

March 10, 2010

Legal Policy Section
Antitrust Division
U.S. Department of Justice
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To Whom It May Concern:

The American Farm Bureau Federation (AFBF) submits these comments on behalf of its farming and ranching members nationwide. AFBF is the country's largest general farm organization, representing farmers and ranchers in all 50 states and Puerto Rico. Farm Bureau members grow, produce and raise the food, fiber and energy sources that feed, clothe and fuel the U.S. and the world. Our membership includes producers of every size and scale of operation. Because of the diversity of our members, our comments will cover a variety of areas of interest to our farmers and ranchers. We focus on: the Capper-Volstead Act, dairy, livestock and poultry, rail, and seed.

The Capper-Volstead Act

AFBF strongly supports the Capper-Volstead Act (the Act) and the protections it provides to farmers, ranchers and dairymen to join together to process and market their products. Farmers often purchase inputs from large, multinational companies, and they often sell their products to large, multinational companies. In comparison, 98 percent of farms in the United States are family operations and are clearly at a bargaining disadvantage when working with these multi-national corporations. The Act is a way for farmers to offset some of this disadvantage while still ensuring the protection of the end consumer of products, and the need for this protection is no less today than it was 80 years ago. Representative Volstead's comments for the *Congressional Record* clearly outline this purpose:

The objection made to these organizations [cooperatives] is that they violate the Sherman Antitrust Act, and that is upon the theory that each farmer is a separate business entity. When he combines with his neighbor for the purpose of securing better treatment in the disposal of his crops, he is charged with a conspiracy or combinations contrary to the Sherman Antitrust Act. Businessmen can combine by putting their money into corporations, but it is impractical for farmers to combine their farms into similar corporate forms. The object of this bill is to modify the laws under which business organizations are now formed, so that

farmers may take advantage of the form of organization that is used by business concerns.¹

We understand that the administration has concerns with how the Act is being utilized today and the impact on consumers. However, it is important to note that there are limitations to the protections offered by the Act. For example, the Act subjects any agreements between cooperatives and non-cooperatives to traditional antitrust laws. The administration already has significant authority under the Capper-Volstead Act to prevent cooperatives from using any market power they might accumulate to unduly enhance the price of the products they market.

Section 292 of the Act clearly states that, “If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced,” then the Secretary of Agriculture has the authority to hold a hearing and direct a cooperative to cease and desist from the behavior that is causing the monopolization or restraint of trade. Farm Bureau urges the administration and Congress to consider this pre-existing authority before throwing out the proverbial baby with the bathwater and asking for alterations to or the elimination of the Act.

More importantly, cooperatives that have used their power inappropriately to enhance the price of products they market have been held accountable under the provisions that already exist. One such example is the case of the Eastern Mushroom Marketing Cooperative (EMMC). EMMC attempted to limit mushroom production by non-members of the cooperative by purchasing and leasing land capable of producing mushrooms. EMMC also placed deed restrictions on the titles to the land so that mushroom farming would be barred on the land in perpetuity.

The Department of Justice filed an antitrust lawsuit against EMMC and entered into a consent decree to remove restrictions on producing mushrooms on the land from the titles to the land. Individual mushroom companies then filed suit against EMMC related to the same issues. While this case is still working its way through the judicial process, the initial ruling was against the cooperative on the grounds that they are not eligible for Capper-Volstead immunity because of a non-farmer member with voting rights. This non-farmer member destroyed their antitrust protections.

In summary, AFBF supports the Capper-Volstead Act and believes that the limits that already exist within the Act are adequate to protect consumers from cooperatives using market power to unduly enhance the price of the products they market. Any questions that arise about this cooperative market power should be addressed through the limitations that already exist within the Act before any additional restrictions or complete repeal of the Act are even considered.

¹ *Congressional Record* 1033 (1921).

