UNITED STATES DEPARTMENT OF AGRICULTURE AND UNITED STATES DEPARTMENT OF JUSTICE COMPETITION IN THE AGRICULTURE INDUSTRY WORKSHOPS

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	)	ATTORNEYS GENERAL OF THE
COMMENTS REGARDING	)	STATES OF
COMPETITION IN THE	)	MONTANA, IOWA, MAINE
AGRICULTURE INDUSTRY	)	MARYLAND, MISSISSIPPI,
	)	NEW HAMPSHIRE, NEW
	)	MEXICO, OHIO, OKLAHOMA,
	)	OREGON, SOUTH DAKOTA,
	)	TENNESSEE, VERMONT, and
	)	WEST VIRGINIA

INTRODUCTION

The Attorneys General of the undersigned states[1] (the "States") submit these comments in response to the request by the Department of Agriculture and the Department of Justice.[2]

Concern over the economic welfare of U.S. farmers and ranchers, and their susceptibility to the harmful exercise of market power, helped lead to the passage of the nation's major antitrust legislation.[3] And while much has changed in agriculture over the past century, one thing that has not changed is the vulnerability of our producers to anticompetitive conduct.

For the most part, our farms and ranches remain relatively small businesses that are relied upon to produce a high quality product, with little regard to the cost of the inputs to produce and transport their products, or the prices they will receive upon completion of their labor.

Hence, our farmers and ranchers are twice disadvantaged: Anti-competitive conduct injures farmers and ranchers as *consumers* in various input markets where monopoly or seller power is abused through lower output and higher prices. This conduct also injures them as *producers,* where monopsony or buyer power among processors is abused through lower demand and lower prices.

The impacts do not end at the borders of the farm or ranch, either. The abuse of buyer power can also harm the consumer at the supermarket, as the lower demand at the agricultural processor level translates into lower output at the food consumer level.

The States' agricultural sectors vary widely, from the dairy farms of New England to the corn and soybean farms of the Midwest to the ranches of the High Plains. We find common ground, however, in recognizing that our rural communities and our consumers alike depend on

1 Montana, Iowa, Maine, Maryland, Mississippi, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Vermont, and West Virginia.

2 74 Fed. Reg. 43725-6 (08/27/09).

3 ABA Section of Antitrust Law, *Antitrust Law Developments (Sixth), Volume II,* at 1305.

an efficient and vibrant agricultural marketplace. This, in turn, requires an integrated approach that includes increased cooperation among state and federal competition law enforcers as well as reconsideration of laws and regulations that may no longer serve their original pro-competitive purposes. The States therefore share the objectives of the USDA and USDOJ in these workshops: understand the state of competition in agricultural markets and explore appropriate advocacy, enforcement, and other solutions to meet the needs of agricultural producers and consumers alike.

I. Crop Markets

A. Seeds

Historically, most commercial seed suppliers were small, often family-owned businesses that multiplied seed varieties developed in the public domain by, for example, state agricultural experiment stations.[4] With the development of hybrids and greater intellectual property right protections, the number of private firms engaged in plant breeding grew rapidly for some time. However, consolidation has prevailed since the early 1990s.[5] By 1998, Pioneer Hi-Bred International, the then-largest hybrid seed company, had a 41% market share in hybrid corn.

The trend towards consolidation came along with increasingly sophisticated development of hybrid germplasm and the introduction of transgenic technology into plant germplasm. The new transgenic traits were licensed to seed developers which bred them into the germplasm. These traited seeds provided resistance to herbicides or insect protection. For example, in 1996 Monsanto introduced the "Roundup Ready" trait in soy. By virtue of its market acceptance and broad licensing to third party seed developers, Monsanto increased its market share from less than 2% of total planted major field crops in the U.S. in 1996, to 68% of major field crops—and 91% of the U.S. soy crop—in 2007.[6]

The rapid acceptance of transgenic traits coincided with a trend towards concentration within the industry, so that today five multi-national companies own the most commercially successful trait technologies for crops. Transgenic seeds now account for 80% of planted corn, 92% of planted soybeans, and 86% of planted cotton.[7] Monsanto's Roundup Ready trait has been bred into most seeds offered by third party seed developers, including Pioneer.

