DEPARTMENT OF JUSTICE

Statement

of

JOHN M. NANNES

Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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I am pleased to have the opportunity this morning to discuss issues relating to antitrust enforcement in the agricultural marketplace.

We know that the agricultural marketplace is undergoing significant change. Farmers are adjusting to challenges in international markets, major technological and biological changes in the products they buy and sell, and new forms of business relationships between producers and processors.

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

The Antitrust Division takes these concerns seriously and has been very active in enforcing the antitrust laws in the agricultural sector. During the past two years alone, the Antitrust Division has challenged a number of significant mergers that would have affected agricultural markets, such as:

- the proposed acquisition by Monsanto of DeKalb Genetics Corporation, which would have significantly reduced competition in corn seed biotechnology innovation to the detriment of farmers;

- the proposed acquisition by Cargill of Continental's grain business, which would have significantly reduced competition in the purchase of grain and soybeans from farmers in various local and regional markets;

- the proposed acquisition by New Holland of Case, which would have significantly reduced competition in the sale of tractors and hay tools to farmers; and

- the proposed acquisition by Monsanto of Delta & Pine Land, which would have significantly reduced competition in cotton seed biotechnology to the detriment of farmers.

During the same period, the Antitrust Division also criminally prosecuted companies that had fixed prices for products purchased by farmers -- lysine and vitamins -- and secured numerous criminal convictions and the highest fines in antitrust history.

These enforcement actions demonstrate that the Antitrust Division is committed to enforcing the antitrust laws in the agricultural marketplace.

I. Merger Enforcement

In our conversations with farm groups, we have found that farmers are especially concerned about the potential impact of mergers and acquisitions ("mergers"). Farmers are concerned that mergers will limit the number of sellers of seed, chemicals, machinery, and other equipment from whom they have to buy and will limit the number of customers for crops and livestock to whom they can sell.

For this reason, I think it may be helpful today to start with a discussion of the Antitrust Division's merger enforcement program, with particular emphasis on recent merger enforcement actions that the Antitrust Division has taken in the agricultural sector.

A. Merger Enforcement Standards

The antitrust laws prohibit the acquisition of stock or assets if "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." This enables us to arrest anticompetitive mergers in their incipiency, to forestall harm that would otherwise ensue but be difficult to undo after the parties have consummated a merger. Thus, merger enforcement standards are forward-looking and, while the Antitrust Division often considers historic performance in an industry, the primary focus is to determine the likely competitive effects of a proposed merger in the future.

The Antitrust Division shares merger enforcement responsibility with the Federal Trade Commission ("FTC"), with the exception of certain industries in which the FTC's jurisdiction is limited by statute. The agencies jointly have developed Horizontal Merger Guidelines that describe the inquiry they will follow in analyzing mergers. "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.

Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time." Merger Guidelines § 0.1.

We ordinarily seek to define the relevant markets in which the parties to a merger compete and then determine whether the merger would be likely to lessen competition substantially in those markets. In performing this analysis, the Antitrust Division and the FTC consider both the post-merger market concentration and the increase in concentration resulting from the merger. The Antitrust Division is likely to challenge a transaction that results in a substantial increase in concentration in a market that is already highly concentrated, although appropriate consideration will be given to other factors, such as the likelihood of entry by new competitors, that could affect whether the merger is likely to create or enhance market power or facilitate its exercise.

In most instances, the Antitrust Division is concerned about the ability of the merging companies to raise above the competitive level the price of the products or services they sell. Of course, it is also possible that a merger will substantially lessen competition with respect to the price that the merging companies pay to purchase products. This is a matter of particular concern to farmers, who often sell their products to large agribusinesses. For a while, there seems to have been some uncertainty about whether the antitrust enforcement agencies take this

possibility into account when analyzing mergers. In fact, the Merger Guidelines specifically provide that the same analytical framework used to analyze the "sell-side" will be applied to the "buy-side":

> Market power also encompasses the ability of a single buyer (a "monopsonist"), a coordinating group of buyers, or a single buyer, not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers. In order to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of these Guidelines.

Merger Guidelines § 0.1. Thus, the Antitrust Division reviews mergers to determine not only whether they pose a competitive threat to persons buying goods or services from the merged entity, but also -- as demonstrated by the Cargill/Continental case -- whether they pose a competitive threat to persons selling goods or services to the merged entity.

