designed to provide information about the government's approach to a merger investigation. Successive iterations of the Guidelines have described increasingly sophisticated modes of economic analysis as the standard for agency inquiry. The Guidelines by themselves are, however, not an adequate disclosure. Even if the agency attempts to follow the Guidelines' template for an investigation, the fact-intensive nature of merger inquiries leaves outsiders with little indication of why issues were resolved one way or the other or, indeed, whether the agency even addressed a particular issue. One consequence of the information vacuum may be that merger counseling is becoming increasingly the province of a handful of law firms with the benefit of inside information gained from past dealings with the federal agencies.

18. See Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1399 (1998) ("[O]nly a tiny handful of transactions are ever challenged in court by either agency."); see also Albert Foer, *Toward Guidelines for Merger Remedies*, 52 CASE W. RES. L. REV. 211, 212 (2001) ("[A] new body of administrative law has consequently evolved outside of the judiciary's sight.").

Agency intransigence in the face of demands for more disclosure can be well-grounded. If transparency is excessive, misplaced, or poorly implemented, it can do more harm than good. When a multi-member legislative, judicial, or executive body must reach a decision, confidentiality among members in the formative and negotiation stages can be crucial for compromise and consensus. When prosecutors are investigating potential criminal misconduct, confidentiality may be needed to prevent obstruction or evasion, to avoid unfair adverse publicity for the investigation target, or to lessen the risk that a potential defendant will flee the jurisdiction. When economic regulation of commerce is at issue, pledges of confidentiality may greatly ease the government's task of obtaining sensitive business information. And, of course, secrecy costs less: at least in the short term, there is no more efficient form of government than an autocracy unburdened by disclosure obligations and insulated from outside scrutiny.

Many of these concerns have reduced relevance to an agency explanation issued after its decision is reached. For example, the serious difficulties that could arise in any pre-decisional disclosure requirement that undermined the confidentiality of internal agency discussion, or burdened the communications between the agency and the parties involved in an investigation, are less relevant to a requirement that an agency explain its decision at the time it is announced. Even post-decisional disclosure, however, may have serious drawbacks. As previously noted, prominently cited concerns are: (1) the burden of preparing for a public disclosure; (2) the risk that confidential business information would be disclosed or that the mere threat of disclosure would make it more difficult for the agency to obtain voluntary submissions of information; (3) the risk that disclosure of past agency decisions may unreasonably constrain the agency in making future enforcement decisions; and (4) the risk that more disclosure will politicize enforcement decisions and increase burdens on staff.

The strongest opponent of transparency has been the Justice Department's Antitrust Division. Unlike the FTC, the Antitrust Division, with responsibility for criminal enforcement of the Sherman Act, has operated in a law-enforcement culture. Criminal investigations may be

conducted with the assistance of a grand jury and often are cloaked in secrecy (of course, merger and Section 2 Sherman Act investigations typically do not involve criminal enforcement). Some current and former Antitrust Division officials appear to share a genuine conviction that a law enforcement model (unburdened by the disclosure requirements of administrative agencies) will operate more efficiently and with less political interference. Perhaps this culture is also influenced by the single decision-maker model that allows information to more easily be kept in-house (in contrast to the FTC's commission model that necessitates the sharing of information among five decision-makers).

Whatever the cause, some Antitrust Division officials have in the past opposed efforts to provide more transparency in merger enforcement decisions. One Antitrust Division chief has argued that disclosure of the reasons an agency did not pursue a case might directly or indirectly reveal evidentiary difficulties which, in turn, might make the agency "vulnerable to counsel planning transactions that are designed to frustrate our ability to successfully enjoin them."¹⁹ It has also been argued that disclosure might reduce the flexibility of the agency in responding to unique factual circumstances and that meaningful transparency cannot be implemented without violating the confidentiality guaranteed to the parties who supply the information.²⁰ The Clayton Act may prohibit disclosure of information obtained in a premerger filing except in administrative or judicial litigation, although this construction of the statute may be unnecessarily narrow.²¹

19. *Authorization for the Antitrust Div. of the Dep't of Justice, Oversight Hearings Before the Subcomm. on Monopolies and Commercial Law, House Comm. on the Judiciary*, 99th Cong. 191-92 (1988) (statement of Douglas H. Ginsburg, Assistant Attorney Gen., Antitrust Div.).

20. See the comments of former Antitrust Division officials who registered opposition to the generic reporting recommended by the 1989 ABA Task Force, *supra* note 11, at 32 n.61.

21. The Clayton Act provides:

Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

Objections may also be made to the costs of public disclosure. A high level Antitrust Division official told the author in 1986 that compliance with the Tunney Act's requirements cost a minimum of \$75,000 for each case.²² While these objections may carry some weight, none of them seems to have prevented either agency from providing explanatory information when it has chosen to do so.

No disclosure system is cost-free. For example, issuing explanatory statements whenever an agency closes a major investigation will require a commitment of agency resources that could reduce those available for other enforcement initiatives. With another HSR deadline looming, and with the need to file a brief here or prevent harm there, an agency may not want to spend time on disclosure of a matter already decided. And it could take significant time to determine what is protected under the HSR process. These are valid concerns that warrant reducing the reach and exhaustiveness of any disclosure requirement. But agencies must issue explanatory statements when the investigation results in a decision to seek relief in a court-approved consent decree or through litigation. If a thorough agency investigation results in a decision on the merits not to challenge the conduct, there is no evident reason why this decision should have less guidance value to those who seek to understand the agency's actions.²³

Nor is it clear that injury to persons interested in the enforcement decision is greater when an agency decides to

Clayton Act, 15 U.S.C. § 18a(h) (2000). The phrase "administrative or judicial action or proceeding" can be read narrowly to permit disclosure only in the case of litigation before an administrative or judicial tribunal. But "administrative action" might reasonably be read as any action the agency takes in closing an investigation, even if no judicial or administrative complaint is filed. Under this broader construction, an agency would be free to release information deemed necessary to explain its disposition of an investigation.

22. The conversation was on the occasion of a hearing before the House Judiciary Committee's Subcommittee on Monopolies and Commercial Law (at the time I served as Subcommittee Counsel).

23. As FTC Bureau of Competition Director Joseph Simons puts it, "explaining why the Commission decides not to take action in a particular case may well provide at least as much useful information as an explanation of why the Commission decides to take action in other cases." Joseph J. Simons, Merger Enforcement at the FTC, Remarks delivered at the Tenth Annual Golden State Antitrust and Unfair Competition Institute (Oct. 24, 2002), available at <http://www.ftc.gov/speeches/other/021024/mergerenforcement.htm> (last visited Sept. 20, 2003).

bring an action than when it decides to drop an investigation. Those harmed by conduct subject to an antitrust investigation have a tangible interest in enforcement that could be as strong or stronger than the target firm's interest in avoiding enforcement.

A second cost to public disclosure of an agency enforcement decision would be the potential undermining of the confidentiality of business information. Information gathered in an antitrust investigation may include confidential business data. Businesses, whether or not they are the targets of an investigation, will be less willing to cooperate with an enforcement agency if they fear information submitted will be released to the public. Indeed, the statute that provides for premerger reporting may require that the information contained in the submission to the agency be kept confidential.²⁴ Thus, any public explanation of an agency's action would have to sidestep legal confidentiality requirements and, to the extent confidentiality is not required, should represent a sound compromise of the need for business secrecy with the need for public disclosure. That these compromises can be struck is suggested by post disclosure statements issued by the agencies themselves and by similar statements issued by regulatory agencies involved in competition investigations in the U.S. or abroad.²⁵

Would the release of agency explanations for a decision not to pursue enforcement be a precedent that would undermine agency discretion in pursuing enforcement in future cases? In the baby food merger case²⁶ involving a combination of the second and third largest firms in a market with only three significant competitors, the parties defended their merger on the ground that the combined firm, still significantly smaller than the number one firm, would be a more effective competitor. The FTC won a preliminary injunction, arguing in part that the courts had never recognized a "stronger-number-two-competitor" defense. Suppose that the agency itself had previously cleared a merger of the second and third largest firms in a three-firm industry. Would the FTC's case have been placed in jeopardy because the baby food firms could cite this

24. See sources cited *supra* note 21.

25. See *infra* Parts III.A—B.

26. *FTC v. H. J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

previous clearance? This should not be a major risk if the agency statement explains the basis of its decision not to challenge the first merger and further indicates that its decision is limited to the narrow facts before it. Indeed, the Commission might use the occasion of its clearance opinion to explain under what differing circumstances a combination of the second and third largest firms would be challenged. The FTC issued a disclaimer in its Cruise Mergers statement, explaining that its decision not to challenge either of two alternative proposed acquisitions of Princess Cruise Lines should not be read as a green-light for mergers in high concentration industries.²⁷ Attorneys will be free to cite no-action decisions in arguing against agency action in future cases, but that surely occurs already, even when agency decisions are not published. One problem with the current policy not to explain key decisions to drop an investigation is that knowledge of these decisions may be limited to a privileged few.

What about a case in which an agency chooses not to pursue enforcement, not because the conduct is deemed lawful or harmless, but because, after weighing how to employ limited enforcement resources, the agency determines that other cases should have priority? Or what about a case in which the agency determines that staff mistakes have badly compromised its case and, therefore, undermined its chances of success in a litigated proceeding? Would disclosure of these underlying reasons serve the agency and public interest?

Many decisions to drop an investigation may be a "mix:" the case is not very strong; the agency is overcommitted; the case may make bad law; one commissioner thinks the efficiency defense is strong; the discovery did not produce strong evidence; etc. In these cases, the agency should not have to announce a definitive decision when none was made. No agency can pursue all of the unlawful conduct that it confronts. Without embarrassment, an agency could explain that it is dropping an investigation for administrative reasons with no determination whether the conduct is lawful or unlawful. Staff mistakes need not be publicly

27. Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc., F.T.C. File No. 021 0041 (Oct. 4, 2002), at <http://www.ftc.gov/os/2002/10/cruisestatement.htm> (last visited Sept. 20, 2003).

disclosed (such disclosure might undermine training and morale of staff), but the public has an interest in knowing whether or not investigated conduct was determined to be lawful, or merely not a proper focus for enforcement at the time the agency reached its decision.

D. The House Judiciary Committee and Merger Enforcement Transparency (1986-1988)

The House Judiciary Committee made a substantial effort to obtain and disseminate data on merger enforcement during the period 1986-1988.²⁸ Chairman Peter Rodino (who also chaired the Subcommittee on Monopolies and Commercial Law) wrote to the Antitrust Division and the FTC seeking comprehensive data not only on merger cases that resulted in enforcement action, but also on investigations that were subject to second requests but were terminated without enforcement action.

