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DEPARTMENT OF JUSTICE

Antitrust Enforcement and Agriculture

Address by

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I am pleased to have the opportunity to discuss the role that the antitrust laws play in the agricultural marketplace. In the last few years, agricultural producers and others have expressed concern about competitive conditions in the agricultural marketplace, about the impact on farmers of particular mergers and acquisitions, and about levels of concentration in agriculture generally. We know that the agricultural marketplace is undergoing significant changes, including major advances in technology and productivity, changes in business relationships between producers and packers/processors and, in certain sectors, increasing concentration.

As recent actions by the Antitrust Division demonstrate, we hear the concerns being expressed and take them very seriously. By any measure, the Division has been spending a significant amount of time, energy, and resources on agricultural issues recently. Sometimes our work results in enforcement actions, a few of which I will describe shortly.

Perhaps the most recent Division actions – apart from case filings – reflecting both that it hears these concerns and that it takes them seriously are Assistant Attorney General Joel Klein's announcement last year that he would create within the Division a new position of Special Counsel for Agriculture and his fulfillment of that promise with my appointment. Assistant Attorney General Klein has asked me to draw upon my quarter-century experience in antitrust and litigation at the state and federal levels to focus full-time on the agricultural marketplace and to provide him assistance and advice to supplement the Division's ongoing antitrust enforcement efforts. Mr. Klein has also personally traveled to the Midwest twice in the last year to visit with large groups of farmers, to hear their concerns directly and to improve everyone's understanding of how the antitrust laws operate and how the Division works to protect competition under them. Over the last several years, other Division officials have met with individual farmers and agricultural organizations and testified at hearings here in Washington and in the field as well to hear these concerns and to explain how the Division's mission to enforce the antitrust laws applies in the agricultural sector. Let me now turn to those topics to give you a better understanding of the work of the Antitrust Division.

The role of the Antitrust Division in the midst of the changes faced by the agricultural marketplace is narrow but important: we enforce the antitrust laws. We are not regulators. We do not have the power to restructure any industry, any market, or any company, or stop any practice, except to prevent or cure specific violations of the antitrust laws that we can prove in court. When we bring an action, the court decides whether the antitrust laws are being violated in the particular instance, and whether the remedy we are seeking fits the violation. The court's decision depends on the particular facts in evidence. Therefore, we bring an enforcement action in court only when we are in possession of factual evidence that gives us good reason to believe that the antitrust laws have been violated.

There are three basic kinds of violations of the antitrust laws. First, the antitrust laws prohibit conspiracies to deny market access or otherwise suppress competition. Second, they prohibit the use of predatory and/or exclusionary conduct to acquire or hold on to a monopoly in a market. Third, they prohibit mergers and acquisitions (referred to collectively hereafter as "mergers") that are likely to substantially lessen competition in a market. On a day-to-day basis, the most frequent context in which we consider concentration levels, about which agricultural producers and others express concerns, involves our analysis of mergers. The antitrust laws do not prohibit all increases in concentration. Increases in concentration may occur through internal growth or through mergers. Internal growth, in particular, is generally thought to be economically beneficial, as it most often reflects the success of producers in the marketplace in attracting and satisfying customers. So, too, mergers can be economically beneficial, allowing the resulting entities to operate more efficiently, reduce costs, and better meet the demands of the marketplace.

The antitrust laws are based on the notion that competitive market forces should play the primary role in determining the structure of our economy. The consumer is the primary beneficiary of antitrust enforcement and effective competition among producers of goods and services at all levels in the production process, because that competition leads to better quality, more innovation, and lower prices. This is why it is often said that the antitrust laws protect competition, not competitors. But producers who seek to supply products and services also benefit, because antitrust enforcement and effective competition enable them to do so free from anticompetitive interference. Our job is to stop the specific kinds of private-sector conduct I just mentioned from interfering with competitive market forces.

