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Subject: comments by John Crabtree, Center for Rural Affairs, Lyons, Nebraska
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Center for Rural Affairs comments to USDA and Department of Justice

Agricultural Competition and Antitrust Policy Workshops

comments attached (pdf) and embedded below

December 31, 2009

The Center for Rural Affairs (www.cfra.org) is a national organization headquartered in Lyons, Nebraska (population 963). The Center was established in 1973 as an unaffiliated 501(c)3 nonprofit corporation by rural Nebraskans concerned about family farms and rural communities and we work to strengthen family farms, ranches, mainstreet businesses and rural communities.

The Center would like to thank Secretary Vilsack and Attorney General Holder for the opportunity to comment on these issues and participate in this process. The following are brief comments on some crucial issues that we hope will become part of the discussion at your joint workshops.

1. Undue and unreasonable preferences prohibited under Packers and Stockyards Act

The Packers and Stockyards Act (P&SA) makes it “unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry to: . . . (b) make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever.” 7 U.S.C. § 192(b).

Though this provision has been law for decades, USDA has never issued regulations establishing the criteria it will use to evaluate complaints that a packer, swine contractor, or live poultry dealer has violated this statutory provision. USDA’s failure to maintain and publish a coherent policy for analyzing such complaints has been a substantial contributing factor to the loss of thousands of family farm livestock and poultry producers over the

last few decades.

To address that problem, Section 11006 of the 2008 farm bill directs: “As soon as practicable, but not later than 2 years after the date of the enactment of this Act, the Secretary of Agriculture shall promulgate regulations with respect to the Packers and Stockyards Act, 1921 (7 U.S.C. § 181 et seq.) to establish criteria that the Secretary will consider in determining— (1) whether an undue or unreasonable preference or advantage has occurred in violation of such Act”

Courts have also mistakenly ruled that undue preferences must have anti-competitive impacts to violate the act. That is a misreading of the Act. Its legislative history demonstrates that Congress intended to prohibit unfair practices that adversely impact producers, without regard to whether they restrain trade, create a monopoly or control prices. USDA has repeatedly argued in court cases that the plain language of this subsection of the Packers and Stockyards Act does not require the proof of an adverse impact on competition or of restraint of commerce or trade. But only with formal rulemaking will courts consistently interpret the law as it was intended.

Specific issues to consider in rulemaking

a. Clarify that an unreasonable preference need not be shown to have an anti-competitive impact in order to be a violation of the Packers and Stockyards Act:

Rules promulgated under this section must explicitly state that it is not necessary to show an anti-competitive impact in order to find an action of a packer, swine contractor or live poultry dealer to be unlawful as an undue or unreasonable preference or advantage. Similarly, the rules must state that just because a packer, swine contractor or live poultry dealer presents a business reason for the challenges action, this alone will not constitute an adequate defense of the action nor preclude the action from being determined to be unlawful under § 192(b) of the Packers and Stockyards Act. As USDA has repeatedly argued in court cases, the plain, clear and unambiguous language of § 192(b) of the Packers and Stockyards Act does not require proof of an adverse effect on competition or of restraint of commerce or trade.

b. Recognize that undue preferences may arise in any aspect of packer-producer transaction:

Rules promulgated under this section must recognize that an “undue or unreasonable preference or advantage” may arise under many aspects of livestock transactions, including but not limited to – base or formula pricing; formulas used for premiums or discounts; duration of the purchase or contract commitment; delivery location requirements; delivery date and time requirements; and terms related to integrators provision of inputs or services, grower compensation and capital investment requirements under production contracts. It is easy for packers, swine contractors or live poultry dealers to unlawfully prefer large-volume livestock producers over smaller-volume producers in very subtle ways. Such unlawful actions may also occur when certain types of purchase agreements, marketing agreements and cash market purchases are offered to some producers but not to others, and not just when livestock are actually delivered for slaughter.

c. Clarify that is it unlawful for packers to prefer large-volume livestock producers over smaller volume producers in any manner that is not substantiated by actual, verifiable differences in carcass quality, meat attributes or transactional costs:

Premiums should be allowed for measurable and verifiable differences in carcass and meat quality only if those premiums are available producers of a broad range of production volume. Premiums should be allowed for a specified time of delivery or delivery in times of urgent need only if those premiums are available to producers of a broad range of production volume. Premiums should be allowed for real and verifiable efficiencies in the cost of procuring, transporting, handling and other transactional activities that occur outside the plant. However, premiums for efficiencies that are theorized to occur inside the plant should be disallowed unless

those premiums real and verifiable and made available to producers of a broad range of production volumes wherever feasible.

As we have previously pointed out in Packers and Stockyards Administration listening sessions and in other communications with USDA, a family farmer with 150 sows in a farrow-to-finish operation marketing 3,600 head of hogs per year (i.e. a smaller volume producer) realizing a \$0.06 per pound volume-based discount would cost a smaller volume producer approximately \$2,700 per potload of hogs (semi-trailer carrying approximately 180 hogs at market weight of 250 to 280 lbs, and industry standard for a unit of delivery of hogs to a slaughter plant) or \$54,000 per annum in purely volume-based discounts (large-volume premiums not available to that producer simply because he/she is a small-volume producer). A large-volume premium (or small-volume discount) of \$0.06 per pound is extremely common in hog production. Our experience demonstrates that \$0.06 to \$0.12 per pound for small-volume discounts (large volume-premiums) is common throughout hog producing states. We also hear many reports of small-volume discounts that far exceed that range, some exceeding \$0.15 per pound and a few even exceeding \$0.20 per pound.

