Testimony of

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August 23, 2002

I am honored to have been asked to offer my views on the need for restoring fair and open competition in the livestock markets. In the last four years, I have been particularly interested in issues involving competition in agriculture. I have been an invited witness at Congressional hearings including an appearances before the Senate Agriculture Committee, the Senate Judiciary's Subcommittee on Antitrust, Business Rights and Competition, and the Subcommittee on Agricultural Appropriations to discuss competition issues in agricultural markets. I have also been an invited participant in several events sponsored by the U. S. Department of Agriculture including the Public Forum on Captive Supplies, held in Denver, Colorado on September 21, 2000.

In 2000, I published an article in the Wisconsin Law Review: Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy, 2000 Wis L. Rev. 531. The central thesis of that article was that there are serious problems of market failure in agriculture directly related to the high and increasing levels of concentration in the industries buying from and supplying farmers and ranchers. I urged increased antitrust enforcement and also suggested legislative action in addition to antitrust enforcement was essential to restoring competition in agricultural markets. The goal of legislation should be to facilitate the operation of a dynamic market process that is efficient, transparent, open and fair.

Farmers are poorly served by existing market structures and practices both as producers and as buyers. The range of competitive market problems confronting farmers and ranchers today extend from the unnecessarily restrictive contracts for the purchase of genetically modified seed and the limited competition in many equipment markets to the excessive concentration in most of the industries buying and processing agricultural products including those in meat, grain and dairy. The existence of concentrated markets creates the incentive and the capacity for such firms to engage in conduct aimed at exploiting those participants with limited options and to entrench existing market power against the threat of deconcentrating and effective competition.

Free and open markets are generally the best institutional structure for achieving all the important goals of economic policy: efficiency, dynamic growth, equitable allocation of resource, opportunity for all participants. Economists and policy makers have also long recognized that markets are not inherently fair, efficient or open. Where markets are unconcentrated, there are many buyers and sellers, and there is a strong tendency for efficient, workable and fair methods to develop as the inevitable outcome of the interaction of many participants all seeking a neutral and open market place.

But no such inherent tendency exists in markets where a substantial difference in size between buyers and sellers exists and the market is also highly concentrated, i.e., there are few firms altogether on one side. Also, if one side has significant and persistent advantages in information or some other important element related to the transactions between buyer and seller, then too such a market is unlikely to experience much pressure for desirable conditions. There is a grave danger that such markets will be shaped by strategic conduct that frustrates the goals of an efficient, open, fair and accessible marketplace. This in turn imposes immediate burdens on the disfavored class of participants and ultimately on consumers and the economy as a whole as less efficient production and market transactions take place. When markets lack such inherent tendencies to desirable conditions, the law can play a vital role in defining rules for the participants that reduce their capacity to engage in strategic conduct and restore greater balance between the parties. The statute books contain many such laws including ones regulating credit, insurance, product safety, job safety, franchising of various kinds (e.g., gas stations, fast food, automobile dealerships), energy markets and, of course, securities markets.

It is true that in the last two examples we have seen massive regulatory failure. Enron and others were able to game the regulatory system in both gas and electricity, and Enron, Worldcom, and others lied about their income and profits in direct violation of existing law regulating publicly traded companies. For different reasons, both energy and public capital markets are very vulnerable to strategic conduct. Over the last 30 years, this country has gone through both a process of moving away from strict utility regulation in order to get the benefits of the market for consumers and a parallel effort to rewrite the regulation of capital markets to ease the burdens on those enterprises that participate in these markets. Unfortunately, in both cases, the process was flawed. Profit seeking energy firms and their managers have exploited the flaws in the new market regulations for their own gain to the great detriment of users of energy including farmers and ranchers. Managers and some of their close friends as a result of the false accounting have also profited greatly from the inflated value of the stock and stock options they held.

We are witnessing today a renewed awareness that such markets require well crafted and effectively enforced rules to ensure that the market process works in the best interest of the general public, producers, investors, and consumers. Such regulation does not replace the market. It seeks to facilitate its operation by ensuring that all participants have reasonable information, equitable treatment, and access.

