DEPARTMENT OF JUSTICE

STATEMENT

OF

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BEFORE THE

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CONCERNING

ANTITRUST ENFORCEMENT
AND THE MEATPACKING INDUSTRY

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Good afternoon, Mr. Chairman and members of the Committee. I appreciate the opportunity to discuss antitrust enforcement in the agricultural marketplace, and in particular the role of antitrust enforcement in ensuring that the livestock slaughter markets are competitive.

In recent years, agricultural producers and others have expressed concern about competitive conditions in the agricultural marketplace, about the impact on farmers of particular mergers and acquisitions, and about levels of concentration in agriculture generally. We take those concerns very seriously. The Antitrust Division has been very active in recent years in the agriculture industry, and has brought a number of enforcement actions of importance to producers and consumers, some of which I will describe shortly. Antitrust Division officials have also traveled to various places around the country to meet personally with producer groups, and have met and spoken with individual producers and farm organizations and testified at hearings in Washington and in the field to hear producers' concerns directly and to improve everyone's understanding of how the antitrust laws operate. And I am happy to be here today as a part of those efforts.

There are three basic kinds of violations of the antitrust laws. First, the antitrust laws prohibit conspiracies to suppress competition. Second, they prohibit the use of predatory or exclusionary conduct to acquire or hold onto a monopoly. Third, they prohibit mergers that are likely to substantially lessen competition in a

market. The ultimate goal in each instance is to promote competition as a means of ensuring that consumers get the benefit of competitive prices, innovation, and efficiency, free from artificially imposed restraints. I will describe each of these types of violations in a little more detail in a minute.

The antitrust laws apply in the same way in every industry, with a very few exceptions where their application is limited by specific statute; an exception important for agriculture is the Capper-Volstead Act, which permits agricultural producers to market their products jointly through cooperatives. A number of industries are also regulated by government agencies under statutes that go beyond the antitrust laws to establish additional, industry-specific rules for appropriate behavior in the marketplace; for example, the livestock, meat-packing, and poultry industry is regulated by USDA's GIPSA. When I talk about the antitrust laws, I mean the laws that we enforce at the Antitrust Division -- the Sherman and Clayton Acts. I do not include the Packers and Stockyards Act, which is enforced by GIPSA rather than by DOJ. The Packers and Stockyards Act is a fair trade practices and payment protection law that promotes fair competitive environments for the livestock, meat, and poultry industries.

While we often speak of consumers as the targeted beneficiary of antitrust enforcement, producers also benefit, by having healthy incentives to provide the

best products and services they can, with the expectation that they will be able to do so free from anticompetitive interference. And the overall U.S. economy benefits, as the products and services desired by consumers are produced more efficiently, in greater quantities, and at competitive market prices.

In this regard, let me emphasize that we do look at so-called "monopsony" concerns -- the potential for competition to be diminished by anticompetitive conduct or merger at the buyer side that adversely affects sellers. If buyers obtain market power through merger or restrain trade, and thereby depress prices for the inputs they purchase below competitive levels, producers of those inputs will have depressed incentives to produce, which will result in reduced quantities of those inputs available for consumers compared to what would be available in a competitive market. So a focus on promoting competition is entirely compatible with our taking enforcement action in a monopsony case when the facts warrant.

We are very much aware of the trends toward increasing concentration in some agricultural sectors. In particular, the steer-heifer side of the cattle slaughter market has been highly concentrated for some time, with four meatpacking firms now controlling over 80 percent of the market. Lamb slaughter is also quite concentrated. Hog slaughter, and processing for crops such as corn, wheat, and soybeans, are also moderately concentrated, at least at the national level, and may

be more concentrated in some local areas. High concentration in a market is not in and of itself a violation of the antitrust laws. On the other hand, a high level of concentration increases the potential for antitrust scrutiny. It is an important backdrop in all of our analyses.

