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June 17, 2008

The Honorable Herb Kohl
Chairman
Subcommittee on Antitrust, Competition Policy and
Consumer Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are the responses for the record of Douglas Ross, Special Counsel for Agriculture, Antitrust Division, U.S. Department of Justice, to written questions received following the May 7, 2008, hearing held by the Subcommittee entitled, "Concentration in Agriculture and an Examination of the JBS/Swift Acquisitions."

We hope this information is helpful to you. If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Ranking Member

Follow Up Questions for Doug Ross from Hearing Entitled "Concentration in Agriculture and an Examination of the JBS Swift Acquisitions

From Senator Kohl

1. **In 1999, John Nannes, the then-Deputy Assistant Attorney General in the Antitrust Division noted in Congressional testimony that the concentrated nature of the beef processing industry required special vigilance. He stated, "We are fully aware, for example, that the concentration level in the steer and heifer segment of the beef packing industry is very high, which makes it very likely that we would take a careful look even at transactions producing only a modest change in concentration."**

   In contrast, Mr. Ross, you were quoted on the website MeatingPlace.com saying, in reference to the JBS transactions, that a high level of concentration alone does not constitute a violation of antitrust law. While this may be true, it leaves a very different message from the previous Administration's concern about concentration in meatpacking. Without commenting on the merits of the JBS deal, don't these quotes suggest two very different approaches to antitrust enforcement in agriculture? Why do you have such a difference in approach from that taken by Mr. Nannes a decade ago?

Both of the quotes you cite are consistent with the approach applied under the Horizontal Merger Guidelines. The Antitrust Division analyzes mergers pursuant to the Guidelines developed jointly by the Department of Justice and the Federal Trade Commission, with whom the Division shares merger enforcement responsibility. Under this approach, market concentration and market share are factors in the antitrust analysis, but are not dispositive.

Section 2 of the Guidelines states that "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger." The Commentary on the Horizontal Merger Guidelines indicates that the Division does not make enforcement decisions solely on the basis of market shares and concentration, but both measures nevertheless play a role in the analysis. Accordingly, mergers occurring in industries characterized by high shares in at least one plausible relevant market usually require additional analysis and consideration of factors in addition to market share. As Mr. Nannes went on to explain, "there may be other circumstances in which the prospects of new entry or other factors would cause us to conclude that the historic market share is not a good predictor of their future market share or market power. So we use the market shares as a starting point rather than an ending point for our analysis." *Competitive Issues in Agriculture and the Food Marketing Industry Before the H. Comm. On the Judiciary*, 106th Cong. 35-36 (1999).

2. **Nearly two years ago, we received allegations of anti-competitive and monopolistic conduct by DFA, the nation's leading milk marketing cooperative. One allegation in Florida was that independent dairy cooperatives could not have their milk processed in plants affiliated with DFA unless the independent cooperative paid the processor millions of dollars above the cost of processing the milk. It was alleged that this and other anti-competitive conduct seriously harmed the ability of independent cooperatives to compete, and ultimately resulted in higher milk prices to consumers.**

   We were informed that the staff of the Antitrust Division recommended to Assistant Attorney General Barnett in September 2006 that the Justice Department pursue an antitrust case against DFA. If so, it appears that no action was ever taken on the recommendation. Are these allegations true? Why was no enforcement action taken against DFA? What is the status of the DFA investigation today? If it is still pending, what accounts for the delay in coming to a decision as to whether to bring an enforcement action?

The Division welcomes and listens to allegations of potential antitrust violations, and takes these allegations very seriously. If the Division determines that the antitrust laws have been violated, it will take appropriate enforcement action. While the Department does not discuss matters relating to its internal deliberations, I can tell you that the Antitrust Division has monitored actions of DFA and other participants in the dairy industry for potential violations of the antitrust laws, and will continue to do so.

3. **Many critics of antitrust enforcement in the Justice Department in recent years point to the Smithfield/Premium Standard merger, which the Justice Department did not challenge. They argue this merger created a monopsony in pork processing in the southeastern United States, and depressed the prices farmers received for swine. What is your response? Was this deal a merger to monopsony, and, if so, why did the Justice Department not challenge it?**

The Division issued a detailed explanation of its decision to close its investigation of Smithfield's acquisition of Premium Standard Farms on May 4, 2007 (available at www.usdoj.gov/atr/public/press_releases/2007/223077.htm). After a careful investigation, the Division determined that the transaction was not likely to harm competition, consumers or farmers.