The antitrust laws protect competition in the agricultural sector of our economy just as they do in other parts of the economy. A number of industries are also regulated by government agencies under statutes that go beyond the antitrust laws to establish additional, industry-specific regulatory requirements and standards. For example, the meat-packing industry is regulated by USDA's Grains Inspection, Packers and Stockyards Administration. While the antitrust laws play an important role in helping keep markets competitive, they will never address all of the complex issues facing American agriculture in this time of change. That is why the government continues to focus on a broad range of agriculture policy issues.

What the Antitrust Laws Prohibit

A minute ago, I referred to three different types of antitrust violations. Let me state them more specifically. First, it is a violation of section 1 of the Sherman Act for separate firms to agree among themselves not to compete with each other, but instead to join forces against their consumers or their

suppliers. Second, it is a violation of section 2 of the Sherman Act for a firm to monopolize or attempt to monopolize a market. Third, it is a violation of section 7 of the Clayton Act for a firm to merge with another firm or acquire its assets if to do so would be likely to substantially lessen competition in any market. I'd like now to describe each of these types of violations in a little more detail, and give you an idea of how we approach each of them.

1. Collusion

The first type of antitrust violation, when firms that are holding themselves out to the public as competing against each other instead agree with each other to unreasonably restrain competition among themselves, is often referred to as collusion. Collusion is a willful subversion of the normal operation of free markets, and can result in serious harm to consumers, suppliers, and the economy. It virtually always results directly in inflated prices to consumers, or depressed prices to suppliers, and in denial of choices in the marketplace; indeed, that is its purpose. The most common types of collusion are agreements to fix prices, agreements to allocate markets, and agreements to boycott particular customers, suppliers, or competitors.

Price fixing can include agreeing on the specific price, or rigging a specific bid, but it can also include agreeing to increase or depress price levels, or agreeing to follow a formula that has the intended effect of raising or depressing prices or price levels. Allocation of markets can include agreeing to divide up geographic areas to avoid competition, or agreeing to divide up customers or suppliers within an area, or agreeing to divide up a sequence of bids. Group boycotts can include any agreement among competitors that they will deal with their customers or their suppliers only on particular terms, in order to suppress competition.

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

It is important to remember that with any of these forms of collusion, proving a case requires evidence of an agreement between the firms in question. Absent direct or circumstantial evidence that the firms are not making their decisions independently, it is not enough to show merely that two agribusiness firms, for example, bid the same price for a commodity, or that one tends to buy in one area and another tends to buy in another area. What would concern us is if there were additional facts showing collusion directly or circumstantially, such as patterns of bids over time, or patterns of attendance at various sales or auctions, that didn't make competitive sense – that couldn't be explained as part of normal competitive behavior. Needless to say, if we obtained reliable evidence suggesting agreement, such as two firms discussing with each other what price they intend to bid or accept, or where they plan to focus their buying or selling, we would definitely be concerned and look into it.

Let me mention three collusion cases we have brought recently. The first one I'll mention is our criminal prosecution against Archer Daniels Midland and others, beginning in 1996, for participating in an international cartel organized to suppress competition for lysine, an important livestock and poultry feed additive. The cartel had inflated the price of this important agricultural input by tens of millions of dollars during the course of the conspiracy. ADM pled guilty, and was fined \$100 million – at the time the largest criminal antitrust fine in history, now the third largest. Other participating corporations have also been prosecuted and assessed multi-million-dollar fines. In addition, three ADM executives were convicted for their personal roles in the cartel; last summer, two of them were sentenced to serve two years in prison and

fined \$350,000 apiece for their involvement, and the other executive had 20 months added to a prison sentence he was already serving for another offense.