The Committee gathered substantial information that was not available to the public and, in 1988, published in aggregate form statistics derived from the two agencies merger enforcement during the years 1982-1987. Perhaps the most significant previously undisclosed information that came out of these statistics was that the two agencies were (with one exception) not challenging acquisitions in which the post-acquisition Herfindahl-Hirschman Index in the market of highest concentration²⁹ was less than 1800. During the five years in question, out of fifty-one cases in which either agency either filed a complaint or, by indicating its serious concerns, prompted the parties to abandon or restructure the transaction, only a single case involved a market of highest concentration with a post-merger HHI of less than 1800. Only two cases were in the 1800-2000 range.³⁰

The Committee also obtained from the Antitrust Division HHI numbers for certain transactions subject to a

28. I served as Counsel for the Subcommittee on Monopolies and Commercial Law, House Committee on the Judiciary, from 1980 to 1988.

29. Some of the transactions involved multiple markets. The Committee used only the market of highest concentration in this measure of enforcement initiatives. See House Subcommittee on Monopolies and Commercial Law, *Federal Merger Enforcement (1979-1987)*, reprinted in 54 ANTITRUST & TRADE REG. REP. 476, 477 (1988).

30. See *id.*

second request, but not subject to further agency enforcement action. Although the Division described the relevant market, it did not name the parties to the transaction. Unfortunately, the process of parsing and determining how best to disseminate this data was left unresolved with the change in Committee leadership in 1989.³¹ The Committee's efforts and the agency response to these efforts, however, suggest the feasibility of reporting information, including identifying the relevant markets and providing HHI numbers, on closed investigations that were subject to second requests.³²

II. CURRENT LAW AND PRACTICE IN DISCLOSURE OF ANTITRUST ENFORCEMENT DECISIONS

Law enforcement agencies do not, as a matter of course, release information about investigations that do not bear fruit or do not result in law enforcement action. That pattern, however, does not apply to investigations of possible anticompetitive conduct by some federal agencies and by competition law agencies outside the United States. Anticompetitive conduct, where it exists, usually has a market wide-impact and may affect rivals, customers, and suppliers. To see how disclosure issues involving investigations of anticompetitive conduct are dealt with here and abroad, this section looks at three Federal agencies and at the European Union. It then describes current disclosure practices at the Antitrust Division and the FTC.

A. *Merger Enforcement Transparency in Non-Antitrust Federal Agencies*

Transparency appears to be a matter of course for a number of federal agencies that make decisions regarding mergers. The Federal Reserve Board, the Federal Communications Commission (FCC), and the Federal Energy Regulatory Commission (FERC) routinely issue opinions when they pass on a merger within their

31. Chairman Rodino did not run for reelection in 1988 and Congressman Jack Brooks assumed the Chair of the Judiciary Committee in January of 1989.

32. The agencies have clear authority to release HSR information to Congress, but may lack such authority for a general release of information to the public. See sources cited *supra* note 21.

regulatory jurisdiction. An example of an agency that makes efficient disclosure of a notified acquisition and of the agency decision is The Federal Reserve Board. The Board invites public comments on applications for bank mergers,³³ occasionally holds public hearings before reaching a decision, and publishes the orders disposing of all applications.³⁴

The FCC has jurisdiction to review mergers involving communications firms. It reviewed, for example, the merger of Bell Atlantic and NYNEX, approving that merger subject to conditions in 1997.³⁵ The FCC has concurrent jurisdiction (with the Department of Justice and Federal Trade Commission) to enforce Section 7 of the Clayton Act but chose to review the NYNEX merger under the broader public interest standard of the 1934 Communications Act.³⁶ The communications agency issued a lengthy opinion, using the DOJ/FTC 1992 Merger Guidelines as the framework for its analysis of competition issues. The FCC concluded that the applicants had failed to carry their burden of establishing that the proposed transaction was in the public interest. Thus, the FCC's approval was contingent on the parties' agreement to commitments that would promote entry and provide procompetitive benefits offsetting the likely negative effects of the merger.

FERC is another federal agency that provides detailed opinions in its review of mergers under its jurisdiction. For example, in 2002, FERC issued a twenty-one page opinion explaining its decision to clear (subject to conditions) the Ameren Corporation's acquisition of two other electric

33. Notice of Formations and Mergers of, and Acquisitions by, Bank Holding Companies, Change in Bank Control, Federal Reserve Release, 68 Fed. Reg. 53,740 (Sept. 12, 2003), available at <http://www.federalreserve.gov/releases/h2a/h2a.cfm?view=pubs> (last visited Sept. 20, 2003).

34. Federal Reserve orders disposing of applications to make an acquisition are available at: <http://www.federalreserve.gov/boarddocs/press/orders>.

35. See *In re NYNEX Corp.*, 12 F.C.C.R. 19,985, 20,097 (Aug. 14, 1997); see also *infra* Part IV (discussing the Bell Atlantic/NYNEX merger).

36. The Communications Act of 1934 (codified as amended at 47 U.S.C. §§ 214(a), 310(d) (1994)).

power generation firms.³⁷ Significantly, FERC will issue an opinion even if it clears a merger without any conditions.³⁸

The model provided by regulatory agencies such as the Federal Reserve, FCC, or FERC will not easily fit the antitrust enforcement scheme. Such agencies have relatively narrow regulatory jurisdiction with relatively few merger cases to review. A merger review proceeding under Section 203 of the Federal Power Act³⁹ has a formality and structure (contemplating interventions by interested third parties) that is lacking in the negative clearance model for antitrust law merger enforcement. In a FERC proceeding, third parties may intervene to obtain tactical advantage or gain leverage to extract concessions from the agency or the merging parties.⁴⁰ Specialized regulatory agencies may also have substantial leverage over industry participants when reviewing a merger. In contrast, the antitrust agencies may depend more on voluntary cooperation, cooperation that might be undermined if firms were concerned that confidential business data would be leaked. But confidentiality must be a concern of any agency that reviews proposed mergers and should not be an excuse to withhold information useful to the public. The models provided by the Federal Reserve, FCC, and FERC are evidence that concerns with confidentiality and agency flexibility need not preclude a useful and informative statement explaining how an agency has resolved major issues before it.

B. Merger Enforcement Transparency in European Union Decisions

Outside the United States, one can look to transparency models in the competition law of other nations. In the United Kingdom, for example, decisions of Competition

37. *Ameren Servs. Co. ex rel. Ameren's Pub. Util. Subsidiaries*, 101 F.E.R.C. ¶ 61,202 (Nov. 21, 2002); *see also* *Am. Elec. Power Co.*, 90 F.E.R.C. ¶ 61,242 (2000).

38. *See, e.g., N. States Power Co.*, 90 F.E.R.C. ¶ 61,028 (2000) (reviewing potential competition issues involved in the merger but concluding that no harm to competition is likely).

39. 16 U.S.C. § 824(b) (1994).

40. This formal tactical maneuvering is absent from Hart Scott Rodino premerger clearances. On the other hand, it is apparent that informal interventions and submissions, or even public relations battles designed to influence the agency, do occur with respect to premerger clearances before the FTC and the Antitrust Division.

Commission tend to be lengthy public documents with detailed analysis and multiple appendices containing factual data. These decisions are issued whether the Commission finds a violation or no violation of the British competition law.⁴¹ In Germany, the Bundeskartellamt makes efficient use of its web site to provide an up-to-date data base of all pending mergers that have been reported to the agency.⁴² The data base includes the names of the parties to the transaction, the likely product markets involved, and information about how to contact the staff that are reviewing the transaction. According to one commentator, this immediate notification of pending mergers "will facilitate the participation of interested third parties" at an early stage of agency review of the transaction.⁴³

Perhaps the most influential disclosure model outside the United States is the competition law of the European Union ("EU"). For those accustomed to the relative lack of meaningful information provided by the U.S. enforcement agencies, the practice of the European Communities ("EC") provides a striking contrast. Transparency is a fundamental principle governing the actions of the European Commission. Article 253 of the EC Treaty requires that the Commission state the reasons for which its acts are based. Article 254 of the Treaty requires that regulations, directives and decisions of the Commission be published. These tenets of transparency are echoed in the European Commission's Merger Regulation.⁴⁴

The European Commission's web site⁴⁵ systematically lists all notified transactions, disclosing the lines of business in which participating firms are active, and

41. See, e.g., COMPETITION COMMISSION, P&O PRINCESS CRUISES PLC AND ROYAL CARIBBEAN CRUISES LTD: A REPORT ON THE PROPOSED MERGER, 2002, at 115 (issuing an opinion of 115 pages, not including the extensive appendices, in the merger investigation of Royal Caribbean Cruises' proposed acquisition of the P&O Princess).

42. Available at <http://www.bundeskartellamt.de/neuanmeldungen.html>.

43. Horst Henschen, *Update, Germany—German Federal Cartel Office Changes Publication Rules for Merger Transactions*, 4 ABA INT'L ANTITRUST BULL., Fall/Winter 2001, at 52, available at <http://www.abanet.org/antitrust/committees/international/fallwinter01.pdf> (last visited Sept. 20, 2003).

44. See Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, arts. 6-7, 11, amended by Council Regulation 1310/97, 1997 O.J. (L 180) 4-5.

45. Available at http://www.europa.eu.int/comm/competition/index_en.html.

reports the Commission's dispositions of each of the notified transactions. Even transactions that are cleared summarily under Article 6(1)(b) of the Merger Regulation are the subject of a Commission statement that identifies the parties, the nature of the transaction (joint venture, acquisition of stock, etc.), the relevant product and geographic markets, the degree of overlap of the participating firms, and other salient facts that led the Commission to conclude that no challenge was necessary.⁴⁶ This is a substantial disclosure undertaking. For the year 2002, the European Commission published 240 clearance decisions under Article 6(1)(b). During the same year, an additional ten clearance decisions involved commitments by the merging firms.⁴⁷

As is the case with U.S. merger enforcement, only a small percentage of reported transactions result in an extended investigation. In 2002, the EU Commission issued final decisions in ten cases involving extended investigations under Article 6(1)(c). For these transactions, the obligatory Commission statement is likely to be much more detailed. The statement is required regardless of whether the Commission determines to challenge the merger, to allow it to proceed with conditions, or to allow it to proceed unconditionally.⁴⁸ The statement must be published, albeit provisions are made to maintain business secrets of firms that have supplied information.

In its 2002 opinion explaining its decision not to challenge a proposed acquisition in the cruise line industry, the EU Commission issued a fifty-seven page statement that contains extensive discussion and references to economic analyses and other materials submitted by the parties.⁴⁹ Part of this length can be attributed to the need to assess the proposed acquisition in various geographic

46. For an example of Article 6(1)(b) clearance, see Case COMP/M.2048, Alcatel/Thomson Multimedia JV (Oct. 26, 2000) (citing a Commission statement that explains its decision not to challenge the joint venture at issue), *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m2048_en.pdf (last visited Sept. 20, 2003).

47. The statistics for the European Commission are available at <http://europa.eu.int/comm/competition/mergers/cases/stats.html> (last visited Sept. 20, 2003).