As part of its investigation, the Division considered the extent to which the transaction would allow the merged firm to lower prices paid to farmers in North Carolina, South Carolina and Virginia—an area in the southeastern United States in which Smithfield and Premium owned three of the four pork-packing plants. Despite the two companies' high share of pork-packing capacity in the area, the Division found that any attempt by the merged firm to lower prices paid—either to farmers who sell market-weight hogs, or to contract farmers who raise hogs for the merging parties—would likely be unsuccessful. First, the Division found that independent farmers at that time shipped, and had the ability to increase shipments of, market-weight hogs to plants outside the three states. In addition, independent farmers shipped and had the ability to increase shipments of weaner and feeder pigs (younger hogs that are lighter than market-weight hogs) to other states in the Midwest for finishing and slaughter. Second, the Division found that contract farmers retained at that time by Smithfield and Premium would switch, or credibly threaten to switch, to other firms that need hog-raising services, such as independent producers who own hog production operations in the area. That is, if Smithfield tried to lower prices to its contract finishers, those finishers could turn to the independent producers in sufficient numbers to negate Smithfield's incentive to exercise monopsony power against the contract finishers. Therefore, the Division concluded that the acquisition was not likely substantially to lessen competition.

4. **Has the Justice Department examined retrospectively mergers in the agriculture sector to determine what impact the deals had on prices paid to farmers or prices paid by consumers? If so, what has the Justice Department concluded?**

   If not, given the significant concern over agriculture concentration and the rise in food prices, does the Justice Department intend to study the issue?

When undertaking a new investigation or enforcement action in the same market or a related market as previous matters, the Department has an opportunity to assess competitive conditions as they developed subsequent to previous transactions. Furthermore, staff in the sections responsible for agriculture-related enforcement stay abreast of agricultural issues, keep up to date on market trends in those areas, and monitor conditions that would be relevant to our enforcement efforts. Performing more formal retrospective merger studies likely would consume significant time and resources that otherwise would be spent on enforcement matters. In addition, such studies are often inconclusive due to numerous intervening events that may impact actions after the merger. The Division keeps apprised of USDA studies of agriculture markets that have a bearing on our enforcement, as well as reports and articles from the trade press, private sector, and academic sources.

I would note that the Department and the FTC jointly held a merger workshop in February 2004 to study how effective the agencies' merger enforcement has been. And, as Special Counsel for Agriculture, I have led the Division's special outreach effort to speak with and listen to agricultural producers and organizations, which has been an important source of information for potential violations of the antitrust law that could lead to enforcement efforts.

From Senator Grassley

1. **Could you please tell me what the Justice Department does to monitor market performance of the agriculture industry that has been consolidating over the last decade? What mechanism is there to learn whether or not the expected outcome when a merger occurred was or was not what was experienced 5 – 10 years later? Have you looked at the competitive impacts of agricultural mergers that have gone through recently to determine whether there have been any adverse results? For example, do you believe that the Smithfield PSF acquisition has resulted in a monopsony in Virginia, North Carolina and South Carolina?**

In general, the Division has two legal sections that are responsible for agriculture-related enforcement. Attorneys in those sections stay abreast of agricultural issues, keep up to date on market trends in those areas, and monitor conditions that would be relevant to our enforcement efforts. As a law enforcement agency, the Division generally focuses its resources on pending matters, and our compulsory process powers are focused on determining whether a violation of law exists in particular cases. Accordingly, the Division's conclusion to close its investigation of Smithfield's acquisition of Premium Standard Farms was based on legal and economic analysis of market facts and conditions that existed at that time, which indicated that any potential ability or incentive to exercise monopsony power were negated by market realities. The Division is confident in its conclusion that the acquisition was not likely substantially to lessen competition in the southeastern United States.

When undertaking a new investigation or enforcement action in the same market or a related market as previous matters, we do have an opportunity to assess competitive conditions as they developed subsequent to previous transactions. Performing more formal retrospective merger studies likely would consume significant time and resources that otherwise would be spent on enforcement matters. In addition, such studies are often inconclusive due to numerous intervening events that may impact actions after the merger. The Division keeps apprised of USDA studies of agriculture markets that have a bearing on our enforcement, as well as reports and articles from the trade press, private sector, and academic sources.