These developments in transgenic traits and improved germplasm have coincided with increased crop yields: since the mid-1990s, overall corn yields have increased 36%, soy yields have increased 12%, and cotton yields have increased 31%.[8] The introduction of genetic traits has also been credited with reducing input costs for herbicides and pesticides, saving farmers more than $1 billion a year in such chemical and labor costs, in addition to less tangible savings

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[4] Jorge Fernandez-Cornejo and Richard E. Just, *Researchability of Modern Agricultural Input Markets and Growing Concentration*, Amer. J. Agr. Econ. 89 (Number 5, 2007), 1269.
[5] *Id.*
[6] See, "Adoption of Genetically Engineered Crops in the U.S.: Extent of Adoption" at http://www.ers.usda.gov/Data/BiotechCrops/adoption.htm (Visited 2-23-10).
[7] *See* Diana L. Moss, *Transgenic Seed Platforms: Competition Between a Rock and a Hard Place?*, American Antitrust Institute at 10. http://www.antitrustinstitute.org/archives/files/AAI_Platforms%20and%20Transgenic%20Seed_102320091053.pdf.
[8] Council for Biotechnology Information; Factsheet: "Helping Increase Crop Yields for America's Farmers," available at http://www.whybiotech.com/resources/CBIAgriculture2009.pdf.

in time, effort and known environmental impacts.[9] Yet the prices charged for the transgenic traits, as well as for the underlying germplasm, have increased dramatically: corn seed in 2009 is reported to be 30% more expensive than it was in 2008, while soybean seed was 25% more expensive in 2009 than in 2008.[10]

These prices are a factor of both the germplasm price and the so-called "technology fee," which functions as a royalty fee for the transgenic trait.[11] The royalties are a consequence of patent protection for the specific event causing the mutation or modification in the genetic material which creates the herbicide tolerance, insect resistance or other beneficial trait. Patents provide an inventor nearly unfettered control over access to an invention during the life of the patent, including the ability to charge for that access.[12] However, if an inventor licenses its invention to others and, through that process, restrains competition that would have occurred absent the license, antitrust liability could arise.[13] In a concentrated industry, law enforcers must carefully analyze whether any holder of intellectual property is acting within the scope of its patent in imposing any restrictions on the use of the claimed invention.

While the increase in seed and trait prices may be offset by savings in other inputs or other additives, it is unclear to what extent rising transgenic seed prices have led to sufficient corresponding benefits to agricultural producers. There is additional concern that increased vertical integration and acquisitions may have raised the bar for entry so high that entry into the trait market is difficult, or nearly impossible.

RECOMMENDATION:

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[9] Sankula, Sujatha. 2006. *Quantification of the Impacts on U.S. Agriculture of Biotechnology-derived Crops Planted in 2005* (Executive Summary), National Center for Food and Agricultural Policy.

[10] *See*, Kristina Hubbard, *Out of Hand: Farmers Face the Consequences of a Consolidated Seed Industry*, Farmer to Farmer Campaign Report, Dec. 2009 at 21. http://farmertofarmercampaign.com/Out%20of%20Hand.FullReport.pdf.

[11] *Id.*

[12] United States patent law is generally intended to protect an inventor's right to fully control and benefit from an invention for a term of years – until that patent expires, the inventor holds exclusive control, within the scope of its patent, and may limit any rights to use that invention. *Monsanto v. Scruggs*, 459 F. 3d 1328, 1338 (Fed. Cir 2006); see also, *Miller Insituform, Inc. v. Insituform of N. Am. , Inc*., 830 F.2d 606, 609 (6th Cir. 1987) ("A patent holder who lawfully acquires a patent cannot be held liable under Section 2 of the Sherman Act for maintaining the monopoly power he lawfully acquired by refusing to license the patent to others.") Antitrust laws do not prevent a monopolist from charging a high royalty for use of an invention. *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."). Evidencing the right of control over its intellectual property, the patent owner may charge different licensees different royalties. *E.g., Akzo, N.V. v. International Trade Comm'n*, 808 F.2d 1471, 1488-89 (Fed. Cir. 1986) (Patentee was free to charge higher prices for those uses of its patented process that have greater value). Case law has also recognized the ability of a patent holder to impose restrictions that might carry over to subsequent purchasers. *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992); see also *Monsanto Co. v. McFarling*, 363 F.3d 1336, 1340 (Fed. Cir. 2004) (Not an antitrust violation or misuse of Monsanto's licenses to prevent farmers from replanting the progeny of its patented seed because the progeny also contain the patented invention.).