48. See Council Regulation 4064/89, *supra* note 44, arts. 6(1)(c), 8, 20.

49. Case COMP/M.2706, Carnival Corp./P&O Princess (July 24, 2002), *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m2706_en.pdf (last visited Sept. 20, 2003).

markets (the UK, Germany, and the three Mediterranean nations markets). A better gauge of thoroughness would be the opinion's treatment of whether the product market should be limited to cruises (or broadened to include other vacation options). The opinion devotes eleven pages of analysis to this topic and includes charts and other data provided by the parties or their economic consulting firms. This information could be useful in fostering a more nuanced understanding of the law and in providing a platform for oversight of the EU Commission's decisions.

The European Commission's Carnival decision contains a number of references to deleted data, suggesting that the statement may have been a redacted version of the draft opinion circulated by the Competition Directorate to the Commission before the Commission reached its decision. The thoroughness of the Commission's statement tends to refute concerns that a detailed statement would intolerably compromise agency flexibility or business secrecy.

C. Transparency at The Federal Trade Commission and The Antitrust Division

Once a federal antitrust agency commits to a meaningful investigation of past or anticipated conduct of a firm, three outcomes are possible: (1) the investigation may be dropped unconditionally, usually before any litigation is initiated (in premerger investigations, the investigation may be dropped even if the agency finds the proposed merger to be unlawful when, in anticipation of agency enforcement, the parties abandon the proposed merger);⁵⁰ (2) the investigation may result in a settlement, reached either before or after litigation is commenced, in which the target firm agrees to the imposition of a remedy; or (3) the investigation may result in litigation and a tribunal-imposed resolution of that litigation.

Because of the relative openness of judicial or administrative litigation and the likelihood that a tribunal decision will be accompanied by an explanatory opinion, transparency has not been a major issue for cases resolved

50. On occasion, an agency will drop a case after litigation has been commenced. A well-known example is the Antitrust Division's 1982 decision to drop its case against IBM after a decade of litigation in the Southern District of New York.

by a court or administrative tribunal.⁵¹ Some transparency is provided in settled cases in which the terms are stated in an administrative or judicial decree. On the other hand, there appears to be little or no disclosure when a federal antitrust agency drops an investigation, when a planned merger is abandoned by the parties, or when the Justice Department reaches a "fix-it-first" restructuring resolution of a proposed merger.

1. *Standards Governing Consent Settlements.* For the federal antitrust agencies, the only firm standards governing disclosure of law enforcement decisions are those governing consent resolutions of administrative or judicial cases that have been filed. These standards are described below.

a. *Justice Department Settlements Under the Tunney Act.* Cases settled by the Justice Department are governed by the terms of the Antitrust Procedures and Penalties Act (Tunney Act).⁵² This legislation was a 1974 congressional response to charges that the Justice Department, yielding to political pressure from the White House, had granted ITT a sweetheart settlement to a suit challenging ITT's acquisition of three companies. To discourage such political settlements, the Tunney Act requires that a proposed settlement be published in the Federal Register, together with a Justice Department "competitive impact" statement that describes the underlying proceeding and other information, including a "description and evaluation of alternatives" to the consent proposal actually considered by the United States.⁵³ This proposal is then open to public comment for a sixty-day period, at the close of which the comments and the Department of Justice's reply to the comments must also be published in the Federal Register.⁵⁴

51. See Calkins, *supra* note 15, at 15-21 (explaining why judicial opinions provide an excellent platform for criticism that leads to overturning or weakening ill-considered holdings).

52. 15 U.S.C. § 16 (2000).

53. 15 U.S.C. § 16(b). The Tunney Act also requires publication of a list of documents upon which the Department relied and disclosure by the defendant of all relevant contacts between the defendant and officers or employees of the United States (other than contacts between the Justice Department and counsel of record). 15 U.S.C. §§ 16(b), (g).

54. 15 U.S.C. § 16(d).

Summaries of this material must be published in newspapers of general circulation for seven days over a two week period.⁵⁵ After receiving all of the submissions, the district judge is instructed to approve the judgment if its entry is "in the public interest."⁵⁶ The Tunney Act does not spell out how the court is to proceed if it declines to accept the settlement. The litigated cases suggest that a judge who is reluctant to approve a decree wields a fair amount of leverage to press for changes in the decree and may allow for a continuation of the litigation (perhaps substituting other persons to prosecute in lieu of the Department of Justice).⁵⁷

The Tunney Act remains controversial. There is now a considerable body of precedent applying the Act, some of it supporting a more activist judicial role,⁵⁸ and some supporting more limited judicial involvement.⁵⁹ Not surprisingly, the Justice Department, which has on occasion sought to evade application of the Act altogether,⁶⁰ argues for a limited judicial role consistent with a court's traditional but bounded equity powers to intervene to prevent an unjust outcome.⁶¹ Viewed in this way, the Tunney Act does precious little (other than mandating a sixty-day comment period) to alter pre-existing judicial

55. 15 U.S.C. § 16(c).

56. 15 U.S.C. § 16(e). The Act indicates that the court, in determining whether a proposed decree is in the public interest, may consider various factors, including "the competitive impact of such judgment" and "the impact of entry of such judgment upon the public generally and on individuals alleging specific injury from the violations set forth in the complaint." *Id.*

57. See generally Lloyd C. Anderson, *United States v. Microsoft, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 ANTITRUST L.J. 1, 10-36 (1966) (reviewing the history of Tunney Act litigation).

58. See, e.g., *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). See also *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) (representing the high water mark for aggressive interpretation of judicial powers under the Tunney Act, *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). That case no longer states the prevailing law in the D.C. Circuit. See *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995).

59. See *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995) (explaining that the court should interfere with a consent decree only if it "appears to make a mockery of judicial power").

60. See, e.g., Anderson, *supra* note 57, at 20-21 (describing the Justice Department's maneuvering to try to avoid application of the Tunney Act).

61. See, e.g., Brief for Plaintiff, *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d (D.C. Cir. 2003), available at <http://www.usdoj.gov/atr/cases/fl1900/11901.htm> (citing cases that construe the Tunney Act narrowly).

powers. An interpretation of the Tunney Act that envisions a more activist role for the court might more effectively constrain politicized sweetheart settlements, but it might also run amuck of the constitutionally based separation of powers principle by transferring prosecution powers to the Judiciary.⁶²

A serious concern with the Tunney Act is the Justice Department's consistent practice of disclosing its analysis only of competitive issues that are addressed in the consent decree and failing to provide meaningful analysis of alternative remedies that were considered. The competitive impact statements apparently are drafted after the parties have reached agreement on a consent order and are confined to the issues addressed in that order.⁶³ Parties that have provided comments on Tunney Act settlements⁶⁴ or have openly challenged such settlements⁶⁵ have consistently pointed out the Government's failure to address issues beyond those addressed in the settlement and to provide meaningful analysis of alternative remedies considered by the Government. Although the courts may be reluctant to

62. See Anderson, *supra* note 57, at 24, 32 (reviewing the constitutional arguments).

63. Former FTC General Counsel Stephen Calkins has described the inadequate disclosure surrounding consent orders in these words:

Complaints accompanying orders set forth some facts, but rarely with the thoroughness and impartiality of a good judge issuing a published opinion. Government staff commentary accompanying consent orders explain the rationale of the decision to settle, but rarely with the kind of candor and comprehensiveness that one would expect of a judicial opinion. At best, outsiders gain an understanding of agency views of an issue in situations where potential defendants have been willing to acquiesce in an agreement for some undisclosed mix of reasons.

Calkins, *supra* note 15, at 18 (citation omitted).

64. See, e.g., *infra* Part IV.C. (discussing Professor Carstensen's comments on the Justice Department's settlement of the Archer Daniels Midland acquisition of Minnesota Corn Processors).

65. See the Brief written by Kenneth W. Starr and Robert H. Bork, challenging the Government's settlement of the Microsoft case: Brief of Appellants Computer and Communications Industry Association (CCIA) and Software and Information Industry Association (SIIA) in *The Computer and Communications Industry Association v. United States*, No. 03-5030, at 51 (D.C. Cir., May 5, 2003), available at http://www.cciainet.org/legal/ms/brief_050503.pdf (last visited Oct. 27, 2003) (arguing that the "independent 'public interest' determination contemplated by the [Tunney] Act would be meaningless if, by failing to comply with the statute's disclosure requirements, parties could deprive courts and the public of the information they need to engage in informed review of a decree's antitrust relief").

enforce the Act's disclosure requirements, the Department's narrow disclosure cannot be reconciled with the wording of the statute. A competitive analysis is incomplete if it addresses only competition issues for which the Department was able to negotiate relief in the consent order. If the Department were free to ignore genuine competition issues not addressed in the order, even the most egregious sweetheart settlement could be packaged in a manner that reduced public scrutiny of critical issues. Because the Tunney Act expressly requires a "description and evaluation" of alternative remedies, the Department's failure to provide this analysis is difficult to defend.

Another fundamental deficiency in the Tunney Act is that it does absolutely nothing to prevent political bias or errors in judgment that result in an enforcement action not being brought. If antitrust enforcement is susceptible to political influence (which to some degree it surely is), one would expect this problem to be evidenced at least as often in the dropping of an investigation as in the settlement of ongoing litigation. In the long term, the public interest might be well served by cutting back burdensome or tenuous requirements of the Tunney Act and adopting a broader provision that requires a published agency explanation each time a substantial investigation is dropped or a case is settled. These provisions would not prevent, just as the Tunney Act does not prevent, politically tainted agency action, but they would open any important enforcement decision to informed public scrutiny, and do so without raising separation of powers issues. In the long term, this disclosure should provide for better accountability for the agency's actions.

b. *FTC Consent Settlements in Competition Cases.* FTC cases settled by consent are governed by Part 2 of that agency's rules.⁶⁶ Commission consent orders, once initially approved by the Commission, are placed on the public record for thirty days to allow for comments. Also published is a Commission explanation of the proposed consent order.⁶⁷ After termination of the comment period, the Commission may issue the order, modify it, or withdraw it

66. 16 C.F.R. §§ 2.31-2.34 (2003).

67. 16 C.F.R. § 2.34(c).

for further proceedings.⁶⁸ These rules governing consent orders are less rigorous than the Tunney Act procedures. There is, for example, no provision for a court or other outside body to review the order under a public interest standard. There is no requirement for disclosure of any FTC reply to comments, no requirement for publication of the proposed consent agreement in newspapers of general circulation, nor is there an opportunity for an outside tribunal to continue the proceeding against the wishes of the Commission majority.

Why do the FTC and the Justice Department operate under different standards for entry of a consent settlement? The FTC, unlike the Justice Department, functions not only as an investigating and prosecuting agency, but also as an administrative tribunal. Any decision by the Commission must be approved by a majority of the FTC's five members, only three of whom can be members of the same political party. A biased sweetheart settlement is unlikely to escape the attention of all five Commission members, any one of whom can respond by filing a dissenting statement that will bring the matter to the attention of the public.

