DEPARTMENT OF JUSTICE

ANTITRUST ENFORCEMENT

AND

AGRICULTURE

Address by

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I appreciate the opportunity to discuss antitrust enforcement in the agricultural marketplace, and in particular the role of antitrust enforcement in ensuring that agricultural markets are competitive, both on the selling side and on the buying side. We know that the agricultural marketplace is undergoing significant change. Farmers today must adjust to challenges in international markets, to major technological changes in the products they buy and sell, and to new forms of business relationships between producers and processors.

In the midst of these changes, farmers in particular have expressed concern about the level of competitiveness in agricultural markets. Competition at all levels in the production process leads to better quality, more innovation, and competitive prices. Farmers know how important antitrust enforcement is to ensuring competitive markets. Enforcement of the antitrust laws can benefit farmers, as purchasers of goods and services that allow them to grow crops and raise livestock, and also as sellers of crops and livestock that feed people, not only in our country but also around the world.

The Antitrust Division takes these concerns very seriously and has been very active in enforcing the antitrust laws in the agricultural sector. Antitrust Division officials have also undertaken a special outreach effort in agriculture, meeting with producers and producer groups in Washington and around the country to listen to their concerns and to improve everyone's understanding of the role that antitrust enforcement plays. The antitrust laws apply in the same way in every industry, with a very few exceptions where their application is limited by specific statute; one exception important for agriculture is the Capper-Volstead Act, which permits agricultural producers to market their products jointly through cooperatives. In addition, certain industries are also regulated by government agencies under statutes that go beyond the antitrust laws to establish additional, industry-specific rules for appropriate behavior in the marketplace;

for example, the livestock, meat-packing, and poultry industries are regulated by USDA's GIPSA under the Packers and Stockyards Act, a fair trade practices and payment protection law.

We are very much aware of the trends toward increasing concentration in some agricultural sectors. In particular, the steer-heifer side of the cattle slaughter market has been highly concentrated for some time, with four meatpacking firms now controlling about 80 percent of the market. Lamb slaughter is also quite concentrated. Hog slaughter, and processing of crops such as corn, wheat, and soybeans, are also moderately concentrated, at least at the national level, and may be more concentrated in some local areas. High concentration in a market is not in and of itself a violation of the antitrust laws. On the other hand, a high level of concentration is an important backdrop to antitrust analysis.

Monopsony

Let me emphasize that the Antitrust Division closely looks at so-called "monopsony" concerns in merger enforcement. Monopsony is the mirror image of monopoly, except on the buying, not the selling, side of the market. One example of the exercise of monopsony power is a situation in which a purchaser with market power reduces the quantity it purchases in order to force down the per unit price it pays. As with an exercise of monopoly power, if the result of an exercise of monopsony power is that output falls below the competitive level, then overall economic welfare is thereby reduced.

A casual observer might believe that, if a merger lowers the price the merged firm pays for its inputs, consumers will necessarily benefit. The logic seems to be that because the input purchaser is paying less, the input purchaser's customers should expect to pay less also. But that is not necessarily the case. Input prices can fall for two entirely different reasons, one of which

arises from a true economic efficiency that will tend to result in lower prices for final consumers. The other, in contrast, represents an efficiency-reducing exercise of market power that will reduce economic welfare, lower prices for suppliers, and may well result in higher prices charged to final consumers. Antitrust must distinguish these two situations and pursue enforcement against the latter, but not the former.

Consider first how a merger may lower the true economic cost of purchasing. An example might be where a merger enables the firm to commit to larger orders and thereby permits its supplier to save on its costs by scheduling longer and less costly production runs. These cost savings typically will benefit both the merged firm and its suppliers, and to the extent they lower the buyer's marginal cost of production, will tend to be passed along to some extent to final consumers. The case where a merger lowers input prices for no reason other than that the merged firm can now exercise monopsony power is entirely different. If a buyer obtains market power through merger, and thereby is able to depress prices for the inputs it purchases below competitive levels, then producers of those inputs will have depressed incentives to produce, which will result in too few resources utilized to produce the inputs compared to what would be available in a competitive market. This is likely to harm both suppliers and consumers.

While we often speak of consumers as the targeted beneficiary of antitrust enforcement, suppliers also benefit, by having healthy incentives to provide the best products and services they can, with the expectation that they will be able to do so free from anticompetitive interference. And the overall U.S. economy benefits, as the products and services desired by consumers are produced more efficiently, in greater quantities, and at competitive market prices.

A focus on

promoting competition goes hand in hand with our taking enforcement action in a monopsony case when the facts warrant.

