



January 5, 2010

Legal Policy Section
Antitrust Division
U.S. Department of Justice
450 5th Street, N.W.
Suite 11700
Washington, D.C. 20001.

Re: Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy; Notice of public hearings and opportunity for comment; 74 *Fed. Reg.* 43725 (August 27, 2009).

Dear Mssrs. Weiser and Tobey:

The American Meat Institute (AMI) submits this letter and the attached document in response to an invitation from the United States Department of Justice and the United States Department of Agriculture (hereinafter collectively the Departments) for comments pertaining to the above-referenced *Federal Register* notice (the notice) published by the Departments. AMI is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products and AMI member companies account for more than 95 percent of the United States' output of these products. Many AMI members are directly involved in the acquisition of livestock and all are involved in the production and sale of meat and meat products. Because AMI members have a significant interest in the workshops scheduled for 2010, AMI submits the following comments for your consideration.

The notice listed several specific topics of interest to the Departments which include "buyer power ...vertical integration ...legal doctrines and jurisprudence, economics and current economic learning."¹ These topics are worthy of discussion in the context of competition in "agriculture," but do not capture other important issues and topics relevant to the issues of agriculture and antitrust enforcement.²

¹ 74 *Fed. Reg.* 43726 (Aug. 27, 2009).

² For ease of discussion, these comments and supplemental comments will adopt and use the notice's reference to "agriculture" in its broadest sense, including the production and distribution of food through to the consumer. To limit the dialogue, for example, only to the production and sale of livestock without recognizing the impact that the remainder of the distribution system and consumer demand have on industry structure is to ignore the realities of the market.

Accordingly, AMI's comments include a discussion about the importance of a consistent and uniform application of the antitrust laws, as well as a discussion of the impact of that certain, specific issues have on the meat industry and its structure.

In addition, based on the notice and statements made by officials with both Departments, AMI understands that an important part of the workshops will be the utilization of panels comprised of people with expertise on various topics that will be the focus of discussion at each workshop. To aid the Departments in assembling those panels to optimize the educational element of the workshops, through these comments, AMI is submitting for the Department's consideration the names of potential panelists to participate in the workshops in Iowa, Colorado, and Washington, D.C. For the agencies to glean the best understanding of industry structure and functions persons selected as panelists need to be experts in their respective fields with notable experience in same.

Existing Antitrust and Competition Statutes Are Equally Applicable and Effective for the Meat Industry as with All Other Industries.

Among the topics for discussion raised in the notice and elsewhere regarding the workshops is the "[A]pplication of antitrust laws to monopsony and vertical integration in the agricultural sector, including the scope, functionality, and limits of current or potential rules" and "[T]he effect of agricultural regulatory statutes or other applicable laws and programs on competition." AMI has long contended that, with respect to antitrust and competition, consumers, livestock producers, the meat industry, and all other sectors of the economy are best served by a consistent application of a uniform set of statutory requirements. To that end, AMI submits for the Departments' review and consideration, Attachment A, a submission by Professor Steven Calkins, former general counsel to the Federal Trade Commission and an expert on antitrust theory and enforcement.

Regulatory Policies, Particularly Food Safety Policies, have affected the Structure of the Meat Industry

An array of factors affect competition and industry structure in the meat industry, among them trade, international competition, changing consumer demand and expectations, and the changing structure of retail customers. Another very significant consideration, however, is the impact government regulatory policy has had on the structure of the meat industry. Admittedly, the meat industry is, in many respects, no different than other manufacturing sectors insofar as the applicability of various regulatory requirements, e.g., environmental and worker safety regulations. The meat industry is, however, subject to some unique regulatory requirements in at least one respect, and those requirements have very much affected the structure of the industry.

Specifically, federal food safety policy has been a significant contributing factor to increased concentration in the meat industry. The meat and poultry industry is one of the most intensely regulated industries in the economy, with

arguably only the nuclear energy industry subject to as much daily scrutiny. Meat and poultry packing and processing establishments are permitted to operate only if they receive a grant of inspection from the Food Safety and Inspection Service (FSIS or the agency) and those inspected establishments operate pursuant to daily, and in slaughter facilities continuous, oversight by FSIS inspectors, as provided by the Federal Meat Inspection Act (FMIA) or the Poultry Products Inspection Act (PPIA).³ This direct involvement and interaction in packing and processing facilities by government inspectors on a day in and day out basis affects and can hinder the ability of some plants, particularly those with fewer scientific resources, to compete in an increasingly science based, regulatory system. Interestingly, one could argue forcefully that the growing scientific knowledge base that leads to evolving food safety policies, and hence a much safer food supply, has also contributed to a more concentrated meat industry.