Placing these differences to one side, each agency has similar problems in dealing with settlements: One such problem is how to deal with important antitrust issues that are not directly addressed in the settlement. Here, the FTC, just as the Antitrust Division, tends to disclose only those issues addressed in the settlement, leaving the public uninformed as to its thinking on other genuine competition issues raised by the investigation.⁶⁹

2. *FTC Antitrust Enforcement Transparency.* Table 1 below shows the FTC's merger enforcement activity during the five fiscal year period 1998-2002. Throughout this analysis, second requests are used as a measure of the number of substantial premerger investigations conducted by the agency. Under the HSR Act, second requests are a demand for additional documentation that is typically issued when the investigating agency believes that further information is required to address serious competitive issues that may be raised by a planned acquisition (or that further information is required to support the agency's

68. 16 C.F.R. § 2.34(e).

69. See *infra* Part IV.C. for a discussion of settled cases.

preliminary conclusion that the transaction would violate the law). In the past few years, well over 50% of second requests have led to enforcement action by the agency.⁷⁰ This measure is subject to error because a substantial merger investigation could occur without a second request being filed. Nonetheless, this is the best available indicator that the agency regards a particular transaction as appropriate for something more than a perfunctory inquiry.

As Table 1 shows, of the 188 FTC investigations involving second requests during the five year period, an estimated 44 were dropped by the agency, 39 others were dropped after the parties abandoned the acquisition (perhaps because of expressed agency misgivings about the transaction), 87 resulted in consent orders that imposed restructuring or other conditions on the transaction, and 18 were litigated through the filing of an administrative complaint (and often also in a preliminary injunction proceeding in a federal district court).

Table 1

HSR Merger Enforcement Federal Trade Commission FY 1998 - FY 2002						
	Full Phase Investiga- tions	Second Requests	Est. Dropped Investiga- tions	Abandoned Mergers	Consent Resolutions	Litigated Cases
FY 1998	56	46	12	7	23	4
FY 1999	47	45	15	12	18	0
FY 2000	53	43	11	9	18	5
FY 2001	42	27	3	4	18	2
FY 2002	41	27	3	7	10	7
Totals	239	188	44	39	87	18

Table 2 shows the relative percentage of these cases in which no disclosure or inadequate disclosure was made. The table includes under the category of no disclosure or inadequate disclosure the following dispositions: (1) when the FTC drops a merger investigation that was subject to a

70. See Leary, *supra* note 13, at 137.

second request; and (2) when the parties to a proposed acquisition abandon the transaction in the face of agency opposition. During the five fiscal year period (1998-2002), 44% of all dispositions of significant merger investigations occurred under conditions of inadequate or no disclosure. When investigations are dropped because the parties abandon the proposed merger in the face of FTC opposition, there is typically no meaningful disclosure. However, when the agency decides to drop an investigation because it determines that there would be no Section 7 violation, the Commission has increasingly offered some disclosure. During the three fiscal years 2000-2002 when a merger investigation subject to a second request was dropped, one or more commissioners issued an explanatory statement on six occasions;⁷¹ on one other occasion, the Commission issued a brief press release.⁷² In many of these cases, disclosure may have been provoked by disagreement among the commissioners. Thus, with respect to PepsiCo's acquisition of the Gatorade brand from Quaker Oats and with respect to General Mills' acquisition of Pillsbury, the Commission dropped the investigation in the face of a 2-2 split over whether to take enforcement action. As described in Part IV.A. below, the disclosure provided was inadequate. Statements tended to address only the issues on which the Commissioners disagreed and did not provide a full picture of the underlying facts or the competition issues at stake.

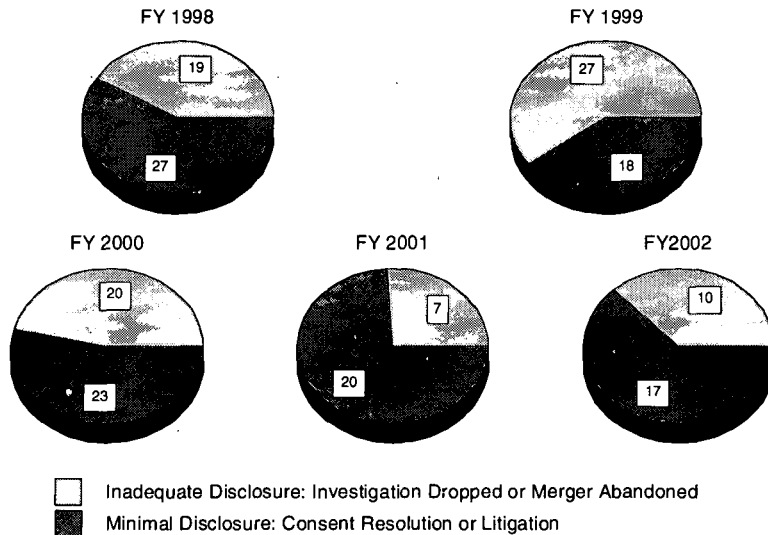
71. See *Synopsys Inc./Avanti Corp.*, F.T.C. File No. 021-0049 (Statements of 3 Commissioners, July 26, 2002) at <http://www.ftc.gov/opa/2002/07/avant.htm>; *Hewlett-Packard Inc./Compaq Computer Corp.*, F.T.C. File No. 011-0249 (Statement of 1 Commissioner, Mar. 2002), at <http://www3.ftc.gov/os/2002/03/hpthompson.htm> (last visited Sept. 22, 2003); *Corp. General Mills, Inc./Diageo plc/Pillsbury Co.*, F.T.C. File No. 001-0213 (Statements of 3 commissioners, Oct. 2001), at <http://www3.ftc.gov/os/caselist/0010213.htm> (last visited Sept. 20, 2003); *Phillips Corp./Tosco Corp.*, F.T.C. File No. 011-0095 (Statement of the Commission, Sept. 18, 2001), at <http://www3.ftc.gov/os/caselist/0110095.htm> (last visited Sept. 20, 2003); *Amerisource Health Corp./Bergen Brunswick Corp.*, F.T.C. File No. 011-0122 (Statement of the Commission and one individual commissioner's statement, Aug. 24, 2001), at <http://www3.ftc.gov/os/caselist/0010122.htm> (last visited Sept. 20, 2003); *PepsiCo, Inc./Quaker Oats Co.*, F.T.C. File No. 011-0059 (2 statements, each signed by 2 commissioners, Aug. 2001), at <http://www3.ftc.gov/os/2001/08/anthonythompsonpepsistatement.htm> (last visited Sept. 20, 2003).

72. See *Covisint, Inc.*, F.T.C. File No. 001-0127 (Sept. 11, 2000), at <http://www3.ftc.gov/os/caselist/0010127.htm> (last visited Sept. 20, 2003).

Table 2

FTC Merger Enforcement Transparency

FY 1998 - FY 2002



The most complete disclosure of reasons for dropping a merger investigation probably occurred in the October 2002 Commission and dissenting statements for the cruise merger investigation.⁷³ Apparently the issuance of the cruise merger statements, while perhaps reflecting a trend toward greater openness, does not indicate any basic change in FTC disclosure policy.⁷⁴

The category of minimally adequate disclosure includes cases in which there was a consent decree entered or cases that were litigated through issuance of an administrative complaint (and often in a preliminary injunction proceeding). Over the five fiscal year period, 56% of the significant premerger investigations resulted in minimally adequate disclosure of the Commission's analysis. Most of these cases (87 of the 104 investigations in this category) were consent settlements. As described in Part IV below,

73. The Cruise Mergers statements were issued in fiscal year 2003 and are not tabulated in Table 2. The statements and supplementary material released by the Commission are cited in note 88, *infra*.

74. See *infra* Part IV.A. (discussing the Cruise Mergers Statements).

consent resolutions usually result in substantial disclosure, but the information is typically based solely on the issues addressed in the proposed settlement.

Non-merger antitrust enforcement occupies a smaller block of the Federal Trade Commission's competition law resources. During the five-year fiscal period (1998-2002), Table 3 shows that 58 full phase non-merger investigations resulted in seven litigated cases (either by an administrative complaint or federal court complaint for a permanent injunction) and 31 cases settled by consent. Most of the full phase investigations opened by the Bureau of Competition presumably would have raised significant antitrust issues. Although it is difficult to obtain an accurate sense of the transparency problem, subtracting the 38 cases from the 55 full phase investigations, it appears that roughly 17 full phase investigations were dropped during the five-fiscal-year period. The Commissioners issued statements explaining their decision to terminate the Western States Gasoline investigation in May of 2001,⁷⁵ but this result was an exception. There was no systematic or full disclosure of the reasons that the remainder of these investigations were terminated. For the cases resolved by consent, the disclosure problem (as with consents in merger cases) again lies in the failure to describe and analyze genuine competition issues that were not addressed in the consent order.

75. See *Western States Gasoline Investigation*, F.T.C. File No. 981-0187 (Statement of Commissioners Anthony, Swindle and Leary, separate statement of Commissioner Thompson, May 2001), at http://www.ftc.gov/os/2001/05/wsgpi_swindle.htm (last visited Sept. 20, 2003).

Table 3

Non-Merger Enforcement Federal Trade Commission FY 1998 - FY 2002			
	Full Phase Investigations	Consent Resolutions	Litigated Cases
FY 1998	14	10	2
FY 1999	11	4	1
FY 2000	6	8	1
FY 2001	10	1	2
FY 2002	17	8	1
Totals	58	31	7

3. *Justice Department Antitrust Civil Enforcement Transparency.* In comparison to the FTC, the Justice Department has been notably less forthcoming in providing information about antitrust enforcement decisions. The comparisons drawn here involve only merger and other civil antitrust enforcement. Criminal enforcement is addressed separately in a subsequent section.

Table 4 below shows the overall HSR enforcement activity for the Antitrust Division during the five fiscal year period 1998-2002. As was the case with the FTC, the data uses the number of second requests as a basis for computing the number of substantial premerger investigations that were dropped by the agency. The Department compiles a list of investigations in premerger review that is significantly larger than the number of second requests. For example, during the five fiscal year period, the Department reports opening 670 HSR investigations, yet only 290 of these (or 43%) resulted in the Department issuing a second request. Most of these investigations are likely to have involved substantial antitrust issues for which an explanation of the agency decision could have provided significant guidance.