Enforcement Actions

We investigate and bring enforcement actions against three basic kinds of antitrust violations. First, we bring criminal prosecutions against hard-core forms of collusion, such as price-fixing and market allocation, that violate section 1 of the Sherman Act; we also bring civil enforcement actions under section 1 against joint ventures and other forms of collaboration among competitors when they have the effect of suppressing competition. Second, we bring enforcement actions under section 2 of the Sherman Act against monopolization or attempted monopolization, the use of predatory or exclusionary conduct to acquire or hold onto a monopoly. Third, we bring enforcement actions under section 7 of the Clayton Act to prevent mergers from substantially lessening competition in a market. Our goal in each instance is to promote competition as a means of ensuring that consumers get the benefit of competitive prices, innovation, and efficiency, free from artificially imposed restraints.

Collusion

The Antitrust Division has brought a number of criminal prosecutions under section 1 of the Sherman Act in recent years in the agricultural sector. Beginning in 1996 there was the prosecution of the international cartel for lysine, an important livestock and poultry feed additive, leading to Archer Daniels Midland paying a then-record antitrust fine of $100 million and three ADM executives being sent to prison. There was our prosecution beginning in 1998 of

the international cartel for vitamins, another important animal feed additive, in which F. Hoffmann-La Roche Ltd. of Switzerland and BASF Aktiengesellschaft of Germany paid record-breaking fines of $500 million and $225 million, respectively, along with numerous other corporate and individual convictions, multimillion-dollar fines, and prison sentences. In 2003, another firm, DuCoa LP, pled guilty and was sentenced to pay a $500,000 fine, and we indicted DuCoa's former president. There was our prosecution beginning in 2001 of the cartel for MCAA, used to produce herbicides, in which the Dutch company Akzo Nobel Chemicals BV paid a $12 million fine and French company Elf Atochem paid a fine of $5 million, and one Akzo Nobel and two Elf Atochem executives went to prison; an additional firm, Hoechst Aktiengesellschaft of Germany, pled guilty and was sentenced to pay a $12 million fine.

On a smaller scale, we also successfully prosecuted two cattle buyers in Nebraska in 1997 for bid-rigging in connection with procurement of cattle for a meat packer, after an investigation conducted with valuable assistance from USDA's GIPSA, which was investigating some of the same conduct under the Packers and Stockyards Act. Both individuals pled guilty and were fined and ordered to make restitution to the victims. These cases are notable in that they focus on "monopsony" type of harm – harm to producers – the direct victims of the conspiracy included agricultural producers in their role as sellers rather than as consumers. While we do not generally find sellers to be victims of collusion as often as we find buyers to be, the somewhat unusual structure of the agricultural marketplace – with relatively more producers selling to relatively fewer packers and processors – presents more possibilities for sellers to be victims. The Antitrust Division keeps a lookout for violations of this kind and will prosecute them when the facts warrant.

On the civil side, in December 2004, we brought an action against the Eastern Mushroom Marketing Cooperative (EMMC) to end a conspiracy to restrain trade in the mushroom market. EMMC, the nation's largest mushroom farmer cooperative, agreed to stop its practice of buying mushroom farms only to shut them down, and to make farms it had previously shut down available to competing farmers.

Monopolization

Monopolization enforcement actions under section 2 of the Sherman Act are rare, not only in agriculture but in other markets as well. Section 2 monopolization violations require both that the firm have a monopoly – or, in the case of attempted monopolization, a very high market share and a "dangerous probability" of attaining a monopoly – and that the firm have engaged in predatory or exclusionary conduct in order to acquire or maintain its monopoly. The levels of single-firm market share required are typically much higher than what we have found in many agriculture markets in recent years. And it must be demonstrated that the conduct is actually harming competition, not just disadvantaging rivals. The proper treatment of single-firm conduct under the antitrust laws presents some of the most complex issues facing the Division, the courts, the antitrust bar, producers, and consumers, as well as the business community. To explore how best to identify anticompetitive exclusionary conduct, the Division and the Federal Trade Commission have been holding joint hearings since June 2006, examining whether and when specific types of single-firm conduct are procompetitive or benign, and when they may harm competition and consumer welfare.

Let me give you an agriculture-related example of the kind of situation that might warrant enforcement action under section 2. A minute ago, I mentioned the Capper-Volstead Act, which allows producers of agricultural commodities to form processing and marketing cooperatives – to engage in joint selling at a price agreed to by the producer members of the co-op – subject to certain limitations enforced in the first instance by USDA. Suppose a group of livestock producers were to form a cooperative, as some cattle producers have attempted to do in recent years, to slaughter and process their own livestock for the wholesale market. Suppose also that there was an established meatpacker with monopoly power in the area in which the cooperative was setting up its business, and that the established meatpacker used its monopoly power to attempt to drive the cooperative out of the market by, say, cutting off access to transportation or to wholesale markets by taking actions that made no economic sense except if they succeeded in eliminating competition. That's a good example of the kind of conduct we would investigate as a possible violation of section 2.

