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STATEMENT OF
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Good afternoon, Mr. Chairman and members of the Subcommittee. I appreciate the opportunity to discuss antitrust enforcement in the agricultural marketplace, and in particular, the role of antitrust enforcement in ensuring that agricultural markets are competitive, both on the selling side and on the buying side. While the Antitrust Division cannot comment on the specifics of any transaction that it is currently investigating, we fully understand the Committee's interest in knowing how the Division analyzes mergers in agriculture industries generally. My testimony today will review the standards that the Division applies in evaluating mergers and acquisitions, and I will discuss recent cases in the agriculture sector that have proven to be illustrative of how these standards are applied to particular sets of facts.

The agricultural marketplace is undergoing significant change. Farmers are adjusting to challenges and opportunities in international markets, to major technological changes in the products they buy and sell, and to new forms of business relationships between producers and processors.

In the midst of these changes, farmers in particular have expressed concern about the level of competitiveness in agricultural markets. Farmers are very aware of the importance of competitive markets to sustain their livelihoods, and their ability to help put higher quality food products on America's tables at lower prices and to maintain incentives for innovation in producing agricultural products. Competition at all levels in the production process makes this possible.

The Antitrust Division takes these concerns very seriously and has been very active in enforcing the antitrust laws in the agricultural sector. Enforcement of the antitrust laws can benefit farmers, as purchasers of goods and services that allow them to grow crops and raise livestock, and also as sellers of crops and livestock that feed people, not only in our country but also throughout the world. Antitrust Division officials have also undertaken a special outreach effort in agriculture, meeting with producers and producer groups here in Washington and around the country to listen to their concerns and to improve everyone's understanding of the role that antitrust enforcement plays.

The Role of Antitrust Enforcement in Agriculture Markets

The antitrust laws apply in the same way in every industry, with a very few exceptions where their application is limited by specific statute. One exception important for agriculture is the Capper-Volstead Act, which permits agricultural producers to market their products jointly through cooperatives. In addition, certain 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 industries are regulated by USDA's Grain Inspection, Packers and Stockyards Administration (GIPSA) under the Packers and Stockyards Act.

The Antitrust Division investigates and brings enforcement actions against three basic kinds of antitrust violations. First, we bring criminal prosecutions against hard-core forms of collusion, such as price-fixing and market allocation, that violate section 1 of the Sherman Act; we also bring civil enforcement actions under section 1 against joint ventures and other forms of collaboration among competitors when they unreasonably suppress competition. Second, we bring enforcement actions under section 2 of the Sherman Act against monopolization or attempted monopolization, the use of predatory or exclusionary conduct to acquire or hold onto a monopoly. Third, we bring enforcement actions under section 7 of the Clayton Act to prevent mergers from substantially lessening competition in a market.

As members of this Committee understand, the responsibility entrusted to us as enforcers of the antitrust laws is not to engineer the best competitive 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 activity that interfere with those market forces in violation of the antitrust laws.

We are law enforcers, not regulators. 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.

While the antitrust laws play an important role in helping keep markets competitive, they will not address all of the complex issues facing American agriculture in this time of change. There is a broad range of agriculture policy issues for the government to focus on, and antitrust enforcement is only one part of that.

For us at the Antitrust Division, of course, it is the important part, because it is our part. The Division is committed to stopping anticompetitive mergers or conduct from harming the agricultural marketplace, whether it is buyers or sellers who are harmed in the first instance.

My focus today is on the analysis that the Division employs in reviewing mergers, and the vital role that merger enforcement has in protecting competition in agricultural markets. The Division's goal is to promote competition as a means of ensuring that consumers get the benefit of competitive prices, innovation, and efficiency.