What the Antitrust Laws Prohibit

A minute ago, I referred to three different types of antitrust violations. Let me state them more specifically. First, it is a violation of section 1 of the Sherman Act for separate firms to agree among themselves not to compete with each other, but instead to join forces against consumers or suppliers. Second, it is a violation of section 2 of the Sherman Act for a firm to monopolize or attempt to monopolize a market. Third, it is a violation of section 7 of the Clayton Act for a firm to merge with another firm or acquire its assets if to do so would be likely to substantially lessen competition in any market. I'd like to describe each of these types of violations in a little more detail, to give you an idea of the kinds of factual evidence we look for to support enforcement action.

Collusion

The first type of antitrust violation, when firms that are holding themselves out to the public as competing against each other instead agree with each other to unreasonably restrain competition among themselves, is often referred to as

collusion. Collusion is a willful subversion of the normal operation of free markets, and can result in serious harm to consumers, suppliers, and the economy. It virtually always results directly in inflated prices to consumers and denial of choices in the marketplace; indeed, that is its purpose. The most common types of collusion are agreements to fix prices, agreements to allocate markets, and agreements to boycott particular customers, suppliers, or competitors.

Price fixing can include agreeing on the specific price, or rigging a specific bid, but it can also include agreeing to increase or depress price levels, or agreeing to follow a formula that has the intended effect of raising or depressing prices or price levels. Allocation of markets can include agreeing to divide up geographic areas to avoid competition, or agreeing to divide up customers or suppliers within an area, or agreeing to divide up a sequence of bids. Group boycotts can include any agreement among competitors that they will deal with their customers or their suppliers only on particular terms in order to suppress competition.

It is important to remember that with any of these forms of collusion, proving a case requires evidence of an agreement among competitors. It is not enough to show merely that two meat packers, for example, bid a similar price, or that some packers go to some auction barns or feed lots and other packers go to other barns or feed lots. What would concern us is if there are additional facts,

such as patterns of bids over time, or patterns of attendance at various auction barns or feed lots, that don't make competitive sense -- that can't be explained as part of normal competitive behavior. Needless to say, if we learned that two or more packers were discussing with each other what price they intend to bid, or which auction barns or feed lots they intend to buy from, we would definitely be concerned.

Let me describe a few collusion enforcement actions we have brought in recent years in the agricultural sector.

Lysine. The first one I'll mention is the Division's criminal prosecution of Archer Daniels Midland and others, beginning in 1996, for participating in an international cartel organized to suppress competition for lysine, an important livestock and poultry feed additive. The cartel had inflated the price of this important agricultural input by tens of millions of dollars during the course of the conspiracy. ADM pled guilty, and was fined $100 million -- at the time the largest criminal antitrust fine in history. Other participating corporations, two Japanese and two Korean firms, were also prosecuted and assessed multi-million-dollar fines. And three ADM executives were convicted for their roles in the cartel; two of them were sentenced to serve 36 and 33 months in prison, respectively, and fined $350,000 apiece for their involvement, and the other executive had 20

months added to a prison sentence he was already serving for another offense.

Vitamins. In 1999 we prosecuted Swiss pharmaceutical giant F. Hoffmann-La Roche Ltd. and BASF Aktiengesellschaft of Germany, for their roles in a decade-long worldwide conspiracy to fix prices and allocate sales volumes for vitamins used as food and animal feed additives and nutritional supplements. The vitamin conspiracy affected billions of dollars of U.S. commerce. Hoffmann-La Roche and BASF pled guilty and were fined $500 million and $225 million, respectively. These are the largest and second-largest antitrust fines in history. Six former executives from the two firms agreed to submit to U.S. jurisdiction, to plead guilty, to serve time in a U.S. prison, and to pay substantial fines for their roles. This investigation has resulted in 24 corporate and individual prosecutions to date, including convictions against Swiss, German, Canadian, Japanese, and U.S. firms, and convictions of 11 American and foreign executives who are serving or have served time in federal prison and another executive who received two years' probation; another executive agreed to plead guilty and is awaiting sentencing.