The Dairy Industry

Recent turmoil in the dairy industry has brought a great deal of attention to the players in and the structure of the industry. The focus of this scrutiny has often been on the spread between the price that farmers receive for their milk and the price that consumers pay. On average, only about 40 percent of what a consumer pays for milk in the grocery store actually makes its way back to the farmer who produced that milk.

Many dairy cooperatives also own processing capacity, thus some producers have concern about whether profits accrued to the cooperative during times of low prices are returned to the producer in the form of patronage dividends. However, it is the responsibility of cooperative boards to make financial decisions deemed necessary for that organization. Cooperatives are given certain considerations in federal milk pricing, such as being allowed to re-blend milk prices to their members. The U.S. dairy marketing system of federal orders, classified pricing, and pooling play an important role in how producer prices are settled.

Many industry participants view the relatively low farmer's share of the retail price of milk as proof of anticompetitive behavior by dairy cooperatives, dairy processors or both. Our comments on the importance of the Capper Volstead Act protections provided to cooperatives are outlined in a previous section of this document. If any cooperatives, including dairy cooperatives, are not following the rules outlined in the Act, then they should be held accountable. However, AFBF does not see any reason to throw-out the entire valuable concept of agricultural cooperatives to address any anti-competitive concerns in this single market.

AFBF would also note that there are more than just farmer-cooperatives between the farm gate and the consumer's grocery cart. To blame dairy cooperatives for this price spread is disingenuous when milk also travels through a processor and a retailer before reaching the end consumer.²

Dairy policy is also extremely complex and plays a significant role in how dairy products are produced, sold and marketed. Attempts to influence the dairy market could have a multitude of policy implications and vice versa. Any assessment of competition in the dairy industry should be sure to take these unique characteristics into account before dramatic policy or market changes are considered.

AFBF urges thoroughness and thoughtfulness as the Department of Justice and USDA study competition in the dairy industry, and we encourage the Department of Justice to utilize the wealth of information at USDA on dairy policy and practices.

² For a good recent review of this issue, see Brester, G.W., J.M. Marsh, and J.A. Atwood. 2009. "Evaluating the Farmer's-Share-of-the-Retail-Dollar Statistic" *Journal of Agricultural and Resource Economics* 34(2):213-236.

Livestock and Poultry

The livestock and poultry industry have received a great deal of attention over the past decade in conversations about concentration in agricultural markets. Concentration in the cattle, hog, and poultry markets increased rapidly during the 1980s and early 1990s. As the following table shows, all of these industry are now fairly highly concentrated (with the greatest concentration observed in the production of beef from fed cattle). The top four processors in the cattle, hog and broiler markets are now responsible for the majority of all processing in their individual sectors.

Concentration in Poultry and Livestock Procurement Percentage of Purchases by Four Largest Processors³

Commodity	1985	2005
Cattle – Steers and Heifers	50	79
Cattle – Cows and Bulls	17	49
Hogs	32	64
Broilers	34	53

While the existence of large firms does not guarantee non-competitive behavior, many livestock and poultry producers are concerned about the potential these firms have to exercise market power. In general, studies on the impact of market power on livestock prices have found a small, negative impact (for example, roughly 1percent - 3 percent in the cattle industry, which has probably been the most actively studied). Price impacts are generally small in relation to cost reductions associated with the economies of size that have accompanied increased concentration.

While empirical evidence to date shows minimal negative impacts of market power, the extremely high levels of concentration in the livestock and poultry sector clearly suggest the potential for abuse. For this reason, AFBF believes that the Department of Justice and USDA owe it to America's farmers and ranchers to work together to closely monitor the performance of the nation's livestock and poultry markets and to carefully analyze the potential impact of any further consolidation. In particular, it is critical that the impacts of further consolidation be considered in the context of regional markets. For economic and animal welfare concerns, it is only reasonable for farmers to ship animals to market within a reasonable distance. Economically feasible distances can vary significantly by species, region of the country, and even time of year. On specific issues such as these, USDA's expertise will be absolutely critical in defining what can reasonably be considered a regional market so that the impact of consolidation and market power can be accurately assessed.

