DEPARTMENT OF JUSTICE

Statement

of

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Introduction

I am pleased to be here this morning to explain the role of the federal antitrust laws and the Justice Department's Antitrust Division with regard to protecting competition in the agricultural sector of our economy.

There have been a number of occasions recently in which agricultural producers and others have expressed concern about how the agricultural marketplace is functioning, about the levels of concentration in agriculture generally, and about possible anticompetitive conduct in certain sectors. We take these concerns very seriously.

By any measure, we have spent a significant amount of time, energy, and resources on agriculture issues in the recent past, and have brought a number of significant enforcement actions. I personally spend a significant amount of time on these issues.

Today, I want to briefly describe the situations that the antitrust laws address, and then discuss a number of the enforcement actions we have taken. The antitrust laws prohibit conspiracies to deny market access or otherwise suppress competition. They also prohibit the use of predatory and/or exclusionary conduct to acquire or hold on to a monopoly in a market. And they prohibit mergers that are likely to substantially lessen competition in a market.

We know the agriculture marketplace is undergoing significant change. There are advances in technology, productivity, and in many sectors, a trend towards consolidation. In the midst of these changes, the Antitrust Division has a narrow but important role. The antitrust laws are based on the notion that competitive market forces should play the primary role in determining the structure of our economy. Our job is to stop the specific kinds of private-sector conduct I mentioned a minute ago from interfering with those market forces.

The primary beneficiary of antitrust enforcement is the consumer, who receives better quality, increased innovation, and lower prices when competition is not interfered with. But antitrust enforcement also benefits the producers and marketers who want to compete in supplying products and services to consumers by enabling them to do so free from anticompetitive interference. And the overall U.S. economy also benefits, as the products and services desired by consumers are made available in greater quantities through a better allocation of resources, and at competitive market prices.

We are law enforcers, not regulators. We do not have the power to restructure any industry, any market, or any company, or stop any practice, except to prevent or cure specific violations of the antitrust laws that we can prove in court. Our authority rests ultimately on our ability to bring enforcement actions.

And when we bring an action, the court decides whether the antitrust laws are being violated in the particular instance, and whether the remedy we are seeking fits the violation.

The antitrust laws apply in the same way in every industry, with a very few exceptions where their application is limited by specific statute. A number of industries are also regulated by government agencies under statutes that go beyond the antitrust laws to establish additional, industry-specific regulatory requirements and standards. For example, the meat-packing industry is regulated by USDA's Grain Inspection, Packers and Stockyards Administration.

While the antitrust laws play an important role in helping keep markets competitive, they will never 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.

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 their consumers or their 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, and give you an idea of how we approach each of them.

1. 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, or depressed prices to suppliers, and in 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.

This summary of course oversimplifies the full range of Section 1 violations. There are other kinds of such violations where the anticompetitive intent and effect may be less clear-cut. But all section 1 violations share the same basic characteristic, that firms who are supposed to be independent actors in the marketplace are instead agreeing to join forces to restrain competition.

It is important to remember that with any of these forms of collusion, proving a case requires evidence of an agreement between the firms in question. It is not enough to show merely that two agribusiness firms, for example, bid the same price for a commodity, or that one tends to buy in one area and another tends to buy in another area. What would concern us is if there are additional facts, such as patterns of bids over time, or patterns of attendance at various sales or auctions, that don't make competitive sense -- that can't be explained as part of normal competitive behavior. Needless to say, if we obtained reliable evidence about two firms discussing with each other what price they intend to bid or accept, or where

they plan to focus their buying or selling, we would definitely be concerned and look into it.

Let me mention three collusion cases we have brought in the recent past. The first one I'll mention is our criminal prosecution against 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, now the third largest. Other participating corporations have also been prosecuted and assessed multi-million-dollar fines. In addition, three ADM executives were convicted for their personal roles in the cartel; earlier this month, two of them were sentenced to serve two years in prison 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.

The second collusion case I'll mention is our prosecution of the Swiss pharmaceutical giant, F. Hoffmann-La Roche Ltd., and a German firm, BASF Aktiengesellschaft, for their roles in a worldwide conspiracy, over the course of nine years, to raise and fix prices and allocate market shares for certain vitamins

sold in the United States and elsewhere. The conspiracy affected $5 billion in U.S. commerce, involving vitamins used not only as nutritional supplements and food additives, but also as additives in animal feed. On May 20 of this year, the two firms agreed to plead guilty, with Hoffman-La Roche to pay a fine of $500 million and BASF to pay a fine of $225 million. These are the largest and second largest antitrust fines in history -- in fact, the $500 million fine is the largest criminal fine of any kind in history. A former Hoffmann-La Roche executive also agreed to submit to U.S. jurisdiction, to plead guilty to participating in the conspiracy and lying to Justice Department investigators about it, and to serve a four-month prison term and pay a $100,000 fine. These prosecutions are part of an ongoing investigation of the worldwide vitamin industry in which there have been nine prosecutions to date.