MCAA. The third enforcement action I'll mention is the Division's prosecution, brought in June 2001 under AAG James' leadership, against Dutch chemical company Akzo Nobel Chemicals BV, along with an Akzo Nobel executive of Swedish citizenry. They were charged with participating in an

international price fixing and market allocation scheme involving the chemicals monochloroacetic acid and sodium chloroacetate -- collectively known as MCAA -- which are used to produce herbicides among other things. The United States consumes $50 million worth of MCAA each year. The company pled guilty and agreed to pay a $12 million criminal fine, and the company executive was sentenced to three months in federal prison and a $20,000 fine. In March of this year, French-based chemical conglomerate Elf Atochem S.A. pled guilty to participating in the same scheme and agreed to pay fines totaling $8.5 million. An Elf Atochem executive also pled guilty, and agreed to serve 90 days in federal prison and pay a $50,000 fine, and two weeks ago another Elf Atochem executive pled guilty and agreed to the same sentence.

Cattle Procurement. On a smaller scale, we also successfully prosecuted two cattle buyers in Nebraska a few years ago for bid-rigging in connection with procurement of cattle for a meat packer, after an investigation conducted with valuable assistance from USDA's GIPSA, which was investigating some of the same conduct under the Packers and Stockyards Act. Both individuals pled guilty and were fined and ordered to make restitution to the victims. This case differed from the others in that the direct victims of the conspiracy included agricultural producers in their role as sellers rather than as consumers. While sellers generally

do not figure prominently as victims of collusion as often as buyers do, the somewhat unusual structure of the agricultural marketplace -- with relatively more producers selling to relatively fewer packers and processors -- presents more possibilities for sellers to be victims. And the Antitrust Division keeps a lookout for violations of this kind and will prosecute them when the facts warrant.

Let me return to the Capper-Volstead Act for a minute. As I mentioned, this law allows producers of agricultural commodities to form processing and marketing cooperatives -- in effect to engage in joint selling at a price agreed to by the producer members of the co-op -- subject to certain limitations enforced in the first instance by USDA.

In that connection, I want to mention efforts in recent years by some cattle producers to organize cooperatives to slaughter and process their own beef for the wholesale market. Not only would such a cooperative most likely be protected under the Capper Volstead Act, but if established meatpackers attempted to drive it out of business by cutting off access to transportation or to wholesale markets, that would raise serious antitrust issues and we would certainly want to investigate.

Monopolization or Attempt to Monopolize

Let me now turn to the second type of antitrust violation, monopolization or attempt to monopolize. In the meatpacking area, monopolization might involve a packer with a monopoly attempting to drive rival packers out of business by

illegally interfering with their ability to engage in the business. Under section 2 of the Sherman Act, it is not necessary to prove an agreement among two or more firms. One firm can illegally monopolize by itself.

But it is important to understand how rarely we see a true case of monopolization. Monopolization means more than just that a firm has engaged in restrictive conduct. It requires that the firm have a monopoly -- and that means an extremely high market share all to itself -- and that it engaged in the restrictive conduct in order to acquire or maintain the monopoly. Or, in the case of attempted monopolization, the firm must stand a "dangerous probability" of acquiring a monopoly as a result of the restrictive conduct. And for a "dangerous probability," the courts generally require, for starters, that the firm involved in the restrictive conduct already have a quite large market share -- a 50-percent share for a single firm might not be enough, a 60-to-70 percent share may be enough, depending on the circumstances. That's not the four-firm combined share familiar to agricultural producers from USDA publications and elsewhere; that's the share for a single firm. And even a large market share might not be enough, if other factors indicate that the restrictive conduct is unlikely to succeed in creating a monopoly.

Just as important, section 2 monopolization means more than just that the market is highly concentrated. Under our antitrust laws, a firm may lawfully have a monopoly, as long as the firm has not acquired it or maintained it illegally. So both things -- very high market share, plus restrictive conduct to exclude competition --

must be present. One or the other by itself is not enough.

Let me emphasize that monopolization requires demonstrating that the conduct is harming competition, not just that it is disadvantaging rivals. It is quite rare that we encounter it. And I don't have any recent cases to cite you in agriculture. But if we ever did find it in agriculture we would take appropriate enforcement action as warranted by the facts.

