



# DEPARTMENT OF JUSTICE

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## STATEMENT

OF

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United States Senate

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Mr. Chairman and Members of the Committee:

I am pleased to be here this afternoon to discuss the implications of increased economic concentration in the meat-packing industry, and the role of the federal antitrust laws and the Justice Department's Antitrust Division in ensuring that this industry remains subject to healthy competitive market forces. As many have noted, concentration in this industry has increased significantly over the last 15 years.

I would like to provide you with a brief overview of the role of the antitrust laws and the Department's role in enforcing them. But first, let me explain our relationship with the Federal Trade Commission and the USDA with regard to jurisdiction over practices in the meat-packing industry.

**Respective Roles of the Department, the FTC, and USDA**

The Department is a law enforcement agency with respect to the meat-packing, cattle, and hog industries, not a regulatory agency. This is an important distinction. Our primary responsibility in these areas is to investigate possible violations of the antitrust laws -- most prominently, the Sherman and Clayton Acts -- and to prosecute violations when they are found to exist.

For the most part, the Department shares federal enforcement authority over the antitrust laws with the FTC. One exception is that the FTC does not have criminal enforcement authority, so matters that involve potential criminal violations of the Sherman Act would be handled by the Department. Another exception is

that, by tradition, the FTC handles enforcement of the Robinson-Patman Antidiscrimination Act.

Even where the Department and the FTC share enforcement responsibility, we do not conduct joint investigations, nor do we duplicate each other's investigative efforts. Instead, the two enforcement agencies have developed a formal liaison process to determine cooperatively which agency will investigate a particular matter. Generally, the agency with the greater current expertise in the particular industrial sector involved will handle the matter. This cooperative arrangement prevents unnecessary duplication of effort that would waste scarce enforcement resources and that might unduly burden private entities. Pursuant to this arrangement, the Department has investigated possible antitrust violations in the cattle, hog, and lamb industries, while the FTC has investigated in the poultry and retailing industries.

The USDA's Grain, Inspection, Packers and Stockyards Administration (GIPSA) is a regulatory agency. 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 to regulate the meat-packing industry. GIPSA's regulatory authority under that Act extends beyond conduct that violates the antitrust laws. And if GIPSA, in the course of its regulatory activity, uncovers conduct that it believes may violate the antitrust laws, it has authority to refer the matter to us for investigation and enforcement.

In accordance with our complementary roles, the Justice Department's Antitrust Division and the GIPSA have established a close, cooperative working relationship to share information with respect to our respective investigations. Our agencies are in frequent contact. For example, we received valuable market information from GIPSA during our recent investigations into the lamb industry and into a potential merger between major meat packers, and we are currently consulting with GIPSA in connection with its investigation of federal cattle procurement practices. We are also actively involved in an interagency working group advising GIPSA in its oversight of several economic studies having to do with market concentration in the red meat-packing industry, including the effects of livestock supply arrangements. We have played significant roles in helping GIPSA shape these studies at the outset and select the academic researchers, and in helping with the technical review of the studies in progress. We fully expect our cooperative working relationship to continue to reap benefits in the future.

#### **Recent Department Activities Regarding the Meat-packing Industry**

In recent years, the Department has conducted several investigations into meat-packing industry practices, pursuant to our role in enforcing the Sherman and Clayton Acts. Although confidentiality requirements under the antitrust laws limit my ability to discuss in detail the Division's investigative activities or the rationales for our determinations in specific

cases, I want to mention a few that are already public knowledge.

In the early 1990's, we conducted an extensive investigation into complaints about possible misconduct by packers and breakers (wholesalers) in the lamb industry, before ultimately deciding the evidence was insufficient to warrant prosecution. We also conducted an investigation into reports in 1993-94 that Cargill's large meat-packing subsidiary Excel might be interested in acquiring Beef America, a significant Nebraska beef packer.

The Department has also undertaken substantial outreach efforts with respect to these industries, consistent with our efforts to promote competition and remain familiar with the basis for any competitive concerns. On numerous occasions, we have met or spoken with concerned parties in Washington, D.C., and around the country regarding meat-packing practices. In just the last year or so, our more prominent outreach efforts have included attending a meeting in Omaha with the Nebraska Cattlemen/Feedlot Council, a meeting in Kansas City with the Center for Rural Affairs, a meeting in Rapid City to speak with the Western Organization of Resource Councils, and another meeting in Omaha with cattle and hog producers and packers.

### **Antitrust Enforcement Jurisdiction**

The Department's antitrust enforcement jurisdiction focuses on three kinds of conduct that can undermine competitive freedom: collusion, monopolization and mergers and acquisitions.

