



December 29, 2009

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

agriculturalworkshops@usdoj.gov

Re: Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy

The Iowa Farm Bureau appreciates the opportunity to provide comments on issues of concern regarding consolidation and market performance in agricultural markets. Iowa Farm Bureau is a general farm organization with more than 154,000 members with an extensive grassroots policy process that represents the interests of farmers across the state of Iowa.

Consolidation is an inherent pressure in agricultural markets. However, consolidation is not limited to agricultural markets. The factors driving consolidation include economics of scale, efficiency gains that occur from developments in technology allowing more to be done by fewer individuals, public policies which encourage specialization and production efficiency, high cost of entry, shrinking margins and rapidly increasing risk. As these pressures continue to intensify, the environment for a small undiversified producer, processor or supplier becomes increasingly tenuous. However, consolidation and concentration in agriculture is not always per se a negative event. It only becomes a negative for market performance when a firm exercises market power to the detriment of other market participants.

For the purpose of analysis, the agricultural economy is often divided into the following three sectors: inputs, production, and outputs. Consolidation can occur horizontally in any of these sectors as firms seek to expand their scale of operations or it may happen vertically across any or all of these sectors as a company attempts to control more of the marketing channel. Due to the capital intensive requirements for integrating vertically, it is rare for one company to control a significant amount of the market in all three sectors. Occasionally, one entity is able to consolidate significant market share in two of the three sectors. However, evidence of the exercise of actual market-distorting power as a result of vertical integration is rare.

More important to the agricultural economy is the development of significant consolidation in any one of the three sectors for any specific agricultural commodity that results in a firm exercising market power to the detriment of other market participants. By comparison of the three sectors, production is generally the most difficult to consolidate. This is a result of the enormous amount of capital that would be required to procure capital assets such as land, buildings, or equipment, consolidation in production capability is slow and risky enough to make accumulation of market distorting power difficult. The large investment in land and equipment required for agricultural production creates a very competitive environment where producers are forced to take the prices offered by the market as well as pay the price for inputs dictated by the markets. This is especially true for grain and oilseed crop production, but holds true for many other commodity production sectors also. Even some of the most concentrated production commodities like eggs and hogs have single-firm concentration percentages that rarely exceed single digits.

However, for input suppliers and processors the situation is different. Fewer geographical locations of operation and reduced amounts of capital required for operation within these sectors, as well as the highly competitive nature of production agriculture, creates a real possibility that producers will face buyers with oligopsony or monopsony power and suppliers with oligopoly or monopoly power. While competitive markets may exist nearly everywhere in theory, the real-world experience may be one of more limited market opportunities and choices for producers than the theory suggests since many producers will not have either the time or resources to access anything other than relatively local markets.

Figure 1ⁱ. Combined Market Share (by volume) for the Four Largest Steer and Heifer Slaughter Firms, Four Largest Cow and Bull Slaughter Firms, and the Four Largest Boxed-Beef Producers