More specifically, several FSIS policies and regulations regarding food safety, while almost undoubtedly enhancing the safety of the meat and poultry supply, have had a direct and meaningful impact on the structure of the industry, particularly in the meat industry. In the mid-1980's FSIS determined that the presence of a pathogen such as *Listeria monocytogenes* in a ready-to-eat meat product, e.g., hot dogs, cooked ham, or cooked turkey, caused the product to be adulterated pursuant to the FMIA or the PPIA. Adulterated products found to be in commerce are subject to recall, with the producing company incurring all of the costs associated with the recall.

In 1994 FSIS declared *E. coli* O157:H7 (*E. coli*) to be an adulterant in raw ground beef, a policy that has evolved through administrative fiat such that today *E. coli* is deemed to be an adulterant in all non-intact beef products, as well as beef products intended to be used in the production of nonintact beef products. Thus, the agency's policy today is such that not only is raw ground beef adulterated if found to contain *E. coli*, so are the components utilized to produce ground beef, as well as mechanically tenderized beef products, if they test positive for *E. coli*. Moreover, FSIS recently has expanded again its adulteration policies such that in 2009 in three separate instances the agency has asked meat companies to recall beef precuts because of the presence of particular strains either *Salmonella* Newport or *Salmonella* Tiphimuirum.

That the FSIS *E. coli* policy has led to industry consolidation, directly and indirectly, is indisputable. In that regard, in 1997 Hudson Foods engaged in the largest recall of beef products ever to that time, approximately 25 million pounds, because of the FSIS *E. coli* policy. Not long thereafter, Hudson Foods went out of business, with various parts of the company sold to different buyers. The Hudson Foods recall and a series of other *E. coli* related recalls served as a model, and a warning, prompting several mid-sized, family owned, generally single plant cattle slaughter and beef production companies to take action to preserve and protect the equity the families had built in the business. In several instances the company simply "cashed out" and sold their operations to larger, more diversified companies. In at least one other instance, two cattle slaughter and beef processing companies,

³ 21 U.S.C. 601 *et seq.* and 21 U.S.C. 451 *et seq.*

both in the “Top 10” in terms of size of operation, merged to better position themselves and enhance survival in the event of *E. coli* recalls, which have subsequently occurred.

In addition, in 1996 FSIS promulgated the Hazard Analysis, Critical Control Point/Pathogen Reduction final rule (HACCP), which also included mandatory sanitation standard operating procedures (SSOPs). By all scientific measures, the HACCP rule, which also, has enhanced in a marked way the safety of the meat and poultry supply. Specifically, since the implementation of HACCP in 2000 the prevalence rate of *E. coli* O157:H7 in ground beef products has been reduced by 45%, the incidence rate of foodborne illness associated with *E. coli* O157:H7 has seen a 44% reduction, and there has been a 74% reduction in the prevalence of *Listeria monocytogenes* in ready-to-eat products.

The above-discussed benefits of mandatory HACCP and SSOPs are laudable and noteworthy. These two regulatory programs, however, also notably affected industry structure. Specifically, these two regulatory programs are document intensive and it is indisputable that they increased the cost of doing business on all federally and state inspected establishments. When FSIS published the HACCP rule it estimated the present value for all industry costs over a 20 year time period at between \$968 million and \$1.156 billion.⁴ Without question, food safety needs to be the number one priority of the meat industry, regardless of size of operation. But considering the enormity of the costs associated with HACCP and SSOP implementation, and the plethora of regulatory requirements that flowed from that rule, it is also unquestionable that the HACCP rule, along with other food safety related policies, has had an effect on the structure of the meat industry.

Research has been done Examining and Explaining the Rationale for the Existing Current Market Structure and other Significant Factors Continue to Influence that Structure

As the Departments undoubtedly are aware, significant research has repeatedly been done regarding livestock markets generally, with some focused on the hog and pork markets, some on cattle and beef markets, and some focused on both. For example, in 1996 the Grain Inspection, Packers and Stockyards Administration (GIPSA) conducted a study regarding the structure and concentration in the meat packing industry. In 2007 a GIPSA commissioned study done by the Research Triangle Institute conducted a comprehensive Livestock and Meat Marketing Study.⁵ Time and time again the research supports the conclusion that the meat and livestock industry is evolved based on a drive for efficiencies and other competitive forces. In moving forward in examining the issues attendant to “Agriculture and Antitrust Enforcement Issues in Our 21st Century” this collective body of work should not be discounted or discarded.