[13] *See* Antitrust Guidelines for the Licensing of Intellectual Property, §3.1 at http://www.justice.gov/atr/public/guidelines/0558.htm#t3.

Continue awareness and scrutiny. To the extent there is consensus as to the existence of any problem, there is no simple solution due to both the interplay of long-standing policies of protecting property rights governed by patent laws and the economic efficiencies claimed by the multi-national companies that now dominate the industry.

The complexity of the seed industry requires a thorough understanding of the industry, current antitrust jurisprudence, and intellectual property laws. State Attorneys General, the DOJ and USDA should explore the concerns which have been raised and consider whether there are bases for changes in policy and existing laws.

B. Grain Transportation

Railroads ship more than one-third of U.S. grain production,[14] and the majority of production in several major grain-growing States.[15] Since 1980, consolidation of railroad operations and facilities has reduced the number of Class I railroads from 40 to 7.[16] The Surface Transportation Board recently concluded that "even after factoring out rising fuel costs, railroad rates have risen in the past three years after falling for decades."[17]

Any efficiencies recognized by railroad consolidation have not led to lower prices for "captive" grain farmers served by a dominant railroad. According to the USDA, rail rates for grains and oilseeds have increased 73 percent since 2003, and rail rates in 2008 for grains and oilseeds were 81 percent higher than rates for all other commodities.[18] For similar long-distance grain routes to Portland, Oregon, the rates from North Dakota, with one Class I railroad, are approximately double the amount from South Dakota with two Class I railroads.[19] Railroad monopoly power, as measured by the Lerner Index "markup" ratio above marginal cost, is higher for grain shipments than any other commodity. A study commissioned by the Surface Transportation Board concluded that "grain shippers are not unjustified in viewing themselves as paying relatively high markups."[20] Recent findings on Montana grain shippers confirm the impact of railroad captivity.[21] Captive grain shippers in that state had been charged $19 million

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[14] Ass'n American Railroads, *Railroads and Grain*, at 3 (July 2007), http://www.aar.org/Home/AAR2/InCongress/BackgroundPapers.aspx.

[15] Kenneth Clayton, *Rail Competition and Service*, House Committee on Transportation and Infrastructure, at 3 (U.S.D.A. Sept. 21, 2007).

[16] *Id*. at ES–8; *see also* Assn. of Am. R.R.s, *The Effects of Rail Mergers on the Number of Class I Railroads and Shipper Captivity* 1, http://www.aar.org/Resources/~/media/AAR/. BackgroundPapers/NumberofClassIRRsAug2008.ashx (Aug. 2008) (claiming 22 "Class I railroads or rail systems" in 1980 under inflation–adjusted definition).

[17] STB Office of Economics, Analysis & Administration, *Study of Railroad Rates: 1985–2007* 2, http://www.stb.dot.gov/stb/industry/1985–2007RailroadRateStudy.pdf. (Jan. 16, 2009).

[18] Ag. Marketing Svc., *Fuel Surcharges Drive Record Rail Rates in 2008 But Drop in* 2009, Weekly Highlights (U.S.D.A. Dec. 17, 2009).

[19] *Freight Railroads: Industry Health Has Improved, but Concerns About Competition and Capacity Should Be Addressed*, Gov't Acct. Off. Rpt., 07–94 at 21 (2007).

[20] Laurits R. Christensen Assocs., Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition*, at 11–22, ES–23 tbl. ES–6. http://www.stb.dot.gov/stb/elibrary/CompetitionStudy.html.; select "Executive Summary" (Nov. 2008).