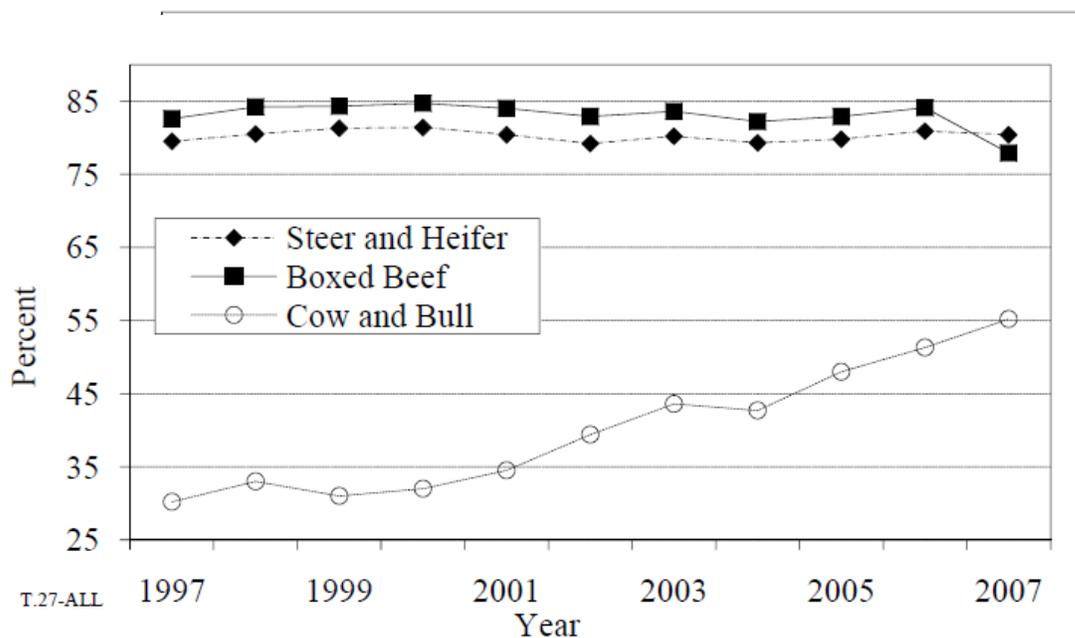
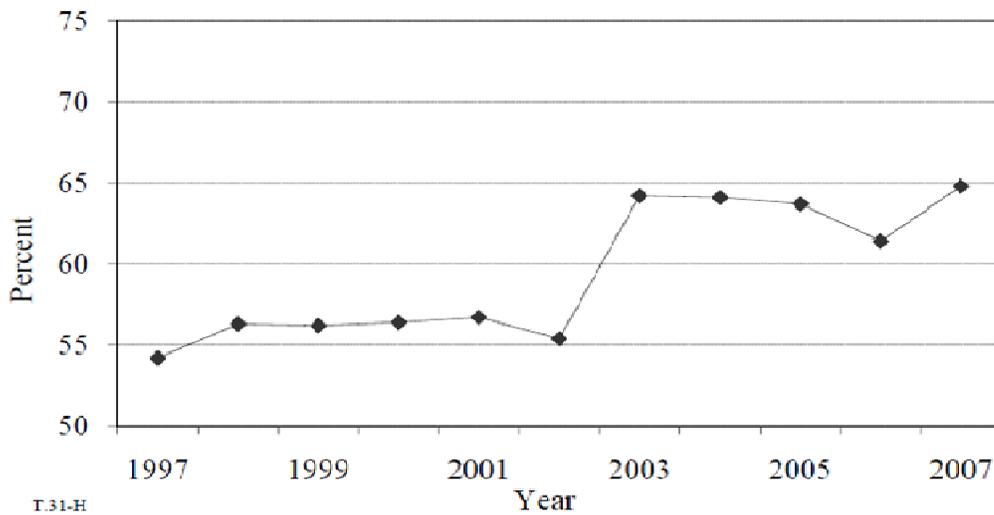


Figure 2. Combined Market Share (by volume) for the Four Largest Hog Slaughter Firms



The following comments focus on drivers of consolidation within selected agricultural markets which should be monitored by the appropriate regulatory agency to ensure that consolidation is not enabling the exercise of market power to the point of distorting market structures in a way that will weaken the ability of all market participants to operate freely within agricultural markets. In addition, some comments are directed toward the functioning of the market structures in livestock and crop production as examples of current market forces.

Livestock markets

The operational structure of the production sector of the livestock markets has steadily transformed over time. In 1993 less than 35% of the United State swine inventory was held in herds over 2000 head. By 2007, over 80% of swine inventory was held in herds over 2000 head. Evidence of consolidation in production is easy to find. In Iowa, the number of hog producers has dropped from 37,000 in 1990 to less than 8,300 in the latest USDA report while hog inventory numbers have increased from 13.5 million head to 19.5 million head during that same period of time. However, even as consolidation occurs, evidence of the existence or practice of market power is difficult to find.

A review of margins (in figure 3 and 4) over 38 years suggests that both pork and cattle producers are still subject to the prices offered by the market with no evidence that individual producers are able to exercise market-distorting power