I would note that the Department and the FTC jointly held a merger workshop in February 2004 to study how effective the agencies' merger enforcement has been. And, as Special Counsel for Agriculture, I have led the Division's special outreach effort to speak with and listen to agricultural producers and organizations, which has been an important source of information for potential violations of the antitrust law that could lead to enforcement efforts.

2. **Many are concerned that increased consolidation in agriculture makes it easier for the larger market participants to engage in anti-competitive and predatory business practices. Do you agree? How does the Justice Department monitor, investigate and prosecute this kind of activity?**

Section 2.0 of the Department of Justice/Federal Trade Commission Horizontal Merger Guidelines states that, "[o]ther things being equal, market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power." The Division applies the analysis set out in the Guidelines to ensure that mergers and acquisitions in agriculture—as in all industries—do not make it easier for firms to engage in business practices that harm competition. As part of this analysis, the Division examines the extent to which post-merger market conditions are conducive to unilateral or coordinated interaction, including the exercise of monopsony power, that harms consumers. In addition, the Division's enforcement of cases involving monopolization and unilateral anticompetitive conduct is extremely important. The Antitrust Division endeavors to apply consistent, objective standards in order to maintain aggressive enforcement of civil non-merger matters to protect competition in the important agriculture sector of our economy.

Staff in the sections responsible for agriculture-related enforcement stay abreast of agricultural issues, keep up to date on market trends in those areas, and monitor conditions that would be relevant to our enforcement efforts. And, as Special Counsel for Agriculture, I have led the Division's special outreach effort to speak with and listen to agricultural producers and organizations, which has been an important source of information for potential violations of the antitrust law that could lead to enforcement efforts.

3. **In your written testimony, you say that buyer market power depresses price and incentives to produce. Thus too few resources are productively used in the economy. That is exactly the result we are seeing in the beef industry as our cattle numbers and producer numbers decline, despite a growing U.S. population that increases overall beef consumption, is that not true?**

The Division is committed to preventing anticompetitive mergers or conduct from harming the agricultural marketplace. The Division has pursued monopsony cases as appropriate, including cases in the agricultural industry, such as its challenge to the Cargill/Continental Grain merger (the case filing for this matter is available at www.usdoj.gov/atr/cases/indx159.htm). In the beef industry in particular, in 1993 and 1994 the Division received reports that Cargill's large meatpacking subsidiary Excel was looking into acquiring Beef America. Both of these packers were among the top five in the steer-heifer slaughter market, and our concerns that competition in livestock procurement might be adversely affected by the merger—the monopsony concern—led us to open an investigation. We aggressively questioned Excel and others in the marketplace, clearly communicating our concerns. A Cargill executive has publicly stated that our investigation convinced the parties to abandon the merger.

Generally, the Division analyzes the potential anticompetitive exercise of market power on the buyer side in the same manner as on the seller side. For mergers, our starting point is the Horizontal Merger Guidelines. Similar analysis goes into evaluating joint ventures and other collaborative conduct. Monopolization or attempted monopolization would also be analyzed in similar fashion on the buyer side as on the seller side. The Division is committed to preventing transactions or conduct from increasing buyer market power in violation of the antitrust laws.

4. In your written testimony, you say that "the unifying theme of the guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise." Doesn't the JBS acquisition do just that?

The Horizontal Merger Guidelines describe the analytical process that the Division employs to determine whether to challenge a merger or acquisition. Under this process, the Division assesses whether the merger would significantly increase concentration and result in a concentrated antitrust market, properly defined and measured. The Division also assesses whether the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects. The Division analyzes whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern. The Division also assesses any efficiency gains that reasonably cannot be achieved by the parties through other means. Finally, in certain cases, the Division assesses whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market. The process of assessing market concentration, potential adverse competitive effects, entry, efficiency and failure is a tool that allows the Division to answer the ultimate inquiry in merger analysis: whether the merger is likely 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. Market power also encompasses the ability of a buyer to depress the price paid for a product to a level that is below the competitive price, and thereby depress output.

The Division is currently reviewing the proposed JBS acquisition. You may be assured that the Division will conduct a thorough investigation of the proposed transaction's effect on competition, and if we determine that this transaction would substantially lessen competition in any relevant market, we will take appropriate enforcement action to prevent such harm from occurring.