It has been, I think, the genus of our economic system that we have over time preferred, whenever its is feasible, market facilitating regulation to governmental command and control of economic activity. Professor John McMillan of the Stanford University Business School has just published a very interesting book on the market process, Reinventing the Bazaar: A History of Markets (Norton, 2002). This book aimed at the general reader explains in convincing detail why markets are so effective and important. The author also emphasizes that for markets to fulfill their social function they must be competitive and equitable. Participants must have good information and access. Further, he emphasizes, as I have, the importance of government regulation in ensuring that markets remain open, balanced and fair when they are otherwise vulnerable to strategic conduct and self-seeking manipulation. Where one side or the other has special advantages, there will be an entirely understandable tendency to exploit that advantage. The role of law is to restore balance and facilitate the ongoing effectiveness of the market.

The focus of this hearing is on the questions of whether packers are abusing their market power and, if so, what can and should be done about it to restore open and competitive markets. My brief answers are that there is strong evidence of abuse: discrimination among producers, conduct strategically aimed at exploiting and entrenching market power. The harder problem is how to restore a fair, open, equitable and accessible market. Antitrust law can and should make an important contribution especially when other agencies of government having more relevant powers lack the political will and institutional capacity to act. Indeed, antitrust law provides tools that can deal with some, but not all, of the problems that exist in facilitating a fair, open and accessible market in livestock. But in the contemporary enforcement world and given the inherent limits to antitrust law and its enforcement, market specific laws that limit or eliminate

opportunities for specific kinds of strategic behavior are essential to achieving improved market behavior in a timely and effective way. Such rules can constrain strategic and opportunistic behavior by packers and facilitate a more open, accessible and efficient market for livestock.
I want to discuss with you, first, the kinds of problems that exist in the contemporary market for livestock. Second, I will discuss the potential for antitrust law to deal with those problems. Are Livestock Markets the Target of Strategic Conduct Having Adverse Effect on Farmers and Consumer?

The initial point that needs re-emphasis is that the markets for livestock, especially for the purchase of livestock, are highly concentrated. The four dominant firms in beef handle about 80% of all the steer and heifer slaughter. The level of concentration in pork is lower, but growing. More importantly, for any farmer there are very few choices-rarely more than two and often only one-for potential buyers. Thus, buying side concentration is substantially greater than selling side concentration which is the conventional measure.
High buying side concentration invites the kind of market price manipulation that we have recently seen in energy markets in California. Participants, especially those operating at more than one level (e.g., selling natural gas and electricity produced by the use of gas), had the opportunity and incentive to drive up prices enormously. The regulatory system seeking a competitive and open market was not able to identify and regulate the strategic conduct that was occurring. Only now are both state and federal regulators figuring out how the dominant firms exploited the market. The same opportunities exist in meat packing. Large firms buying livestock in largely non-competitive environments have the opportunity to manipulate prices to exploit farmers and ranchers. Eventually, this will drive many producers from the market. At that time, the packers will seek foreign imports and increase prices further.
The large packers led by Tyson are also entering into various kinds of special relationships with the increasingly concentrated grocery industry. Among the kinds of relationships being created are ones involving "slotting" fees in which the food processor pays for special access to the retail chain. This forecloses smaller firms from access and thus makes competition and deconcentration of these industries more difficult. Another growing and worrisome trend is the designation by a retailer of a leading firm in a class of grocery as a category captain. The captain then controls the selling of the particular category of food for the entire chain-setting prices, designating the brands to be offered, regulating access to specials or other competitive initiatives. This method of doing business is coming into meat as branding becomes more important in this area. There is a symbiotic relationship between the increasingly concentrated buying power of the retail chains and the buying power of the packers. In combination they will have a mutual interest in suppressing new competition at both levels. Resolving these competitive concerns would take us beyond the scope of this hearing, but it is suggestive of the range of competitive problems that exist.
The other recent lesson from the business world is that some large firms tend to have a culture of lawlessness. Enron not only manipulated the market for energy, it also engaged in significant deception of its shareholders and creditors by making false financial statements. Worldcom, Global Crossings, and Quest, each a major firm in its field, also engaged in comparable lawless behavior. In the meat packing business, we have recently had violations of food safety, employment and accounting requirements. Moreover, there is a long history of market exploitation by these firms and their predecessors. The beef trust was one of the inspirations for the Sherman Act. Early antitrust litigation featured a number of successful challenges to the