The market power associated with concentration in the processing sector is often multiplied in those sectors where the relationship between producers and processors is governed primarily through production and/or marketing contracts. The poultry industry

³ USDA, Grain Inspection, Packers and Stockyards Administration, *Assessment of the Livestock and Poultry Industries*.

is particularly reliant on contracting, and farmers have had a number of concerns about how processors⁴ handle contracting. Many farmers have been hesitant to express these concerns for fear of losing their contracts.

It is important to keep in mind that poultry houses represent a significant capital investment on the part of producers – one that is typically financed by a third party (e.g., a local bank or other farm credit provider). Unless these houses are kept in production via contracts with local processors, the farmer has no way to service the debt on that investment. There is also no alternative use for the poultry houses, or at least none that is likely to generate sufficient revenue to service the farmer's debt. Fear of losing a contract will often prevent a farmer from being vocal about concerns about contracting terms. In the poultry industry, losing a contract is generally tantamount to going out of business. Since spot markets for poultry no longer exist, without a contract a farmer has no market access in the poultry industry. Moreover, farmers typically have little or no opportunity to switch contracts between integrators, either because of differences in production systems between integrators or because only one integrator operates in the farmer's geographic area.

Many of the concerns producers have had with contracts were addressed in the 2008 Farm Bill. Some of the positive changes that were included in the farm bill and have been implemented by USDA are:

- The elimination of mandatory arbitration clauses.
- A requirement that written growout contracts be delivered at the same time as poultry building specifications are delivered.
- An allowance in confidentiality clauses that permit poultry producers to discuss written contracts with their lenders, accountants and attorneys before they sign them.

Despite the increased protections offered in the 2008 Farm Bill, many of America's poultry producers still have no bargaining power when considering contracts with integrators. Producers have to sign a contract in order to have birds in their poultry houses to generate income for debt service, but they have few if any choices among integrators with whom to contract due to limited regional competition between integrators. Given the lack of balance of power in situations such as this, AFBF believes it is important for USDA and the Department of Justice to be mindful of trends in poultry contracts and the impact of mergers and acquisitions on local markets.

In summary, the government should continue to monitor the conduct of firms to ensure a marketplace free of price manipulation. AFBF believes that livestock producers should have access to competitive markets for price discovery that accurately determine the value of their products.

⁴ The term "processors" is actually too narrow a description of the firms that poultry producers do business with. Processing facilities are controlled by vertically integrated firms (commonly referred to as integrators) that also operate breeding operations, hatcheries, feed mills and transportation divisions.

AFBF supports:

- Effective enforcement of antitrust laws and the Packers and Stockyards Act.
- The investigation of all mergers, ownership changes or other trends in the meat packing industry for actions that limit the availability of a competitive market for livestock producers, particularly within regions.
- The oversight of livestock and poultry contracts to ensure these contracts are clearly-written in a way that confidentiality concerns are addressed, investments are protected, price transparency and price discovery mechanisms are present, and contractors are held accountable for honoring the terms of the contracts.

Railroads

American agriculture depends heavily on the railroad system, especially given the inefficiencies of shipping large quantities of commodities via truck and the lack of availability of barge shipment in many parts of the country. The Association of American Railroads estimated that in 2007 about 16.9 percent of total rail shipments by weight were of agricultural, food and lumber products.⁵ In many areas of the country where waterways are not available for barge shipment, rail shipment is the dominant mode of transportation for farm commodities to port. For example, in Montana, it is not unusual for as much as 90 percent of the wheat to be shipped to market or port via rail.⁶ Despite this heavy reliance on rail, some sectors of agriculture such as the grain sector have dramatically decreased use due to increased rail prices, the closing of rural branch lines and unreliable or poor service.

