DEPARTMENT OF JUSTICE

"Toward A Competition Policy Agenda for Agriculture Markets"

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Remarks as Prepared for the
Organization for Competitive Markets
11th Annual Conference
St. Louis, Missouri

August 7, 2009

I. Introduction:

I am very happy to be here with you today. In terms of her priorities for the Justice Department's Antitrust Division, Christine Varney, my boss and the new Assistant Attorney General, has emphasized the importance of competition issues affecting agriculture as one area on which she will focus. It is thus appropriate that my first speech as the Deputy Assistant Attorney General in charge of Policy, Appellate, and International Matters is before this important conference.

In speaking with you all today, I will share my understanding of the current state of affairs in agriculture markets and invite your suggestions as to how the Antitrust Division should approach these issues. In particular, I will outline our plans for learning more about these markets in the upcoming workshops that we will conduct with the US Department of Agriculture (and will include participation from other interested stakeholders, such as State Attorneys General) to examine the state of competition in agriculture markets. Before outlining some of the key areas we and the USDA expect to examine in our workshops, I will begin by discussing the role that concerns about agriculture markets played in spurring the enactment of the Sherman Act and the Division's recent activities in the agriculture marketplace.

II. American Antitrust Enforcement and Agriculture Markets

The Department of Justice's interest in competition issues affecting agriculture markets is longstanding. Indeed, the history of the Department and the laws it enforces is filled with connections to the concerns of farmers and ranchers. Going on 120 years strong, the Sherman Act

remains the primary legal authority supporting the Department's enforcement efforts. On all accounts, it is a remarkable piece of legislation—it can be printed on a single page and it functions as the "Magna Carta of free enterprise."[1] Like the Constitution itself, the Sherman Act was built for "ages to come"[2] and has proved itself capable of withstanding the test of time. Consequently, the law first created to address the trusts of the late 1800s now addresses effectively both traditional markets and the challenges to competition in our modern, high technology economy.

Stated generally, the Sherman Act provides sound medicine for a free market economy and has thus been rightly celebrated as a very successful piece of legislation. Put in its broadest terms, the Sherman Act prohibits two things: (1) anticompetitive combinations or coordination among actual or potential market competitors; and (2) anticompetitive practices as well as exclusionary conduct by firms that have monopoly power in a particular market.[3]

Congress enacted the Sherman Act in 1890 to respond to the emergence of trusts in many industries. Such combinations restricted total output, raised prices for consumers, and excluded new entry. Most famously, John D. Rockefeller spearheaded the development of the Standard Oil trust, which was ultimately broken up as a result of a case launched by President Theodore Roosevelt's administration. It is also well known that concerns about monopoly power and trusts in agriculture markets were essential to securing the passage of the Sherman Act. In particular, during the debates on the Sherman Act, several representatives noted their great concern about the efforts of the beef trust in Chicago to control the price of livestock.[4] Representative Henderson of Iowa, for example,

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[1] *United States v. Topco Associates, Inc*., 405 U.S. 596, 610 (1972).
[2] *M'Culloch v. Maryland*, 17 U.S. 316, 415 (1819).
[3] 15 U.S.C. §§ 1-2 (1890). As I noted, this is a simplification of the law's impact as it also addresses other issues, including attempts to monopolize.
[4] *See* Gregory Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L. J. 707, 714-15 (2007) ("In both houses of Congress, participants in debates often singled out the beef trust for condemnation,

noted that the beef trust controlled "the stock-yards, the cattle-yards, and the transportation in Chicago" and were apparently able "to keep up the price of every beefsteak that is used in this country."[5] Explaining how this trust adversely impacted both farmers and consumers, Rep. Ezra B. Taylor added that the "beef trust fixes arbitrarily the daily market price of cattle, from which there is no appeal, for there is no other market. The farmers get from one-third to half of the former value of their cattle and yet beef is as costly as ever. . . . This monster robs the farmer on the one hand and the consumer on the other."[6] This concern was underscored by a Senate select committee that examined beef prices and recommended passage of the Sherman Act, concluding that "the principal cause of the depression in the prices paid to the cattle raiser, and of the remarkable fact that the cost of beef to the consumer is not decreased in proportion, comes from the artificial and abnormal centralization of markets."[7]

