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From: Goule, Chandler [mailto:cgoule@nfudc.org]
Sent: Wednesday, December 30, 2009 12:25 PM
To: ATR-Agricultural Workshops; John.Ferrell@osec.usda.gov
Subject: Fw: USDA/DOJ Comments NFU

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----- Original Message -----
From: C Goule <cgoule@gmail.com>
To: Goule, Chandler
Sent: Wed Dec 30 12:22:15 2009
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NATIONAL FARMERS UNION

December 30, 2009

Legal Policy Section
Antitrust Division
U.S. Department of Justice
450 5th St. NW, Suite 11700
Washington, DC 20001

To Whom It May Concern,

On behalf of the 250,000 independent family farmers, ranchers, dairymen and rural resident members of the National Farmers Union (NFU), I am delighted to respond to the request for comments on the United States Department of Agriculture (USDA)/Department of Justice (DOJ) workshops and the impacts all forms of concentration are having on independent producers. NFU greatly appreciates the concern USDA and DOJ have shown over issues regarding current market competition, concentration, vertical integration, captive supply, captive transportation and the impacts on producers and consumers. NFU firmly believes that while everyone has the right to make a profit, the wellbeing and productivity of independent producers must not be compromised. Farmers and ranchers deserve agricultural markets that are accessible, transparent, competitive, and fair. Unfortunately, agricultural markets today often fail to maintain those basic standards of market health and functionality.

The five workshops outlined in the Federal Register on Thursday, August 27, 2009 are intended to provide agricultural producers the opportunity to describe the negative impacts of the increasingly concentrated and dysfunctional agricultural markets. While NFU appreciates the intent of the workshops, we hope that USDA and the DOJ understand the difficulties and risks producers face by openly addressing their situations. NFU hopes to represent our members who are unable to speak openly and bring forth their concerns for discussion. It is vital to the continued wellbeing of our nation's producers that these concerns be addressed and that USDA and DOJ establish a constant dialogue concerning market control and antitrust concerns in the agriculture industry.

Introduction

Anti-competitive actions within the agricultural marketplace stifle the ability of independent farmers and ranchers to receive a fair price for their commodities. NFU has found a consistent and alarming progression toward increased consolidation and concentration within all sectors of agriculture—protein, dairy, seeds and genetic material and even produce and specialty crops. Lack of competition has become so widespread throughout the agriculture industry that a separate competition title was specifically included within the 2008 Farm Bill to address independent farmers' concerns. NFU appreciated the inclusion of the title. However, this was merely one small attempt to address the consolidation and vertical integration that has been occurring for decades and it is clear that more must be done to fully address the situation.

For many years, NFU has provided the necessary financial support for Drs. Mary Hendrickson and William Heffernan, from the University of Missouri's Department of Rural Sociology to conduct their "Concentration of Agricultural Markets" studies. The most recent commissioned study in 2007 revealed that the market control of the top four firms (CR4) in most agricultural sectors has continued to increase. The study showed that the CR4 for beef packing was 83.5%, 66% for pork packing, 55.5% for broilers, 55% for turkeys, 80% for soybean crushing and 55% for flour milling.

According to the University of Missouri's study results, contrary to other sectors of the economy, the ethanol industry has witnessed a decrease in consolidation and an increase in competition in recent years. The study indicates that while a decade ago the top four companies owned 73 percent of the ethanol market, today, the top four companies control 31.5 percent of all ethanol produced in the U.S. The increase in ethanol production competition is directly related to the increasing number of farmer-owned ethanol cooperatives across the country. Farmer-owned ethanol plants currently account for 39 percent of total capacity. Farmer ownership ensures that economic benefits of the ethanol plants are retained by the producers and the rural communities in which these plants are located, instead profiting a non-local company. This is a clear example of the potential benefits that public policies which encourage market diversification and discourage monopolization have on our food and energy systems.