Agricultural producers are frequently captive rail customers and as a result can experience unreliable service and be subject to exorbitantly high rates. While agricultural, food and lumber products account for about 16.9 percent of rail shipments by weight, these same sectors contribute more than 23 percent of the gross revenue for rail companies.⁷ Clearly the agricultural sector tends to pay higher rates than many other sectors. While rail rates were relatively constant from 1987 to 2003, since 2003 rates have jumped an average of more than 7 percent per year.⁸ In addition to regular rate price increases, rail carriers have also begun charging exorbitant fees for switches and overloaded railcars, have attempted to shift all accident liability to customers, and have refused to provide transparent information regarding their fuel costs.

While rail carrier cost increases can explain some of the increases in rail freight pricing, increasing rail company profits reveal that price increases are not merely being used to cover increased costs. The dramatic consolidation in the industries makes these price hikes even more suspect. When the Staggers Act was passed in 1980 deregulating the rail industry, there were more than 40 Class I railroads. After more than 50 mergers and acquisitions, there are only seven left. Four of these rail carriers comprise more than 95 percent of all rail business, and three of them control more than 70 percent of grain

⁵ Class I Railroad Statistics, Association of American Railroads, July 17, 2008.

⁶ Wheat and Barley Movement, National Ag Statistics Service, USDA, April 8, 2009.

⁷ Class I Railroad Statistics, Association of American Railroads, July 17, 2008.

⁸ *A Study of the Competition in the US Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition*, Laurits R. Christensen Associates Inc., November 2008.

movement.⁹ At a time when trucking costs are at historical highs due to gasoline prices and truck freight supplies are tight, these rail price increases have left many in the agricultural sector with no real choice or competition for transportation.

Because of the increasingly brazen and anticompetitive business practices of the rail carriers, AFBF has supported legislation in both the House (H.R. 233) and Senate (S. 146) that would eliminate rail carriers' antitrust exemption and subject them to the same antitrust laws that apply to other transportation modes. The bills would give the U.S. Department of Justice Antitrust Division and the Federal Trade Commission the authority to review and regulate rail mergers and collective ratemaking.

We look forward to working with Congress to ensure passage of this critical legislation, and if passed, we will work with the proper authorities at the Department of Justice and the Federal Trade Commission on implementation.

As AFBF policy states:

We believe that railroad mergers have resulted in fewer carriers and reduced service for agriculture forcing increased reliance on other, less efficient and more costly forms of transportation. We support additional oversight of the railroad industry, including any future plans for consolidation. Before any railroad mergers are approved, an operation plan must be developed and agreed upon to ensure competitive service for agriculture. In addition, we believe the federal government and Congress should review the current situation and implement reforms that recognize the needs of U.S. agriculture.

Our policy also explicitly supports open access rules where there is a lack of competition, giving greater rate-making flexibility to rail carriers while still providing the necessary regulatory authority to protect captive shippers against monopoly pricing, and the elimination of discriminatory railroad rates between geographic areas of the country (rates should be based on weight, volume and distance). AFBF opposes railroad nationalization, parallel mergers of rail systems, granting of railroad abandonments that lessen competition, and the merger of railroad companies with barge companies.

The Biotech Seed Industry

The seed industry has changed dramatically since the introduction of the first biotech soybean seed in 1996. The industry was once highly segregated and dominated primarily by small and medium-sized regional seed companies that focused on seed varieties best-suited for a specific growing region. High-tech innovations in seed biotechnology and a series of high-profile mergers in the agriculture seed, biotech and chemical industries changed all of that. The mergers started with the largest of the companies combining forces, but soon many smaller, regional seed companies became acquisition targets as well.

⁹ Written Testimony Submitted by The National Industrial Transportation League to the Surface Transportation Board, October 12, 2005.

This consolidation within the seed industry coincided with the introduction of the first biotech seed traits. Companies have delivered these traits through their own network of seed companies and through broad licensing agreements with other seed companies, including competitors. In the early years of ag biotechnology advancements, one company dominated the playing field – Monsanto. Other companies were slow to introduce competing traits, and patents allowed Monsanto with opportunity to build extraordinary market share.