Table 4

HSR Merger Enforcement Transparency Department of Justice FY 1998 - FY 2002							
	Initiated Investiga- tions	Second Requests	Est. Dropped Investiga- tions	Aban- doned Mergers	Fix It First Resolu- tion	Tunney Consents	Litigated Cases
FY 1998	176	102	51	17	24	10	0
FY 1999	175	68	21	10	16	21	0
FY 2000	137	55	7	13	16	18	1
FY 2001	106	43	11	4	20	8	0
FY 2002	76	22	12	1	5	4	0
Totals	670	290	102	45	81	61	1

As Table 4 shows, of the 290 investigations involving second requests during the five year period, an estimated 102 were dropped by the agency, forty-five resulted in the parties abandoning the acquisition (usually as the result of expressed agency intent to challenge the transaction), 81 resulted in a fix-it-first restructuring implemented without a court order, 61 resulted in a settlement reflected in a court order subject to the Tunney Act, and one was litigated.

Table 5 shows the relative percentage of these cases in which minimally adequate disclosure was made. The table includes under the category of inadequate disclosure the following dispositions: (1) when the Antitrust Division drops a merger investigation; (2) when the parties to a proposed acquisition abandon the transaction, often in the face of expressed agency opposition; and (3) when the Department resolves competition issues through a fix-it-first settlement that requires the merging parties to restructure before proceeding with the merger. In most of these cases, the Department offers no adequate public

explanation of its enforcement decision and analysis. One reason that the Justice Department provides minimally adequate disclosure in such a small percentage of cases is that, unlike the FTC, the Department resolves a high percentage of cases through its "fix-it-first" settlements with either perfunctory or no disclosure. In some of the fix it first resolutions and in a few cases in which the parties abandon a proposed merger, the Department issues a press release announcing this result. Thus, during the four fiscal year period 1998-2001, the Department reports issuing press releases in sixty-six premerger investigations in which the parties either abandoned the transaction or agreed to restructure before consummating the acquisition.⁷⁶ This figure represents 55% of the 120 premerger cases resolved in this manner during the four year period. As described in Part IV.B. below, the press releases tend to be summary and do not provide adequate disclosure of the facts and underlying analysis employed by the agency.

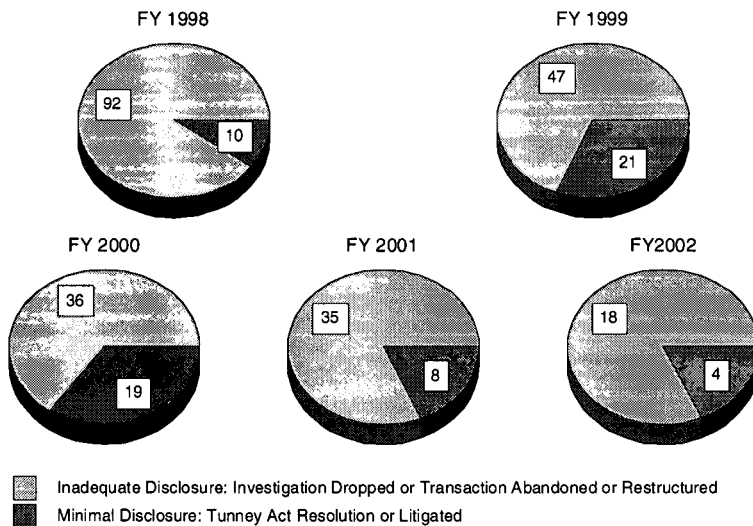
During the five fiscal year period (1998-2002), Table 5 shows that 79% of all dispositions of significant merger investigations occurred under conditions of inadequate or no disclosure. The category of minimally adequate disclosure includes cases in which there was a Tunney Act consent decree entered or cases that were litigated in a preliminary injunction proceeding. Almost all of the cases in which the Department's disclosure was minimally adequate (sixty-one of the sixty-two investigations in this category) were Tunney Act consent settlements. As described in Part IV.C. below, Tunney Act resolutions result in substantial disclosure, but the information provided may be deficient in critical respects.

76. This data is gathered from Hart Scott Rodino Reports for Fiscal Years 1998-2001, available at <http://ftc.gov/bc/hsr/hsrinfopub.htm> (last visited Sept. 20, 2003).

Table 5

Antitrust Division Merger Enforcement Transparency

FY 1998 - FY 2002



The Antitrust Division has, in addition to its investigations of pending mergers under the HSR Act, a considerable number of non-HSR merger investigations. Most of these investigations apparently involve acquisitions that fell outside the Hart-Scott-Rodino reporting thresholds. During the five fiscal years 1998-2002, the Division reports 217 non-HSR merger investigations. In 50 of these cases, the Division issued a civil investigative demand, an indication of the substantiality of these investigations.⁷⁷ The available Division data does not reveal in what percentage of these 50 cases the Division took some formal enforcement action as the result of its investigation, but it seems likely that transparency deficiencies are comparable to those for HSR investigations.

The picture for non-merger civil enforcement at the Antitrust Division looks somewhat different, but the issues in terms of transparency are very much the same. Non-merger civil enforcement, measured by the number of investigations and cases filed, appears to occupy a small

77. This data is from the Antitrust Division's workload statistics.

percentage of the Division's resources. These figures may be somewhat misleading when, as in the case of the Microsoft litigation, a single investigation and the ensuing litigation occupy a major chunk of the agency's resources. What is clear is that only a very small percentage of these investigations result in public disclosure of the Division's analysis.

Table 6

Non-Merger Civil Enforcement Antitrust Division FY 1998 - FY 2002		
	Initiated Cases	Filed Cases
FY 1998	94	5
FY 1999	56	7
FY 2000	40	2
FY 2001	30	0
FY 2002	27	3
Totals	157	17

As Table 6 indicates, during the five fiscal year period 1998-2002, the Department initiated 157 civil non-merger investigations but filed only 17 cases. These filed cases, whether settled by consent or litigated to judgment, are likely to have produced at least minimum disclosure of the underlying facts and analysis. But the 17 cases represent only 10% of the investigations that the Department initiated during this period. A significant chunk of the investigations may not have involved substantial issues and would not have produced meaningful disclosure because of the routine nature of the issues. One must assume, however, that many of these investigations did raise substantial competition issues, and that the Division's analysis of these issues would have offered meaningful guidance to outsiders interested in the Division's enforcement policies. Yet, as in the merger area, there is no systematic and meaningful disclosure of such information when the Department closes a resource-intensive investigation.

4. *Justice Department Antitrust Criminal Enforcement Transparency.* The Antitrust Division commits substantial resources to criminal enforcement of the antitrust laws. During the five fiscal year period 1998-2002, the Division reports filing 259 criminal cases, or an average of 52 each year.⁷⁸ Criminal matters warrant separate treatment for at least two reasons: (1) special confidentiality needs underlie the use of criminal investigations and grand juries; and (2) criminal enforcement involves per se violations of the Sherman Act as to which, at least in theory, there is less ambiguity in the law.

A premature public announcement that a criminal investigation is underway may have various undesirable consequences. For example, it may cast unwarranted shadows on the reputation of a firm that is subject to the investigation and it may complicate the gathering of evidence by giving warning to the investigation targets. After an indictment, the investigation is no longer a secret, but the Division may continue to probe related criminal activity involving other conduct, or other firms or individuals.

The Antitrust Division's criminal enforcement has been largely restricted to cartel activity such as bid rigging or other forms of price fixing. Because this conduct is per se unlawful under the Sherman Act, there may be less ambiguity in the law. Counselors should have less difficulty in providing legal advice about the illegality of such conduct.

Even with respect to criminal enforcement, however, the benefits of transparency are strong. There is a need, just as in civil investigations, to provide timely information concerning the investigation of a publicly traded firm so that leaked information does not foster unfair trading in the firm's stock. Although counselors may have relatively little difficulty in determining that certain types of conduct are per se unlawful, the power to deter such conduct rests not only in its clear illegality but also in the likelihood of substantial punishment. The Antitrust Division has in recent years sought to publish its cartel enforcement

78. See Antitrust Division, Department of Justice, Workload Statistics FY 1993-2002, available at <http://www.usdoj.gov/atr/public/12848.htm> (last visited Sept. 20, 2003). See generally Status Report: A Summary Overview of the Antitrust Division's Criminal Enforcement Program (Jan. 23, 2003), available at <http://usdoj.gov/atr/public/guidelines/12576.htm> (last visited Sept. 20, 2003).

successes and the large fines and imprisonment levied upon defendants. For example, after criminal penalties had been levied against participants in the lysine cartel, the Division released video tapes and transcripts of cartel meetings as a part of an effort to educate the business public about the risks of cartel conduct.⁷⁹ The Division has also periodically updated press releases which provide a list of the largest criminal fines levied against cartel participants.⁸⁰

Division disclosure has, however, been uneven and less systematic than some might hope. For example, the largest criminal fines ever levied were against firms involved in the vitamin cartel, yet relatively little information was made available about this cartel conduct (in contrast to the lysine cartel where the Division provided much more background).⁸¹ Most of these criminal cartel cases are settled. As in civil enforcement, the disclosure that accompanies a settlement is generally far less extensive than the information that would be provided in a litigated court judgement. When the Division has reached a settlement with all likely defendants involved in cartel conduct, the Division should make a disclosure that is comparable to that offered in civil enforcement settlements, including identification of the markets at issue, the nature of the alleged unlawful conduct, the degree of commerce involved, and the reasons for accepting the negotiated settlement. Near-miss issues that were resolved in favor of the defendants should also be identified. The Division should not, however, be forced to take a position on conduct the lawfulness of which it did not clearly resolve.

79. The tapes were informally released by the Division as a part of a public education effort that included speeches by Division officials describing various cartels and how the Division investigated and prosecuted them. An example is a speech by Deputy Assistant Attorney General Gary R. Spratling, *The Trend Towards Higher Corporate Fines: It's a Whole New Ball Game* (Mar. 7, 1997) (describing the lysine cartel and how criminal fines were calculated), available at <http://www.usdoj.gov/atr/public/speeches/4011.htm> (last visited Sept. 20, 2003).

80. An example is the list, as of Jan. 23, 2003, of criminal fines in excess of \$10 million, available at <http://usdoj.gov/atr/public/criminal/12557.htm> (last visited Sept. 20, 2003).

81. See JOHN M. CONNOR, *GLOBAL PRICE FIXING: OUR CUSTOMERS ARE OUR ENEMY* (2001) (providing an in-depth description of the lysine, citric acid, and vitamin cartels).

III. SELECTED CASE STUDIES IN ENFORCEMENT TRANSPARENCY

In this section, I examine some of the details of disclosure offered (or not offered) in specific law enforcement decisions by the two agencies.

A. Cases Dropped After an Investigation

Most investigations initiated by either enforcement agency are terminated without further enforcement action. This is certainly true with respect to premerger clearance under the HSR Act, where in fiscal year 2001 roughly 97% of reported transactions were cleared routinely and without a second request for information. Statistical data on the number of cleared transactions is useful and is made available by the agencies.⁸² Detailed information about such clearances should not be required because of their limited guidance value. But terminated investigations are likely to have guidance value if the issues were carefully examined by the agency and produced an agency decision on the merits. Even if an agency finds a proposed merger objectionable, the agency will drop its investigation if the parties abandon the transaction. Beyond a notice that the agency has cleared these transactions or that the parties have abandoned the proposed merger, there is typically no disclosure of the agency's analysis.⁸³ Below, three examples of the disclosure offered in terminated merger investigations are examined: one by the Antitrust Division and two by the FTC.

