DEPARTMENT OF JUSTICE

STATEMENT

OF

JOHN M. NANNES
ACTING ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON AGRICULTURE, RURAL DEVELOPMENT & RELATED AGENCIES
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CONCERNING

AGRICULTURAL MARKET CONCENTRATION

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Good morning, Mr. Chairman and members of the Subcommittee. I am pleased to have the opportunity to discuss issues relating to antitrust enforcement in the agricultural marketplace.

As I believe most of you know, we are awaiting a Senate vote on the nomination of Charles James to be Assistant Attorney General for the Antitrust Division. Until that time, the Division is deferring official policy statements. However, the Antitrust Division is first and foremost a law enforcement agency, and our enforcement work continues even during times of transition. For that reason, I thought it would be helpful to the Subcommittee if I were to describe how the Division enforces the antitrust laws and review how those laws have been applied in agricultural industries.

We know that the agricultural marketplace is undergoing significant change. Farmers are adjusting to challenges in international markets, to major technological and biological 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 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 ensuring competitive markets. Enforcement of the 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.

Under Section 7 of the Clayton Act, the Division can challenge a merger or acquisition that it concludes may tend substantially to lessen competition. During the past few years, the Division has challenged a number of significant mergers that would have harmed 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.

Under section 1 of the Sherman Act, the Antitrust Division can challenge agreements between competitors that restrain trade. With respect to the types of agreements that are obviously anticompetitive -- such as price fixing and allocations of markets and/or customers -- the Division often proceeds by criminally prosecuting the companies and individuals involved. In recent years, the Division has criminally prosecuted various companies for fixing prices for products purchased by farmers -- lysine and vitamins -- and has secured numerous criminal convictions and some of the highest fines in antitrust history. Under the Sherman Act, the Division can also proceed civilly to challenge other types of agreements or unlawful monopolies that it concludes are injuring suppliers or customers; here, too, it brings enforcement actions to challenge anticompetitive business conduct that injures farmers.

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 can 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 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

Section 7 of the Clayton Act prohibits 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 authority 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 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 to 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. Generally speaking, the Antitrust Division has been likely to challenge a transaction that results in a substantial increase in concentration in a market that is already highly concentrated, although appropriate consideration has also been 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 concern raised by a merger is the potential 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 have the potential to substantially lessen competition with respect to the price that the merging companies pay to *purchase* products or services. This is a matter of particular concern to farmers, who often sell their products to large agribusinesses. The Merger Guidelines specifically provide that the same analytical framework used to analyze the "seller-side" is also applied to the "buyer-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 has reviewed mergers to determine not only whether they posed a competitive threat to persons buying goods or services from the merged entity, but also -- as demonstrated by the Cargill/Continental case -- whether they posed a competitive threat to persons selling goods or services to the merged entity.

While most of the merger challenges brought by the Antitrust Division have involved companies that compete with one another ("horizontal competitors"), the agencies also consider whether mergers involving companies at different levels in the production and marketing process ("vertical relationships") may have anticompetitive consequences. Challenges to vertical mergers are less frequent because these mergers often allow the merged companies to compete more efficiently in the marketplace**,** by reducing costs or streamlining production. However, there are circumstances in which a vertical merger may substantially lessen competition, such as by foreclosing competitive access to one of the markets involved in a way that raises barriers to entry or otherwise threatens competitive prices. In those instances, the Division takes whatever enforcement action may be warranted.

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 is usually reviewed by whichever of the two agencies is most knowledgeable about the relevant product or service.

We take concentration into account from the beginning of our review. In determining whether or not to conduct an investigation, we consider the pre-merger and post-merger concentration levels in the affected markets. In those industries already characterized by high

concentration levels, there is a substantially increased likelihood that a proposed merger is subjected 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 consummating the merger, 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 ends and the parties then are generally free to proceed with the merger. However, if the reviewing antitrust agency identifies competitive concerns, it explains the nature of those concerns to the parties, and the parties have an opportunity to address them. Unless the parties can convince the agency that its competitive concerns are not warranted, the agency prepares to file suit to seek an injunction against the merger.

Sometimes the parties make a proposal to address the competitive concerns that the reviewing antitrust agency has identified. For example, when a merger between multi-product firms raises competitive concerns with respect to only a subset of their products, divestiture of the competitively problematic product lines 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 or the problem is so pervasive that the agencies conclude the transaction must be prohibited in its entirety. In those

circumstances, the reviewing antitrust agency challenges the merger in court, generally seeking a preliminary injunction to prevent consummation of the merger while it is being challenged.

C. Recent Merger Enforcement Actions in Agriculture-Related 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 few years, the Antitrust Division has successfully challenged 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 Division's commitment to enforce the antitrust laws in this vital segment of our economy.

1. Three 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, such as insect resistance, into corn seed. 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. Two years ago, 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 likely would have anticompetitively depressed prices received by farmers for their grain and soybeans in certain regions of the country; we were also concerned that the merger would 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 their elevators competed to purchase wheat and corn from farmers in central California; and (3) Beaumont, Texas, where their 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 was designed to ensure that farmers in the affected markets would continue to have alternative buyers for their grain and soybeans. After reviewing public comments on the proposed consent decree and the Division's response to those comments, the court determined that the decree was in the public interest and entered it in June 2000.