Collusion is a coordinated effort among supposedly independent firms to subvert natural competitive forces. This

includes conduct such as price fixing, bid rigging, and allocation of customers or market territories. This conduct virtually always results directly in inflated prices to consumers and denial of choices in the marketplace; indeed, that is its purpose. The Department can prosecute this conduct criminally or civilly under Section 1 of the Sherman Act. Most often, collusion occurs in a horizontal setting -- that is, among those who are ostensibly competing directly against each other. But anticompetitive collusion can also occur in a vertical setting, for example between a supplier and a retailer to force retail prices higher by withholding product from discount retailers.

The lamb investigation is a typical example of an investigation of potential collusion. Over the course of two years, we searched for evidence that major Western packers were allocating customers or territories between themselves, agreeing as to the prices they would pay for lambs or the method of calculating those prices, or agreeing to use a price formula for reimbursing producers. We also looked into various complaints of other possible anticompetitive activity.

We received information from several sources, including GIPSA, industry groups, and academics -- particularly a team at Texas A&M University that had recently completed a comprehensive study of the lamb industry. Department representatives also made several trips to major lamb growing areas of the country to explain the nature of the investigation, meet with producers and other industry representatives, and gather additional information. In all these meetings we explained the antitrust

principles relevant to our investigation, answered questions, and urged that anyone having any information or suspicions that they believed might suggest the existence of an antitrust violation provide that information to us.

We closed the investigation because it did not reveal evidence of violations of the antitrust laws. Our decision to close the investigation was consistent with the results of the comprehensive study of the industry and its problems undertaken by the Texas A&M group. That study included a detailed description of the nature, structure, and competitive circumstances of the industry, including an empirical analysis of the factors that affect retail price spreads at various levels of the industry. The study concluded that economic factors such as changes in lamb supply and demand, high processing and marketing costs, and seasonality factors largely explained changes in lamb price spreads. The study found no evidence of collusive behavior among lamb industry participants. Rather, the study attributed many of the industry's recent problems to an increase in production since 1987 and a long-term decline in demand for lamb products resulting in lower producer prices.

The second kind of conduct we focus our antitrust enforcement efforts on is monopolization or attempted monopolization, which is prohibited under Section 2 of the Sherman Act. Proving a case of monopolization requires more than just proving that the firm in question has monopoly power in the relevant market. It must also be proven that the firm has used unlawful anticompetitive means to acquire or maintain its

monopoly power. Proving a case of attempted monopolization requires proving that the firm has used unlawful anticompetitive means in an attempt to acquire a monopoly, and that there is a dangerous probability that the attempt will succeed.

The third kind of conduct involves mergers, acquisitions, and similar arrangements such as joint ventures, all of which I will refer to generically as mergers. Section 7 of the Clayton Act prohibits mergers that threaten to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country.

Evaluating a merger is a highly fact-intensive exercise. The Department and the FTC have jointly formulated and published merger guidelines that explain the principles that the two agencies follow and the factors they take into account with respect to horizontal mergers. The basic objective is to prevent mergers from creating or enhancing "market power," or facilitating its exercise. Market power is an antitrust term that means the ability of one or more sellers to profitably raise and keep prices above the competitive level for a significant period of time; or the ability of one or more buyers to profitably depress and keep the price paid for a product or raw material below the competitive level. We examine market concentration levels, the potential for anticompetitive effects, and the potential for entry by new competitors, among other things.

Another factor the Department considers in appropriate circumstances is whether the merger makes possible new

procompetitive efficiencies that would substantially reduce costs for the merged firm. Those efficiencies must be more than conjectural; they must be likely. It must also be likely that the merged firm would pass the cost savings on to consumers in the form of lower prices and increased production. And even if those conditions are both satisfied, the efficiencies will not be enough to justify an otherwise anticompetitive merger if there is an alternative means of achieving the same efficiencies without the adverse effects on competition. It is important to note that a merged firm's being able to flex increased market power to force prices for supplies down is not regarded as an efficiency that benefits consumers.

One recent example of a merger investigation was the investigation the Division opened in response to reports of Excel's possible interest in acquiring Beef America.

### **Conclusion**

The Antitrust Division takes very seriously its responsibility to ensure that all markets -- including meat-packing markets -- remain free of anticompetitive conduct. We will continue to closely monitor developments in the marketplace and confer with those knowledgeable about the industry, including those expressing competitive concerns. We would urge anyone who has evidence of an antitrust violation to share it with us; I can assure you that, if the evidence warrants, we will investigate thoroughly and if violations are found we will prosecute them vigorously.

Mr. Chairman, that concludes my testimony. I would be pleased to answer any questions.