[21] *See* John Cutler, et al., *Railroad Rates and Services Provided to Montana Shippers*, Rpt. to the St. of Mont. (Feb. 2009) (available at http://www.doj.mt.gov/news/releases2009/20090226railroadreport.pdf).

more annually by the single monopoly railroad serving the state than grain shippers in more competitive transportation markets.[22]

Unfortunately, railroads claim immunity from antitrust enforcement for most of their conduct related to shipping grain crops under the judicially-created filed-rate doctrine[23] and various statutory exemptions.[24] Meanwhile, Surface Transportation Board rate reasonableness proceedings have failed to provide relief to grain shippers.[25] The Board itself has estimated that nearly 90% of the $1 billion of farm product shipping revenue captive to a dominant railroad is ineligible for full rate relief under the Board's procedures, and that 60% of farm product shippers are eligible for no more than limited relief through abbreviated rate proceedings.[26] The absence of antitrust protection and resulting abuse of monopoly power has imposed an enormous cost on shippers. For example, the Surface Transportation Board's approval (over the objections of the Antitrust Division) of the 1996 merger of the Union Pacific and Southern Pacific Railroads gave the Union Pacific a monopoly in hundreds of western markets. The monopoly was estimated to result in $800 million in consumer price increases annually.[27]

RECOMMENDATION:

Repeal railroad antitrust immunity and reform common carrier regulation to make quality transport more accessible to agricultural shippers. Given the deregulation of the railroad industry over the past three decades, "it is imperative that antitrust fill the gap left by regulators."[28] The States recommend repeal of railroad antitrust exemptions paired with effective regulatory reform to prevent abuse of captive shippers served by a dominant railroad.

II. Livestock

A. Cattle

The cattle industry has more producers and generates more revenue than any other agricultural production sector. More than half a million fed cattle are purchased for around half a billion dollars by cattle packers in an average week.[29] Historically, cattle markets were separated into two sectors: the producers that breed and feed cattle until they are at ideal market weight, and the packers that slaughter, cut and box the beef for sale to the public. Increased

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[22] *Id.* at 12.
[23] *See Keogh v. Chi. & N.W. Ry.*, 260 U.S. 156, 163 (1922) ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper.").
[24] *See generally*, ABA Section of Antitrust Law, *Comments on the Railroad Antitrust Enforcement Act*, 6-7 (Dec. 2008), http://www.abanet.org/antitrust/at-comments/2008/12-08/comments-HR1650_S772.pdf.
[25] *See generally* Anthony Johnstone, *Captive Regulators, Captive Shippers: The Legacy of McCarty Farms*, 70 Mont. L. Rev. 239 (2009).
[26] *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) at 35 (Served Sept. 5, 2007).
[27] U.S. Dept. Just., *Justice Department Urges Denial of Union Pacific / Southern Pacific Merger*, http://www.usdoj.gov/atr/public/press_releases/1996/0673.pdf. (June 3, 1996).
[28] Darren Bush, "The Intersection of Competition Policy and Surface Transportation Regulatory Policy: An Examination of H.R. 165, the 'Railroad Antitrust Enforcement Act of 2007'," (Before the House Judiciary Cmmte Antitrust Task Force, Feb. 25, 2008), http://www.abanet.org/antitrust/at-committees/at-exemc/railroad-exemptions/darrenbush.pdf.
[29] *See* Amended Complaint, *U.S et. al. v. JBS et. al.*, Civil Action No. 08-CV-5992, pp.7-8, paragraph 19.

horizontal concentration and vertical integration have blurred this once well-defined line, with potential anti-competitive effects.