Other agriculture concerns also fueled support for the Sherman Act. Although it was not a large trust, the Cottonseed Oil Trust raised concerns among Southern representatives and led to the passage of local antitrust legislation that was a predecessor of the Sherman Act. Indeed, on June 23, 1889, the *New York Times* reported on a judicial decision in which a New Orleans court issued a permanent injunction restraining the Cotton Oil Trust from doing business or writing contracts in Louisiana, reporting that Wall Street was "worried a good deal" about the decision.[8] But the Sherman Act, which took inspiration from this law, focused on Main Street consumers, not Wall

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and they condemned it for reducing the prices paid to cattle farmers more than for prices paid to consumers").

[5] 21 CONG. REC. 4091 (1890) (statement of Rep. David B. Henderson). Senator William Boyd Allison of Iowa commented, to similar effect, that: "It is the common and the current belief among farmers of the State in which I reside and of all of the West that there is a combination in the city of Chicago which not only keeps down the price of cattle upon the hoof but also has such relations and situations as respects the internal commerce of the country that its members are enabled to make the consumers of beef pay a high price for that article." 21 CONG. REC. 2470 (1890) (statement of Sen. William Boyd Allison).

[6] 21 CONG. REC. 4098 (1890) (statement of Rep. Ezra B. Taylor).

[7] S. Rep. No. 829, at 33 (1890).

Street profits. As Senator John H. Reagan of Texas explained in advocating for the passage of the Sherman Act, the Cottonseed Oil trust "put down the price of cotton seed about one-third and put up the price of oil to whatever they please."[9]

The early years of Sherman Act enforcement addressed a number of agriculture markets. A very significant early case involving the Sherman Act, for example, was its application to the Beef Trust in 1903-06. In 1903, under President Theodore Roosevelt, the Justice Department filed a civil suit seeking an injunction against members of the Beef Trust based upon their coordination in violation of the Sherman Act. In an important precedent, the district court ruled that the Sherman Act applied to the trust's operations. On appeal, Attorney General William Moody argued the case himself and the Supreme Court substantially upheld the injunction against the trust.[10]

III. The Changing Agriculture Marketplace

Over the last twenty years, changes in technology and the marketplace have revolutionized agriculture markets, producing some substantial efficiencies as well as concerns about concentration. Notably, farmers today increasingly turn to patented biotechnology that is used to produce seeds resistant to herbicides and insects, producing larger crop yields than ever before. At the same time, this technological revolution and accompanying market developments have facilitated the emergence of large firms that produce these products, along with challenges for new firms to enter this market.

The Antitrust Division recently evaluated a series of mergers in the agriculture industry,

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[8] *Cottonseed Oil Trust.; A Circular Explaining the Effect of A Recent Court Decision*, N.Y. Times, June 23, 1889.
[9] 21 CONG. REC. 2645 (1890) (statement of Sen. John H. Reagan).
[10] *U.S. v. Swift*, 122 Fed 529 (N.D. Ill. Cir. Ct. April 18, 1903), *aff'd (in large part), Swift v. U.S.*, 196 US 375 (1905).

obtaining relief to remedy identified anticompetitive concerns. In the market for cottonseeds, for example, the Antitrust Division required Monsanto and Delta & Pine Land to divest a significant seed company, multiple cottonseed lines, and other valuable assets before allowing them to proceed with their merger. Also, because DPL had had a license allowing it to "stack" a rival's trait with a Monsanto trait, Monsanto was also required to amend certain terms in its current trait license agreements with other cottonseed companies to allow them, without penalty, to stack non-Monsanto traits with Monsanto traits. As a result, producers of genetically modified traits gained greater ability to work with these seed companies.[11] Going forward, the Division will continue to examine developments in the seed industry.