Mergers

The third type of antitrust violation, a merger or acquisition that is likely to substantially lessen competition in a particular product market and geographic market, has a different legal standard from the other two in that it does not require proof of anticompetitive conduct that has already occurred. Here, the principal focus is not on whether the merging parties have engaged in wrongful conduct, but on whether the merger would change the market structure to such a degree that competition would likely be substantially lessened. The Clayton Act enables us to prevent anticompetitive mergers before they are consummated, to prevent harm to the competitive market structure that would otherwise result but would be difficult to fix after the fact. The remedy we seek for a merger that violates the Clayton Act is to sue to stop the merger, or to insist that it be modified to remove the cause for antitrust concern.

Merger reviews require a careful analysis of the markets involved. The Antitrust Division analyzes mergers pursuant to Horizontal Merger Guidelines developed jointly by the Department of Justice and the Federal Trade Commission. The analysis is aimed at determining whether the merger is likely to create or increase market power, or to facilitate the exercise of market power, in any market. The Merger Guidelines define market power as the ability of a seller or coordinating group of sellers to profitably maintain prices above competitive levels for a significant period of time, or the ability of a buyer or coordinating group of buyers to depress prices below competitive levels and thereby depress output.

An important first step in analyzing a merger is to determine the scope of the product markets and geographic markets that would be affected by it. Once we know the size and shape of an affected market, we can then determine how big the various firms' market shares are, and more accurately predict how that market would be affected by the restructuring that would result from the merger.

The scope of a geographic market is generally defined by the smallest geographic area in which a hypothetical firm, assuming it faced no competition in that area, could make a small but significant change in price stick. Usually, we are looking at that firm as a seller, and determining the smallest area within which the firm's customers would be unable to thwart the firm's inflated pricing by going

outside that area to purchase -- unable to, that is, because it would be economically impractical to travel to or receive shipments from outside that area. But, as our Merger Guidelines expressly note, we also look at the firm as a buyer, and determine the smallest area in which sellers to the firm would be unable to thwart the firm's depressed prices by selling to others outside that area -- unable to, that is, because it would be economically impractical to travel or ship outside that area. (Product markets are defined in a similar fashion, focusing on an array of products rather than a geographic area in order to determine which products are close enough substitutes for each other to be considered in the same market.)

A decision as to the dimensions of a market can sometimes be reached by examining recent buying and selling patterns in the marketplace. But the decision can also depend on a variety of other, more subtle factors, because the ultimate question is not how far the buyers and sellers have traveled or shipped in the past, but how far they could or would travel or ship in response to anticompetitive price changes.

Once we have defined the market, we turn to the question of market concentration and how it would be affected by the merger. There is no automatic threshold of market concentration that will always result in a determination that a merger would violate section 7 of the Clayton Act. Other factors also play an

important role in analyzing the impact of the merger -- such as other features of the market that make anticompetitive effects more likely or less likely; and the ease or difficulty of entry into the marketplace by new competitors who could neutralize any anticompetitive potential.

But market concentration is the first factor we look at, because as a market becomes highly concentrated, not only are price fixing and other collusion easier to coordinate; there is also a dampening effect on competitive rivalry, even in the absence of collusion.

In the recent past, the Antitrust Division has carefully reviewed a number of mergers in the agricultural sector, including mergers among meatpackers. Virtually all of the increase in market concentration among competing steer-heifer packers since 1988 has resulted from internal growth rather than acquisition. In 1993 and 1994, however, we received reports that Cargill's large meat-packing subsidiary Excel was looking into acquiring Beef America. Both of these packers were in the top five, and our concerns that competition might be adversely affected by the merger led us to open an investigation. We aggressively questioned Excel and others in the marketplace, clearly communicating our concerns. A Cargill executive has publicly stated that our investigation convinced them to abandon the merger.

While we have not openly challenged any meatpacking mergers recently, we look carefully at each of them. And we have challenged a number of transactions involving other agricultural products or inputs that would have otherwise harmed producers.