1. *Bell Atlantic/NYNEX (Antitrust Division 1997)*. The Department of Justice investigated the proposed acquisition of NYNEX by Bell Atlantic in 1997-98. This was a combination of two large regional telephone companies that provided local telephone service in adjacent regions of the

82. See Annual Hart Scott Rodino Reports, *supra* note 76.

83. Occasionally, the Antitrust Division does issue a press release to mark a decision to close a merger investigation. Examples include the Bell Atlantic/NYNEX investigation discussed below and the two sentence press release announcing that the Department would not challenge the merger of Comcast and AT&T Broadband. Antitrust Division, Department of Justice, Press Release, Nov. 13, 2002, available at http://www.usdoj.gov/opa/pr/2002/November/02_at_671.htm (last visited Sept. 20, 2003).

East Coast. NYNEX controlled local telephone service in New York and New England while Bell Atlantic operated in Atlantic states from New Jersey southward to Virginia. Although not actual competitors in providing local service, the two firms were viewed as potential competitors. For example, Bell Atlantic's operations in Northern New Jersey were thought to provide a ready stepping stone for entry into the greater New York City market.

This was not a case of the agency abandoning its investigation before it had reached a conclusion. The Justice Department, after investigating this acquisition for almost a year, issued a two sentence press release announcing that the investigation had been dropped because the merger did not violate the antitrust laws.⁸⁴ Whether or not the Department's conclusion was the correct one, some analysis of the Department's reasons for reaching this conclusion would have been in order. Another agency with concurrent jurisdiction over this acquisition, the Federal Communications Commission, concluded that this same transaction, in the absence of conditions requiring additional commitments from the firms, would have violated the standards of Section 7 of the Clayton Act. The FCC issued an extensive opinion explaining its analysis of the potential competition issue.⁸⁵

The contrast between the FCC's detailed, fact-based analysis and the void in Justice Department disclosure is highlighted because the two reviewers reached decisions that potentially conflict. One might reconcile the results based upon the FCC's application of a broad public interest standard, but the FCC's analysis was based on competitive effects under the same Merger Guidelines that the Justice Department applies to enforce Section 7 of the Clayton Act. Whether or not the conflict was real, oversight and review of the handling of this important merger would have been enhanced by Justice Department disclosure. As it was, post-

84. Department of Justice Press Release, Apr. 24, 1997 ("The Division has decided that it will not challenge the transaction, having concluded that the merger does not violate the antitrust laws."), *available at* http://usdoj.gov/atr/public/press_releases/1997/173at.htm (last visited Sept. 20, 2003).

85. *See* NYNEX Corp., F.C.C. 97-286 (Aug. 14, 1997).

merger scholarship had to rely on the facts and analysis provided by the FCC.⁸⁶

2. *Cruise Mergers (FTC 2002)*. The Federal Trade Commission, like the Justice Department, does not routinely issue statements explaining a decision to drop an investigation. The Commission, however, has offered some disclosure in dropped investigations, particularly when there is disagreement among the five commissioners.⁸⁷

When the FTC dropped the cruise mergers investigation in October of 2002, the Commission issued a statement (signed by three commissioners) along with a dissenting statement (signed by two commissioners).⁸⁸ The Commission's statement was short, but structured and comprehensive in addressing most of the major issues that had been raised during an investigation that lasted the better part of a year. The opinion explained the proposed transactions, analyzed the relevant market and an alternative market definition considered and rejected by the Commission, and assessed some of the possible anti-competitive impacts that might occur in that market. Although this unusual effort to provide a more comprehensive statement was inadequate in some respects,⁸⁹ the

86. See, e.g., Steven R. Brenner, *Potential Competition in Local Telephone Service: Bell Atlantic-NYNEX (1997)*, in *THE AMERICAN REVOLUTION: ECONOMICS, COMPETITION, AND POLICY* 116 (Kwoka & White eds., 1999).

87. See *supra* notes 71-72 and accompanying text.

88. Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd/P&O Princess Cruises plc & Carnival Corporation/P&O Princess Cruises plc., F.T.C. File No. 021 0041 (Oct. 4, 2002), at <http://www.ftc.gov/os2002/10/cruisestatement.htm> (last visited Sept. 20, 2003). The Commission's statements were supplemented by material released by the directors of the Bureaus of Competition and Economics. Joseph J. Simons, Director, Bureau of Competition, Merger Enforcement at the FTC, Remarks to the Tenth Annual Golden State Antitrust and Unfair Competition Institute (Oct. 24, 2002), available at http://www.ftc.gov/speeches/other/021024merge_enforcement.htm (last visited Sept. 20, 2003); Bureau of Economics, FTC, Cruise Investigation: Empirical Economic and Factual analysis (Nov. 22, 2002), available at <http://www.ftc.gov/be/hilites/ftcbeababrownbag.pdf> (last visited Sept. 20, 2003).

89. See Warren S. Grimes & John E. Kwoka, *A Study in Merger Enforcement Transparency: The FTC's Ocean Cruise Decision and the Presumption Governing High Concentration Mergers*, *THE ANTITRUST SOURCE* (May 2003), available at <http://www.antitrustsource.com> (last visited Sept. 20, 2003).

cruise merger statements still stand as a template for disclosure for an important terminated merger investigation. It would appear, however, that the Commission regards the Cruise Mergers statements as necessary only because of the unusual complexity of the issues involved in that investigation.⁹⁰ Although the FTC Chairman has publicly lauded the Cruise Mergers statement as a constructive disclosure,⁹¹ the Commission has since made clear that it does not intend to issue similar statements when other major investigations are terminated.⁹²

3. *General Mills Acquisition of Pillsbury (FTC 2001).*

Another example of FTC disclosure of its reasons to terminate an investigation was its October 2001 decision to allow an acquisition of the Pillsbury Co. by General Mills, Inc. The FTC's decision to drop the investigation was a default result sought by none of the four voting commissioners. Two of the commissioners supported a proposed consent agreement offered by the merging parties, under which General Mills would have divested a plant and certain rights to the "Doughboy" trademark to a third party. The remaining two commissioners believed this remedy inadequate to protect the public and favored seeking a preliminary injunction to enjoin the transaction. Neither pair of Commissioners was willing to support the other side's favored resolution, and the parties were allowed to consummate the acquisition without any FTC action.

Commissioners Swindle and Leary, who favored accepting the parties proposed consent agreement, filed an opinion indicating that General Mills would honor the

90. FTC Cruise Mergers Statement, *supra* note 88.

91. Chairman Muris states:

On several occasions in the past year, the Commission has issued statements explaining why it declined to take actions involving mergers for which the agency had issued a second request or otherwise conducted a significant inquiry. By doing so, the agency has sought to provide greater transparency concerning our analysis of mergers.

Timothy J. Muris, Chairman, Federal Trade Commission, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, Milton Handler Annual Antitrust Review (Dec. 10, 2002), available at http://www.abcnyc.org/calendar/2002_12/event_1210.html (last visited Sept. 20, 2003).

92. See FTC Response to AAI Comments in Wal-mart Stores, Inc./Supermercados Amigo (providing a link to the FTC responses to commenting parties), available at <http://ftc.gov.opa/2003/02/fyi0315.htm> (last visited Sept. 20, 2003).

terms of the proposed consent even without its formal acceptance by the Commission.⁹³ In their separate opinions urging that a preliminary injunction be sought, Commissioners Thompson and Anthony argued that these remedies were inadequate, citing the difficulty of bifurcated ownership of a single trademark and the FTC's negative experience with remedies that involved divestiture of something less than an ongoing business.⁹⁴

The opinions, none of which was more than a page and a half in length, framed the remedial issue in broad terms, but failed to provide a systematic analysis of the markets involved and the anticompetitive risks that were to be addressed by the proposed trademark remedies. The General Mills/Pillsbury statements are probably typical of the statements issued by one or more commissioners in the face of a disagreement. Usually these statements broadly frame the issue that was the focus of disagreement, but ignore or treat superficially other competitive issues that were raised during the investigation. The adequacy of a particular remedy is best judged in light of the seriousness of the anticompetitive threats raised by an acquisition such as General Mills/Pillsbury. Yet none of the opinions provide nearly enough factual background for an outsider to intelligently assess these threats. Commissioner Thompson, for example, indicates that the merger "would drastically increase concentration in the already concentrated markets for cake mixes, ready-to-spread frosting, family flour, cookie mixes, brownie mixes, quick bread mixes, pancake mixes, and potato mixes." Commissioners Swindle and Leary state that for the markets in question, the acquisition would reduce the number of significant competitors "from three to two or two to one," but fail to identify which markets they were describing. Indeed, none of the opinions describe the participants in these markets (other than General Mills or Pillsbury), provide any premerger or postmerger market shares or Herfindahl numbers, detail the history of entry, or provide any perspective on the premerger competitive behavior of the major market participants.

93. Statement of Commissioners Orson Swindle and Thomas B. Leary, *available at* <http://www.ftc.gov/os/2001/10/gmstmtswinleary.htm> (last visited Sept. 20, 2003).

94. Statements of Mozelle W. Thompson and Sheila F. Anthony, *available at* <http://www.ftc.gov/os/2001/10/gmstmtant.htm> (last visited Sept. 20, 2003).

The bifurcated trademark ownership that was part of the failed consent (but which General Mills said it would implement even in the absence of the consent order) seems tailor-made for future disputes that could come before the Commission or some other tribunal. Had the FTC at least offered a fuller statement of the competitive conditions and concerns addressed at the time of the acquisition, this could have provided a foundation for future adjudication of competitive abuses. In the face of the genuine disagreement among the commissioners over the appropriate remedy, post-decision oversight of the adequacy of the remedy would also have been useful. The absence of meaningful disclosure hampers the achievement of either of these goals.

B. Justice Department Fix-It-First Resolutions of Merger Investigations

When the Justice Department resolves anticompetitive issues in a pending merger through a negotiated restructuring, it often does so on the condition that the merging parties effect the restructuring before the merger is consummated. There is much to commend the fix-it-first program—it substantially lessens the need for post merger scrutiny because the needed restructuring has supposedly been effected. There is no occasion to file a district court claim with its attendant costs. The implications for transparency are, however, less positive. The Department sometimes issues a press release to announce the restructuring; on other occasions, there is no press release.