anticompetitive conduct of the industry. After World War I, the industry was the target of a major FTC study that documented its lawless behavior; the Department of Justice brought an antitrust suit that resulted in a major consent decree that restructured the industry and forbad the surviving firms from engaging in certain businesses in an effort to restore competition; and, of course, Congress adopted the Packers and Stockyards Act (PSA), one of the most sweeping authorizations to regulate a market to promote and protect fair and open competition on the books. The subsequent legal history shows a massive resistance to the decree by the packers and their continued efforts to avoid both its commands and those of the PSA. This historical record and contemporary behavior in other areas is highly suggestive that the culture of this industry is lawless. The central implication is that meat packers are likely to engage in abusive conduct if they can.

When I was reviewing materials about the operation of the beef slaughter markets in connection with the Public Forum on Captive Supplies (Denver, September 21, 2000), I was immediately struck by the inequitable treatment of feedlot operators. If the operator had an arrangement with a meat packer (captive supply agreement), then the operator got significantly more favorable terms than the operator down the road with the same quality of beef who was not so favored. Some economists argued that the evidence supported the claim that the manipulation of captive supplies only slightly effected day to day cash market prices. To me that was the tip of the tail of this dog. The real problem was and is that only favored producers have the opportunity to get the higher prices. This undermines two important goals of a workable market: access and equitable treatment. Surprisingly, economists other than Professor Taylor of Auburn have paid little attention to the implications of this record of discrimination.

There is also good reason to be concerned that the "higher" prices received by the favored feedlots are only relatively higher when compared to the concurrent cash price. Thus, the deeper danger is that the total mix of prices is manipulated downward by the trade off between captive and cash purchases. This strategy is feasible only in concentrated markets where competition from new entrants or marginal firms will not disrupt the scheme.

In addition, some packers were setting the prices for their captive supply price based on the cash price being paid at their own facilities at the time the captive supply was delivered. The packers have the capacity to schedule the delivery of the captive supply and so can match scheduled delivery with the prices they simultaneously pay in the cash market. The incentive to manipulate prices is obvious, and there is no legitimate business justification for the practice. Two years ago, there was a consensus among those of us participating in the Denver Forum that this practice should be banned under the PSA. Regrettably, the Department of Agriculture has yet to adopt such a regulation. This is one of the most conspicuous examples of the failure of the regulatory authorities to facilitate open and fair competition.

Assuming, as many predict, that longer term contracts with various quality specifications are going to replace most or all of the cash market, it should be obvious that there are complex issues to be resolved on how such transactions would work. In particular, how will prices be set once the cash market is largely or entirely gone? When and how will a seller be able to substitute comparable livestock from another source to fulfill a contract? How can access for all qualified producers be maintained when most or all purchases are made via a contract system? It would seem to me to be foolish indeed to allow the packers unilaterally to establish the terms and conditions for this emerging contractual system. The packers necessarily will consider primarily their own economic self interest and potential for strategic gain. The farm community groups and the legislators from farming areas should be at the forefront of insisting on the development of an appropriate, fair set of rules within which these new marketing relationships can develop.

Packer ownership of livestock is a particularly hot topic currently. It is an extreme form of captive supply and the element most fully manipulable. Moreover, such ownership contributes little or nothing to the more efficient operation of the packers. Any legitimate needs can satisfied through other types of contractual relationships. It is, as we all know, only part of the totality of captive supply. Because the exact numbers of both packer owned livestock and those under contract are not available nor do the packers disclose information about the timing for delivery of these cattle, there is substantial capacity to manipulate both short term and long term market prices for both cattle and hogs under contract and those sold in the cash market.

In addition, both types of captive supply allow the packers more readily to engage in other practices that avoid competition among themselves, to the extent that they still compete at all. For example, there are recurring reports that the packers establish informal arrangements not to compete with each other in bidding for livestock, in particular cattle, from any particular feeder. The result is that producers basically wind up with a single buyer for all practical purposes even if there are several buyers that could compete to buy from that producer.

Even when buyers compete, they often insist on a right of first refusal (if they will match a higher bid, they get the pen). This discourages price competition among bidders because the favored bidder can always win by merely matching a competing bid. The obvious reason for this practice is to stifle the incentive to compete for any particular purchase. It makes economic sense only if the potential competitors have an underlying understanding to allocate producers and want to avoid competing on price with each other. There is once again no legitimate business justification for this practice.

