



AMERICAN FARM BUREAU FEDERATION®

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July 15, 2005

Deborah A. Garza, Chair
Jonathon R. Yarowsky, Vice Chair
Antitrust Modernization Commission
1120 G Street, NW
Suite 810
Washington, D.C. 20005

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BY:.....

Dear Ms. Garza and Mr. Yarowsky:

The American Farm Bureau Federation (AFBF) appreciates the opportunity to provide comments on issues under study by the commission. As the nation's largest organization of farmers and ranchers, no organization has more members impacted by the work and ultimately, the recommendations of the commission regarding agricultural immunities and exemptions to U.S. antitrust law, and merger enforcement and review of agriculturally related enterprises.

Most of the questions contained in the May 19 *Federal Register* notice are specific to the technical application of antitrust law. We will focus these comments on questions contained in Item V, General Immunities and Exemptions, and to Item VII, Merger Enforcement.

V. Immunities and Exemptions

The immunities and exemptions to U.S. antitrust law that are under examination by the commission and considered most important to AFBF include, but are not limited to, the Capper-Volstead Act, the non-profit agricultural cooperatives exemption, the Agricultural Marketing Agreement Act, the Export Trading Company Act, the Webb-Pomerene Act and the Anti Hog Cholera Serum and Hog Cholera Virus Act. All were enacted in furtherance of a valuable public purpose, which has increased during the life of these programs.

It is extremely important that the combined economic, structural and social impacts of the immunities, exemptions and their relative interdependence be examined. One impact cannot be examined without also examining the others because they are intertwined. Economically and structurally, agricultural producers are far more productive than a century ago. However, their relative market strength as individual producers is little more than it was a century ago. Generally, in the early 20th century there were a greater number of small farms selling products to a greater number of smaller customers. Today there are fewer but bigger farms selling products to fewer but bigger customers. The increased demands of these customers on producers today require a capacity to consistently produce a volume and quality of agricultural products that far exceeds the ability of the vast majority of farms.

Farm producers must have the ability to join together to conduct marketing activities and meet competitive market conditions, to reduce price risk and in many cases to even have a market for their production. History shows, the limited immunities and exemptions to antitrust liability afforded to farm producers by the Capper-Volstead Act, the Agricultural Marketing Agreements Act, the Export Trading Company Act and the Webb-Pomerene Act has created orderly marketing systems for producers. The exemptions encourage the creation of value-added food and agricultural products with functional, cost saving benefits for consumers. Consolidation is a reality in all sectors of food production and marketing today. The public and private value of joint producer marketing organizations will not diminish in the future.

The immunities and exemptions should not be subject to sunset review. This would create and foster future uncertainty and render the applicable immunities and exemptions nearly useless. It is costly in terms of resources and capital to create and operate cooperatives. Producers will be far more reluctant to make such investments if there is an opportunity for the immunity and/or exemption upon which the investment is authorized to be eliminated. If the purpose of an immunity or exemption is justifiable upon its authorization by Congress, that justification should be sufficient for its uninterrupted continuation unless or until the Congress in its purview has reason to question that justification.

Proponents of an immunity or exemption should not have the burden of proving that the benefits of the immunity or exemption exceed their cost any more than is necessary to secure authorization for such immunity or exemption from Congress. AFBF opposes regular sunset reviews and a burden of proof clause that is any more stringent than that required to authorize the immunity or exemption in the first place.

AFBF strongly supports the Capper-Volstead Act, which has been crucial to the economic growth and development of U.S. agriculture in the 20th century. Farmer cooperatives established and operated pursuant to the Capper-Volstead Act have served farmers and consumers very effectively by organizing the critical mass of commodity processing and marketing not otherwise available to individual farm businesses. This critical mass has allowed farmers and producers to gain market strength that is crucial for their economic survival.