Mergers

The Antitrust Division has brought a number of enforcement actions in recent years under section 7 of the Clayton Act to prevent anticompetitive mergers from being consummated in agricultural markets. We have either insisted that the merger be modified to remove the cause for antitrust concern or, when that is not possible, we have sought to block the merger in its entirety. There was our 1998 challenge to Monsanto's proposed acquisition of DeKalb Genetics Corporation, involving corn seed biotechnology innovation, in which Monsanto met our concerns by agreeing to spin off its claims to a new technology for introducing new traits such as insect resistance into corn seed, and to license its Holden's corn germplasm to over 150 seed

companies that bought it from Monsanto at the time, so that they would be free to use it to create their own corn hybrids if they chose. There was our 1999 challenge to Cargill's proposed acquisition of Continental's grain business, in which we protected competition in the purchase of grain and soybeans from farmers in a number of local and regional markets, as well as competition in the futures markets, by requiring Cargill and Continental to divest a number of grain and soybean storage facilities in the Midwest, the West, and the Texas Gulf. There was our 1999 challenge to New Holland's proposed acquisition of Case Corporation, in which we protected competition in the sale of tractors and hay tools to farmers by requiring that the parties divest New Holland's large two-wheel-drive agricultural tractor and four-wheel-drive tractor businesses, and Case's interest in a joint venture that made hay and forage equipment. There was our 1999 challenge to Monsanto's proposed acquisition of Delta & Pine Land, involving cotton seed biotechnology, in which Monsanto abandoned the acquisition after we advised that we were prepared to challenge it in court. In August 2006, the parties announced that they are again pursuing the acquisition, and our investigation into its likely competitive effects is ongoing.

Three other actions include our December 2002 challenge to Suiza Foods' proposed acquisition of Dean Foods, our April 2003 challenge to Dairy Farmers of America's already-consummated acquisition of Southern Belle Dairy Co. LLC, and our August 2004 challenge to the Syngenta/Astrazeneca/Advanta sugar beet seeds merger.

In 2001 in Suiza/Dean, we required Suiza Foods to change its originally proposed acquisition of Dean Foods in two significant ways. First, we required Suiza to divest 11 milk processing plants in 8 states (Alabama, Florida, Indiana, Kentucky, Ohio, South Carolina,

Virginia, and Utah) to preserve competition in markets for milk sold at school and at other retail outlets. Second, we required Suiza to modify its supply contract with DFA, who would also own half interest in National Dairy Holdings, L.P., the new firm to which the processing plants were being divested, to ensure that dairies owned by the merged firm in the areas affected would be free to buy their milk from sources other than DFA.

In DFA/Southern Belle, we and the Commonwealth of Kentucky filed a civil antitrust lawsuit in 2002 to compel DFA to divest its interests in Southern Belle Dairy. This merger between two dairy processors was not subject to the Hart-Scott-Rodino premerger notification requirements, because its dollar value fell below the statutory threshold for reporting, and the Division did not learn about it until after it had been completed. DFA's acquisition eliminated the only other independent bidder for school milk in the area, resulting in a monopoly in 47 school districts in Kentucky and Tennessee, and reduced the number of independent bidders from three to two in 54 other school districts in those two states. After successfully appealing an adverse pretrial district court decision, the Division and Kentucky proposed a final judgment that restores competition for school milk contracts in 100 districts in the two states by requiring divestiture of Southern Belle by DFA and the Allen Family Limited Partnership. The proposed settlement is pending before the district court during a public comment period that ended on January 16, 2007, and the court will now determine whether it is in the public interest to enter the final judgment.

In 2004 in the sugar beets seed case, the court approved entry of a decree requiring divestiture of Advanta’s sugar beet seed business to preserve competition and innovation before that merger could proceed.

In the meatpacking area, the Antitrust Division has carefully reviewed a number of proposed mergers in recent years. Smithfield's recently proposed acquisition of Premium Standard Farms is currently being investigated. While we have not found enforcement action to be warranted in any recent meatpacking mergers to date, the firms in these markets know that we are looking at all such mergers closely. Without addressing any specific proposed merger between packers, the principal markets of potential concern in our investigation would be the procurement markets for the livestock in question. These markets could be defined as regional or local, depending on our conclusion in the particular case as to how far a livestock producer could economically travel or ship in order to get competitive prices for the livestock to be sold. We would look at each of those markets to assess whether the proposed merger, and the consequent reduction by one in the number of competing packers in that market, would be likely to so reduce competition among the remaining packers as to enable them to depress the prices they offer for livestock below competitive levels.