The second collusion case I'll mention is our prosecution of the Swiss pharmaceutical giant, F. Hoffmann-La Roche Ltd., and a German firm, BASF Aktiengesellschaft, for their roles in a worldwide conspiracy, over the course of nine years, to raise and fix prices and allocate market shares for certain vitamins sold in the United States and elsewhere. The conspiracy affected \$5 billion in U.S. commerce, involving vitamins used not only as nutritional supplements and food additives, but also as additives in animal feed. In May 1999, the two firms agreed to plead guilty, with Hoffman-La Roche to pay a fine of \$500 million and BASF to pay a fine of \$225 million. These are the two largest antitrust fines in history – in fact, the \$500 million fine is the largest criminal fine of any kind in history. A former Hoffmann-La Roche executive also agreed to submit to U.S. jurisdiction, to plead guilty to participating in the conspiracy and lying to Justice Department investigators about it, and to serve a four-month prison term and pay a \$100,000 fine. These prosecutions are part of an ongoing investigation of the worldwide vitamin industry in which there were more than a dozen prosecutions and over \$875 million in fines as of the end of 1999.

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

Before I leave collusion, I should mention an important exception to the prohibition against agreements to restrain competition, found in the Capper-Volstead Act. This law allows producers of agricultural commodities to form processing and marketing cooperatives – in effect to engage in joint selling at a price agreed to by the producer members of the co-op – subject to certain limitations enforced in the first instance by USDA.

2. Monopolization or Attempt to Monopolize

Let me now turn to the second type of antitrust violation, monopolization or attempt to monopolize, which is a violation of section 2 of the Sherman Act. For various reasons, this type of antitrust violation occurs less commonly than collusion, but it is also a serious willful subversion of the free marketplace. An example of monopolization or attempt to monopolize would be a dominant company in the market attempting to drive its competitors out of business by interfering with their ability to engage in the business. This might be attempted by the clearly dominant firm refusing to buy from producers who sell to any of its competitors, or refusing to ship with transportation companies who ship for any of its competitors, or refusing to sell to distributors or retailers who handle the products of any of its competitors – if the dominant company in question had enough market power that these refusals would have anticompetitive effects. Monopolization does not require proof of an agreement among two or more firms; one firm can illegally monopolize by itself.

But it is important to understand that monopolization cannot be proved just by showing that a firm has engaged in restrictive conduct. The law also requires proof that the firm has a monopoly – and that requires an extremely high market share all to itself – and that it engaged in the restrictive conduct in order to acquire or maintain the monopoly. Or, in the case of attempted monopolization, it must be proved that the firm has a "dangerous probability" of acquiring a monopoly as a result of the restrictive conduct. And

to prove "dangerous probability," the courts generally require, for starters, that the firm involved in the restrictive conduct already have a quite large market share – a 50-percent share for a single firm might not be enough. And even a 60-to-70 percent market share might not be enough, if other facts indicate that the restrictive conduct involved is unlikely to succeed in creating a monopoly.

Just as important, section 2 monopolization cannot be proved just by showing that the market is highly concentrated. Under our antitrust laws, a firm may lawfully have a monopoly – even 100 percent of the market – as long as the firm has not acquired or maintained that monopoly through the kind of restrictive conduct I described a minute ago, but rather, in the words of Judge Learned Hand, "by virtue of superior skill, foresight and industry."

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

3. Mergers

The third type of antitrust violation, a merger that is likely to substantially lessen competition in a particular product market and geographic market, has a different kind of legal standard from the other two, in that it does not require proof that anticompetitive conduct has already occurred. Here, the principal focus is not on the conduct of the merging parties, but on whether the merger would change the market structure to such a degree that competition would likely be substantially lessened. The remedy we seek for a merger that violates the Clayton Act is to sue to stop the merger, or to insist that it be modified to remove the cause for antitrust concern.

Merger reviews require a careful analysis of the markets involved. The Antitrust Division analyzes mergers pursuant to Horizontal Merger Guidelines developed jointly by the Department of Justice and the Federal Trade Commission. The analysis is aimed at determining whether the merger is likely to create or increase market power, or to facilitate the exercise of market power, in any market. Market power is the ability of a firm to raise the price charged to customers – or to lower the price paid to suppliers – a small but significant amount without that move being defeated by counteractive competitive responses by other competing firms moving in to take away those customers or suppliers.