5. At what time, if not now, does the continued consolidation of the meat packing industry become detrimental to either the cow-calf producer, independent feedlot operator, or to the consumer?

The Division is committed to preventing anticompetitive mergers or conduct from harming competition in the agricultural marketplace. The Division will continue to enforce the antitrust laws fully and vigorously in the beef industry to ensure that consolidation does not substantially lessen competition.

6. **Can the Justice Department place any kind of pre-emptive limitations on the JBS merger because of JBS's ability and market power to depress live cattle prices? If so, what are those limitations?**

While I cannot comment specifically on the JBS transaction, which is currently pending before the Department, in general the Antitrust Division has the authority to seek conditions necessary to prevent a transaction from substantially lessening competition in violation of the antitrust laws. Whenever our investigation indicates that a particular merger is likely to substantially lessen competition in a specific relevant market, we aggressively pursue a remedy sufficient to prevent the threatened harm to competition, including litigation to obtain an adequate remedy or block the transaction altogether if necessary. If the Division obtains limitations on a transaction as a condition for the transaction to go forward, these limitations are subject to court review and approval, as being in the public interest, under the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16 (also known as the Tunney Act).

7. **Two competing cattle buyers in California and Arkansas exist today, and that competition will be substantially reduced – that is, there will only be one major buyer – if the JBS transaction goes through. Isn't that a problem? Also, reducing buyers from four to three is a 25% reduction in competition. Isn't that a pretty substantial reduction? In addition, Five Rivers Feeding Company will take at least one JBS plant equivalent off the market, thereby reducing bids for the equivalent number of independent cattle. Why is that not a problem?**

While I cannot comment specifically on the JBS transaction, which is currently pending before the Department, I can assure you that the Division will conduct a thorough investigation of the proposed transaction's effect on competition, and as part of its investigation, the Division will consider the transaction's impact on all relevant markets, including the effects of any potential reduction in production capacity or in the number of competitors in each relevant market. If the Division determines the transaction would substantially lessen competition or tend to create a monopoly in any relevant market, the Division will take appropriate enforcement action to prevent any harm to competition.

From Senator Feingold

1. **Mr. Ross and Prof. Carstensen, since I was first elected to the Senate in 1992, there has been significant consolidation in practically the entire agricultural industry. According to the National Farmers Union's periodic reports on the "Concentration of Agricultural Markets," in that time period beef packers, pork packers, broilers, turkeys, milling, soybean crushing, dairy processing, dairy cooperatives and U.S. food retailing have seen significant increases in market share among the largest firms. Has this consolidation benefited or harmed the farmers and growers who supply the markets? Similarly, what has been the impact on consumers?**

Many mergers pose no harm to consumers, and may produce efficiencies that benefit consumers in the form of lower prices, higher quality goods or services, or investments in innovation. Efficiencies such as these enable companies to compete more effectively, both domestically and overseas. However, if a particular transaction or business practice would pose a threat to competition—whether on the buyer side with respect to farmers and growers, or on the seller side with regard to consumers of agricultural products—the Antitrust Division will enforce the antitrust laws to prevent anticompetitive mergers or conduct from harming competition. As my testimony illustrates, the Division has been very active in the agriculture sector to ensure that concentration does not harm farmers, growers, or consumers.

2. **Mr. Ross, in the past few years, I have noticed an increase in the number of partnerships, joint ventures and agreements to be the exclusive supplier of a certain retailer, such as an agreement between a large retailer and a meat packer to exclusively supply their stores with beef. To what degree does the Department of Justice examine these relationships when considering mergers and anti-trust issues? Does it change the examination if one of these partners is a cooperative? With the consolidation in both retailers and meat packers, is there even more reason for concern because these are more likely to be alliances between giants?**

Joint ventures, partnerships and exclusive supply arrangements are all part of the market facts that our analysis would take into account as part of a comprehensive understanding of the markets that the antitrust laws seek to keep competitive. While any of these can be evidence of efficiency-enhancing ways to participate in the economy, they can be anticompetitive as well. For example, in the corn wet-milling merger in 2002 between Archer Daniels Midland and Minnesota Corn Processors, the Division insisted that a joint venture with a competing corn wet miller be dissolved before the originally proposed merger could proceed because we found that it would have tended otherwise substantially to lessen competition in the market. Under the Capper-Volstead Act cooperatives are exempt from the antitrust laws when acting within the scope of the Act. The Division would take into account in any antitrust analysis whether an exemption was operative.