The most recent "Concentration of Agricultural Markets" study found that it is no longer possible to continue to gather agricultural market concentration information using the traditional industry sources. The agriculture sector has become so concentrated and or consolidated therefore data is no longer published given the ownership structure of the industry. NFU believes that it has become essential that USDA use their regulatory and reporting authority to gather accurate information about agricultural market ownership concentration, and publically disclose that information. Proper market reform and regulation must begin with a clear and accurate understanding of the amount of agriculture market concentration that currently exists.

Market Transparency

Congress took action in 1999 to inject transparency in livestock markets by passing the Livestock Mandatory Price Reporting Act. The Act requires packers, processors and importers to provide price, contracting, and supply/demand information to USDA. The department then uses the collected information to create price reports for producers. For a variety of reasons, the program has not been working as intended for the benefit of independent livestock producers.

Market transparency is a necessary tool for producers to be able to make sure they are receiving a fair market price for their products. Mandatory price reporting (MPR) for livestock will need to be reauthorized in September 2010. This legislation is extremely important for reporting purposes and should not be allowed to lapse as it has in years past. Also, the MPR system should be available on the internet in a user-friendly format as directed by the 2008 Farm Bill. This information should be provided in a real-time manner enabling producers to more efficiently market their product.

The negative effects and results of misreporting can be directly observed in the current dairy industry crisis. In July 2007, NFU sent a letter to USDA informing the agency about the National Agriculture

Statistical Service's (NASS) underreporting of nonfat dry milk (NFDM) prices. The letter stated, "Since July 2006, NASS has been reporting prices of NFDM below the market price. This trend has persisted for nearly eight months and is very troubling, as NASS reports have a direct link to the price received by dairy producers through the U.S. Department of Agriculture (USDA) milk order program. Because the USDA uses NASS data to calculate prices for dairy commodities, farmers receive less than the fair market value for their milk when NASS under-reports. It is estimated that since the NASS misreporting began, roughly eight months ago, dairy farmers have lost hundreds of millions of dollars. This comes at a time when soaring input prices are already threatening the livelihood of America's dairy farmers. It is the responsibility of USDA to ensure proper administration of their programs; NASS cannot be allowed to continue under-reporting prices at the expense of dairy producers."

In 2009, we now can see that this reporting error has cost the dairy industry millions of dollars that will not be recovered and heavily contributed to the current industry crisis. Though initial changes were made there is still a need for the continued development of oversight and auditing of the reporting system. Due to the fact that dairy prices are based on available stocks both in the market and held by the government, accurate reporting is essential to guarantee dairy producers are receiving a fair market price.

Packer Livestock Ownership Prohibition/Captive Supply

In 2002, the Senate approved a prohibition on meat packers owning and feeding the livestock they slaughter, in competition with farmers and ranchers. Unfortunately, the provision was not approved as part of the final 2002 Farm Bill. Prohibiting packer ownership of livestock is a necessary pro-competitive advance to ensure independent producers have a place in the future of livestock production. This proposal has a precedent. In 1920, the FTC entered into a consent decree with packers that they would divest their ownership interest in refrigerated storage facilities, stockyards and railroads. Congress also adopted the Packers and Stockyards Act in 1921 to stop anti-competitive, unfair and unduly discriminatory meat packer practices. Other industries have been required to divest business assets for anti-competitive reasons as well. Meat packers do not need to own livestock to improve quality or keep prices affordable. Indeed, retail meat price inflation has been consistent or accelerated as packer ownership levels have increased.

The 8th U.S. Circuit Court of Appeals has held that state-level provisions violate the Interstate Commerce Clause of the U.S. Constitution and are therefore not an option. Thus, Congress and the USDA must re-think the role of antitrust rules in creating fair and competitive markets. A packer feeding prohibition is a step in the right direction of increasing producer prices and restoring competition to non-competitive markets.