A concentrated buyers market in such a perishable product as fed cattle is highly susceptible to abuse of buyer power.[30] Packers profit by the difference between the price they pay for buying and processing fed cattle, and the price they charge for beef cuts, boxed beef, and all other beef products. When packers reduce production levels, cattle producers are paid less while the total output to consumers may shrink, meaning consumers may pay higher prices. In turn, when packer demand is up, cattle producers are paid more while output to consumer markets increases. However, the undeniable trend over the last several decades is that the ranchers' share of the consumer dollar has declined.[31]

Horizontally concentrated cattle markets are becoming more vertically integrated, too, largely through the procurement of "captive supplies."[32] Packers obtain captive supplies by becoming direct owners of feeder cattle, or entering forward contracts to otherwise commit a supply of cattle to them. While forward contracts often provide stability in a market, these forward contracts lack transparency, and have become mechanisms by which packers may manipulate captive supplies to create artificial declines in spot market prices. Producers likely face lower prices when they guarantee their cattle to packers through forward contracts.[33]

The Packers and Stockyards Act of 1921 ("PSA") was passed in response to a market controlled by the "Big Five" packers and to ensure fair competition and fair trade practices in the marketing of livestock, meat and poultry.[34] The PSA broadly prohibits unfair, deceptive, monopolistic and other unjustly discriminatory practices.[35] While PSA has generally been given credit for being effective in ensuring prompt and accurate payment to livestock producers,[36] it has fallen short in its original intention. The livestock industry as a whole is now more concentrated than it was when PSA was enacted.

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[30] Terence P. Stewart, James R. Cannon, Jr., Eric P. Salonen and Dennis R. Nuxoll, *Trade and Cattle: How the System Is Failing An Industry in Crisis*, 9 Minn. J. Global Trade 449, 459.
[31] *Id* at 464.
32 See Note, Challenging Concentration of Control in the American Meat Industry, 117 Harv. L. Rev. 2643 at 2650 (2004). *See also* Chris Bastian, Deevon Bailey, Dale J. Menkhaus and Terry F. Glover, *Today's Changing Meat Industry and Tomorrow's Beef Sector*, at http://ag.arizona.edu/AREC/wemc/papers/Today_Tomorrows.html: "Vertical coordination between producers and processors takes several different forms. Dr. Clement Ward at Oklahoma State University describes these forms as '(1) packer feeding of livestock in packer-owned facilities or on a custom basis; (2) forward contracting or production contracting; and (3) purchasing livestock under exclusive marketing/purchasing agreements.' Whether vertical integration or coordination is used, the result is basically the same, producers and/or handlers act in tandem with processors, and processors gain control over at least a portion of the supply needed to operate processing plants efficiently and to better provide the types of products demanded by consumers."
[33] *See generally*, Lynn A. Hayes, *Antitrust and Agriculture: The Need for Regulatory Implementation and Enforcement of the Packers and Stockyards Act*, available at http://www.flaginc.org/topics/pubs/arts/CLE_LAH.pdf.
[34] See *generally*, Christopher R. Kelley, *An Overview of the Packers and Stockyards Act*, available at http://www.nationalaglawcenter.org/assets/articles/kelley_packers.pdf.
[35] *Id.*
[36] *Id.*

B. Poultry and Hogs

Unlike the cattle market, almost total vertical integration has occurred in poultry and hog markets. Processor ownership throughout the entire chain of production is the standard, except for a few producers that have turned to highly specialized "niche" markets. Although the poultry sector became almost totally vertically integrated before the hog sector, the hog sector today essentially models the poultry sector.[37]

Vertical integration in the poultry and hog sector can yield efficiency and quality control.[38] It may also help processors respond to market forces in a global economy.[39] Yet non-transparent processor contracts leave producers in a "take it or leave it" position.[40] Paired with consolidation, vertical integration, when taken too far, can reduce choice in the marketplace.[41]

RECOMMENDATION:

Increase federal, state, and interagency coordination in enforcement of the antitrust laws and the Packers and Stockyard Act. Collaborative efforts combine the practical experience and relationships that are strengths of the States with the expertise and enforcement resources of our federal counterparts.[42] The States' involvement in PSA enforcement could help ease the burden on DOJ and Grain Inspection, Packers and Stockyards Administration (GIPSA). Historically, the States have not brought PSA cases; however, exploration into methods of state enforcement of PSA should be supported by federal counterparts. USDA also should consider legislative and regulatory revisions to the PSA to ensure compliance with the Act.[43] Under PSA, GIPSA should consider whether to adopt rules that regulate captive supply livestock procurement methods.[44]