While most of the mergers that the agencies review involve horizontal competitors, the agencies also have guidelines on non-horizontal mergers that address the circumstances in which a vertical merger -- a transaction between companies at different levels in the production and marketing process -- may be challenged.

B. Procedures for Reviewing Mergers

The Antitrust Division and the FTC use a clearance process to work out which agency will review a particular merger. The primary determinant is agency expertise about the product or service at issue, so that a merger will usually be reviewed by whichever of the two agencies is most knowledgeable about the relevant product or service.

We take concentration into account even at this very early stage of our review. In determining whether or not to conduct an investigation, we consider the pre-merger and post-merger concentration level in the affected markets. In those industries already characterized by high concentration levels, there is a substantially increased likelihood that a proposed merger will be subject to a formal -- and often quite extensive -- antitrust investigation.

The Antitrust Division and the FTC have an array of investigatory tools from which to choose in conducting such an investigation. Parties to most mergers meeting certain size thresholds must provide the agencies with advance notice and observe a waiting period before consummation, during which time the reviewing antitrust agency may obtain relevant information and conduct an investigation. In circumstances in which such notice is not required, the reviewing antitrust agency has other statutory powers for obtaining information.

If the reviewing antitrust agency concludes that the merger is not

competitively problematic, the investigation will end and the parties then are generally free to proceed with the merger. However, if the reviewing antitrust agency does not fully resolve its competitive concerns, the agency will identify the nature of its competitive concerns and the parties will have an opportunity to address them. Unless the parties can convince the agency that suit is not warranted, the agency will prepare to file suit to challenge the transaction as originally proposed. Sometimes the parties make a proposal to address the competitive concerns that the reviewing antitrust agency has identified; for example, a merger between multi-product firms may raise competitive concerns with respect to only a subset of their products, in which case divestiture may solve the competitive problem, allowing the parties to proceed with the rest of the merger. There are times, however, when the merging parties' proposed changes to the merger are not enough to solve the problem, in which case the reviewing antitrust agency will challenge the merger and likely seek a preliminary injunction to prevent consummation of the merger while it is being challenged.

C. Recent Merger Enforcement Actions in Agricultural Industries

As a result of the clearance process with the FTC, the Antitrust Division has investigated the preponderance of mergers affecting agriculture, with a prominent exception being grocery store mergers, which are usually reviewed by the FTC.

In the past two years, the Antitrust Division has objected to four significant proposed mergers in agriculture-related industries that we concluded would adversely affect farmers. Each of those transactions was important in its own right, and collectively they demonstrate the Antitrust Division's commitment to enforce the antitrust laws in this vital segment of our economy.

1. Two years ago, the Antitrust Division investigated Monsanto's proposed acquisition of DeKalb Genetics Corporation. Both companies were leaders in corn seed biotechnology and owned patents that gave them control over important technology. We expressed strong concerns about how the merger would affect competition for seed and biotechnology innovation. To satisfy our concerns, Monsanto spun off to an independent research facility its claims to agrobacterium-mediated transformation technology, a recently developed technology used to introduce new traits into corn seed such as insect resistance. Monsanto also entered into binding commitments to license its Holden's corn germplasm to over 150 seed companies that currently buy it from Monsanto, so that they can use it to create their own corn hybrids.

2. Last year, the Antitrust Division comprehensively reviewed the proposed purchase by Cargill of Continental's grain business, which resulted in a suit to challenge the merger as originally proposed. The merger affected a number of

markets. The parties were buyers of grain and soybeans in various local and regional domestic markets and also sellers of grain and soybeans in the United States and abroad. We carefully looked at all of the potentially affected markets and ultimately concluded that the proposed merger could have depressed prices received by farmers for grain and soybeans in certain regions of the country; we were also concerned that the transaction could have had anticompetitive effects with respect to certain futures markets.

To resolve our competitive concerns, Cargill and Continental agreed to divest a number of facilities throughout the Midwest and in the West, as well as in the Texas Gulf. The nature of the relief demonstrates the individualized attention that we paid to local and regional markets. We insisted on divestitures in three different geographic markets where both Cargill and Continental operated competing port elevators: (1) Seattle, where their elevators competed to purchase corn and soybeans from farmers in portions of Minnesota, North Dakota, and South Dakota; (2) Stockton, California, where the elevators competed to purchase wheat and corn from farmers in central California; and (3) Beaumont, Texas, where the elevators competed to purchase soybeans and wheat from farmers in east Texas and western Louisiana.