Captive supply reform is another necessary pro-competitive advance. Packers would be required to transparently bid for livestock delivery contracts and preserve market access for independent producers. Captive supplies are agreements to deliver livestock in the future. Marketing agreements are future contracts for a price to be established by the date of delivery. Forward contracts are agreements for future delivery with a commodity futures basis determined at contract signing. Packers use large volumes of secretly negotiated captive supply to depress market demand and prices for live cattle and hogs. Captive supplies could be pro-competitive if all livestock marketing contracts were traded in an open, transparent and public process, with all buyers and sellers having access to the same information and the same bids. USDA should use its authority under the Packers & Stockyards Act to propound regulations accordingly.

Grain Inspection and Packers and Stockyards Act

The Grain Inspection and Packers and Stockyards Act (GIPSA) must be enforced to the full extent in which the law was written. In years past there has been a bottleneck approach with complaints under GIPSA sent to DOJ, resulting in near complete absence of antitrust law enforcement. Between the two departments, major mergers were allowed to take place, producer complaints to GIPSA were never heard at DOJ, and the marketplace was allowed to further consolidate.

It is GIPSA's responsibility to maintain fair trade practices in the marketing of livestock; provide financial protection for participants in livestock transactions and ensure open competitive marketing conditions for livestock and meat. Companies have been avoiding the DOJ review process by forming strategic alliances without legally merging, producing results identical to a merger while avoiding the law. This lack of enforcement must stop. Regulation needs to be put in place to review the market impact these alliances have and the effects they have on the producers supplying their raw products.

It appears farmers and ranchers have been fighting anti-competitive practices with one hand tied behind their backs. Farmers and ranchers in all sectors of agriculture have seen and felt the negative impacts of increased consolidation and anti-competitive practices. The lack of action by GIPSA to combat anti-competitive practices is a disappointment for family farmers and ranchers across the country.

Seed Industry

NFU has serious concerns about the level of concentration in the seed industry. According to the Farmer to Farmer Campaign, ten companies account for about two-thirds (65 percent) of the world's proprietary seed. Economists say an industry has lost its competitive character when the concentration ration of the top four firms (CR4) is 40 percent or higher. In seed, the top four firms account for 50 percent of the proprietary market alone. Due to the lack of the enforcement of antitrust laws by the DOJ, smaller independent companies have vanished. NFU encourages USDA and DOJ to conduct an immediate and thorough investigation into antitrust and patent laws as they pertain to seeds and germplasm.

Production Contracts

Agricultural production contracts have dramatically shifted control over production from the farmer to the processor and increased vertical integration. Processors or suppliers demand onerous contract stipulations such as prohibiting producers from discussing contracts with their neighbors, holding producers financially responsible for mandatory upgrades to their property, and the power to cancel contracts over the smallest detail. When contract problems arise, producers are forced into costly arbitration negotiations. Many of these concerns were addressed by the 2008 Farm Bill competition title, but issues with implementation and enforcement of the bill remain. Producers must be provided with a mechanism to report unfair practices endured, protecting them from retaliation from companies. It is a glaring sign when producers are afraid to speak up about unfair treatment because they fear for their ability to obtain future contracts and maintain their livelihoods.

Conclusion

Rural communities highly depend on the economic activity of independent producers, and are limited by consolidated and vertically integrated agribusinesses. If we do not solve the problems of market concentration, lack of competition, captive supply and transportation, and strategic alliances that hold producers captive, independent farmers, ranchers and rural communities will be unable to survive. This situation can only result in an increase in imported food, leaving America's consumers at the mercy of foreign companies and a handful of powerful food processors and retailers—an alarming food safety and national security concern.

On the behalf of NFU, I commend you for your attention to this vital issue. Your observations from the upcoming listening sessions will have significant implications that affect all of America's food producers and consumers. NFU looks forward to providing further input and assistance as the workshops approach. Thank you for your consideration.

Sincerely,

Roger Johnson, President
National Farmers Union