Another anticompetitive practice that has emerged from the highly concentrated buying markets is a collective refusal to compete on price. I am informed that in making cash market purchases where there is bidding, the packers will only bid up at a minimum rate of a $1 per hundred weight. This means that the bid must go up roughly $8 to $12 a head which in turn means that the bid has to go up several hundred dollars for a pen of cattle. Obviously, imposing that kind of restraint on bidding reduces the incentive to compete because the buyer can not use a smaller price increase. This practice requires the concurrence of all potential bidders and lacks any legitimate business justification. It works once again to discourage bidding once a packer has made an offer. This allocates livestock without giving the seller the benefit of a competitive market.

Both of these patterns of conduct require some understanding among the buyers, and both have the effect of stifling competition. This is in the overall interest of all buyers only if they operate in a small enough circle of roughly comparable bidders that all can get what they want without paying top dollar for it.

The result is a dysfunctional market. Contracts govern many sales. The favored feedlots and farmers are under an unspoken economic pressure to work with the packer and not express concerns. If there are problems, then the packer can simply refuse to buy. In a market with very few buyers, such a refusal can often result in economic death.

The packers can control their costs by these strategies and can ensure that they will have a docile group of suppliers. It is in the interest of the dominant packers to enhance and maintain this system because they all gain regardless of the level of competition in the downstream markets for meat. Professor Taylor in his recent testimony (July 16) before that Senate Committee on Agriculture, Nutrition and Forestry Committee has provided an extensive economic analysis showing how the margins of the meat packers have increased as result of their exploitation of their buyer power. This directly harms producers and in the long run imposes inefficiency and higher costs on consumers.

In sum, the current market situation for beef and hogs is now very poor. The sellers have limited information, do not have access to all buyers, and can be subject to an arbitrary refusal to deal if the operator displeases the buyer or his supervisor. The implications of this kind of market situation are that producers with options are likely to take some other option even if that is a less efficient use of their skills and resources. Ultimately, the meat production process in this country will be less efficient and the slaughter houses will announce that they need to look overseas for supplies. These will be less efficient suppliers, but they will emerge as major sources of livestock because of the strategic conduct of the packers.

To bring the market for hogs and cattle back to a reasonably workable state of competition requires that there be a conscious effort to seek market governance rules (laws) that achieve the essential conditions of an effective market: good information, equitable treatment of participants, and access for all willing to participate in the market. Indeed, these have been the basic goals of American agricultural law over the years. Unfortunately, but not surprisingly, the dynamics of innovation and the evolution of markets have a strong tendency of make the law on the books less than fully relevant to the realities of the market place. Can Antitrust Law as Currently Understood and Enforced Remedy These Problems?

Antitrust law has been a basic tool for dealing with anticompetitive conduct and market structures for over a century. But its use is limited to its concern for the overall competitiveness of markets, and it is applied in a case specific way so that it can not provide the basis for directly establishing generally applicable rules for the market. It has little capacity to address the problems of comparative equity that arise from economic discrimination when the discrimination has only an indirect effect on the overall state of the market, especially when the conduct at issue is either authorized by or left unregulated by laws and regulations more directly relevant to the specific market. For antitrust law to apply there should be an actual or potential effect on competition arising from the conduct. A major criticism of the Department of Agriculture studies of livestock markets is that they were not framed with that issue in mind nor was the data examined in ways that provide analysis directly responsive to those concerns.

The state of antitrust law with respect to the concerns of farmers as sellers of products into concentrated buying markets offers some good news but on balance does not provide a comprehensive system for facilitating a workably competitive market. I will briefly describe the present state of law as it relates to these concerns, emphasizing the cases that provide the best support for a pro-active program that can address some of the concerns that have motivated the packer ban.

The most important item of good news is that the courts have clearly recognized that buyer power is as much a source of antitrust concern as is seller power. Buyer power is called "monopsony" when a single firm has power; this is the buying side form of monopoly. When several firms have collective power, it is technically called "oligopsony." Within the last three years, three federal circuit courts of appeal, the Second, Seventh and Ninth, have all upheld challenges to buyer power and emphasized that the abuse of such power is of equal concern to antitrust along with the more traditional seller power problems. Toys R Us v. FTC, 221 F3d 928 (7th Cir. 2000); Knevelbaard Dairies v. Kraft, 232 F3d 979 (9th Cir. 2000); Todd v. Exxon, 275 F3d 191 (2nd Cir. 2001).