Losing \$54,000 per annum is no small matter for smaller volume hog producers, particularly when they are willing and able to capture most, if not all, transactional efficiencies and carcass or meat quality attributes captured by large-volume producers. We believe that these purely volume-based discounts for small-volume producers are a clear violation of the Act and have been a critical component of driving hog farmers out of the hog production business, fueling the further concentration and industrialization of hog production to the detriment of farmers, rural communities, consumers and the natural environment.

2. Prohibiting packer ownership of livestock

From the passage of the Packers and Stockyard Act in 1921 until 1973, the Act and the Consent Decree of the 1920 meatpacking antitrust case that preceded the Act were interpreted as prohibiting vertical integration by meatpacking companies into livestock production. Since the administrative decision in 1973 to loosen that interpretation and allow what was then called “custom feeding” of livestock by meatpacking corporations, a steady and dramatic vertical integration of hog, and to a lesser extent cattle, feeding has occurred.

After repeated attempts to convince previous Secretaries of Agriculture to again tighten restrictions on vertical integration, in 1999, after the collapse of hog markets which resulted in a dramatic exodus of farmers from hog production, the Center for Rural Affairs proposed federal legislation that would prohibit packer ownership of livestock and worked with a bipartisan group of Midwest and Great Plains Senators to introduce such legislation. The prohibition on packer ownership of livestock has passed the United States Senate twice, as part of two omnibus farm bills, but been removed both times in a House-Senate Conference Committee.

Previous administrations have feigned support for a prohibition of packer ownership but only in the context of the need for greater authority from Congress. We remain steadfast in our disagreement with the Secretary as well as the USDA Office of General Counsel on this point. USDA has broad, albeit unused, authority under the Packers and Stockyards Act to limit, and in most cases prohibit, packer ownership of livestock. They have not, heretofore, had the political will to use that authority.

Secretary Vilsack should reverse that historic trend and set out to write rules under his broad authority under the Packers and Stockyards Act that restrict or prohibit packer ownership of hogs, cattle and sheep for more than 14 days prior to slaughter. With over half the hogs in the United States now owned or so tightly controlled by packers so as to be indistinguishable from ownership, the time is rapidly approaching when hog production will cease to be a farming venture and will, with the exception of niche markets, be the sole purview of meatpacking corporations. No one can predict with absolute clarity when the hog sector will cross that “tipping point” or more importantly the “point of no return” between hog production as a valuable farming sector and a vertically integrated extension of the meatpacking sector. But we are approaching it with breakneck speed.

Allowing hog production to become completely vertically integrated is a threat to hog farmers, certainly, but also to the rural economy, rural communities, the natural environment and to consumers.

3. Unique antitrust enforcement concerns in agriculture

In brief, the Department of Justice has, on several occasions, agreed with our assessment that there are unique considerations in applying antitrust laws to agricultural mergers and prohibitions on anti-competitive behaviors to agricultural markets. Notably, in 1999, then DOJ Antitrust Division head Joel Klein told me at a public meeting on livestock market competition agricultural antitrust that the Center for Rural Affairs hosted in Saint Paul, Minnesota, that he would, “instruct his staff to prepare methods to analyze the unique impacts of agricultural mergers on farmers and ranchers and utilize those methods to more closely scrutinize pending and future agricultural mergers.” However, nothing of that sort ever happened, or was so ineffective as to never merit notice from observers of agricultural antitrust issues.

Agricultural merger analyses must include a full understanding of the impact of mergers by packing and processing companies on farmers and ranchers

Farmers and ranchers are unique in that they are much dispersed, decentralized producers of raw commodities that are sold into extremely concentrated markets, some of the most concentrated markets anywhere. When the antitrust division evaluates a merger of packing or food processing companies they must consider the impact on producers as well as consumers, and specifically, consider the disparity in market power between millions of farmers and ranchers on the selling side, and three or four packers or processors on the buying side. These disparities in market power call for mergers in markets where these conditions exist to be more closely scrutinized and antitrust cases to be more aggressively prosecuted.

Vertically integration is a complicating factor that severely worsens the impact of horizontal mergers among packers and processors.

The Department of Justice Antitrust Division should develop the analyses and enforcement strategies that Mr. Klein promised to me over ten years ago. Lastly, in order to fully understand the impact of biotechnology on

farmers, do not just talk to economists and scientists, talk to farmers. In particular, I strongly recommend that you invite Todd Leake, farmer from Emerado, North Dakota. He is as knowledgeable about these issues as anyone you will discover anywhere plus he has actually thought through how these issues will impact farmers.

I, and the Center for Rural Affairs, thank you again for taking on this challenge and hosting these workshops. I hope that it signals a growing desire to better enforces our nation's antitrust laws and competition policies in the agricultural arena.

Sincerely,

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