Figure 3

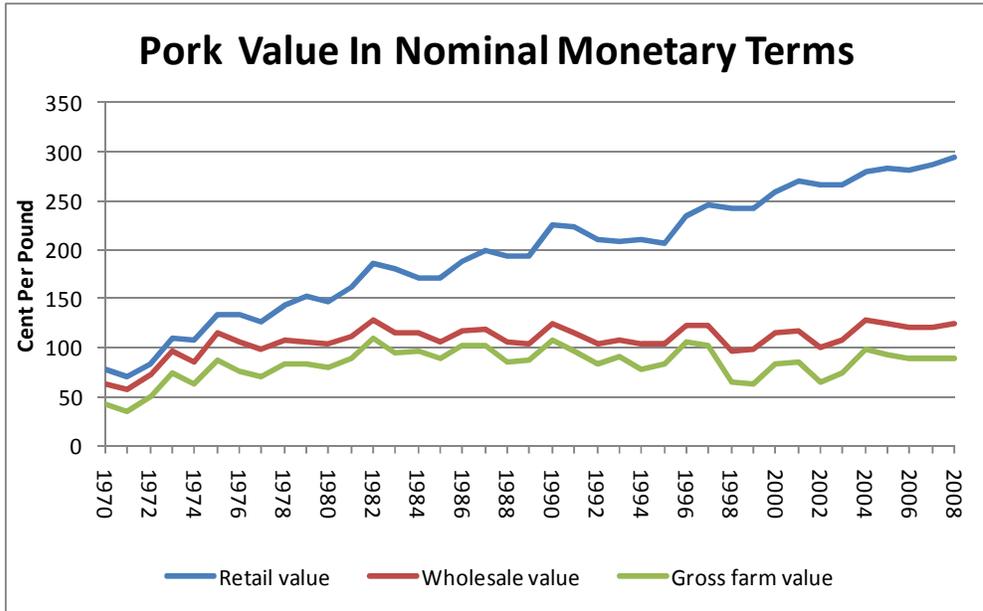
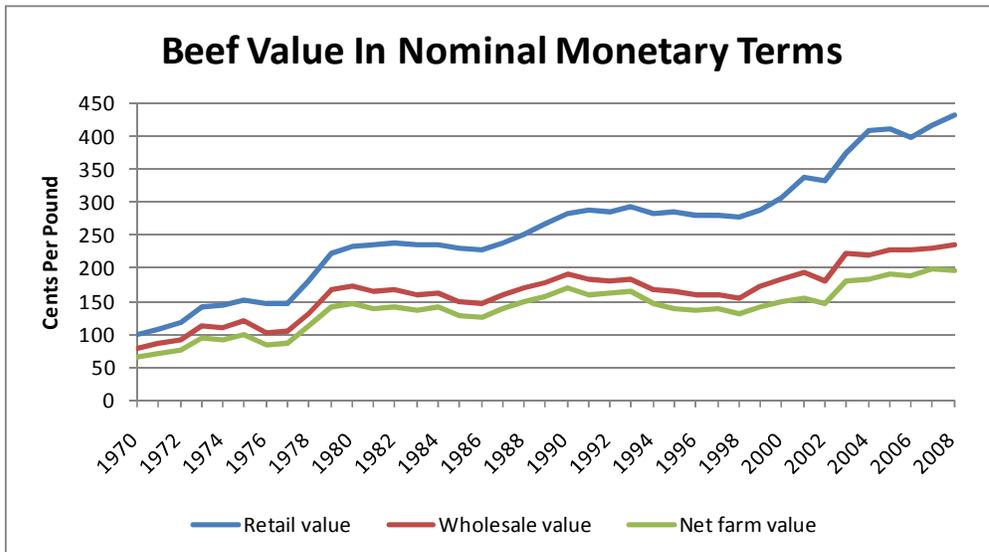


Figure 4



Even though inflation rates were positive over the 38 year period (1970-2008), hog prices stayed relatively flat and cattle prices exhibited only moderate increases. By contrast, retail prices for pork and beef rose significantly. However, even the retail price of pork and beef decreases relative to inflation suggesting that productivity gains within the complete supply chain were sufficiently strong to allow for real price declines.

The declining value of deflated prices for pork and beef (as shown in figures 5 and 6) suggests that the pork market has been competitive enough to adopt technology and scale efficiencies to the degree that producers are forced to take offered prices and are unable to set prices which would allow for expanded margins.

Figure 5.