The Division's ongoing continued vigilance and aggressive investigation in this area has already led to one contemplated merger being abandoned. In 1993 and 1994, the Division received reports that Cargill's large meat-packing subsidiary Excel was looking into acquiring Beef America. Both of these packers were among the top five in the steer-heifer slaughter market, and concerns that competition in livestock procurement might be adversely affected by the merger – the "monopsony" concern – led us to open an investigation. We aggressively questioned Excel and others in the marketplace, clearly communicating our concerns. A Cargill executive has publicly stated that our investigation convinced the parties to abandon the merger.

The 1999 Cargill/Continental acquisition was a "monopsony" case, in that farmers as sellers would have been the direct victims of the loss of competition that was expected to result from the merger as originally proposed. In Cargill/Continental, the parties were not only buyers of grain and soybeans in various local and regional domestic markets, but also sellers of grain and soybeans in the United States and abroad. While we looked at the potential effects on competition in both the "upstream" and "downstream" directions, the challenge was based entirely on concerns about effects in the "upstream" market, where Cargill and Continental were buying from farmers. We carefully looked at each upstream market that could be affected, and traced the potential effect all the way from the local area in which the farmer grew and sold the grain or soybeans to a local elevator and the place at which Cargill or Continental made its final purchase – in some instances, a distance of over 1400 miles, from the farms in Minnesota to the port elevators in Seattle. The relief in the consent decree was carefully fashioned to address the potential competitive problems in each affected local market.

Role of Antitrust Enforcement in the Agricultural Marketplace

As the above summary of our enforcement activities in the agriculture sector reflects, the Antitrust Division regularly has monopsony concerns on our radar screen. When those concerns are present we investigate them fully and, when the facts warrant, we take appropriate enforcement action. Price fixing and other forms of collusion can be unlawful when the immediate victims are sellers as well as when they are buyers. And the Merger Guidelines we developed with the Federal Trade Commission, which set forth the analytical framework for all our merger enforcement, make clear that a competitive analysis of upstream market effects is to be a mirror image of a competitive analysis of downstream market effects. In both cases, we are

looking at whether the merger is likely to create or increase market power, or to facilitate the exercise of market power, in any market; the Merger Guidelines define market power as the ability of a seller or coordinating group of sellers to profitably maintain prices above competitive levels for a significant period of time, or the ability of a buyer or coordinating group of buyers to depress prices below competitive levels and thereby depress output.

We listen carefully to the concerns of agricultural producers and producer groups as to how a proposed merger or a course of conduct might affect them, and we are equally concerned if the effect is anticompetitively low prices for products sold by farmers as if it is anticompetitively high prices for products purchased by farmers. We consult as appropriate with USDA, under longstanding practice as reflected in our Memorandum of Understanding, to get their views on how agricultural producers will be affected by the merger or practice in question, and to take advantage of USDA knowledge and expertise in agricultural markets. The responsibility entrusted to us as enforcers of the antitrust laws is not to engineer the best competitive structure for the marketplace. The antitrust laws are based on the notion that competitive market forces should play the primary role in determining the structure and functioning of our economy. Our job is to stop the specific kinds of private-sector activity that violate the antitrust laws from interfering with those market forces.

We do not have the power to restructure any industry, any market, or any company, or to stop any practice, except in a precise and focused fashion as necessary to prevent or remedy specific violations of the antitrust laws that we can prove in court. We are law enforcers, not regulators. Our authority rests ultimately on our ability to bring enforcement actions in court,

and when we bring an action, it is the court that decides whether the antitrust laws are being violated in the particular instance.

While the antitrust laws play an important role in helping keep markets competitive, they will not address all of the complex issues facing American agriculture in this time of change. There are a broad range of agriculture policy issues for the government to focus on, and antitrust enforcement is only one part of that.

For us at the Antitrust Division, of course, it is the important part, because it is our part. We are committed to stopping anticompetitive mergers or conduct from harming the agricultural marketplace, whether it is buyers or sellers who are harmed in the first instance.

Conclusion

Let me close by urging anyone with any information that they think is relevant to our enforcement activities to contact us. As a law enforcement agency, we treat conversations with us in confidence. If the information leads us to conclude that the antitrust laws have been violated, we will take appropriate enforcement action. The Antitrust Division takes seriously its responsibility to protect the marketplace – including the agricultural marketplace – against anticompetitive conduct and against mergers that substantially lessen competition. As I hope I have made clear, the Division has a record of acting in this important sector when the antitrust laws are violated.