While these comments focus on the Capper-Volstead Act, we want to express our support for federal marketing orders. The Agricultural Marketing Agreement Act of 1937 grants the Secretary of Agriculture authority to enter into marketing agreements with associations of producers. This helps stabilize market conditions and assures consumers of adequate supplies of commodities. Marketing orders for dairy, poultry, fruits and vegetables, and livestock are currently in place. The terms of orders are developed through public hearings held by the Department of Agriculture, providing an opportunity for the public and other government agencies to comment prior to issuance.

VII. Merger Enforcement

A. Federal Antitrust Merger Enforcement Policy Generally

AFBF is concerned with mergers and consolidations and their impact on U.S. family farmers. AFBF supports the comprehensive review of existing antitrust statutes and the development of legislation where necessary to modernize and strengthen antitrust enforcement activities. We request that emphasis be given to regional analysis of possible anticompetitive behavior and impacts when mergers and consolidations involving agricultural enterprises are being reviewed by government agencies.

The Challenges of Economic Concentration for Farmers and Ranchers

Agricultural interests have surfaced concerns of monopolies and trusts and actively worked to formulate appropriate responses. The need to address agricultural concerns was a prominent consideration in the passage and implementation of most of the important antitrust statutes of this country. Perhaps the most well-known example is the passage of the Packers and Stockyards Act in 1921. This was largely in response to concerns about adverse impacts to farmers and ranchers resulting from concentration in the meatpacking industry.

Recent decades have brought further consolidations among those businesses to which farmers and ranchers sell their products. Those engaged in the production of agricultural products are justifiably concerned about the possibility of further oligopsony market power among buyers of their production.

Despite these concerns, commentators, enforcement agencies, and courts appear to focus their inquiries on whether a consolidation or merger can achieve efficiencies at the consumer level (i.e. lower prices or more favorable terms and conditions of purchase). The more relevant and appropriate inquiry is whether the merger or consolidation will adversely effect those persons having to sell their products to the few buyers of those products left in the market.

The unique structure of American agriculture exacerbates these concerns because of the traditional marketing techniques used by farmers and ranchers. As with any independent business, farmers and ranchers by and large act independently when making marketing decisions. As a consequence, a largely non-organized group is selling its commodity production into a highly concentrated sector with significant brand marketing power.

AFBF urges that increased emphasis be given, in any analysis of a proposed merger or consolidation of entities to which farmers and ranchers must sell their products, as to how such a merger or consolidation would impact the market choices and economic well-being of those farmers and ranchers.

B. Regional Considerations

AFBF has concerns about whether or not the Department of Justice and the Federal Trade Commission are adequately and accurately assessing the anticompetitive impacts of mergers and consolidations on a regional rather than on a nationwide basis. For instance, AFBF questions whether enforcement agencies consider all crops and livestock to be national markets.

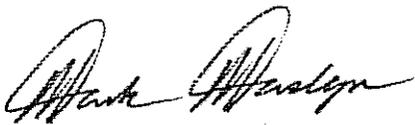
The Department of Justice and the Federal Trade Commission recognize, when appropriate, the need to consider impacts in a relevant, geographic market:

“A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a ‘small but significant and nontransitory’ increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test.”¹

AFBF believes that proposed mergers and consolidations of meatpackers and others acquiring livestock from farmers and ranchers could have anticompetitive impacts in regions as small as two or three states. Accordingly, we urge the Department of Justice and the Federal Trade Commission to carefully review the aforesaid guidelines, and revise them as necessary in order to ensure that regional anticompetitive impacts and effects are duly noted and given appropriate weight.

AFBF appreciates the opportunity to comment on these aspects of the commission’s work.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Maslyn". The signature is fluid and cursive, with the first name "Mark" and last name "Maslyn" clearly distinguishable.

Mark Maslyn
Executive Director, Public Policy

¹ U.S. Department of Justice and Federal Trade Commission “1992 Horizontal Merger Guidelines (with April 8, 1997, Revisions to Section 4 on Efficiencies)”