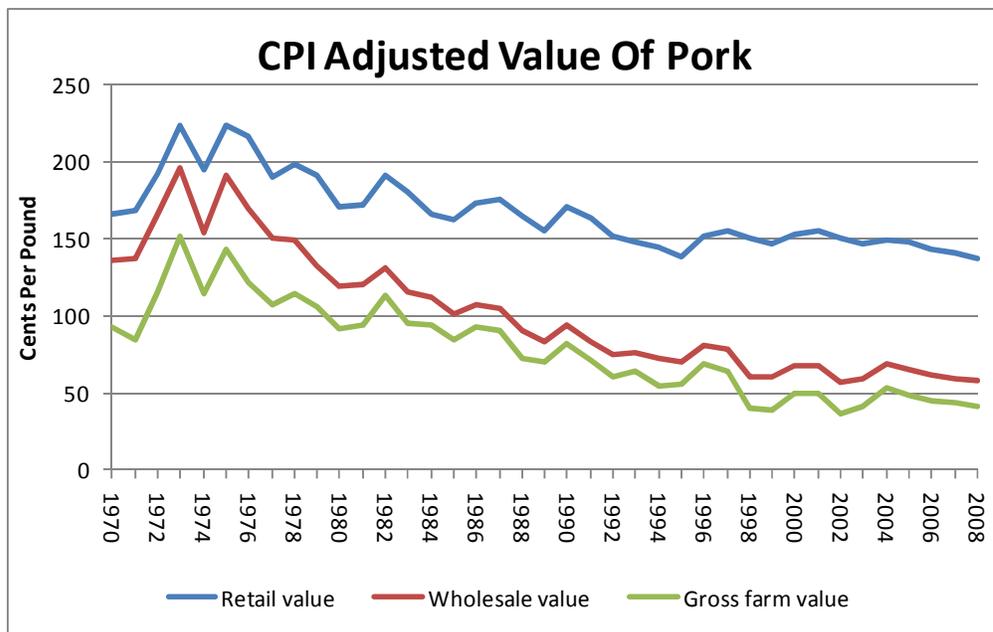
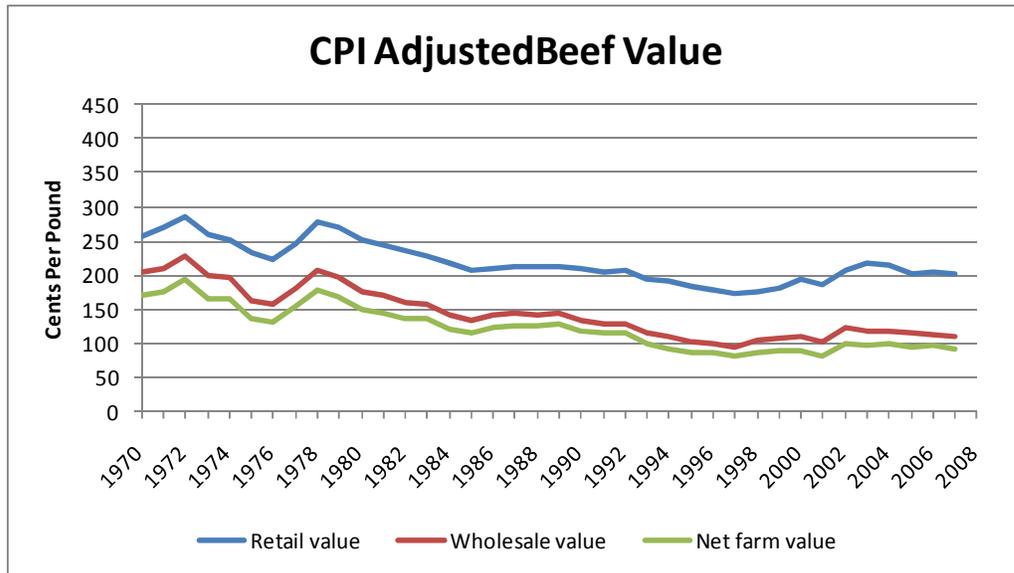


Figure 6



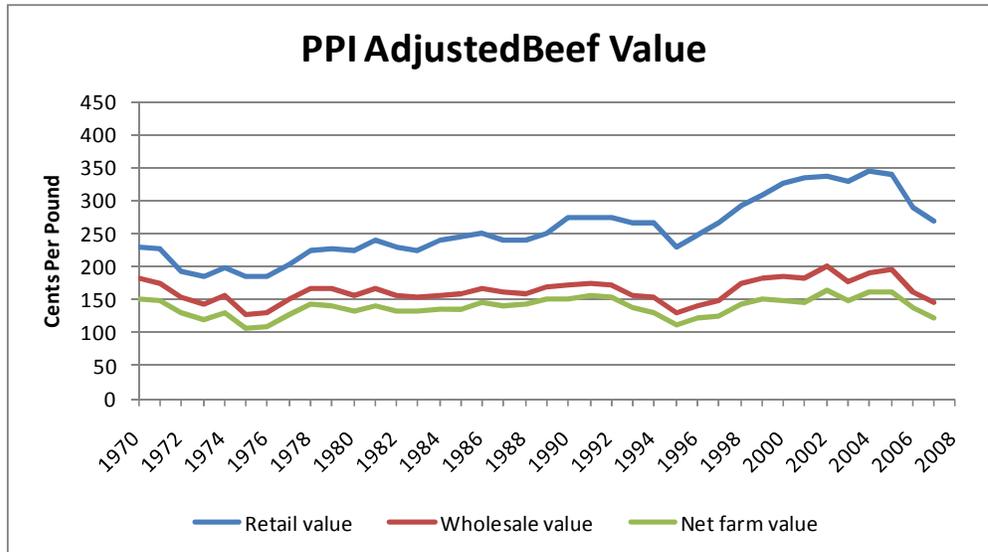
Producers who have left the market include producers of all sizes. Many of the large producers who have exited has done so through merger or acquisition whereas most of the small producers who have left the market have done so through liquidation. The continued rapid decline in the number of producers in the hog production sector has reflected the lack of profit margins in the sector for protracted periods of time.