Merger Enforcement Standards

In our conversations with farm groups, we have found that farmers are especially concerned about the potential impact of mergers and acquisitions. Farmers are concerned that mergers will limit the number of sellers of seed, chemicals, machinery, and other equipment from whom they can buy and will limit the number of customers for crops and livestock to whom they can sell. For this reason, I think it may be helpful to start with a discussion of the Antitrust Division's merger enforcement program

The Division reviews mergers under Section 7 of the Clayton Act, which prohibits the acquisition of stock or assets if "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." This enables us to arrest anticompetitive mergers in their incipiency, to forestall harm that would otherwise ensue but be difficult to undo after the parties have consummated a merger. Thus, merger enforcement standards are forward-looking and, while the Antitrust Division often considers historic performance in an industry, the primary focus is to determine the likely competitive effects of a proposed merger in the future.

The Antitrust Division shares merger enforcement authority with the Federal Trade Commission (FTC), with the exception of certain industries in which the FTC's jurisdiction is limited by statute. The agencies jointly have developed Horizontal Merger Guidelines that describe the inquiry they follow in analyzing mergers. "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time." Merger Guidelines § 0.1.

We ordinarily seek to define the relevant markets in which the parties to a merger compete, and then determine whether the merger would be likely to lessen competition substantially in any of those markets. Customers and businesses often use the word market in a variety of ways. In the antitrust merger context, relevant market definition is a technical exercise involving analysis of customer substitution in response to price increases. In performing relevant market definition analysis, the Antitrust Division and the FTC consider both the post-merger market concentration and the increase in concentration resulting from the merger. However, just because a market is concentrated does not necessarily mean mergers in that market can be shown to violate Section 7. In all cases, appropriate consideration has also been given to other factors--such as the likelihood of entry by new competitors--that could affect whether the merger is likely to create or enhance market power or to facilitate any exercise of market power.

In most instances, the concern raised by a merger is the potential ability of the merging companies to raise above the competitive level the price of the products or services they sell. Of course, it is also possible that a merger will have the potential to substantially lessen competition with respect to the price that the merging companies pay to purchase products or services. This is a matter of particular concern to farmers, who often sell their products to large agribusinesses.
Let me emphasize that the Antitrust Division closely looks at such concerns in merger enforcement. The Merger Guidelines specifically provide that the same analytical framework used to analyze the "seller-side" is also applied to the "buyer-side":

Market power also encompasses the ability of a single buyer (a "monopsonist"), a coordinating group of buyers, or a single buyer, not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers. In order to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of these Guidelines.

Merger Guidelines § 0.1. Thus, the Antitrust Division has reviewed mergers to determine not only whether they posed a competitive threat to persons buying goods or services from the merged entity, but also whether they posed a competitive threat to persons selling goods or services to the merged entity.

One example of the exercise of monopsony power is a situation in which a purchaser with market power reduces the quantity it purchases in order to force down the per unit price it pays. As with an exercise of monopoly power, if the result of an exercise of monopsony power is that output falls below the competitive level, then overall economic welfare is thereby reduced. In other words, consumers are harmed by the exercise of monopsony power in the same way they are harmed by monopoly power.

A merger may lower the true economic cost of purchasing. An example might be where a merger enables the firm to commit to larger orders and thereby permits its supplier to save on its costs by scheduling longer and less costly production runs. These cost savings typically will benefit both the merged firm and its suppliers, and to the extent they lower the buyer's marginal cost of production, will tend to be passed along to some extent to final consumers. The case where a merger lowers input prices for no reason other than that the merged firm can now exercise monopsony power is entirely different. If a buyer obtains market power through merger, and thereby is able to depress prices for the inputs it purchases below competitive levels, then producers of those inputs will have depressed incentives to produce, which will result in too few resources utilized to produce the inputs compared to what would be available in a competitive market. Because output decreases in the end, this is likely to harm both suppliers and consumers because suppliers will get a lower price while consumers get a higher price.

While we often speak of consumers as the targeted beneficiary of antitrust enforcement, suppliers 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. A focus on promoting competition goes hand in hand with our taking enforcement action in a monopsony case when the facts warrant.

While most of the merger challenges brought by the Antitrust Division have involved companies that compete with one another ("horizontal competitors"), the agencies also consider whether mergers involving companies at different levels in the production and marketing process ("vertical relationships") may have anticompetitive consequences.