Legislation that addresses some of these issues, specifically market transparency in contracting for the sale of cattle, was introduced May 20, 2009 (S.1086, the Livestock Marketing Fairness Act), and has been referred to the Senate Agriculture, Nutrition, and Forestry

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[37] Doug O'Brien, *Policy Approaches to Address Problems Associated with Consolidation and Vertical Integration in Agriculture*, 9 Drake J. Agric. L. 33 at 34.
[38] *See* Steve W. Martinez, *Vertical coordination in the Pork and Broiler Industries: Implications for Pork and Chicken Products* at http://www.ers.usda.gov/publications/aer777/aer777fm.pdf.
[39] *See* Harrison M. Pittman, *Market Concentration, Horizontal Consolidation, and Vertical Integration in the Hog and Cattle Industries: Taking Stock in the Road Ahead* at http://nationalaglawcenter.org/assets/articles/pittman_marketconcentration.pdf.
[40] *See generally* Neil E. Harl, *The Structural Transformation of Agriculture* (Mar. 2003) at http://www.econ.iastate.edu/faculty/harl/StructuralTransformationofAg.pdf.
[41] *See* O'Brien, supra note 37.
[42] A recent example of state and federal collaboration to help ensure competition in the cattle marketplace by halting anticompetitive packer concentration occurred in November of 2008 when several States joined the Department of Justice in an important effort to block further packer concentration in *U.S. et. al. v. JBS S.A.* By late February of 2009, the parties to that merger, which would have combined to become the largest beef packer in the U.S. (and world), walked away from the transaction.
See U.S. Dept. Just., *Department of Justice Statement on the Abandonment of the JBS/National Beef Transaction* http://www.justice.gov/atr/public/press_releases/2009/242857.htm (February 20. 2009).
[43] 7 U.S.C. § 192.
[44] *See, e.g.*, Hayes, supra note 32 (describing so-called "WORC" rule to require market transparency in packer ownership of or forward contracting for cattle).

committee.[45] However, this legislation does not directly address packer ownership and feeding of cattle.

III. Dairy

Dairy farming is a quintessential part of many States' landscape and history. Dairy farming operations stretch from California and Oregon to the Midwest—from the southeast to New England. The dairy industry has been called "the paramount agricultural activity of the northeast," critical to the region's economy and rural character.[46] Presently, however, the dairy industry is in crisis. The price of milk paid to farmers reached a thirty-year low in 2009. As prices have dropped below costs, family dairy farms around the country have closed.[47] The peril facing dairy farmers across the country has received significant media attention,[48] as well as recent congressional action in the form of increased subsidies.[49] There has been renewed interest in antitrust review of the dairy industry over the past year.[50]

The dairy industry's concentration is as pronounced as its current economic upheaval. Two players dominate the national dairy market: Dean Foods Company and Dairy Farmers of America, Inc., (DFA), the largest and most powerful dairy cooperative in the country. Private antitrust plaintiffs allege that DFA's agreements with Dean Foods and National Dairy Holdings, the two largest milk bottlers in the United States, have vested DFA with control of access to 70 to 77% of the fluid Grade A milk bottling capacity in parts of the country.[51]

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[45] *See* http://www.govtrack.us/congress/bill.xpd?bill=s111-1086 (describing the Livestock Marketing Fairness Act as Amending the Packers and Stockyards Act of 1921 to prohibit a livestock sale forward contract [with an exception for specified cooperatives] that: (1) does not contain a firm base price that may be equated to a fixed dollar amount on the contract day; (2) is not offered for open public bid; (3) is based on a formula price; or (4) provides for the sale of more that 40 cattle, 30 swine, or other livestock in a quantity as determined by the Secretary of Agriculture).

[46] The Northeast Dairy Compact, Pub. L. 104-127, § 147 (1996).

[47] In Vermont, for example, according to the State's Agency of Agriculture, the number of dairy farms has steadily declined for the last year and half – 87 of the state's 1100 dairy farms have gone out of business since mid-2008, a decrease of nearly eight percent. *See also* http://www.justice.gov/atr/public/testimony/250178.htm ("Crisis on the Farm: The State of Cooperation and Prospects for Sustainability in the Northeast Dairy Industry," September 19, 2009 field hearing comments of Christine Varney noting "unprecedented economic upheaval in the dairy industry," including "record rate" at which dairy farmers have been going out of business).