AFBF strongly supports the patent system as a way to encourage technological advancement in agriculture and supports the right of companies to patent seed traits. While AFBF fully supports the patenting of biotech traits, our farmers are extremely concerned about whether or not the expiration of the first biotech seed trait patent on Roundup Ready[®] soybeans (RR1) will actually increase access to generic traits and seeds. Because a company was an early entrant into this market and earned market power in biotech traits, there is the potential for this market power to deny farmers the opportunity to enjoy off-patent biotech seed products.

More specifically, AFBF is concerned that as companies write licensing contracts for their traits, they will do so in a way that excludes seed companies from selling generic traits. We believe this would be an abuse of market power that will have a detrimental impact on America's farmers.

We believe seed companies should have the ability to introduce generic traits into their seed varieties and sell the products at whatever price the market will bear. The market should drive what products are offered and farmers should be provided with the opportunity to choose an off-patent product.

As licensing agreements are negotiated, companies should not be allowed to use these negotiations to prohibit or restrict the sale of generic traits as a way to force all farmers into purchasing new, more expensive technology. Such a strategy would have a strong negative impact on competition in the industry and would be nothing more than an end-run on the U.S. patent system by essentially banning the sale of a generic product before those sales can even begin.

AFBF is also concerned with the regulatory status of generic biotech products and whether or not the regulatory process in the U.S. and abroad could be used by companies to limit farmer access to generic ag biotech products in the future. Since some sort of regulatory requirements will have to be met either in the U.S. or abroad for ag biotech products and the time necessary for collecting all of the data necessary to obtain these approvals is extensive, the regulatory process could be used as a de facto means of preventing generic products from competing in the market.

Two significant hurdles must be overcome for any generic agricultural biotech product to be available to producers:

1. **A means for maintaining international regulatory approvals post-patent must be found.** In some cases (including Roundup Ready[™] soybeans), agricultural biotech products are de-regulated in the United States and do not

require further regulatory action to be grown and utilized in domestic markets. However, in many foreign markets regular re-registration processes must be maintained in order for shipments containing a particular trait to be traded and exported. Given the prevalence of many agricultural biotech traits in U.S. agriculture, allowing these international registrations to lapse would amount to catastrophic losses in export markets for U.S. commodities. Approximately 20 percent of the corn and 50 percent of the soybeans grown in the United States end up abroad.

- 2. A seamless transition to generic products after patent expiration will have to be found for those products that are still regulated within the United States.** Continuing the registration of some products requires data packages to be submitted to the appropriate regulatory agencies. However, this data can often take years to accumulate. It is unfair to American farmers to allow companies to have a de facto extension of their patents on a given product while other companies work to recreate a set of data that already exists. This is particularly problematic given that agricultural biotech companies are precluded from beginning the data collection process until after the expiration of an agricultural biotech patent for fear of legal action against them. Certainly the original writers of patent law couldn't have foreseen the massive regulatory hurdles that would be constructed for products such as biotech seeds. Some adjustments must be made to the regulatory process and/or the patent process to address the overlap of these two conflicting arenas.

This issue is addressed in other industries with patented products and lengthy regulatory processes – namely the pharmaceutical and agrochemical industries. In the pharmaceutical industry, the Hatch-Waxman Act (PL 98-417) allows a company a short extension of a patent in exchange for providing a statutory exemption from patent infringement for activities associated with regulatory approvals. Namely, regulatory agencies are allowed to use the approval data from the patent-holding company in order to expedite the approval of generic products after the expiration of the patent. Without this legislation, customers would have to wait years after a patent expires on a product before they would have the option of a less-expensive, generic alternative, and companies wanting to introduce a generic product would have to reproduce risky and costly human trials. Under Hatch-Waxman, assistance is only provided for domestic approvals and does nothing to help pharmaceutical manufacturers produce generic drugs for export markets.

