

Testimony of
The Honorable Christine A. Varney

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Statement of Christine A. Varney
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"Crisis on the Farm: The State of Cooperation and Prospects for Sustainability in the Northeast Dairy Industry"

I. Introduction

Mr. Chairman, I am pleased to appear before you today and be here in Vermont to discuss the importance of competition in today's agriculture marketplace, particularly with regard to the dairy industry. I look forward to hearing from your other witnesses, meeting farmers and others in Vermont's agriculture sector who can help me learn more about what's really happening in the dairy business. The Antitrust Division is aware that there is unprecedented economic upheaval in the dairy industry, and that dairy farmers have been going out of business at a record rate. We are very concerned about these developments. In my remarks today, I will briefly provide the Antitrust Division's perspective on the state of the marketplace and our ongoing effort to better understand the industry and the role public policy--including antitrust enforcement--can play to protect and promote competition.

Competition issues affecting agriculture have been a priority for me since I was confirmed last spring as Assistant Attorney General for the Antitrust Division. In a reflection of that priority, the Department announced in August a partnership with the U.S. Department of Agriculture to co-host an unprecedented series of workshops to examine the state of competition in agriculture markets. (1) These workshops will provide us with an important opportunity to learn first-hand from those participating in these markets and evaluate a series of issues, ranging from the effects on competition of concentration in relevant sectors (including dairy), concerns about buyer power, and the economic impact of vertical integration, including contractual relationships between producers, distributors, and retailers.

In these brief remarks, I will take a few minutes to discuss the state of the marketplace and some themes we will be exploring in our upcoming workshops.

II. Buyer Power and Vertical Integration Are Particular Concerns in Agriculture and Dairy Markets.

As I noted before, two particular issues - buyer power and vertical integration - are ones we have already heard about and are interested in exploring in our workshops. Let me explain what these terms mean to competition officials, for those not versed in antitrust jargon.

A number of dairy producers are concerned about the exercise of what economists call monopsony power or, to use a more descriptive term, "buyer power." Traditional monopoly power concerns a dominant producer of goods or services that may be able to charge supracompetitive prices. Monopsony is the other side of the coin. When there are a number of producers in an "input market" and a dominant buyer or buyers of those products, like a dominant dairy processor, the buyer under certain circumstances may exert its power to press the prices lower than would be the case if the buying market were more competitive--i.e., if the sellers had more choices of where and to whom to sell their products. Consolidation among or between buyers can also lead to or enhance monopsony power. In analyzing developments in dairy markets, we are cognizant of the fact that competition is frequently local or regional in nature, meaning that the nature and extent of competition-related concerns will differ across different parts of the country. Thus, national statistics can be misleading. Parts of the dairy industry have experienced extensive consolidation in recent years, with fewer processors and therefore fewer buyers of dairy products. As a result of consolidation, the potential for an exercise of buyer power has increased.

We are also aware that agriculture markets, including dairy, have become more vertically integrated over the last 15 to 20 years. Vertical integration occurs when a manufacturer also participates in other parts of the supply chain, such as distribution of its products or supply of its inputs. Vertical integration frequently involves ownership at multiple stages, though it may be achieved also through contractual commitments. Vertical relationships in dairy markets would include, for example, a processor entering into exclusive agreements with a specific cooperative to buy raw milk.

In many cases, such activities can lead to greater efficiencies and savings for consumers. Indeed vertical integration is widespread in our modern economy. Under certain conditions, however, vertical integration may alter the incentives of parties and thereby facilitate the exercise of market power. A careful review of these arrangements is merited and is thus one of the areas our review will focus on.

As a related point, increased vertical relationships also implicate the transparency of economic conduct in agriculture markets. I am a firm believer in what Justice Brandeis said in another context: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." (2) Markets work better and attempted harms to competition are more likely to be thwarted when there is increased transparency to consumers and government about what is going on in an industry. A question we will be asking is whether agricultural markets would perform better with greater transparency. To the extent that trading in agriculture markets has shifted from organized exchanges to a greater reliance on vertical integration and bilateral trading, transparency may be lessened and efficiency potentially reduced. (3) To the extent that these changes in trading raise competition concerns, we will welcome suggestions and strategies for promoting greater levels of transparency.

III. A Description of the DOJ-USDA Workshops

Finally, I want to say a few words about the series of workshops we have planned with the USDA. The Department of Justice and the USDA published a notice in the Federal Register in August setting forth our plans for a series of jointly run workshops in 2010 to address the

dynamics of competition in agriculture markets. In the workshops, we will examine whether changes in the marketplace, including increased consolidation and vertical integration, have generated efficiencies, or whether they have led to increases in monopoly or monopsony power. We are also actively soliciting input through the end of this year from farmers, ranchers, economists, lawyers, consumer groups and processors about their views and experiences. In particular, we are asking for their perspectives concerning the application of the nation's antitrust laws to agriculture markets, their personal experience with conduct that impacts competition in those markets, and their suggestions for issues that should be addressed at the workshops. Some of the potential topics for the workshops proposed in the initial federal register publication include the impact of agriculture concentration on food costs, the effect of agricultural regulatory statutes on competition, issues relating to patent and intellectual property affecting agricultural marketing or production, and market practices such as forward contracts, market transparency, and increasing retailer concentration. (4)

The goal of the workshops is to promote dialogue among interested parties and foster learning with respect to the appropriate legal and economic analyses of these issues, as well as to listen to and learn from parties with real-world experience in the agriculture sector. I am already aware from feedback the Division has received so far that two areas likely to receive attention at the agriculture workshops are the specific competitive issues facing the dairy industry as well as the share of income generated by the retail sale of agricultural products that goes to farmers. The Antitrust Division invites all contributions to the workshop process and looks forward to active participation.

IV. Conclusion

Mr. Chairman, the Antitrust Division recognizes there has been considerable change in agriculture markets, including dairy. We take seriously concerns about the competitive consequences of those changes. At the same time, we are open to the fact that some of those marketplace and technological changes may promote efficiencies and benefit consumers. The Antitrust Division intends to engage in a careful evaluation of the relevant market conditions, informed by input from those in the agricultural community who live with these developments every day. We are interested in hearing from the stakeholders in these markets both through the workshops and in more informal settings. We will approach the matters that come before the Division and the upcoming workshops without any preconceptions and cannot promise any particular answers or results. I can assure you, however, that we are committed to a careful and comprehensive examination of the marketplace.

1 See Justice Department and USDA to Hold Public Workshops to Explore Competition Issues in the Agriculture Industry (Press Release dated August 5, 2009) (available at http://www.usdoj.gov/atr_public/press_releases/2009/248797.htm); see also Philip J. Weiser, Deputy Assistant Attorney General, *Toward a Competition Policy Agenda for Agriculture Markets*, Remarks as Prepared for the Organization for Competitive Markets (August 7, 2009), available at <http://www.usdoj.gov/atr/public/speeches/248858.pdf>.

2 Louis D. Brandeis, *OTHER PEOPLE'S MONEY* 92 (1914).

3 Although increased transparency is most often a good thing, there are instances where increased transparency can actually facilitate anticompetitive coordination, such as in markets with homogeneous products and high concentration. The Division previously filed comments

highlighting this very concern with the Federal Energy Regulatory Commission, see <http://www.usdoj.gov/atr/public/comments/223049.htm>.

4 See note 1, supra.