Similar to the production sector, the processor or wholesaler of livestock and meat products appears to be either unable or unwilling to exert market distorting power. While both the beef and port markets have consolidated over the past 40 years, neither has maintained a pricing strategy that enables them to match general price inflation. An analysis of the 38-year trend for packer margins provides some evidence that processors in the beef industry may have sufficient market power to pass along some of the increases in wage and production costs to livestock producers. However, beyond this there is little evidenceⁱⁱ of the application of market distorting power.

These charts provide additional evidence regarding the lack of exercise of market power by packers. As with the producers price, the packer's price tends to remain flat or slope down over time. When deflated by CPI both swine and cattle trends slope downward demonstrating the competitive nature of the packer industry. The only exception to downward slopes for deflated packer price series is when cattle price is deflated by PPI. In this case the packer price remains flat, verifying the results of the analysis described above. Specifically, that beef processors are able to pass along to producers some of the inflating cost of wages etc... (see

Figure 7). Our findings are consistent with the majority of research which has been done on this subject.

Figure 7

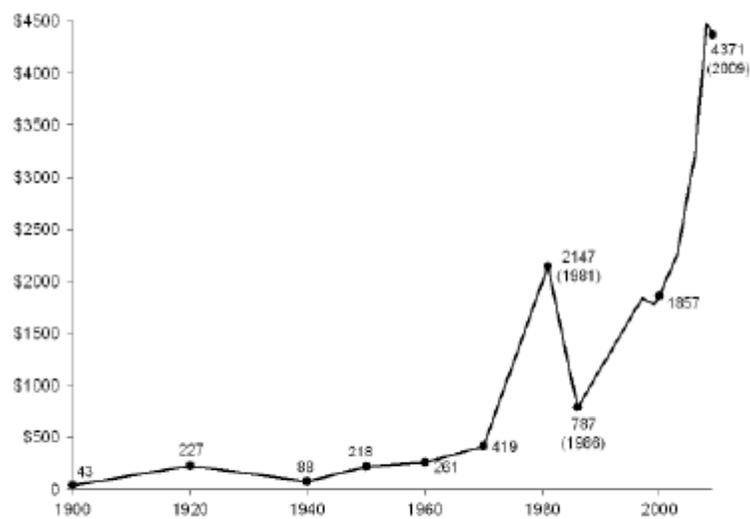


While the inputs, production, processing, and retail sectors of livestock production continue to consolidate, there is little evidence of the exertion of significant market distorting power. However, the drivers of consolidation as well as the effect of consolidation on each sector should continue to be monitored by economic studies conducted by USDA and university researchers. Any modeling used for enforcement action should take into account all of the drivers of market structure change throughout the marketing and value chain for livestock and meat products. Inquiries designed to monitor market performance should be conducted in a manner that minimizes negative effects or market disruptions that may occur as a result of government action.

Crop Farming

Commercial crop farms have been getting larger as a result of tighter profit margins, increased efficiencies resulting from technology development and higher capital barriers to entry. One barrier to entry is the cost of the farm land. As can be seen in the figure below, land values in Iowa have increased significantly during the past decade. Land ownership trends continue to favor acquisition of farm land by commercial farms through rental agreements rather than through purchases as one means of coping with the high capital barrier to entry.

Figure 1. Average value per acre of Iowa farmland.



Source: 1900-1950 USDA Census of Agriculture, 1951-2009 ISU Land Values Survey.

The percentage of farmland rented in Iowa has not significantly changed over the past few decades. In the coming years one would expect the percent of land rented to increase. An increase in age of owner¹, an increase in out of state owners, and an increase in multiple owners all point towards an increase in the amount of land that is rented. There are some mitigating factors, such as increasing age of farmers, mechanization and so forth, nonetheless, one would expect rented acres to increase over time. One dramatic change that has occurred is the method of renting. Basically landowners have one of two types; cash rent or crop share. In 1982, the rented acres were equally divided between cash rent and crop share rent. By 2007, however, this had changed dramatically with 77% of the rented acres now cash rented and 22% crop shared. There appears to be two driving forces towards more cash rent. One is the changing nature of land ownership. An out of state owner is not likely to be interested in being paid a bushel of corn in Iowa (and the percent of land owned by out-of-state owners increased from 6 percent to 21 percent during this period). Similarly the nature of farming is also leading the increase in cash renting. As one person has more landlords it is easier to keep track of a cash rent as opposed to shares. Cash renting land has become so popular that there are actually more acres cash rented than there are acres actually farmed by the owner.