With regard to pork, the Division evaluated and declined to challenge Smithfield's acquisition of Premium Standard in 2007. In so doing, the Division investigated its impact on the prices of pork products to consumers, the competitive consequences related to the purchase of hogs from farmers, and the merger's likely effects on the purchase of services from farmers who raise hogs. Ultimately, the Division concluded that the merger would not undermine competition in the marketplace, but emphasized it would maintain a watchful eye on the marketplace.[12]

With regard to beef, the Division filed a complaint in federal court in Illinois in October 2008 that opposed the proposed merger of JBS and National Beef Packing Company. The Division opposed that merger because it found that by eliminating one of only four competitively significant

[11] Competitive Impact Statement, *U.S. v. Monsanto Company and Delta Pine and Land Company*, Case No. 1:07-cv-00992 (D.D.C. May 31, 2007); *see also* Ken Heyer & Dennis W. Carlton, *The Year in Review: Economics at the Antitrust Division, 2006-2007*, 31 REV. IND. ORG. vol. 2, p. 121 (2007) ("[A]vailable evidence [about the relationship between Monsanto and Delta & Pine Land] suggested that, going forward, the two firms were not so much close partners as they were one another's chief rivals.").

[12] *See Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of Smithfield Inc.'s Acquisition of Premium Standard Farms Inc*. (Press Release dated May 4, 2007) (available at http://www.usdoj.gov/atr/public/press_releases/2007/223077.htm).

packers, the merger would place more than 80% of domestic fed cattle packing capacity in the hands of the remaining three major firms and enable them to exercise market power against producers and sellers of livestock. Consequently, the Division concluded, the consummation of this merger would have resulted in lower prices paid to cattle suppliers and higher beef prices for consumers. After several months of litigation, the parties abandoned the deal.

IV. Current Areas for Examination

As I mentioned at the outset, the Antitrust Division is planning to look, in cooperation with the USDA, into the state of competition in agriculture markets. This undertaking, which will include a number of workshops, will touch on a set of important questions that will include, but not necessarily be limited to:

(1) evaluating the state and nature of competition in a range of agricultural markets;

(2) the impact of vertical integration;

(3) concerns about "buyer power";

(4) relevant regulatory regimes; and

(5) questions about the nature of transparency in the marketplace.

I should emphasize at the outset that these areas are, by no means, the only ones we will consider nor will we necessarily consider only those issues where antitrust action may be appropriate or feasible. They are, however, ones where we believe a careful evaluation is in order so that we are able to fulfill our mission of enforcing the antitrust laws, serving as an effective advocate for competition, and protecting consumers.

A. Particular Market Segments

For many farmers and consumer advocates, we understand that there are concerns regarding the levels of concentration in the seed industry—particularly for corn and soybeans. In studying this market, we will evaluate the emerging industry structure, explore whether new entrants are able to introduce innovations, and examine any practices that potentially threaten competition.

Let me mention two other industry segments that will receive attention. First, we recognize that the dairy market has experienced considerable consolidation over the past decade and there are questions about the state of competition in that market. Second, as I noted above, livestock markets, such as the beef market evaluated in the JBS/National merger, are ones where the Division is keeping a close watch. In analyzing developments in these markets, we are cognizant of the fact that competition is frequently local or regional in nature, meaning that the nature and extent of competition-related concerns will differ across different parts of the country and that broad national statistics can be misleading.