We also required divestitures of river elevators on the Mississippi River in

East Dubuque, Illinois, and Caruthersville, Missouri, and along the Illinois River between Morris and Chicago, where the merger would have otherwise harmed competition for the purchase of grain and soybeans from farmers in those areas. The Illinois River divestitures (and an additional required divestiture of a port elevator in Chicago) also prevented the merger from anticompetitively concentrating ownership of delivery points that have been authorized by the Chicago Board of Trade for settlement of corn and soybean futures contracts.

In addition, we required divestiture of a rail terminal in Troy, Ohio, and we prohibited Cargill from acquiring the rail terminal facility in Salina, Kansas, that had formerly been operated by Continental, and from acquiring the river elevator in Birds Point, Missouri, in which Continental until recently had held a minority interest, in order to protect competition for the purchase of grain and soybeans in those areas.

This relief assures that farmers in the affected markets will continue to have alternative buyers to whom to sell their grain and soybeans. The case demonstrates that the Antitrust Division will challenge mergers that threaten competitive harm to sellers of goods and services.

3. Last November, the Antitrust Division filed a complaint challenging the proposed merger between New Holland and Case Corporation because of our

concern that the transaction would lead to higher prices for certain types of machinery purchased by farmers. The parties manufactured and sold two- and four-wheel drive tractors that were used by farmers for a variety of applications, including pulling implements to till soil and cultivate crops. They also manufactured and sold a variety of hay and forage equipment, including square balers and self-propelled windrowers. The Antitrust Division concluded that the transaction would significantly lessen competition and lead to higher prices and lower-quality products.

The parties agreed to significant divestitures in order to address our concerns. Those divestitures included New Holland's large two-wheel-drive agricultural tractor business, New Holland's four-wheel-drive tractor business, and Case's interest in a joint venture that makes hay and forage equipment.

4. Most recently, Monsanto abandoned its proposed acquisition of Delta & Pine Land Co., after the Antitrust Division indicated that it was prepared to sue to prevent consummation of the transaction. The Antitrust Division concluded that the merger, which would have combined the two largest cotton seed companies, would have anticompetitively harmed farmers raising cotton.

Taken as a whole, these enforcement actions establish certain important propositions about our merger enforcement efforts in agriculture-related industries.

The Antitrust Division carefully reviews agricultural mergers for their competitive implications. If a merger is likely to lead to anticompetitive prices for products purchased by farmers, the Antitrust Division will file suit (New Holland/Case). If a merger is likely to lead to anticompetitive prices for products sold by farmers, the Antitrust Division will file suit (Cargill/Continental). The Antitrust Division's concerns are not limited to traditional agricultural products, but extend also to biotechnology innovation (Monsanto/DeKalb and Monsanto/ Delta & Pine Land). And, while the Antitrust Division will consider proposed divestitures and other forms of relief that permit a merger to proceed as restructured, the Antitrust Division will not shrink from challenging a merger outright if it concludes that lesser forms of relief are not likely to address fully the competitive problems raised by the merger (Monsanto/ Delta & Pine Land).

II. Criminal Enforcement of the Antitrust Laws

In addition to our merger enforcement program, the Antitrust Division has moved aggressively to prosecute companies that engage in price fixing or allocation of customers. Such conduct willfully subverts the operation of free markets and can cause serious economic harm. It virtually always results in inflated prices to purchasers or depressed prices to suppliers; indeed, that is the very purpose of such conduct.

The key to such illegal conduct is an agreement among competitors. It is not enough for us to show that competitors charged the same or similar prices for a product or service. The Antitrust Division must prove that the competitors agreed upon prices or price levels, or upon the allocation of customers or markets, although we may be able to rely upon circumstantial evidence in order to do so. A company convicted of violating the antitrust laws is subject to substantial fines, and an individual convicted of violating the antitrust laws is subject to fine and imprisonment.

In the past few years, the Antitrust Division has prosecuted a number of cases and secured convictions and multi-hundred million dollar fines in various industries that have involved products purchased by farmers. Two prosecutions deserve particular mention.