The third collusion case I'll mention is a much smaller case in monetary terms than the first two; but it is an important one for agricultural producers nonetheless. In December 1997, as the result of an investigation conducted with valuable assistance from USDA, who was also conducting its own investigation under the Packers and Stockyards Act into some of the same conduct, the Department criminally prosecuted two cattle buyers in Nebraska for bid-rigging in

connection with the procurement of cattle for a meat packer. Both individuals pled guilty and were fined and ordered to make restitution to the victims.

Before I leave collusion, I should mention an important exception to the prohibition against agreements to restrain competition, found in the Capper-Volstead Act. 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.

2. Monopolization or Attempt to Monopolize

Let me now turn to the second type of antitrust violation, monopolization or attempt to monopolize, which is a violation of section 2 of the Sherman Act. For various reasons, this type of antitrust violation occurs less commonly than collusion, but it is also a serious willful subversion of the free marketplace. An example of monopolization or attempt to monopolize would be a dominant company in the market attempting to drive its competitors out of business by interfering with their ability to engage in the business. This might be attempted by the clearly dominant firm refusing to buy from producers who sell to any of its competitors, or refusing to ship with transportation companies who ship for any of its competitors, or refusing to sell to distributors or retailers who handle the

products of any of its competitors -- if the dominant company in question had enough market power that these refusals would have anticompetitive effects. Monopolization does not require proof of an agreement among two or more firms; one firm can illegally monopolize by itself.

But it is important to understand that monopolization cannot be proved just by showing that a firm has engaged in restrictive conduct. The law also requires proof that the firm has a monopoly -- and that requires 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, it must be proved that the firm has a "dangerous probability" of acquiring a monopoly as a result of the restrictive conduct. And to prove "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. And even a 60-to-70 percent market share might not be enough, if other facts indicate that the restrictive conduct involved is unlikely to succeed in creating a monopoly.

Just as important, section 2 monopolization cannot be proved just by showing that the market is highly concentrated. Under our antitrust laws, a firm may lawfully have a monopoly -- even 100 percent of the market -- as long as the

firm has not acquired or maintained that monopoly through the kind of restrictive conduct I described a minute ago, but rather, in the words of Judge Learned Hand, "by virtue of superior skill, foresight and industry."

So both elements -- very high single-firm market share, plus conduct to exclude competition -- must be proved. One or the other by itself is not enough.

3. 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 that anticompetitive conduct has already occurred. Here, the principal focus is not on the conduct of the merging parties, but on whether the merger would change the market structure to such a degree that competition would likely be substantially lessened. 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. Market power is the ability of a firm to raise the price charged to customers -- or to lower the price paid to suppliers -- a small but significant amount without that move being defeated by counteractive competitive responses by other competing firms moving in to take away those customers or suppliers.

Before we get to that analytical step, however, we must first go through the exercise of determining the scope of the product markets and geographic markets that would be affected by the merger. This is an essential first step in our analysis -- until we know the size and shape of the market, we cannot know how big any firm's market share is, for example. The scope of a market is generally defined by the smallest geographic area in which a hypothetical firm, assuming it faced no competition for its product 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 for their buying needs. 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 -- that is, because it would be economically impractical to travel or ship outside that area.

A decision as to the dimensions of this area 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 structural 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. We would also consider the impact of any demonstrable efficiency gains from the merger that would demonstrably result in competitive benefits.

In the recent past, we have reviewed a number of proposed mergers and acquisitions in the agricultural marketplace.

For example, in the biogenetics area, last year we investigated Monsanto's acquisition of DeKalb Genetics Corporation. 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 to satisfy our concerns, Monsanto spun off its claims to agrobacterium-mediated transformation technology, a recently developed technology used to introduce new traits into corn seed, such as insect resistance, to the University of California at Berkeley. Monsanto also entered into binding commitments to license its Holden's corn germplasm to over 150 seed companies that currently buy it from Monsanto, so that they can use it to create their own corn hybrids.

As you know, we had the proposed Cargill/Continental Grain merger under review for several months, and earlier this month we challenged the merger as originally proposed and filed a complaint and proposed consent decree in court. To resolve our competitive concerns, Cargill and Continental will divest a number of grain facilities throughout the Midwest and in the West, as well as in the Texas Gulf. While this consent decree, if approved by the court, will resolve the competitive problems, it is still pending before the court under a Tunney Act proceeding in which the court makes the final determination that the decree is in

the public interest. Because the case is still pending, there are limits to what I can say now, but a fair bit about the case is already in the public record in our filings thus far.