An example of a fix-it-first case in which the Division did issue a press release is the September 2002 announcement that Wakefield Materials Co. would be required to divest a ready-mix concrete facility serving northern metropolitan Boston as condition for an acquisition of Wakefield by Aggregate Industries plc.⁹⁵ The press release identifies northern metropolitan Boston as a key geographic market in which competition in the ready-mix market would have been affected (the proposed acquisition "would have reduced the number of ready-mix concrete suppliers able to service large construction projects

95. See Antitrust Division, Department of Justice, Press Release (Sept. 6, 2002), available at http://www.usdoj.gov/opa/pr/2002/September/02_at_515.htm (last visited Sept. 20, 2003).

in densely populated northern metropolitan Boston from three to two"). It is quite possible that this one-plant divestiture resolved the only serious threat to competition posed by this acquisition. But there is a hint in the press release that at least one other geographic market was at issue. The release indicates that Wakefield, in an agreement with the Attorney General of Massachusetts, would relinquish a lease it held on a ready-mix plant in Worcester, Massachusetts, located approximately sixty miles West (and slightly south) of Boston. No information was provided on the competitive conditions that lay behind this agreement, nor on any other markets in which Wakefield and Aggregate Industries might have competed before the merger.

The Wakefield/Aggregate Press Release, like most disclosures by either agency, fails to discuss any "near-miss" markets or issues. The public is informed only about those markets or issues in which remedial action is taken. No mention is made of areas that may have been investigated and determined to be of insufficient competitive concern to consider relief. In many of the fix-it-first cases, the Antitrust Division makes no disclosure at all, so that the public has no knowledge of the parties to the transaction, the markets that were deemed threatened, or the nature of the restructuring relief that the parties agreed to.⁹⁶

The Antitrust Division's use of the fix-it-first remedy in Wakefield and in the numerous other merger cases stands in contrast to the FTC, where all settled cases involve entry of an enforceable consent. In principle, the fix-it-first approach is a clean and efficient way to resolve anti-competitive issues before the acquisition is consummated. There are cases, however, when the post-acquisition behavior on the merging parties would call for further agency action. Suppose that the Department has required the merging parties to spin off a plant to a rival firm as a condition for proceeding with the acquisition. After the spin off is accomplished, the merged firm undermines the operation of the divested plant by seeking to lure away the plant's valued employees and customers. Although there is

96. In the annual Hart Scott Rodino reports to the Congress, the Antitrust Division may make known the names of the parties to these fix-it-first agreements, but no further information is provided.

no evidence that this has occurred or will occur in connection with the Wakefield acquisition, the Antitrust Division would lack an easily enforceable judicial order in any case in which it had relied on the fix-it-first remedy.

The need for a judicially enforceable order is not directly relevant to the transparency issue. There is, however, the disquieting possibility that the burdens of Tunney Act compliance are fostering unintended consequences. The Antitrust Division may be going out of its way to avoid the burdens of Tunney Act compliance, foregoing use of judicially enforceable orders even when it is in the public interest to issue such an order. If there were no significant added burdens to obtaining a judicially enforceable consent, one might expect the Division to obtain such a consent in every settled case (in accord with FTC practice). This concern suggests the need to tailor any transparency reform to minimize the burden on the enforcement agency.

C. Cases Settled By Consent of the Parties

Looking at the universe of cases in which the Federal agencies determine to bring an enforcement action, by far the largest group of these cases are settled by consent of the parties. The settlement is often reached before any administrative or judicial complaint is filed. If the agency wants to obtain sanctions for non-compliance, governing procedures for both agencies still require that an administrative (FTC) or judicial (DOJ) complaint be issued. Of course, settlements also occur after litigation has been initiated. Examples include the Justice Department's settlement of the AT&T litigation in 1982 and of the Microsoft case in 2001.

Below, two examples of consent resolutions are examined, one each for the Antitrust Division and the FTC.

1. *Archer Daniels Midland/Minnesota Corn Processors*. In July of 2002, Archer Daniels Midland Co. (ADM) entered into an agreement to acquire Minnesota Corn Processors, LLC. (MCP). Both firms were prominent producers of corn wet milled products, including corn syrup and two grades of high fructose corn syrup (HFCS 42 and HFCS 55). The markets before the acquisition were highly concentrated, with five firms competing in the manufacture of these

products in the U.S. and Canada. ADM was the largest producer for some of these products, with 10% of all corn syrup manufacturing capacity, 33% of all HFCS 42 capacity, and 25% of all HFCS 55 capacity. MCP sold these products through a joint venture with another corn miller, Corn Products International (CPI). MCP's market share was not disclosed by the Antitrust Division, but its joint venture with CPI was reported to have 20% of corn syrup manufacturing capacity, and more than 15% each of the capacity for HFCS 42 and HFCS 55.

In September of 2002, the Antitrust Division filed a civil complaint challenging the acquisition and immediately announced a consent settlement subject to Tunney Act review. The complaint and competitive impact statement indicated that the acquisition would reduce the number of independent competitors from five to four and would result in substantially higher concentration in the markets for corn syrup, HFCS 42, and HFCS 55. The consent agreement was said to "eliminate the anticompetitive effects"⁹⁷ by requiring the merged firm to dissolve the joint venture between MCP and CPI and notify CPI of its right to conduct independent operations in competition with the merged firm. The termination of the joint venture would ensure that "there are at least five independent competitors in the corn syrup and HFCS markets, and will preserve and encourage ongoing competition between ADM and CPI."⁹⁸

The Tunney Act review process produced comments, most prominently those filed by Professor Peter Carstensen on behalf of himself, the National Farmers Union, the Organization for Competitive Markets, and seven law or economics professors (in addition to Professor Carstensen). These comments faulted the Antitrust Division's disclosure on a number of counts, among them that (1) the Division failed to disclose the separate market shares of MCP and CPI in any of the relevant markets identified; (2) the Division made no mention of ADM's direct and indirect ownership of Tate & Lyle PLC, the corporate parent of A.E. Staley Manufacturing Co., a direct rival in the production and sale of products within the relevant markets; and (3) the Division failed to disclose any information about

97. U.S. Department of Justice, Competitive Impact Statement, *United States v. Archer-Daniels-Midland Co.*, Sept. 13, 2002, available at <http://www.usdoj.gov/atr/cases/f11900/11901.htm> (last visited Oct. 27, 2003).

98. *Id.*

possible anticompetitive effects of the acquisition in the market for ethanol.

The disclosure that the Antitrust Division makes in consent cases tends to be more comprehensive than any disclosure that the Division might make in fix-it-first resolutions or investigations that are closed unconditionally. Yet, as the ADM case illustrates, the Division's disclosure is often inadequate for meaningful oversight of its actions. Thus, the failure to provide the market shares of two key participants in the relevant markets, MCP and CPI, made difficult any meaningful assessment of the adequacy of the consent relief. The Division claimed that its relief (requiring dissolution of the joint marketing venture between MCP and CPI) would ensure that the same number of independent competitors (five) would remain in the market after consummation of the merger. But it seemed likely that the combination of ADM and MCP would increase the market share of the largest participant in these markets, with the result that the post merger HHI would be higher than the premerger HHI.⁹⁹ The increased opportunity for anticompetitive strategic behavior by a larger number one firm ought to be a serious issue in any combination of this sort, yet this issue was not mentioned in the Division's analysis.

The Carstensen comments also highlight the Division's failure to address issues that could be of substantial competitive effect, yet were not even mentioned in the Division's initial Competitive Impact Statement. The first is the impact of ADM's indirect ownership of a significant interest (approximately 16%) of a direct rival (A.E. Staley) in the markets that are at issue in this acquisition. The second is the impact of the acquisition on the ethanol market. The Division has now addressed these issues in its response to the Tunney Act comments, and Professor Carstensen has replied in a letter to the Court.¹⁰⁰

99. According to a letter from Prof. Carstensen to the Court, the Antitrust Division has now acknowledged that this acquisition, even with the dissolution of the joint venture, "will increase concentration in the HFCS 42 market by 300 HHI points to 3300 and in the HFCS 55 market by 100 HHI points from 2500 to 2600." Carstensen Letter to the Honorable John Bates, U.S. District Court for the District of Columbia, Apr. 17, 2003, available at http://www.competitive-markets.com/whats_new/2003/4-17.htm (last visited Sept. 20, 2003).

100. *Id.*

The response suggests that the Antitrust Division did consider at least some of these issues, but deemed any potentially stronger remedy that might be achieved not worth the cost and risk of litigating. Whether the Division has made a sound policy decision in agreeing to the consent resolution is beyond the scope of this paper. The inadequacy of the Division's disclosure, however, is very evident in this case. The intervention (through his Tunney Act comments) of Prof. Carstensen has forced into the public domain additional serious issues that were not revealed in the Antitrust Division's competitive impact statement. This seems the reverse of the how the process should work: the Division's initial disclosure should raise these issues in the first instance, not wait for outsiders' comments to compel the Division to address them. The Tunney Act envisions a full disclosure of matters relevant to a competitive assessment of the consent settlement.¹⁰¹ The Department's disclosure in ADM was not within the letter and spirit of the Tunney Act's requirements.

2. *Wal-Mart/Supermercados Amigo*. In February of 2002, Wal-Mart Stores, Inc. signed an agreement to purchase the outstanding voting shares of Supermercados Amigo, Inc. Walmart is a global food and general merchandise retailer that, through a subsidiary, owns and operates in Puerto Rico nine traditional Wal-Mart stores, one Wal-Mart superstore, and eight SAM's Clubs. Amigo was the largest supermarket chain in Puerto Rico. After an investigation that lasted the better part of a year, the FTC announced in November of 2002 that it accepted a consent order from the parties that would require divestiture of four Amigo supermarkets. Under the Commission's rules, the proposed order was open for public comment for thirty days.

In its analysis published simultaneously with its complaint, the Commission defined a relevant market that included not only supermarkets, but also supercenters and

101. The Competitive Impact Statement made no mention that the settlement would significantly increase concentration in at least two of the key markets, an omission that would make a travesty of the Tunney Act's requirement of a meaningful competitive analysis. See Section 5(b) of the Tunney Act, 15 U.S.C. §16(b)(3)(2000) (requiring that the "competitive impact statement" include "an explanation of the proposal for a consent judgment, including an explanation of . . . relief to be obtained thereby, and the anticipated effects on competition of such relief . . .").

club stores of the type that Walmart operates. This market definition, a departure from that the Commission has used in past supermarket mergers, was explained with some detail in the Commission's analysis.¹⁰² The Commission found that many Puerto Rican consumers considered the three types of stores as interchangeable when seeking a food retailer. Although broader market definitions, by diluting market shares, usually work in the favor of the merging parties, in this instance, the broader market definition made it easier for the Commission to challenge a supermarket chain acquisition by a firm that did not operate supermarkets in Puerto Rico. The Commission's statement was also forthcoming in providing HHI data, both pre- and post-merger, for the three local markets in which it was ordering divestitures.