[48] *See, e.g.*, http://www.reuters.com/article/idUSTRE5190JN20090210 (Reuters, 2/9/09); http://abcnews.go.com/Business/milk-prices-low/story?id=8605563 (ABC News, 9/18/09); http://iowaindependent.com/14103/for-dairy-farmers-crisis-looms (Iowa Independent, 4/16/09); http://www.minnpost.com/stories/2009/09/15/11567/klobuchar_warns_of_crisis_for_states_dairy_farmers (Minnesota, 9/15/09).

[49] Pub. L. 111-80.

[50] For example, on August 6, 2009, Senators Bernie Sanders, Chuck Schumer, and Russ Feingold sent a letter summarizing their understanding that the Department had conducted a twenty-six month investigation of the dairy industry, and that career antitrust division lawyers recommended that enforcement action be taken against firms such as Dean Foods, DFA, and National Dairy Holdings.[50] The Senators urged the antitrust division to "re-examine the evidence gathered during this investigation and take any appropriate action." http://www.vermontagriculture.com/news/2009/VarneyDairy8-6-09.pdf.

[51] *In re Southeastern Milk Antitrust Litigation*, 555 F. Supp. 2d 934 (E.D. Tenn. 2008) (alleged control of 77% of southeast market); Complaint in *Allen v. Dairy Farmers of America*, Docket No. 2:09-cv-00230-wks, filed Oct. 8, 2009 (alleged control of 70% of northeast market).

Both DOJ and state Attorneys General have challenged certain mergers and acquisitions by DFA and the entity that is now Dean Foods.[52] DOJ and Attorneys General from Wisconsin, Illinois and Michigan recently filed a complaint alleging that Dean Foods, the largest milk processor in the area, unlawfully acquired two processing plants in Wisconsin from Foremost Farms, the fourth largest processor in the area.[53] The complaint alleges that the acquisition would increase market concentration and eliminate an aggressive competitor of Dean Foods, which has approximately 57 percent of the market for processed milk in northeastern Illinois, the Upper Peninsula of Michigan, and Wisconsin.

Outside the merger context, the most recent antitrust litigation involving dairy cooperatives and processors has been in the form of private class actions. There is ongoing antitrust litigation entitled *In re Southeastern Milk Antitrust Litigation*, [54] which involves multiple class actions against Dean Foods, National Dairy Holdings, and DFA, among others, alleging conspiracies to reduce prices paid to farmers and to raise prices charged to direct purchasers of processed milk. The plaintiffs' claims have survived initial Capper-Volstead Act defenses and the case is in discovery. In addition, on October 8, 2009, a private class action was filed in Vermont alleging unlawful monopsony and monopoly by Dean Foods, DFA, Hood, and Dairy Marketing Services. The plaintiffs' allegations include claims that the defendants coerced farmers into joining DFA in order to get access to bottling plants owned by Dean Foods, and that all of the defendants conspired to artificially lower the price of milk paid to farmers.

Finally, during the last century a number of States promulgated pricing-related laws affecting milk that were aimed at preventing pricing discrimination against producers. These regulations may offer significant competitive pricing information. For example, Wisconsin State Statute 100.201(2)(a)(1), allows wholesalers and retailers to request copies of published price lists from any wholesaler. While this particular statute provides a mechanism to discourage price discrimination, published price lists could be used to encourage tacit collusion between competing wholesalers. It may be prudent to evaluate how such laws can discourage discrimination while also reducing the amount of competitive pricing information they make available to the industry.