¹ According to a recent land ownership survey conducted by Iowa State University, over half (55%) of the land in Iowa is owned by people over the age of 65. In 1982, only 29% of the farmland was owned by people over 65. As landowners retain ownership later into life, more of that land is farmed by a rental operator rather than an owner-operator.

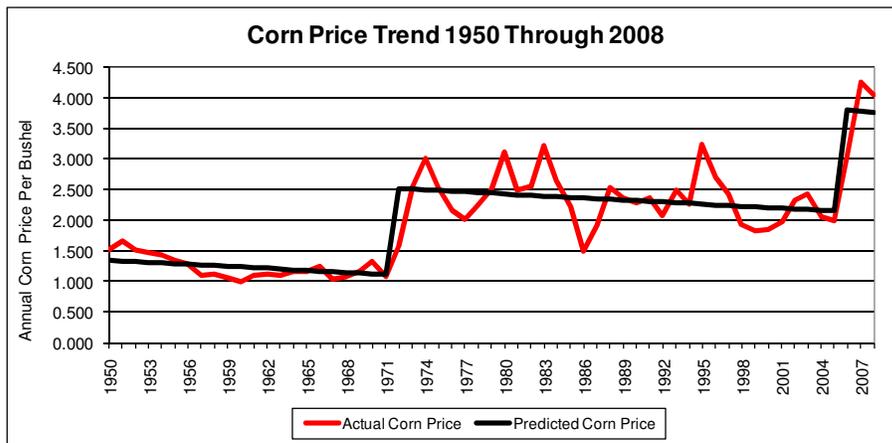
However, industry trends provide substantial evidence of a highly competitive structure in the production and processing sectors. Due to barriers to entry created by regulation and capital requirements, the input sector has become much more consolidated and more able to control price and supply of material needed for crop production. After the advent of hybrid seed corn, a highly competitive seed corn breeding and genetics industry developed. In Iowa there were hundreds of seed corn companies. In the past two decades, the seed corn industry has experienced very significant consolidation with most of the primary genetic material for today's hybrids being controlled by a few large corporations. Similarly, production of nitrogen fertilizer has consolidated to the point that only a few companies control a high percentage of the production and import of fertilizer – with more takeovers and mergers being attempted at this moment.

The distribution network for inputs is less concentrated, but has undergone significant consolidation in the past two decades. In Iowa, a significant amount of inputs such as fertilizer and seed are distributed by farmer-owned cooperatives. By definition, the ownership of a distribution system by customers engaged in highly competitive industry will have difficulty applying significant market power to the detriment of the owner/customers. However, some of the upstream supply market structure bears continued monitoring.

Crop Production

Despite the number of farms decreasing, the price received by farmers for commodities such as corn, soybeans and wheat have remained very responsive to market signals. As a result of high competition, commodity prices actually trend slightly down in nominal terms as technology-supported supply increases tend to outpace demand increases. Figure 8 details the downward sloping nature of commodity process using a 39 year trend.

Figure 8



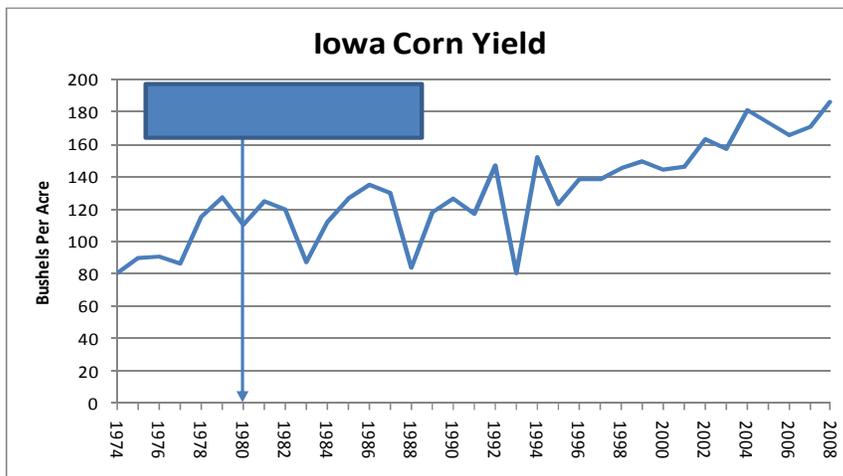
In addition, Chart 6 also illustrates the effect of demand disruptions in shifting the mean price and introduction of additional volatility into the price by market forces. Both the volatility effect and mean shift are apparent twice, first in 1972 and then again from 2006 through the present. However, once these demand shifts are experienced, the commodity price resumes a general downward trend until a new market demand disruption occurs.