3. In November 1999, 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 resolve 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. Following the public comment and response period, the court determined that the decree was in the public interest and entered it in March 2000.

4. Last year, Monsanto abandoned its proposed acquisition of Delta & Pine Land Co., after the Antitrust Division indicated that it was prepared to challenge the merger in court. The 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 provide a good picture of our merger enforcement efforts in agriculture-related industries. The Antitrust Division carefully reviews agricultural mergers for their competitive implications, and files suit if a merger is likely to lead to anticompetitive prices either for products purchased by farmers (New Holland/Case) or for products sold by farmers (Cargill/ Continental). The 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 considers proposed divestitures and other forms of relief that permit a merger to proceed as restructured, the Division challenges 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 enforcing the antitrust laws against anticompetitive mergers, the Antitrust Division has moved aggressively to prosecute companies that engage in price fixing or allocation of markets or 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.

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that restrain trade. The key to such illegal conduct is an anticompetitive agreement among

competitors. It is not enough for the Antitrust Division to show that competitors charged the same or similar prices for a product or service. We must prove that the competitors agreed upon prices or price levels, or upon the allocation of customers or markets. 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 substantial fines and imprisonment.

In the past few years, the Antitrust Division has prosecuted a number of cases and secured convictions and hefty fines in various industries involving 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 have been sentenced to serve 36 and 33 months in prison, respectively, 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. Two years ago, 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 were part of an ongoing investigation of the worldwide vitamin industry, in which there have been 24 corporate and individual prosecutions to date, including convictions of Swiss, German, Canadian, Japanese, and U.S. firms, and convictions of 12 American and foreign executives who are serving or have served time in federal prison, and another executive who has agreed to plead guilty and is awaiting sentencing.

The lysine and vitamin cases received substantial publicity because of the prominence of the companies involved, the amount of commerce at stake, and the record size of the fines. But we have also brought prosecutions on a smaller scale. We 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 ('USDA"), which was investigating some of the same conduct under the Packers and Stockyards Act. In short, we have brought charges against companies that engage in criminal anticompetitive behavior that adversely affects farmers, from isolated acts to multi-year international conspiracies.

III. Investigations of 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 under Section 1 of the Sherman Act or unlawful monopolization or attempted monopolization under Section 2 of the Sherman Act. Conduct that may raise competitive issues of particular interest to farmers include strategic alliances between agribusiness companies, joint ventures among suppliers, and restrictions imposed on intellectual property rights.

The Antitrust Division has conducted a number of civil investigations into whether some particular conduct is unreasonably restraining trade to the detriment of farmers. One such investigation resulted in the Division filing a lawsuit last fall to challenge a non-compete agreement between developers of long-shelf-life-tomato seeds, after we had concluded that the agreement was interfering with the development of new seeds for use by American farmers. That case is pending before the district court in Arizona.

IV. Other Agriculture-Related Activities at the Antitrust Division

The Antitrust Division has a long-standing cooperative relationship with USDA, through which we have provided assistance to each other in a number of respects. Division attorneys and economists investigating particular mergers have made extensive use of the wealth of information about agricultural markets that USDA collects in the ordinary course of its work. USDA has also contacted the Division to provide other useful information regarding major agriculture-related mergers we were investigating, and has forwarded investigative leads to the Division, such as the one resulting in the prosecution of the two cattle buyers in Nebraska for price-fixing. The Division has assisted USDA by consulting on studies USDA has conducted regarding competition-related aspects of agricultural markets, such as the red meat studies a few years ago,

as well as on USDA's recent efforts to revise its investigative processes at the Grain Inspection, Packers and Stockyards Administration.

Two years ago, the Division entered into a memorandum of understanding with USDA, along with the FTC, to memorialize this working relationship and to reaffirm our commitment to work together and exchange information as appropriate on competitive developments in the agricultural marketplace.

The Antitrust Division also works with other relevant federal agencies on specific matters of common interest. For example, the Division worked closely with the Commodities Futures Trading Commission during the investigation of the Cargill/Continental merger.

Last year, the Division created the position of special counsel for agriculture. The special counsel reports directly to the Assistant Attorney General and works exclusively on agricultural issues. The Antitrust Division has a full contingent of attorneys and economists available to work on agriculture-related matters, some of whom have extensive experience and expertise in those markets, and the special counsel has been a valuable complement to those existing enforcement resources, providing a sustained focus and public presence to our investigative and outreach efforts in agriculture. He has met with and spoken to a number of agricultural producers and producer groups, both here in Washington and in farm states, to explain to them how the antitrust laws work and how to bring relevant information to our attention. He has also met and maintained contact with a number of state attorneys general from farm states.

V. Conclusion

Mr. Chairman and members of the Subcommittee, we in the Antitrust Division understand the concerns that have been expressed about competition in agricultural markets. We take

seriously our responsibility to ensure that the antitrust laws are enforced no less vigorously in agricultural markets than they are elsewhere in our economy. We believe that our enforcement record demonstrates that commitment.

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