Before we get to that analytical step, however, we must first go through the exercise of determining the scope of the product markets and geographic markets that would be affected by the merger. This is an essential first step in our analysis – until we know the size and shape of the market, we cannot know how big any firm's market share is, for example. The scope of a market is generally defined by the smallest geographic area in which a hypothetical firm, assuming it faced no competition for its product in that area, could make a small but significant change in price stick. Usually, we are looking at that firm as a seller, and determining the smallest area within which the firm's customers would be unable to thwart the firm's inflated pricing by going outside that area for their buying needs. But, as our Merger Guidelines expressly note, we also look at the firm as a buyer, and determine the

smallest area in which sellers to the firm would be unable to thwart the firm's depressed prices by selling to others outside that area – that is, because it would be economically impractical to travel or ship outside that area.¹

A decision as to the dimensions of this area can sometimes be reached by examining recent buying and selling patterns in the marketplace. But the decision can also depend on a variety of other, more subtle factors, because the ultimate question is not how far the buyers and sellers have traveled or shipped in the past, but how far they could or would travel or ship in response to anticompetitive price changes.

Once we have defined the market, we turn to the question of market concentration and how it would be affected by the merger. There is no automatic threshold of market concentration that will always result in a determination that a merger would violate section 7 of the Clayton Act. Other factors also play an important role in analyzing the impact of the merger – such as other structural features of the market that make anticompetitive effects more likely or less likely; and the ease or difficulty of entry into the marketplace by new competitors who could neutralize any anticompetitive potential. We would also consider the impact of any demonstrable efficiency gains from the merger that would demonstrably result in competitive benefits.

In the recent past, we have reviewed a number of proposed mergers in the agricultural marketplace. The following examples show efforts to protect the interests of farmers as purchasers of corn seed, cottonseed, and farm equipment, and as sellers of grain and soybeans.

In the first seed example I'll mention, in the biogenetics area, in 1998 we investigated Monsanto's acquisition of DeKalb Genetics Corporation. Both companies were leaders in corn seed biotechnology and owned patents that gave them control over important technology. We expressed strong concerns about how the merger would affect competition for seed and, to satisfy our concerns, Monsanto spun off its claims to agrobacterium-mediated transformation technology, a recently developed technology used to introduce new traits into corn seed, such as insect resistance, to the University of California at Berkeley. Monsanto also entered into binding commitments to license its Holden's corn germplasm to over 150 seed companies that currently buy it from Monsanto, so that they can use it to create their own corn hybrids.

In another seed matter, last year Monsanto abandoned its proposed acquisition of Delta & Pine

¹ Market power by a buyer is addressed by the Merger Guidelines under the same analytical framework as a seller's market power that may result from a merger:

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.

Land Co., which would have combined the nation's two largest cottonseed companies, after learning of our intention to sue to resolve concerns about the anticompetitive effects of the proposal.

In another agriculture merger case seeking to protect farmers as buyers of farm machinery, last November we filed a complaint challenging the Case/New Holland acquisition as originally announced. To resolve the Division's competitive concerns that the proposed acquisition would likely result in higher farm machinery prices, New Holland Co. has agreed to sell its four-wheel-drive and large two-wheel-drive tractor businesses (part of the nation's \$1.5 billion market for agricultural tractors), and Case Corp. has agreed to spin off its hay tool business (the U.S. market for hay tools is about \$250 million). Our proposed consent decree is pending in court under a Tunney Act proceeding in which the court makes the final determination that the decree is in the public interest.

In a case where the concerns of farmers as sellers of grain and soybeans were involved, in July 1999, we challenged the Cargill/Continental Grain merger as originally proposed. We were concerned that the proposed transaction would have depressed prices received by farmers for grains and soybeans in certain regions of the country. To resolve our competitive concerns, Cargill and Continental agreed to divest a number of grain facilities throughout the Midwest and in the West, as well as in the Texas Gulf. Our proposed consent decree is still pending before the court. Earlier this month, the Department filed its responses to public comments. Let me give you a sense of the thoroughness with which the Division investigated all the potentially affected markets and sought relief in those markets in which we concluded that the transaction was competitively problematic.