Despite the relatively full picture painted by the FTC's analysis, it failed to address any of the near-miss issues. For example, there was no significant discussion of other local markets in which the merger might have substantially raised concentration, no discussion of potential competition issues (Was Walmart a likely entrant in various local Puerto Rican markets?), and no discussion of the strategic conduct issues that might be raised by allowing Walmart to acquire the largest supermarket chain on the island. In particular, the analysis did not discuss the likely buying power that would be wielded by the merged firm in Puerto Rico, an issue that was raised in a number of public comments.

The Commission responded to these concerns in publicly released letters addressed to each of the parties filing comments.¹⁰³ FTC Rules, unlike the Tunney Act, do not require a published response to comments received by the agency. The FTC's decision to publish the letters sent to commenting persons is a laudable and important step toward needed transparency. These responses, along with its initial analysis released when the consent was announced, provide a fairly full picture of its competitive analysis of the proposed merger. The FTC's response as to

102. The adequacy of this explanation was questioned in a letter from Albert Foer, President, American Antitrust Institute, to Donald Clark, Secretary, Federal Trade Commission (Dec. 20, 2002) (on file with author).

103. The Commission's February 2003 press release announcing final approval of the consent is *available at* <http://ftc.gov>. <http://www.ftc.gov/opa/2003/02/fyi0315.htm> (providing a link to the FTC responses to commenting parties).

"near-miss" geographic markets was perfunctory and not helpful. In other areas, however, the Commission provided a more complete picture of its reasoning, explaining its position on buying power issues as well as potential competition. Many may disagree with the Commission's analysis on these points.¹⁰⁴ Without disclosure of its reasoning, there would be no opportunity to disagree. The benefits of disclosure include the ability to understand the agency position and, if one disagrees, to join an open debate that may shape future public policy.

The primary shortcoming of the FTC's disclosure in Walmart lies in its failure to address "near-miss" issues, a defect that was partially remedied only after public comments pressured the agency to address these issues.

IV. RECOMMENDATIONS AND CONCLUSIONS

One of the key issues in designing a transparency policy is its overall impact on antitrust law and policy. The Sherman Antitrust Act is now well into its second century. The Act's history is replete with examples of apparently contradictory Supreme Court precedents and chameleon-like shifts in agency enforcement policy. What is remarkable about the last forty years of this history is that the shifts have occurred within relatively narrow constraints. Leaving out the area of vertical restraints where legal and economic theory seem less settled, antitrust has become more deserving of the accolade that it is a system of laws, not of men. There is a substantial area of consensus and a tradition that gives policy makers more guidance and, perhaps, greater security that whatever enforcement decisions they make, competition and the system of antitrust enforcement will survive. Would greater transparency undermine these achievements by "politicizing" enforcement decisions?

104. The FTC offered a view of unlawful monopsony power that would be confined to cases involving a monopsonist's ability to lower purchase price and restrict output by suppliers. This view may rest on a sound reading of the theoretical economics underlying monopsony, but it hardly exhausts the coverage of Section 2 of the Sherman Act. As demonstrated by cases such as *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc), monopoly abuses (and by analogy also monopsony abuses) include the use of a dominant or near-dominant firm's market power to gain strategic advantage, such as by raising a rival's cost to compete.

Antitrust has always been, and will always be, political—both in the positive and more pejorative senses of that word. Debate and genuine disagreement is a healthy manifestation of a vibrant and evolving antitrust policy—in this sense the political debate surrounding antitrust is positive. Antitrust enforcement must always be conducted with an eye for its political constituency—and to avoid creating major political issues for its opponents. That may lead to some expedient and short-sighted enforcement decisions, but a pragmatic awareness of politics is necessary for survival. At the same time, because antitrust enforcement directly affects business profits, the more tawdry aspects of influence buying and conflicts of interest are also known to antitrust. In this sense, the political side of antitrust is a negative.

Antitrust is an evolving system of laws that must live within a complex political system that itself must respond to a changing world. The case for transparency is not that it will be a panacea for all that ails antitrust or the system of competition that antitrust supports. Short-sighted and expedient enforcement decisions will continue to be made. Political influence, often subtle and indirect, will still be a factor. But transparency can support meaningful and timely debate about the cutting edge issues of competition that actually confront contemporary antitrust enforcers. And it can cast sunlight on decisions in a way that can discourage expedient, careless or unprincipled decisions. Transparency will more effectively communicate the law to those who wish to comply with it. Yes, it might in some instances more readily show a path for those who would evade the law, but evasions too may more readily come to light and be remedied if there is openness in enforcement. These are concepts subtle in measurement if not in description. Yet the case for greater openness seems compelling. This is so, in part, because transparency is consistent with fundamental and deeply held values that support a responsive, fair and democratic government.

Achieving transparency reform will be difficult. There are well-meaning and experienced antitrust enforcers who have genuine reservations about moving away from the law-enforcement model of antitrust that has become central to the culture of the Antitrust Division. They have non-trivial concerns about the burdens of greater transparency and a system of voluntary submissions that rests on

maintaining the confidentiality of business information. The truth is, however, that in this age of internet communications, antitrust has already moved well beyond the classic model of law-enforcement as a secret process in which the government enforcer alone knows the critical facts. The Federal Trade Commission has demonstrated that antitrust enforcement can be effectively carried out in a more open environment. In a much more emphatic way, so too has the European Commission.

That more openness is needed, then, is not likely to be the point of contention. The critical questions will be how much, how soon, and how to achieve it at the lowest cost to other enforcement values. The goal of transparency reform should be to achieve adequate public disclosure of all agency enforcement decisions likely to have significant guidance value within or outside the agency. To achieve this goal, substantial change in current disclosure policy will be required. This will require a firm commitment at each agency's highest level. Here are some specific steps that would achieve this goal.

(1) Web sites need to be updated to provide more accessible and complete information. For each enforcement category, the sites should provide multiple indexes of decisions, including listings broken down by date of decision, names of the parties, and subjects addressed in each decision. Subject indexes should be coordinated between the agencies so that each agency's web site can contain meaningful cross-references to the other's site. For example, a subject index for health care advisory opinions (FTC) or business review letters (Antitrust Division) should include coordinated topic headings that a site visitor can use to obtain seamless access to decisions of the other agency.

(2) For all publicly traded firms, each agency should promptly and effectively disclose each critical stage of a civil enforcement investigation, thereby minimizing concerns that leaked information is the basis for unfair trading in the firm's stock. For criminal investigations, the Antitrust Division should reexamine its disclosure practices to provide the maximum disclosure consistent with enforcement needs and to ensure that leaked information does not become a basis for unfair stock trading.

(3) Both the FTC and the Antitrust Division should consider making more efficient use of their web sites to

provide information about pending merger investigations. Announcements of pending mergers should be organized into a separate sublisting within the site. The prompt web postings of reported mergers used by other federal agencies such as the Federal Reserve, and by the European Union and Germany's Bundeskartellamt, would seem an excellent way to reduce costs in disseminating information and to invite interested outsiders to provide comments about pending mergers. Statutory authorization may be required for some of these changes. Because there may be initial doubt about which federal agency will be assigned to review a merger transaction, the agencies should coordinate these initial postings, perhaps designating responsibility for this task to a single agency. At a minimum, the disclosure should include a description of the parties and the proposed transaction and information concerning the market or markets in which the firms are active.

(4) For all merger transactions for which the agency reaches a decision on the merits of a Clayton Act Section 7 claim, the agency should provide more detailed disclosure if the acquisition involved the issuance of a second request or was subject to an extended investigation. The FTC's cruise merger opinion is a template for such an expanded explanation, which should include a description of any relevant market; information concerning the degree of premerger and postmerger concentration in each relevant market, including market share data for the participants and industry-wide data (HHI numbers); a description of all major competitive issues considered by the agency or raised by outside parties and an explanation of why the agency did or did not find these competitive issues determinative; a full description of the remedy, if any, that the agency would obtain in settlement of the case; and a description of alternative remedies, if any, that might have been available and an explanation of why the agency did not opt for these alternatives.

(5) The agencies should provide more complete disclosure in settled cases, including identification of near miss issues and whether or not they were resolved in the target firm's favor and description of alternative remedies considered but not adopted by the agency. The Tunney Act would appear to require this disclosure in cases settled by the Antitrust Division, but this disclosure should become standard practice for both agencies in any settled case,

regardless of whether the Tunney Act applies. This disclosure should also apply to criminal cases at the point at which the Division has resolved its investigation with all of the targets of its criminal inquiry.

(6) Reform should also be directed to eliminating unnecessary costs to the current transparency scheme. In particular, the Tunney Act should be amended to eliminate any requirement of publication in newspapers. The HSR Act should be amended to make clear that the agency has authority to release information from a premerger filing when that information is needed to explain an agency decision. In addition, with the ready availability of record evidence on the agencies' web sites, it may no longer be necessary to incur the expense and delay of publishing certain materials in the Federal Register. Unnecessary burdens in any transparency scheme should be eliminated lest they create internal incentives against disclosure and undermine the overall goal of attaining meaningful transparency.

Most of these steps will not involve substantial costs to the agency. Improving the accessibility of information already made available will require updating and expanding each agency's web site, but once the improved site is operational, the additional costs of improved accessibility should not be substantial. Additional costs will be incurred in order to issue more detailed explanations at the conclusion of a major investigation. These statements would not be required in a large number of cases, but will require nontrivial commitments by the agency. Internal decision memoranda may be the basis for the agency's public explanation, but such memoranda would have to be carefully edited to assure no confidential material is released. It is likely, however, that once agency disclosure becomes routine, the process would become more efficient and less resource intensive.¹⁰⁵

105. One issue likely to arise is the extent to which the agency should disclose market shares of the parties to the transaction. Market share data is made available in litigated cases and, often, in cases settled by consent. As a general rule, market shares should be released at the time the agency announces any disposition of an investigation which is likely to have precedential impact. This information can be valuable to anyone seeking to understand current agency policy and to those who would critique and review the agency's enforcement record. On the other hand, in some cases, release of market share data could compromise business secrecy and confidential information voluntarily provided to the agency. To the extent that these

Both the FTC and the Antitrust Division probably have the authority to issue explanatory statements without further legislation. Indeed, both agencies already do so on occasion. To the extent that additional legislation is required to authorize such statements, or to the extent that the agencies do not voluntarily provide these statements, Congress should act to ensure that transparency is achieved.

The matter of transparency is especially urgent with respect to merger enforcement because the locus of law and rulemaking power has shifted to the federal agencies, with only sparse judicial review of agency decisions. The virtual vacuum on explanations of decisions to drop substantial merger enforcement investigations, or of agency concerns underlying a decision of the merging parties to abandon the transaction or restructure in a fix-it-first agreement, is highly unsatisfactory.

constraints limit the release of market share data of individual firms, the agency may still be in a position to release composite market share data, or indicate a range within which the agency believes that individual market shares fall.