In three of the Division's recent enforcement actions involving agriculture, cooperatives have been involved, although none of these actions was affected by the Capper-Volstead exemption. First, in 2000 the Division challenged the proposed acquisition by the cooperative Dairy Farmers of America of the non-cooperative SODIAAL North America in an inquiry that found likely anticompetitive consequences for competition in branded butter in the Philadelphia and New York City metropolitan areas. Second, in December 2004, the Division forced the Eastern Mushroom Marketing Cooperative, the largest mushroom farmer cooperative in the country, to stop its practice of buying mushroom farms only to shut them down, and to agree to make farms it had previously shut down available to competing farmers. Third, in the acquisition by Dairy Farmers of America ("DFA"), a cooperative, of Southern Belle Dairy, we challenged the consummated acquisition as illegal due to the higher school milk prices it resulted in for 100 school districts in Kentucky and Tennessee; after prevailing on appeal, the Division obtained a consent decree requiring DFA to divest Southern Belle.

With respect to alliances between retailers and meat packers, consolidation in these markets would be a factor the Division would include in the analysis of the competitive factors as part of any enforcement inquiry or action. As the Horizontal Merger Guidelines make clear, however, size or concentration levels alone are not outcome-determinative, as all of our inquiries are fact- and case-specific, with the goal of ensuring that the effect of a proposed acquisition or merger is not substantially to lessen competition.

3. **Mr. Ross and Mr. Carstensen, would a ban on packer ownership and other controls on captive supply have a positive or negative impact on competition in the beef industry? What would be the effect on the integrity of price discovery and consumer and producer prices?**

In the November 6, 2007 Statement of Administration Policy on H.R. 2419, the Administration expressed its strong opposition to a proposed prohibition on packer ownership of livestock, on the grounds that it would interfere with the freedom to contract, require divestiture of assets by entities that have operated legally, limit opportunities for farmers and ranchers to participate in marketing alliances and increase prices for American consumers.

4. **Mr. Ross, it has recently been reported that the former CEO of Dairy Farmers of America played a role in the unauthorized transfer of $1 million to former DFA Board Chairman Brubaker. Does the Antitrust Division or the Department of Justice more generally have authority to investigate such a transaction? If not, which agency or agencies have an oversight role?**

While I am aware of press reports that suggest the Department of Justice and the Commodities Futures Trading Commission may be investigating the transfer referenced in your question, I cannot comment specifically on any potential or actual investigation. Depending on the specific facts and circumstances regarding the transfer, either agency (or both) may have authority to investigate the matter.

5. **Mr. Ross, dairy markets and the prices that feed into the FMMO system are also overseen to some degree by the USDA and CFTC. Is there a formal system or are there regularly scheduled meetings for coordinating oversight activities and sharing relevant information with these other agencies? How about the Chicago Mercantile Exchange, which oversees the cash cheese market? How frequently have such meetings, communications or referrals occurred?**

As reflected in an August, 1999 Memorandum of Understanding, the Antitrust Division has a long-standing positive working relationship with USDA on competition matters in the agricultural sector, and both attorneys and economists remain in regular contact with USDA on specific matters as well as on more general mutual concerns as appropriate. In addition, the Division and the USDA have instituted periodic meetings between "front office" officials at the two agencies to discuss both specific and general matters of interest.

The Division has also been in contact on appropriate occasions with the Commodities Futures Trading Commission. For example, in the Cargill/Continental matter, the Division's investigation included extensive consultations with officials from the CFTC, among others, to consider the impact of the proposed transaction on futures markets. After the final judgment was entered in that matter, three additional firms became eligible to make delivery on the futures contracts, reducing concentration in ownership of facilities eligible for delivery of the contracts and introducing a greater degree of competition among potential deliverers on the contracts. These changes reduced the likelihood of future attempts to manipulate prices established in the corn and soybean futures markets, and helped contracts function well in the settlement's aftermath.

The Division will continue to consult, when appropriate, with other government regulatory entities to take advantage of expertise that may be helpful for understanding the competitive dynamics of markets or industries in which those entities have extensive expertise, though the Division makes its own enforcement decisions in accordance with its distinct enforcement responsibilities.