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

Thus here, among the required divestitures, we insisted on divestitures in three different markets where both Cargill and Continental currently operate competing port elevators, to preserve the competition that currently exists for purchasing the grains and soybeans of affected producers: (1) Seattle, where the elevators now compete to purchase corn and soybeans from farmers in portions of Minnesota, North Dakota, and South Dakota; (2) Stockton, California, where the elevators now compete to purchase wheat and corn from farmers in central California; and (3) Beaumont, Texas, where the elevators now compete to purchase soybeans and wheat from farmers in east Texas and western Louisiana.² We also required divestitures of river elevators on the Mississippi River in East Dubuque, Illinois, and Caruthersville, Missouri, and along the Illinois River between Morris and Chicago, where the merger would have

² In addition to benefitting farmers and other suppliers in the above-mentioned states – who can be said to be captive to the elevators involved – the required divestitures may also benefit farmers and other suppliers in Illinois, Iowa, Nebraska, Missouri, Kansas, Oklahoma, Colorado, and New Mexico, who, while not necessarily captive to the elevators involved, nevertheless rely on them as competitive alternatives.

otherwise harmed competition for the purchase of grain and soybeans from farmers in those areas.

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

Moreover, we required divestiture of a rail terminal in Troy, Ohio, and we are prohibiting Cargill from acquiring the rail terminal facility in Salina, Kansas, that had formerly been operated by Continental, and from acquiring the river elevator in Birds Point, Missouri, in which Continental until recently had held a minority interest, in order to protect competition for the purchase of grain and soybeans in those areas.³

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

Coordination with USDA

The Antitrust Division maintains close contact with the USDA's Grain, Inspection, Packers and Stockyards Administration (GIPSA). GIPSA does not have authority to enforce the Sherman and Clayton Acts, although it does have authority to consider competition concerns as part of its authority under the Packers and Stockyards Act; that authority, by the way, extends beyond conduct that violates the antitrust laws. And if GIPSA uncovers conduct that it believes may violate the antitrust laws, it has authority to refer the matter to us for investigation and enforcement. We and GIPSA share information with each other on a regular basis. For example, I already mentioned the assistance they provided that led to a criminal prosecution for bid rigging at a Nebraska cattle auction, and in the Cargill/Continental merger investigation. In other examples, we received useful market information from GIPSA during our investigations into the lamb industry a few years ago, as well as during our investigation into other recent mergers. We have consulted with GIPSA in connection with its investigation of federal cattle procurement practices, and helped advise GIPSA in shaping and overseeing recent economic studies of agricultural market concentration issues. Last summer, together with the Federal Trade Commission, the Antitrust Division and USDA signed a Memorandum of Understanding Relative to Cooperation With Respect to Monitoring Competitive Conditions in the Agricultural Marketplace that ensures that they will share information as appropriate and "confer regularly . . . consistent with applicable confidentiality restrictions, to discuss law enforcement and regulatory matters related to competitive conditions in the agricultural marketplace."⁴

³ We also required Cargill to enter into what is called a "throughput agreement" to make one-third of the loading capacity at its Havana, Illinois, river elevator available for leasing to an independent grain company, and are imposing restrictions on Cargill in the event it seeks to enter into a throughput agreement with the operator of the Seattle facility.

⁴ The Antitrust Division shares antitrust enforcement responsibility with the Federal Trade Commission, with a few exceptions (e.g., criminal enforcement under the Sherman Act is exclusively in the Antitrust Division; and by tradition the FTC handles enforcement of the Robinson-Patman Antidiscrimination Act).

Conclusion

When someone from the Antitrust Division speaks about our work, we try to make clear to everybody that if they have any information that they think is relevant to our enforcement activities, we want to hear about it. As a law enforcement agency, we treat conversations with us in confidence. If the information leads us to conclude that the antitrust laws have been violated, we will take appropriate enforcement action. In the meantime, we will continue monitoring this industry closely.

The Antitrust Division takes seriously its responsibility to protect the marketplace – including the agricultural marketplace – against anticompetitive conduct and mergers that substantially lessen competition. As I hope I have made clear, the Division has a record of acting in this important sector when the antitrust laws are violated.