Crop Production Inputs

The structure of the seed industry has changed significantly over the past 20 years. First it was a consolidation of firms based on the acquisition of germ plasm and traditional breeding programs followed by a round of consolidation as firms without specific, protected biotechnology traits were acquired by firms with such technology. This resulted in fewer suppliers servicing the market and significant expansion of the market share of the largest seed and genetics firms. As intellectual property law has been established and enforced in agriculture, the seed industry specifically has become more consolidated in outlet sources and more competitive in the field of research and development. Patent protection in the seed industry has allowed the innovators of new technology to put their product on more acres and license technology to competitors. As more market share has been acquired through protection from duplication and licensing technology to competitors, the innovators have gained some power to set higher prices for farmers to pay and extract economic rents from their technology developments. On the other hand, the competition to secure intellectual property rights for the next best-producing seed product has resulted in a steeper increasing yield curve which has been very beneficial to farmers by increasing overall average yields and decreasing yield variation.

Figure 9 demonstrates the 69% increase in yield since the Supreme Court decision to allow patenting of living organisms, much of which occurred once the technology developments spurred by the court decision were approved by regulatory agencies and commercialized.

Figure 9



Another critical point to consider in the seed industry is the existence of competition in the distinct areas of traits as well as germ plasm. While a company like Monsanto may dominate a certain trait such as the Round-up Ready gene, that same gene can be inserted in competitive seeds with different germ plasm to then enter the market as a partial competitor to the fully Monsanto-owned seed. In addition, other seed companies can capture the value of germ plasm traits they develop while offering the Monsanto trait as a package. Iowa State University estimates (table 1) that Monsanto currently sells different traits both directly and through license agreements onto 81% of corn acres and 94.5% of soybean acres.

CORN	2000	2005	2009
Single-Trait Acres	17.2	27.8	14.1
Double-Trait Acres	0.1	13	4.5
Triple-Trait Acres	0	1.3	31.2
RR w/ non-Monsanto traits	0	0.5	20.7
Total Monsanto trait acres	17.3	42.6	70.6 %
of total planted acres	21.8%	52.1%	81.1%
COTTON			
Single-Trait Acres	5.6	3.2	1.2
Double-Trait Acres	4.1	7.7	5.3
RR w/ non-Monsanto traits	0	0	0.7
Total Monsanto trait acres	9.7	10.9	7.1 %
of total planted acres	62.6%	76.8%	78.9%
SOYBEAN			
Roundup Ready	45	66.4	71.7
Roundup Ready 2 Yield	0	0	1.5
Total Monsanto trait acres	45	66.4	73.2 %
of total planted acres	60.4%	92.1%	94.5%

Source: Monsanto (percent values calculated based on USDA planted acres by Iowa State University)

Anti-competitive practices which may develop as a result of the current market structure involve controlling the distribution of traits for the purpose of punishing competitors or forcing farmers pay more for traits they do not want or need as part of their operation. The first practice may appear in the form of unfair contract requirements such as paying a higher premium or influencing product development by not allowing the licensed trait to be included with licensee traits. The second practice is called bundling, in which the price of unwanted traits are included in the price of a package that contains the desired traits or access to the desired traits is bundled with other services or products in a way that stifles competition. In some cases this may be a result of the manner in which the product is developed. However, if there is not a compelling necessity for all of the traits to be included, farmers should be allowed to select their product based on the price for the specific trait(s) they need.

Summary

A critical balance needs to be struck in the seed industry between regulations that would stifle innovation and technology development while enforcing laws against non-competitive market behavior. U.S. farmers need and want efficient, competitive markets. However, care should be taken not to allow one company to create an anti-competitive environment through exclusionary practices (which would seek to control competition through penalization) or all-or-nothing sales packages which force farmers to pay for traits which they do not want or need. However, any enforcement model must take equal care to ensure that innovators are allowed to capture the reward of technology development, thus continuing the incentive for product development and improvement.

Agricultural Marketing and Supply Distribution

The Capper-Volstead Act

Iowa Farm Bureau 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 Capper-Volstead Act is a way for farmers to counteract some of this market-place disadvantage while still addressing the public interest of ensuring the protection of the end consumer of products. We believe 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.”²

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 Capper-Volstead 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 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 asking for alterations to or the elimination of the Capper-Volstead 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.

Farm Bureau believes that the limits that already exist within the Act are, and have proven, 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 modifications of the Act are even considered.

² Congressional Record 1033 (1921).