B. Vertical Integration

Over the last 15-20 years, a number of agriculture markets have become more vertically integrated. For those unfamiliar with the term, "vertical integration" is when a firm operates at multiple levels in the chain of production. Vertical integration takes place, for example, when a manufacturer expands on its own or purchases a company that provides the raw material or a component part used in production (i.e., it integrates "upstream") or a distribution channel (i.e., it integrates "downstream"). In many cases, such activity can lead to greater efficiencies and savings for consumers, making vertical integration ubiquitous in our modern economy (think, for example,

of Gap producing its own jeans and marketing those jeans in its own stores). Under certain conditions, however, vertical integration can protect or facilitate the exercise of monopoly power.[13]

C. Buyer Power

Many have raised concerns about the exercise of what is called monopsony power or, to use a more descriptive term, "buyer power." Traditional monopoly power concerns a dominant firm that produces the goods or services that consumers want to buy. Where a firm possesses monopoly power, it may be able to charge prices higher than would be the case in a competitive market. Monopsony is the other side of the coin. When there are a number of producers in an "input market" and a dominant buyer of those products, the buyer may exert its power to press the prices lower than they would be if the buying market were more competitive—i.e., if the sellers had more choices of where and to whom to sell their products.[14] Buyer power is thus a form of market power and can disadvantage sellers and create inefficiencies just like "seller power," more commonly known as monopoly power.[15] In the workshops, we will examine the competitive impact of buyer power.

D. Other Legal Regimes

One important area to review is the implementation of the Packers and Stockyards Act. Even after the beef trust was broken up, Congress passed the Packers and Stockyards Act in 1921 to place limits and controls on the way that markets for livestock operate separate and apart from the

[13] For a discussion of both contexts, *see* Joseph Farrell and Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergency of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85 (2003).
[14] For a recent study of this issue, *see* Werden, *supra*, n. 4.
[15] To be sure, simply having a degree of market power—whether on the buyer or the seller side—does not by itself present competitive concerns or give rise to antitrust liability. Indeed, where market power results from superior

strictures of the Sherman Act. We are interested in learning whether the controls of the Act are relevant to the way businesses are run today and whether the law is being implemented effectively to promote competition. We will also be interested in evaluating the impact of any regulatory regimes that may serve to protect particular producers at the expense of consumers.

E. Transparency in the Marketplace

Finally, I want to touch on the nature of transparency in agriculture markets. I am a firm believer that markets work better and attempted harms to competition are more likely to be thwarted when there is increased transparency to consumers and government about what is going on in an industry.[16] A question we will thus be asking is whether there are parts of the agriculture business that lack sufficient transparency. Notably, some have suggested that trading in agriculture markets has shifted from organized exchanges to a greater reliance on vertical integration and bilateral trading. To be sure, such a change could enhance efficiency and may not raise any competition concerns. (Indeed, there are instances where increased transparency can actually facilitate anticompetitive coordination, such as in markets with homogeneous products and high concentration.[17]) To the extent that these changes in trading raise any competition concerns, however, we will welcome suggestions and strategies for promoting greater levels of transparency.

V. Conclusion

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efficiency, for example, the resulting high profits are a legitimate reward under our free enterprise system.

[16] For a discussion of how transparency can play an important role promoting competition and protecting consumers in the context of broadband Internet access, *see* Philip J. Weiser, *The Next Frontier for Network Neutrality*, 60 ADMIN. L. REV. 273, 291-97 (2008).

[17] The Division previously filed comments highlighting this very concern with the Federal Energy Regulatory Commission, see http://www.usdoj.gov/atr/public/comments/223049.htm.

The Antitrust Division recognizes that the agriculture marketplace continues to change. To be sure, many of the ongoing marketplace and technological changes promote efficiencies and benefit consumers. At the same time, however, we are aware that there are important concerns about the competitive consequences of how the marketplace is evolving and we believe that we can improve our work through careful evaluation of the relevant market conditions, informed by input from those in the agricultural community who live with and have to deal with these developments every day. We are thus approaching the upcoming workshops without any preconceptions and cannot promise any particular answers or results. I can assure you, however, that we are committed to a careful examination of the marketplace. As we go forward, I look forward to hearing more from you, continuing this very important dialogue, and working to improve our efforts in this area. Thank you.