In the agrochemical world, data compensation through the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) reconciles the regulatory process with the patent process. While private companies can negotiate the purchase price of the data required for regulatory approvals, it is not unusual for two companies to be unable to reach agreement. That is where the data compensation process included in FIFRA becomes relevant. This process requires binding arbitration between two companies for data compensation if the two companies cannot reach

a private agreement. This ensures that a disagreement between two companies or anti-competitive behavior by one company won't prevent consumers (in this case, farmers) from having access to generic products if there are companies in the marketplace who would like to produce them.

While neither process is perfectly suited to fit the unique attributes of the agricultural biotech industry, the experiences gained in these two industries can help inform the debate and provide guidance to the agricultural community as we face similar challenges.

While these two issues must be addressed as we approach the expiration of agricultural biotech patents, there are a number of complicating factors that are unique to the agricultural biotech industry and will be relevant to consider as solutions are drafted.

1. **Each individual country has a different approval process.** Regulatory requirements can be significantly different from country to country. Countries might not have the same data requirements, the same tolerance levels for unapproved products, or the same timelines for re-registrations. For example, China requires re-registration of biotech seeds every three years, while South Korea only requires re-registration every 10 years. The political realities surrounding agricultural biotech products vary from country to country, and there could be a temptation to use agricultural biotech as yet another reason to erect trade barriers. This diversity in regulatory processes and political realities could make finding a way to maintain post-patent approvals for products more challenging.
2. **Not all ag biotech crops will face the same challenges post-patent.** In the case of soybeans, each farmer is essentially a manufacturer of the seed and can simply save his or her crop from one year and plant it as seed for the next year. This makes tracking the product more difficult and makes staying on top of the registration process abroad even more important. Since farmers will be their own manufacturers of any soybean trait it will be virtually impossible to remove soybean traits from the value chain, even if those products don't have the appropriate international approvals to move freely throughout the chain. Who will be responsible for the re-registration of such products, particularly if no single company still sells the product? Corn, on the other hand, is grown only as a hybrid in this country. Farmers must buy new seed every year, so tracking the product is much easier. It also makes corn a more viable generic market for those seed companies looking to continue selling traits post-patent, which could make off-patent regulatory issues somewhat less difficult to address.
3. **Herbicide tolerant traits and insect-resistant traits will face different regulatory environments.** Herbicide tolerant traits are de-regulated in the United States and will not require continued regulatory action in this country. For example, any company or farmer that would like to reproduce Roundup Ready™ soybeans can do so as soon as the patent expires, with no domestic regulatory hurdles to cross. The international regulatory scene is less clear-cut. In the case

of Roundup Ready™ soybeans, the patent-holder has agreed to maintain these international obligations for at least three years after the expiration of the patent, but this offer applies only to one product. It is critical to note that three years is not long enough for any company to build the data set necessary to satisfy international regulatory requirements. However, insect-resistant traits such as Bt traits in corn and cotton, are not de-regulated and will continue to have domestic regulatory requirements. For example, these Bt traits come with a refuge requirement dictated by the Environmental Protection Agency (EPA). Issues related to this refuge will continue to require regulatory assessments, and responsibility for this regulatory work will no longer be tied to the company with the patent for the trait, but to all of the companies selling the product.

4. **Single-trait products and stacked products are often not treated the same throughout the global regulatory process.** Sometimes single-traits come to market and are later stacked with other traits. In some countries, when stacked products are brought to market the individual traits must be approved by the appropriate regulatory agencies, and then the stack must go through the same process as a separate product. In other countries, pre-existing approvals for single-traits do not need to be duplicated, and only new traits as part of the stack and the stack itself must go through the entire regulatory process. As more stacked traits become available and as companies begin to stack traits belonging to a variety of companies, data compensation and the regulatory responsibilities for these off-patent products will only become more complicated.

Given these complicating factors, it is unlikely that a simple solution will be found to the two key issues facing the industry as agricultural biotech products go off-patent. The Hatch –Waxman Act and FIFRA data compensation have worked well for the pharmaceutical and agrochemical industries, respectively, but a variety of strategies will have to be instituted in order to achieve the same orderly and consistent transition to generic agricultural biotech products.



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