These decisions recognize that firms can have buyer power with a substantially lower market share than is usual in seller power cases (e.g., Toys R Us). The courts have also recognized that it may be rational for more firms to collude together to suppress their competition in buying than conventional theory holds are likely to be able to conspire successfully on the seller side (e.g., Todd v. Exxon). Thus recent case law finds that abuse of buyer power, both collectively and unilaterally, can be a violation of antitrust law, and recognizes that buyer power needs to be examined on its own terms and that the traditional seller power analysis may not be apposite.

In addition, in my view, the decision of the DC Circuit in the Microsoft case served as a strong reminder that a firm with substantial market power can not abuse that position to eliminate potential competition or exploit other market participants in unjustified ways. Microsoft v. U.S., 253 F3d 34 (D.C. Cir., per cur. 2001). The opinion established a workable standard for judging the merits of conduct that has anticompetitive effect by looking critically at the non-monopolistic justification to determine its validity in fact and then asking whether alternative methods of doing business would have achieved the same legitimate goals without causing so much economic harm. Another recent trial court decision involving practices of monopoly airlines to exploit their power over fliers seeking to go to or from a hub city has also stressed the legal rule that, if a business has a monopoly position in some market, this does not give it a license to exploit that position to the detriment of its customers (or by implication suppliers) by imposing avoidable burdens or costs. In re Northwest Airlines, 208 FRD 174 (E.D. Mich. 2002).

Finally, when Cargill acquired Continental Grain, the Justice Department's Antitrust Division threatened to challenge the merger unless Cargill agreed to divest some assets. The basis for the challenge was only the potential adverse effect of that merger on grain producers. Thus, the issue was whether the merger would create unjustified and unnecessary buyer power. The fact that the Cargill choose to settle the case with a considerable divestiture suggests that it was convinced that the government had a good chance of prevailing if the case went to trial. See, US v. Cargill, 2000-2 Trade Cases para. 72,966 (D.D.C. 2000)(affirming consent decree). Although this particular merger case arose under the previous administration, Charles James, the current Assistant Attorney General for Antitrust, has committed that the Division will continue to focus on buyer power problems both in mergers and in other areas.

Thus, the state of the law and the stated commitment of the law enforcers are favorable to a more proactive enfrocdement policy toward the concentrated livestock buying markets.. Unfortunately, when we look at what has in fact been done and what can be done, the record to date is not nearly as hopeful.

First, in the 1980s, the government allowed several major mergers in the meat packing industry that contributed substantially to its present highly concentrated structure. It did so because at the time there was a belief, contrary to economic theory and business experience, that if the downstream markets were competitive, then buyer power would not be able to distort upstream supply market prices. It is now evident that these decisions were wrong. The real economics and efficiencies of slaughter come at the plant level, and not from coordination of many plants. Buyer side concentration has proven harmful to producers regardless of the level of competition on the downstream selling side.

There is, moreover, no statute of limitations on anticompetitive mergers. Therefore, as a matter of law, these mergers could be reconsidered today because the record of anticompetitive effects arising from them is clear. I would have said, however, that no federal antitrust agency is going to revisit its past decisions. In fact, there are powerful reasons supporting such a policy such that even I would be loath to re-open closed matters merely because the analysis of competitive effects proved to be wrong. But, to my surprise, Tim Muris, the Chair of the FTC, has recently announced that he is going to have his staff revisit a number of hospital mergers to see whether they had adverse effects on the price of health care. His statement implied that the FTC might then re-open some of the closed cases. If that happens in health care, then it should also happen in the case of packer mergers.

Second, and even more troublesome, there was the much more recent failure of the Antitrust Division to challenge the acquisition of IBP by Tyson. IBP is the largest beef packer in the country with about 1/3 of the steer and heifer slaughter market. It is also one of the top two firms in the pork industry, and it is a buyer of hogs from the other top pork producer, Smithfield. Meanwhile, Smithfield has itself entered the beef business with two acquisitions of smaller packers. Today, Smithfield and Tyson are both customer/supplier in pork and ostensible competitors in both pork and beef! This in itself would seem to raise serious competitive concerns as well as concern under the PSA.