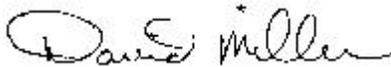
SUMMARY

The members of the Iowa Farm Bureau want strong, competitive, efficient markets that provide access to both inputs and distribution networks which return fair value. Economies of scale and efficient marketing chains are vital to the competitiveness of U.S. products in markets that continue to expand their global reach. Farmers are concerned about market performance that impairs their access to such competitive markets, but farmers are also concerned that regulatory remedies which become burdensome can stifle market innovations and technological advances. Iowa's farmers believe that there is a role for government agencies in providing market performance monitoring and oversight, but it is not the purpose of such oversight to guarantee profits or margins. The purpose of the monitoring and oversight is to provide a structure and benchmarks of performance that enable fair, open markets to function effectively.

Farmer coops are special. The law recognizes the need for farmers to organize into cooperative units that allow for efficient, effective development of marketing and procurement channels. Farmer cooperatives that are organized under such laws should be allowed to be self-governing and self-regulating as long as they do not engage in activities that are specifically banned by the Capper-Volstead Act.

The Iowa Farm Bureau appreciates the opportunity to present these comments.

Sincerely,

A handwritten signature in black ink that reads "David Miller". The signature is written in a cursive style with a small star above the letter 'i' in Miller.

David Miller, Director

Research and Commodity Services

Iowa Farm Bureau Federation

ⁱ Source data for figures 1-9

Figure 1: USDA-GIPSA 2008 Annual Report

Figure 2: USDA-GIPSA 2008 Annual Report

Figures 3 and 4: Livestock Marketing Information Center

Figure 5 and 6: Bureau of Labor Statistics, consumer price index for food and beverages; 1984=100

Figure 7: Bureau of Labor Statistics, producer price index for finished consumer foods: 1982=100

Figure 8: United States Department of Agriculture-Economics Research Service

Figure 9: United States Department of Agriculture-National Agricultural Statistics Service

ⁱⁱ Appendix I: Details of Livestock Margin Trend Analysis

We used the following regression equation to assess market power as expressed by the ability of the processing sector to influence processing margins.

$$6.60 + M_{t-1}(.37) + PPI(.07) + D1999(10.22) - DBSE(3.26)$$

Where:

M_{t-1} = Lagged margin from the previous period

PPI = Production Price Index for finished consumer goods

D1999 = A dummy variable representing the shift to case ready cutting beginning in 1999

DBSE = Period of BSE international trade issues beginning in 2004

Farm to wholesale margin is assumed to be the amount available for processor operating expenses and profits. Therefore, the previous year's margin (M_{t-1}) is used as a proxy for production costs and profits expected by the processor. M_{t-1} is a significant predictor of variation in wholesale margins ($p=.01$). Because the coefficient of this variable is positive, the costs of production can be assumed to be somewhat sticky. However, the coefficient adds only 37 percent of M_{t-1} to current year margins, indicating that there is still variation in the farm to wholesale margin which is not explained by previous costs and profits.

Production Price Index (PPI) variable is significant ($p=.024$). The sign of the PPI variable is positive. Therefore, processors seem to be able to pass inflation in processing costs to the wholesale price and/or to the farm price.

A dummy variable representing the industry shift after 1998 to packers providing case ready processing is significant ($p<.001$) and suggests that the wholesale price data does not completely differentiate between bulk wholesale meats and wholesale meat prices that include some level of further processing or case-ready processing by the primary processing plant.

Variation from the 25-year trend of decreasing herd size is not significant. Therefore, processors are capable of managing the margin through consolidation, cuts/increases in production, plant closure, etc. (ERS, TB-1874). However, margins tend to be managed in a way that maintains a historically consistent margin.

The coefficient of determination (R^2) is .91. Thus, 91 percent of the variation in farm to wholesale margin can be explained by the model. The remaining 9 percent is unexplained random variation.

A similar analysis of the pork processing industry produces even less evidence of the exercise of market distorting power. The approach is modified for pork by removing the factor for BSE and adding a factor for total commercial slaughter.

$$-1.71 + M_{t-1}(-.057) + PPI(-.07) + D1998(7.96) + CS(.00038)$$

Margin from the previous period (M_{t-1}) and PPI show no evidence of being significant predictors of wholesale margin ($p=.71$ and $.25$ respectively). Thus, there is no evidence to suggest that packers are able to pass along to the producers the increases in labor cost, nor any sticky prices in the cost of processing.

The dummy variable representing the shift in processing to case-ready-cutting is significant ($p=.002$). More than anything this result signals the shift of the industry to a new method of operation. In addition, total commercial slaughter is also significant and positive which provides evidence of a highly competitive market which is reliant on fluctuations in supply and demand to set margins. The coefficient of determination (R^2) for this model is .955 indicating that most of the variation in wholesale margins is explained by the variable in the model.