RECOMMENDATION:

Review Capper-Volstead and milk marketing laws: At least two statutory schemes are integral to any anti-competitive review of this industry. The first is the antitrust immunity afforded to certain actions of agricultural cooperatives under the Capper-Volstead Act, 7 U.S.C. §§ 291, 292.[55] The second is the "labyrinth" of federal milk-marketing regulation.[56] The States

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[52] *See, e.g.*, http://www.justice.gov/atr/cases/f243800/243875.htm (DOJ's 2007 settlement regarding DFA's acquisition of Southern Belle Dairy, a milk processor); http://www.justice.gov/atr/cases/f4700/4783.htm (DOJ's 2000 settlement regarding DFA's acquisition of SODIAAL, a butter company); http://justice.gov/opa/pr/2001/December/01_at_652.htm (DOJ's 2001 settlement regarding Dean and Suiza Food Corp.'s merger). Prior to the Dean-Suiza merger, the six New England states challenged Suiza's purchase of Stop & Shop's processing plant in Readville, Massachusetts, and Suiza's proposed exclusive supply agreement with the supermarket chain.

[53] *See* http://www.justice.gov/atr/public/press_releases/2010/254435.htm.

[54] 555 F. Supp. 2d 934 (E.D. Tenn. 2008).

[55] Capper-Volstead immunity is not absolute, of course. Although the Act protects price agreements among producers, it does not protect cooperatives with non-farmer, i.e., non-producer, members, and it does not permit

recommend that the Capper-Volstead Act and particularly the current milk pricing scheme promulgated pursuant to the Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601-14, 671-74; 7 C.F.R. §§ 1000-1199, be reviewed to ensure that they continue to protect and benefit farmers as originally intended. The AMAA and accompanying rules and regulations must not serve as a vehicle for large competitors to exclude smaller, independent entities from the market.

CONCLUSION

In comments submitted to the Antitrust Modernization Commission in 2004, 41 States and the District of Columbia expressed concern that the courts in some circumstances had diluted antitrust laws and that agricultural commodities were "ripe for study."[57] The comments to the Commission also criticized exemptions from the antitrust laws as they may create "enforcement gaps leav[ing] state enforcers, businesses and consumers with limited recourse against massive wrongdoing or potential harm."[58] An integrated approach that includes careful antitrust scrutiny, and enforcement where appropriate, will all be necessary to ensure healthy competition in agriculture.

State Attorneys General have frequently cooperated with federal authorities and members of the private bar in the investigation and prosecution of antitrust violations. These joint efforts can create "a powerful synergy, blending the national perspective of the federal agencies with the unique knowledge of local markets and parens patriae powers of the state Attorneys General."[59] The States submit that this is especially true in the agricultural sector, where local production markets lead to national consumer markets.

Therefore, the undersigned Attorneys General respectfully submit these joint comments and offer their assistance in analyzing and resolving issues regarding competition and regulatory issues in agricultural markets. The Attorneys General have designated the following contact persons for the States to facilitate prompt responses to the DOJ and USDA's questions and/or requests for information:

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cooperatives to set prices with processors or distributors. *See, e.g., United States v. Borden Co.*, 308 U.S. 188, 204-05 (1939) (Capper-Volstead does not protect cooperative of milk producers' attempt to conspire with distributors, labor union, and municipal officers to fix price paid to members); *In re Mushroom Direct Purchaser Antitrust Litigation*, 621 F. Supp. 2d 274, 284, 287 (E.D. Pa. 2009) (no Capper-Volstead immunity where cooperative included a non-farmer processor and cooperative conspired to fix prices with distributors).

[56] *Zuber v. Allen*, 396 U.S. 168, 172 (1969).

[57] *See Amended Comments Regarding Commission Issues for Study*, submitted to the Antitrust Modernization Commission's Request for Public Comment, 69 FR 43969 (July 23, 2004), signed by the Attorneys General of 42 jurisdictions at http://govinfo.library.unt.edu/amc/comments/stateags.pdf.

[58] *See id.*

[59] *See id.*

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Respectfully submitted,

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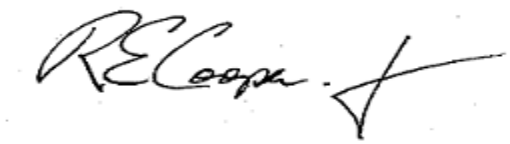

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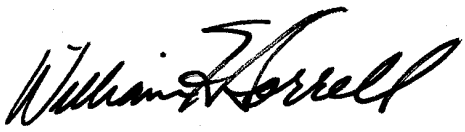

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