Tyson, the nation's leading poultry producer, had long had a declared goal of entering the business of producing both beef and pork. If it had made that entry with either new plants or with the acquisition of smaller firms, as Smithfield has in fact done to enter beef, then competition in beef packing would have been increased and farmers would have had more competitive markets in which to sell their livestock. Even the threat of such entry by Tyson, given its position in related markets and its close links to major grocer retailers, would have deterred existing the packers from exploiting too excessively their market power because of the risk it would induce Tyson to enter sooner or on a larger scale. Despite the obvious competitive problems created by this merger the Antitrust Division cleared it without objection. Six months ago, Doug Ross of the Division in response to my public criticism at a farm meeting claimed that the Division had carefully examined the competitive issues in the Tyson-IBP case. Because such review is secret and the results are not revealed to the public, we have, of course, no way of knowing what the analysis in fact was or what facts the Division relied upon to determine that there was no likely adverse effect on competition. Yet this merger consolidated leading processors of beef, pork and poultry into a single firm which also had various exclusive and category captain deals with major grocer chains.

I would here note in the European Union the competition law enforcers are required to state publicly their analysis of each and every merger they review whether they allow it or deny it. The result is that the standards and their application are much more transparent in Europe. Today, the Department of Justice must provide a written evaluation of every bank merger and bank holding company acquisition in the country. This has provided greater clarity in that area and again has not deterred merger and acquisition. It is high time that the Antitrust Division and the FTC were required to report their analysis of all major mergers whether they challenge them or not. This would make the process more transparent. It would protect the enforcers from false acquisitions of laxness and would allow much more informed critiques of policy. But I digress.

While the Tyson-IBP merger is the most conspicuous example of what appears to be weak merger enforcement, I am aware of other mergers likely to have substantial anticompetitive effect in poultry, grain and livestock have not been challenged. This suggests that the present commitment to enforcement is not likely to reduce the level of concentration or significantly change industry structure.

For the same reasons, I am skeptical that the present antitrust authorities will undertake on their own a sustained investigation, let alone challenge some of the other industry practices that unjustifiably entrench and exploit the packers buyer power. Specifically, the practices of semi-exclusive dealing with producers, and the related practice of informal patterns of first refusal rights can be challenged as violations of Section 1 of the Sherman Act. They are in my view

unreasonable vertical and horizontal restraints on competition. As such, they are illegal under the rule of reason as well as the per se rule that condemns naked restraints on competition.
Even more obviously, the understanding that bidding for cattle will be take place only on the basis of increments of $1 a hundred weight is an unlawful restraint under the antitrust laws. In this instance, there is a very parallel case involving the securities markets where the brokers agreed to set a fixed margin between ask and bid prices rather than allow the market to determine this spread. Those brokers wound up subject to antitrust damage liability of over $1 billion and an injunction barring such conduct in the future. See, e.g., In re NASDAQ Market Makers Antitrust Litigation, 176 FRD 99 (SDNY 1997). Despite this precedent, I have yet to learn of any effort by the Antitrust Division to investigate any of these practices of the meat packing industry or mount a challenge to them.
Even if some of these practices were not the result of an understanding among packers, they could still be challenged as either unlawful vertical agreements, in some situations, and as unlawful monopolistic conduct under Section 2 of the Sherman Act. The recent Micorsoft and Northwest Airlines decisions provide strong support for such challenges. In addition, a growing body of economic scholarship demonstrates that vertical restraints and unilateral conduct by dominant firms can unnecessarily and unjustifiably interfere with efficient competition.
It is even possible to challenge packer ownership of livestock prior to slaughter under Section 2. This conduct serves no legitimate business interest of the major packers that could not be addressed at lower cost and risk through other less intrusive contractual methods. The only benefit they get from this particular strategy is greater leverage as buyers and contractors for livestock. As a result this practice serves only to increase their capacity to exploit whatever inherent buying power they already possess. In addition, it assists their longer run strategy of increasing and entrenching their buyer power. In consequence, it seems to me, that such vertical integration constitutes unlawful monopolization.
I should also emphasize to you that the state of antitrust law is such that bringing cases on the theories I have just suggested, while valid in my view, would be risky. In the last several decades, the courts have not shown themselves to be overly fond of antitrust law in general and seem all too willing to accept the excuses or justifications tendered by businesses. How much this might change in light of the recent revelation that many businesses have engaged in a variety of unlawful practices is hard to estimate. Even if there is some change, the litigation risks of bringing cases along the lines I have suggested would be substantial. In addition, to mount such cases would take a large amount of staff time and other resources-both of which are limited. Nonetheless, it seems to me that continued congressional interest focused on livestock markets may well induce the Antitrust Division to focus more attention and commitment in this area. Certainly it appears that there is a correlation between the number of matters being investigated or litigated and the increased number of hearings at which antitrust law enforcers were asked to explain their action or inaction with respect to agricultural markets. Thus, while current enforcement is much less than is necessary, strong pressure from congress can, I believe, cause a significant further increase in those efforts.
There are inherent limits to reliance on antitrust law as a central tool to create and enforce basic rules for market conduct. Antitrust law is enforced only through a case by case, litigation mode. Thus, it is very difficult to go from a specific case to a rule of general application in the market. Antitrust law can implement some very basic rules, but as soon as there is need for any nuance or complexity to the market facilitation regulation, then antitrust is a blunt and imprecise tool. It is especially badly adapted to developing new market facilitating regulation that requires changes