Monsanto/DeKalb. The first merger challenge I'll describe is the 1998 challenge to Monsanto's proposed acquisition of DeKalb Genetics Corporation, which would have significantly reduced competition in corn seed biotechnology innovation to the detriment of farmers. Both companies were leaders in corn seed biotechnology and owned patents that gave them control over important technology. We expressed strong concerns about how the merger would affect competition for seed and biotechnology innovation. To satisfy our concerns, Monsanto spun off to an independent research facility its claims to agrobacterium-mediated transformation technology, a recently developed technology used to introduce new traits into corn seed such as insect resistance. Monsanto also entered into binding commitments to license its Holden's corn germplasm to over 150 seed companies that currently bought it from Monsanto, so that they would be free to use it to create their own corn hybrids if they chose.

Cargill/Continental. In 1999 we challenged the proposed acquisition by Cargill of Continental's grain business, which would have significantly reduced

competition in the purchase of grain and soybeans from farmers in a number of local and regional markets. The parties were buyers of grain and soybeans in various local and regional domestic markets, and also sellers of grain and soybeans in the United States and abroad. We concluded that the proposed merger could have depressed prices received by farmers for grain and soybeans in a number of regions of the country; we were also concerned that the transaction could have had anticompetitive effects with respect to certain futures markets.

To resolve our competitive concerns, Cargill and Continental agreed to divest a number of facilities throughout the Midwest and in the West, as well as in the Texas Gulf. We insisted on divestitures in three different geographic markets where both Cargill and Continental operated competing port elevators: (1) Seattle, where their elevators competed to purchase corn and soybeans from farmers in portions of Minnesota, North Dakota, and South Dakota; (2) Stockton, California, where the elevators competed to purchase wheat and corn from farmers in central California; and (3) Beaumont, Texas, where the elevators competed to purchase soybeans and wheat from farmers in east Texas and western Louisiana.

We also required divestitures of river elevators on the Mississippi River in East Dubuque, Illinois, and Caruthersville, Missouri, and along the Illinois River between Morris and Chicago, where the merger would have otherwise harmed competition for the purchase of grain and soybeans from farmers in those areas.

This relief was designed to ensure that farmers in the affected markets would continue to have alternative buyers to whom to sell their grain and soybeans. In this case, the focus of the competitive problem was the so-called "monopsony" concern -- that is, that the merger would harm producers as *sellers*.

Case/ New Holland. Next I'll describe our 1999 challenge to New Holland's proposed acquisition of Case Corporation, which would have significantly reduced competition in the sale of tractors and hay tools to farmers. The parties manufactured and sold four-wheel- and large two-wheel-drive tractors (the Versatile and Genesis lines, respectively) that are used by farmers for a variety of applications, including pulling implements to till soil and cultivate crops. They also manufactured and sold a variety of hay and forage equipment, including square balers and self-propelled windrowers. We concluded that the transaction would significantly lessen competition and lead to farmers having to pay higher prices and accept lower quality for this essential equipment.

The parties agreed to significant divestitures in order to address our concerns. Those divestitures included New Holland's large two-wheel-drive agricultural tractor business, New Holland's four-wheel-drive tractor business, and Case's interest in a joint venture that makes hay and forage equipment.

Monsanto/ Delta & Pine Land. In 1999 we challenged Monsanto's proposed acquisition of Delta & Pine Land, which would have significantly

reduced competition in cotton seed biotechnology. The merger would have combined the two largest cotton seed companies, which we concluded would have anticompetitively harmed farmers raising cotton. Monsanto abandoned the proposed acquisition after we advised that we were prepared to challenge the merger in court.

Suiza Foods/ Dean Foods. Finally, let me describe our challenge last December to Suiza Foods' proposed acquisition of Dean Foods. After an extensive investigation, we required Suiza Foods to change its originally proposed acquisition of Dean Foods in two significant ways. First, we required Suiza to divest 11 milk processing plants in 8 states (Alabama, Florida, Indiana, Kentucky, Ohio, South Carolina, Virginia, and Utah) to preserve competition in markets for milk sold at school and at other retail outlets. Second, we required Suiza to modify its supply contract with the cooperative Dairy Farmers of America Inc. (DFA), who would also own half interest in National Dairy Holdings, L.P., the new firm to which the processing plants were being divested, to ensure that dairies owned by the merged firm in the areas affected would be free to buy their milk from sources other than DFA.