Challenges to vertical mergers are less frequent because these mergers often allow the merged companies to compete more efficiently in the marketplace, by reducing costs or streamlining production. However, there are circumstances in which a vertical merger may substantially lessen competition, such as by foreclosing competitive access to one of the markets involved in a way that raises barriers to entry or otherwise threatens competitive prices. This was the case in our recent challenge to the Monsanto/Delta and Pine Land merger, as I will explain in a moment. In such instances, the Division will pursue the appropriate enforcement action just as with horizontal mergers.

Merger Enforcement Activity

The Antitrust Division has brought a number of enforcement actions in recent years to prevent anticompetitive mergers from being consummated in agricultural markets. Where possible, the Division has insisted that the merger be modified to remove any causes for antitrust concern or, when the merging parties do not agree to the necessary conditions, we have sought to block the merger in its entirety. In other cases, the Division recognizes that protecting consumer welfare sometimes requires not challenging transactions where, despite initial impressions, the evidence does not demonstrate harm to competition. The Division has closed such investigations without taking action where warranted by the evidence collected in a comprehensive investigation. I would now like to highlight some of our more recent enforcement actions.

Monsanto/Delta and Pine Land

One of the most interesting cases this past year involved the acquisition of Delta and Pine Land Co. (DPL) by Monsanto. DPL is the largest U.S. producer of cottonseed. It introduced Monsanto's herbicide and insecticide genetic traits into seeds and, more recently, began working with other trait developers to create and commercialize traits to compete with Monsanto. Monsanto was vertically integrated: It was both a significant seed producer as well as the dominant developer of genetic traits for cotton.

After a thorough investigation of this merger, in May 2007 the Division filed a lawsuit along with a consent decree that required Monsanto and DPL to divest a significant seed company, multiple cottonseed lines, and other valuable assets, in order to proceed with the merger. As originally proposed, the merger likely would have harmed farmers in cotton growing regions in the Mid-South and Southeastern U.S. by reducing competition in the sale of cottonseed that has been genetically modified to include desirable traits like insect resistance or herbicide resistance. DPL had worked with other biotech companies to develop cottonseed with traits that would compete with seed containing Monsanto's traits. The merger would have eliminated DPL as a partner for trait developers other than Monsanto, and thus would have delayed or even prevented competitive products from reaching the market.

The appropriate remedy went well beyond divesting Monsanto's seed business. To remedy the vertical concerns, Monsanto was required also to divest significant additional DPL and Monsanto assets, to license Monsanto traits on terms as favorable as DPL had pre-merger, and to include in the licenses the ability to stack non-Monsanto traits with Monsanto traits. Monsanto was also required to divest to Syngenta a group of seed lines carrying Syngenta traits that had been developed by DPL, and that DPL planned to begin marketing as early as 2009. The principal divestiture package was sold to a major trait developer for $310 million shortly after the complaint was filed.

This action was similar to our 1998 challenge to Monsanto's proposed acquisition of DeKalb Genetics Corporation, involving corn seed biotechnology innovation, in which Monsanto met our concerns by agreeing to spin off its claims to a new technology for introducing new traits such as insect resistance into corn seed, and to license its Holden subsidiary's corn germplasm to over 150 seed companies that before the transaction had bought it from Monsanto, so that those companies would be free to use it to create their own corn hybrids if they chose.

DFA/Southern Belle

The Division filed a civil antitrust lawsuit in April 2003 to compel Dairy Farmers of America Corp. (DFA) to divest its 50 percent interest in Southern Belle Dairy. This merger between two dairy processors was not subject to the Hart-Scott-Rodino premerger notification requirements because its dollar value fell below the statutory threshold for reporting, and the Division did not learn about it until after it had been completed. The complaint charged that the partial acquisition reduced competition for school milk contracts in 100 school districts in Kentucky and Tennessee because it gave DFA significant partial ownership interests in two dairies that competed against each other for such contracts. As a result, the acquisition reduced the number of independent bidders for school milk contracts from two to one in 45 school districts in eastern Kentucky, and from three bidders to two in 55 school districts in eastern Kentucky and Tennessee. The federal district court initially dismissed the case, granting summary judgment for DFA. The Department successfully appealed the dismissal to the U.S. Court of Appeals for the Sixth Circuit. After a victory in the court of appeals, the Division announced a settlement in October 2006--negotiated on the eve of a district court trial--that required DFA to divest its interest in Southern Belle Dairy Co., bringing the Division's lawsuit to a successful close.