1. Beginning in 1996, the Antitrust Division prosecuted Archer Daniels Midland and others for participating in an international cartel organized to suppress competition for lysine, an important livestock and poultry feed additive. The cartel had inflated the price of this important agricultural input by tens of millions of dollars during the course of the conspiracy. ADM pled guilty and was fined $100 million -- at the time the largest criminal antitrust fine in history. Two Japanese and two Korean firms also were prosecuted for their participation in the worldwide

lysine cartel and were assessed multi-million dollar fines. In addition, three former ADM executives were convicted for their personal roles in the cartel; two of them were sentenced last year to serve two years in prison and fined $350,000 apiece for their involvement, and the other executive had 20 months added to a prison sentence he was already serving for another offense.

2. Last year, the Antitrust Division prosecuted the Swiss pharmaceutical giant, F. Hoffmann-La Roche Ltd., and a German firm, BASF Aktiengesellschaft, for their roles in a decade-long worldwide conspiracy to fix prices and allocate sales volumes for vitamins used as food and animal feed additives and nutritional supplements. The vitamin conspiracy affected billions of dollars of U.S. commerce. Hoffman-La Roche and BASF pled guilty and were fined $500 million and $225 million, respectively. These are the largest and second-largest antitrust fines in history -- in fact, the $500 million fine is the largest criminal fine ever imposed in any Justice Department proceeding under any statute. Three former Hoffmann-La Roche executives from Switzerland and three former BASF executives from Germany agreed to submit to U.S. jurisdiction, to plead guilty, to serve time in a U.S. prison, and to pay substantial fines for their role in the vitamin cartel. These prosecutions are part of an ongoing investigation of the worldwide vitamin industry, in which there have been 18 prosecutions to date.

The Antitrust Division will prosecute companies for price fixing whenever and however we learn of it. The lysine and vitamin cases get publicity because of the prominence of the companies involved and the amount of commerce at stake, but we also successfully prosecuted two cattle buyers in Nebraska a few years ago for bid-rigging in connection with procurement of cattle for a meat packer, after an investigation conducted with valuable assistance from the Department of Agriculture, which was investigating some of the same conduct under the Packers and Stockyards Act. In short, we have brought -- and will continue to bring -- charges against companies that engage in criminal behavior that adversely affects farmers.

III. Other Potential Anticompetitive Conduct

The Antitrust Division also investigates other forms of business behavior that may have anticompetitive effects. Such conduct may constitute an illegal restraint of trade or unlawful monopolization or attempted monopolization. Conduct that may raise competitive issues of particular interest to farmers include strategic alliances between agribusiness companies, joint ventures among suppliers, and misuse of intellectual property rights.

The Antitrust Division is conducting a number of civil investigations in which we are considering whether conduct is having an anticompetitive impact upon

farmers. It we determine that such is the case, we can and will seek appropriate relief under the antitrust laws.

IV. Additional Steps to Ensure Appropriate Antitrust Enforcement

The Antitrust Division has taken additional steps to assure that it is receiving the information necessary to make the best-informed judgments with respect to agricultural antitrust issues.

Last year, the Antitrust Division (and the FTC) entered into a memorandum of understanding with the Department of Agriculture to assure that the agencies would continue to work together and exchange information relating to competitive developments in the agricultural marketplace. As part of this cooperation, the Department of Agriculture has provided significant assistance and expertise in the various agricultural industries that have been the focus of investigation. The Antitrust Division also works with other relevant federal agencies on specific matters of common interest. For example, the Antitrust Division worked closely with the Commodities Futures Trading Commission during the investigation of the Cargill/Continental merger.

Finally, earlier this year, Assistant Attorney General Joel Klein appointed Doug Ross as special counsel for agriculture. This is a newly created position that reports directly to the Assistant Attorney General. In this position, he is assigned

to work exclusively on agricultural issues. He has over 25 years of law enforcement experience, both in and outside the Antitrust Division, and has already begun to meet and speak with farm groups both here in Washington and in farm states. Among his particular qualifications for the position is his long-time association with the National Association of Attorneys General. The Antitrust Division has often worked with state attorneys general in trying to ascertain the potential impact of agricultural transactions on local farmers, and his assignment to agricultural matters on a full-time basis ensures that this process will be intensified.

V. Conclusion

Mr. Chairman and members of the Committee, the Antitrust Division understands the concerns that have been expressed about competition in agricultural markets. We take seriously our responsibility to assure that the antitrust laws are enforced no less vigorously in agricultural markets than in other markets to which those same laws apply. We believe that our record of antitrust enforcement in this important sector of the economy demonstrates that commitment.

I would be happy to respond to whatever questions the Committee may have.