in significant aspects of market conduct. Indeed, antitrust law often accepts as basic background the legal and institutional context within which enterprises operate. Antitrust seeks to ensure that, to the extent feasible, competition is maintained within that framework. But antitrust law is not a good means to revise fundamentally the rules governing a complex market.

The bottom line is that, despite the importance of antitrust and its undoubted role in policing the livestock slaughter markets, it can not be the only instrument for attempting to establish or change the rules governing the market place. Fundamental change is properly the role of the legislature and the administrative agencies, like FERC, the SEC or the CFTC, that are established to carry out legislative commands. When the relevant agency lacks the authority or the will to engage in market facilitating regulation as seems to be the case with the Department of Agriculture, it is the obligation of congress to respond with appropriate legislation and motivation. Conclusion: Enhanced Antitrust Enforcement With Respect to the Structure and Conduct of the Meat Packers Is a Step Toward Better Market Regulation But It Is Not the Entire Answer

In my view there is a very strong case for increased antitrust enforcement in the livestock markets. The first best option would be to change the structure of the meat packing industry to create a more competitive one. I would here note that the efficient scale of packing plants is very dramatically less than the present market shares of the dominant firms. Thus, it would be possible to restructure the industry into a workably competitive set of firms. However, such a massive undertaking is extremely unlikely. What can and should happen, is that the Antitrust Division should take a more active stance in examining the conduct of the dominant firms in the industry. I have listed several areas where antitrust could be effective within the context of current law. In addition, if the administration is prepared to reopen merger approvals granted by prior administrations, then it can and should revisit the demonstrably bad decisions made on packer mergers both in the recent and more distant past.

Ultimately, however, without a massive change in the structure of the industry, antitrust has only a limited capacity to provide a comprehensive reformation of the market process for livestock that various legislative proposals have suggested. Such proposals also recognize that the Department of Agriculture under both the past and present administrations lacks the political will and institutional competency to engage in the rule making necessary to facilitate an efficient and fair market in livestock. The farm bill originally proposed in the Senate had a chapter that made a real attempt to develop a new and comprehensive set of regulations to facilitate fair and open competition. Regrettably that chapter was removed from the bill even before it came to the floor. Only a proposed ban on packer ownership of livestock made it that far and even that was eliminated by the conference version of the bill.

It seems to me that legislation is going to be required to mandate the regulations that are necessary if the fairness, openness, and accessibility of livestock markets are to be restored. Indeed, even if the Department of Agriculture were to come alive and commence work on market facilitating regulations, the present statutory structure has a number of anomalies that make effective enforcement difficult and frustrate the development of a comprehensive set of regulations that would govern all agricultural markets.

I welcome the interest of the Judiciary Committee in the problem of restoring and maintaining competitive markets in livestock. Achieving that goal is going to require diligent efforts on your part both to encourage enforcement of current law and the creation of a workable set of regulations to facilitate fair, open and accessible conditions in the new marketing contexts that farmers and ranchers will face.