Although the discussion above focuses on an element that has affected meat industry structure over the last 15 years, food safety policy, there are a number of

⁴ 61 *Fed. Reg.* 38806, 38956 (July 25, 1996).

⁵ An exhaustive compilation of the plethora of studies examining the meat and livestock industry is attached hereto as Attachment B.

other factors relevant to the meat industry that the Departments must factor into any calculus examining industry structure and the application of antitrust theory. Among those factors are the changes in consumer, and accordingly retailer, expectations. It is critical that the Departments consider the role and influence that retailers have not only on the meatpackers, but also livestock producers.

The Departments also must consider the role that financial institutions play in market structure. This issue also has been characterized by some as risk management but regardless of its caption, the fact is that financing, at all levels of the production and distribution chain, play a significant, if not the driving, role in the structure of the industry and the tools and devices used therein. Another factor not mentioned in notice or elsewhere is the impact that trade has on the markets and prices received not only for livestock but also for meat. The significant growth in and reliance on export markets over the last 20 years and the impact that adverse events, e.g. BSE in December 2003 and H1N1 in 2009, can have on markets cannot be overestimated and need to be part of any analysis the Departments conduct when examining market behavior and structure and their interrelationship with the antitrust laws and enforcement.

That the industry has and will continue to evolve is clear, as evidenced by the impact that the markedly increased diversion of corn to ethanol production, fueled by government subsidies and tax credits, has had on input costs for those who raise livestock, including partially or largely vertically integrated hog and pork producers. These and other events highlight a fundamental point, articulated by Professor Calkins in Attachment A, knee jerk public policy shifts or actions in the antitrust area that are designed to favor or accommodate a specific industry, or segment of an industry, in response to market behavior are ill-conceived and should not be implemented. The antitrust laws and the longstanding policies underlying serve well the interest of consumers and the affected industry.

Workshop Panels Should Include Persons with Specific, Substantive Expertise

AMI respectfully submits for the Departments' consideration the following people to serve as panelists in one or more of the workshops. AMI may supplement this submission with additional names, as appropriate. The person named in each of the categories listed below have considerable experience working in, with, or on behalf the meat industry and as such their participation on the panels would benefit and enrich the constructive dialogue the Departments seek to foster.

For the Departments' benefit, the nominated panelists are divided into four categories:

- packer/processors -- because of the unique and extensive nature of the extensive government inspection program, as discussed above, as well as the unique aspects of live animal acquisition and marketing the products thereof;

- legal/antitrust attorneys – because any discussion about the application and enforcement of the Sherman and Clayton Acts to the meat industry requires an understanding of those laws as well as the industry;
- finance/banking – because the meatpacking and livestock production industries are so dependant on their ability to borrow working capital and capital for fixed assets; and
- economists/academicians – because it is important for the Departments to appreciate and understand not only the markets, but also the considerable body of economic research, and the findings of that research, that has been done over many years with the respect to the meat industry.

Accordingly, AMI submits the following names for the Departments' consideration.

Packer/Processor

Steve Hunt – Chairman, National Beef/U.S. Premium Beef

Ken Bull -- Vice President – Cattle Procurement, Cargill Beef Business Unit of Cargill Meat Solutions

Gary Machan/Noel White – Tyson Foods

Legal/Antitrust Attorneys

Kim Walker – Faegre & Benson

Mark Ryan – Mayer Brown

Phil Kunkel – Gray Plant & Mooty

Finance/Banking Representatives

Mark Greenwood -- AgStar Financial Services

Economists/Academicians

Dillon Feuz – Utah State University

Steve Koontz – Colorado State University

John Lawrence – Iowa State University

Steve Meyer – Paragon Economics

Ron Plain – University of Missouri

Clem Ward – Oklahoma State University

Conclusion

Agricultural competition policies regarding the livestock and meat sector should be founded on the same, fundamental antitrust principles that apply to the economy as a whole. Such an approach encourages the right of individual persons

or companies to follow the path that best suits their economic interests, within the legal parameters established by the Sherman Act and the Clayton Act. The contemplation of antitrust or farm policy that deviates from this approach by favoring one sector over another or inhibiting or restricting a competitive market should be rejected.

If you have any questions regarding these comments, the supplemental comments that AMI intends to file, or anything else regarding this matter, please contact me at (202) 587-4229 or mdopp@meatami.com.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark D. Dopp", with a horizontal line extending to the right.

Mark D. Dopp
Senior Vice President,
Regulatory Affairs and General Counsel

Enclosure