Taken as a whole, these enforcement actions provide a good picture of our merger enforcement efforts in agriculture-related industries. The Antitrust Division carefully reviews agricultural mergers for their competitive implications,

and files suit if a merger is likely to lead to anticompetitive prices -- whether anticompetitively high prices for products purchased by farmers, or anticompetitively low prices for products sold by farmers. The Division's concerns are not limited to traditional agricultural products, but extend also to biotechnology innovation. And, while the Division is open to proposed restructuring that can enable the rest of the merger to proceed, the Division is prepared to challenge a merger outright if necessary to address the competitive problems.

Coordination with USDA and Others

The Antitrust Division has a long-standing cooperative relationship with USDA, through which we have provided assistance to each other in a number of respects. Division attorneys and economists investigating particular mergers have made extensive use of the wealth of information about agricultural markets that USDA collects in the ordinary course of its work. USDA has also contacted the Division to provide other useful information regarding major agriculture-related mergers we were investigating, and has forwarded investigative leads to the Division, such as the one resulting in the prosecution of the two cattle buyers in Nebraska for price-fixing. The Division has assisted USDA by consulting on studies USDA has conducted regarding competition-related aspects of agricultural markets, such as the red meat studies a few years ago, as well as on USDA's recent

efforts to revise its investigative processes at the Grain Inspection, Packers and Stockyards Administration.

In August 1999, the Division entered into a memorandum of understanding with USDA, along with the FTC, to memorialize this working relationship and to reaffirm our commitment to work together and exchange information as appropriate on competitive developments in the agricultural marketplace.

Last year Assistant Attorney General James designated the Assistant Chief of the Chicago Field Office to be a special point of contact for USDA for criminal matters. The Assistant Chief maintains regular contact with USDA's Office of the General Counsel and Office of the Inspector General. In addition to receiving and responding to inquiries and complaints from USDA relating to potential criminal violations of the antitrust laws, the Assistant Chief conducts antitrust detection training sessions for agents of USDA's Office of the Inspector General.

The Antitrust Division also works with other relevant federal agencies and state attorneys general on specific matters of common interest. For example, the Division worked closely with the Commodities Futures Trading Commission and several states during the investigation of the Cargill/Continental merger.

Role of Antitrust Division in the Agricultural Marketplace

Let me close with a few caveats about antitrust enforcement. The responsibility entrusted to us as enforcers of the antitrust laws is not to design the

best possible structure for the marketplace. The antitrust laws are based on the notion that competitive market forces should play the primary role in determining the structure and functioning of our economy. Our job is to stop the specific kinds of private-sector conduct I listed at the beginning of my testimony from interfering with those market forces.

We are law enforcers, not regulators. We do not have the power to restructure any industry, any market, or any company, or to stop any practice, except in a precise and focused fashion as necessary to prevent or remedy specific violations of the antitrust laws that we can prove in court. Our authority rests ultimately on our ability to bring enforcement actions in court, and when we bring an action, it is the court that decides whether the antitrust laws are being violated in the particular instance, and whether the remedy we are seeking fits the violation. And the court's decision depends on the particular facts in evidence. Therefore, we bring an enforcement action in court only when we are in possession of factual evidence that gives us good reason to believe that there is an antitrust violation.

While the antitrust laws play an important role in helping keep markets competitive, they are not going to, and should not be expected to, address all of the complex issues facing American agriculture in this time of change. That is why the government continues to focus on a broad range of agriculture policy issues.

Conclusion

Mr. Chairman, as I do whenever I make a presentation such as this one about our work, I would like to urge anyone who believes they have information that could be relevant to our enforcement activities to contact us. As a law enforcement agency, we treat conversations with us in confidence. If the information leads us to conclude that the antitrust laws have been violated, we will take appropriate enforcement action. We take seriously our responsibility to protect the marketplace --including the agricultural marketplace -- against anticompetitive conduct and against mergers that substantially lessen competition. As I hope I have made clear, the Division has a record of acting in this important sector when the antitrust laws are violated.

I would be happy to try to answer any questions the Committee may have.