Cargill and Continental operate nationwide distribution networks that annually move millions of tons of grain and soybeans to customers throughout the U.S. and around the world. We looked at all the markets that would be affected by the merger, and concluded that in a number of them, competition would be adversely affected if the assets of the two firms were merged. In this case our concerns were focused on competition among the two firms in the so-called "upstream" markets -- competition for the purchase of grain and soybeans from farmers and other suppliers. The lessening of competition resulting from the merger would have resulted in farmers being anticompetitively forced to accept less money for their major crops than before the merger.

Among the required divestitures, we insisted on divestitures in three different markets where both Cargill and Continental currently operate competing port elevators, to preserve the competition that currently exists there: (1) Seattle, where the elevators now compete to purchase corn and soybeans from farmers in portions of Minnesota, North Dakota, and South Dakota; (2) Stockton, California, where the elevators now compete to purchase wheat and corn from farmers in

central California; and (3) Beaumont, Texas, where the elevators now compete to purchase soybeans and wheat from farmers in east Texas and western Louisiana. In addition to benefitting farmers and other suppliers in the above-mentioned states -- who can be said to be captive to the elevators involved -- the required divestitures may also benefit farmers and other suppliers in Illinois, Iowa, Nebraska, Missouri, Kansas, Oklahoma, Colorado, and New Mexico, who, while not necessarily captive to the elevators involved, nevertheless rely on them as competitive alternatives.

We are also requiring 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.

In the case of the Illinois River divestitures, and an additional required divestiture of a port elevator in Chicago, the merger would also have anticompetitively concentrated ownership of delivery points that have been authorized by the Chicago Board of Trade for settlement of corn and soybean futures contracts. The delivery points would then have been under the control of Cargill and one other firm, which would have increased the risk that prices for CBOT corn and soybean futures contracts could be manipulated. These required

divestitures will address this concern regarding adverse effects on competition in the futures markets.

In addition, we are requiring divestiture of a rail terminal in Troy, Ohio, and we are prohibiting Cargill from acquiring the rail terminal facility in Salina, Kansas, that had formerly been operated by Continental, and from acquiring the river elevator in Birds Point, Missouri, in which Continental until recently had held a minority interest, in order to protect competition for the purchase of grain and soybeans in those areas.

And we are also requiring Cargill to enter into what is called a "throughput agreement" to make one-third of the loading capacity at its Havana, Illinois, river elevator available for leasing to an independent grain company, and are imposing restrictions on Cargill in the event it seeks to enter into a throughput agreement with the operator of the Seattle facility.

I should note that we received valuable assistance in our review of the Cargill/Continental merger from the U.S. Department of Agriculture, as well as the Commodity Futures Trading Commission, and several state attorneys general.

We have also reviewed a number of mergers in the meatpacking area. In 1993 and 1994, for example, we received reports that Cargill's large meat-packing subsidiary Excel, the second largest steer/heifer packer next to IBP, was looking

into acquiring Beef America, at the time the fifth largest steer/heifer packer. As a result of our concerns that competition might be adversely affected by the increased concentration in steer-heifer that would result from this merger, we opened an investigation and began asking questions of Excel and others in the marketplace. Excel never put forth a formal proposal, and we were ultimately able to close our investigation.

Before I conclude my discussion of merger enforcement, I want to mention railroad mergers, such as the merger approved in 1996 between Union Pacific and Southern Pacific. Because rail transportation is one of the primary means of getting agricultural produce to market, the competitive effects of these mergers are also of great importance to the farming community. Unfortunately, we do not have authority to review rail mergers in the ordinary fashion under the antitrust laws.

Initially, Congress gave the authority to review rail mergers to the Interstate Commerce Commission. When Congress abolished the ICC in 1995 and created the Surface Transportation Board to take over some of the ICC's authority, we and others in the Administration urged Congress to turn over review of rail mergers -- at least their competitive implications -- to the antitrust enforcement agencies. The decision was made instead to leave that responsibility with the Surface Transportation Board, and to give the Justice Department a more limited advisory

role. That is, we can make recommendations to the Board. The Board is required to give our recommendations "substantial weight," but is not required to follow them.

We recommended that the Board deny the Union Pacific/ Southern Pacific merger, because we were concerned that it would significantly harm competition in numerous markets west and south of Chicago all the way to the Pacific Ocean and the Gulf of Mexico. The Board approved the merger. Many parties have continued to express competitive concerns about the merger since then.

Conclusion

The Antitrust Division takes seriously its responsibility to protect the marketplace -- including the agricultural marketplace -- against anticompetitive conduct and 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.

Thank you, Mr. Chairman and members of the Committee. I'll be happy to respond to questions at the appropriate time.