Syngenta/Advanta

In August 2004, the Division challenged Syngenta's acquisition of Advanta and required Syngenta to divest Advanta's worldwide sugar beet seed business in order to proceed with the acquisition. Syngenta, based in Switzerland, and Advanta, a Dutch company, were two of only three significant developers of sugar beet seeds suitable for growing in the United States. Both companies devoted considerable research and development resources to seed innovation. If the original transaction had been allowed to proceed, American farmers would have lost one of the major innovators for sugar beet seeds. As a result of the divestiture, farmers were able to continue to benefit from the competition that results in lower priced seeds and continued innovation, to produce higher yields and better disease resistance.

Suiza Foods/Dean Foods

In December 2002, the Division challenged Suiza Foods' proposed acquisition of Dean Foods. In Suiza/Dean, 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 DFA, which would also own a half interest in National Dairy Holdings, L.P., the new firm to which the processing plants were being divested. This remedy was necessary 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.

Cargill/Continental

The Division's 1999 challenge to Cargill's proposed acquisition of Continental's grain business is an example of a monopsony case in that farmers (as sellers) would have been the direct victims of the loss of competition that was expected to result from the merger as originally proposed. In Cargill/Continental, the Division protected competition in the purchase of grain and soybeans from farmers in a number of local and regional markets, as well as competition in the futures markets, by requiring Cargill and Continental to divest a number of grain and soybean storage facilities in the Midwest, the West, and the Texas Gulf. The merging parties were not only buyers of grain and soybeans in various local and regional domestic markets, but also sellers of grain and soybeans in the United States and abroad.

While the Division looked at the potential effects on competition in both the "upstream" and "downstream" directions, the challenge was based entirely on concerns about effects in the "upstream" market, where Cargill and Continental were buying from farmers. The Division carefully looked at each upstream market that could be affected, and traced the potential effect all the way from the local area in which the farmer grew and sold the grain or soybeans to a local elevator and the place at which Cargill or Continental made its final purchase--in some instances, a distance of over 1,400 miles from the farms in Minnesota to the port elevators in Seattle. The relief in the consent decree was carefully fashioned to address the potential competitive problems in each affected local market.

Finally, in conjunction with our merger enforcement program, we also enforce the pre-merger notification and waiting period requirements of the Hart-Scott-Rodino Act. Our most recent HSR enforcement action is in the meatpacking area, filed in February of 2003 against Smithfield Foods for twice making stock acquisitions of its competitor IBP without notifying the antitrust enforcement authorities and observing the required waiting period to enable an appropriate antitrust review. While the HSR Act exempts from its premerger filing requirements certain stock acquisitions that are "solely for the purpose of investment," the Division's complaint alleged that Smithfield's acquisitions were not exempt because Smithfield was also considering and taking steps toward a Smithfield- IBP combination. In November 2004, Smithfield agreed to pay $2 million for this violation.

Conclusion

As the above summary of our merger enforcement activities in the agriculture sector reflects, the Antitrust Division regularly has both monopoly and monopsony concerns on our radar screen. When those concerns are present we investigate them fully and, when the facts warrant, we take appropriate enforcement action. The Merger Guidelines set forth the analytical framework for all our merger enforcement, and make clear that a competitive analysis of upstream market effects is to be a mirror image of a competitive analysis of downstream market effects. In both cases, we are looking at 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. In addition, price fixing and other forms of collusion are just as unlawful when the immediate victims are sellers rather than buyers.

We listen carefully to the concerns of agricultural producers and producer groups as to how a proposed merger or a course of conduct might affect them, and we are equally concerned if the effect is anticompetitively low prices for products sold (e.g., to farmers) as if it is anticompetitively high prices for products purchased (e.g., by farmers).

I would be happy to answer questions from the Committee.