

# **COMPETITION AND AGRICULTURE:**

**Voices from the Workshops on Agriculture and  
Antitrust Enforcement in our 21st Century  
Economy and Thoughts on the Way Forward**



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## COMPETITION AND AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD

In 2010, the Antitrust Division (the Division) of the U.S. Department of Justice (DOJ) and the U.S. Department of Agriculture (USDA) hosted a series of workshops exploring competition in the agricultural sector. As then Assistant Attorney General (AAG) Christine Varney observed in inaugural remarks, “agriculture is an essential part of the American economy” and “well functioning agricultural markets are not only a matter of economic efficiency, but a matter of national security and public health.”<sup>1</sup> The workshops, DOJ and USDA hoped, would create fora for dialogue and learning on the challenges—as well as the opportunities—facing American agriculture in the 21st Century. The Division sought to learn how to best promote, in Attorney General Eric Holder’s words, “free and fair competition” in agriculture.<sup>2</sup>

The workshops did produce a wealth of discussion and information on the state of competition in the agricultural sector.<sup>3</sup> A wide spectrum of interested parties, including farmers, ranchers, processors, retailers, workers, academics, law enforcers, regulators, and other federal, state, and local government officials, gathered across the country to share their perspectives. The sessions covered a range of agricultural commodities, including row crops, dairy products, hogs, cattle, and poultry. Participants offered varied—and at times contradictory—accounts of the problems they face and the solutions they envision.

A clear lesson of the workshops, though, is that antitrust enforcement has a crucial role to play in fostering a healthy and competitive agriculture sector. A number of participants (including Division staff and leadership) stressed the importance of vigorous antitrust enforcement and detailed the ways that anticompetitive mergers and conduct can harm producers, consumers, and others.

These discussions confirmed that a healthy agricultural sector requires competition and, consequently, vigorous antitrust enforcement. With this confirmation, the Division also has emerged from the workshops with an enhanced understanding of agricultural markets, a greater appreciation of how anticompetitive practices in these markets can harm producers and consumers, and stronger relationships with the agricultural community. Bolstered by this understanding, the Division remains committed to taking all appropriate investigatory and enforcement action against conduct threatening harm to competition in agricultural markets.

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<sup>1</sup> Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, A Shared Vision for American Agricultural Markets 2 (Mar. 12, 2010), *available at* [www.justice.gov/atr/public/speeches/257284.htm](http://www.justice.gov/atr/public/speeches/257284.htm).

<sup>2</sup> Eric Holder, Attorney Gen., U.S. Dep’t of Justice, Remarks at the DOJ/USDA Iowa Agriculture Workshop (Mar. 12, 2010), *available at* [www.justice.gov/ag/speeches/2010/ag-speech-100312.html](http://www.justice.gov/ag/speeches/2010/ag-speech-100312.html).

<sup>3</sup> Transcripts and video of the workshops, as well as links to more than 18,000 public comments, are available at [www.justice.gov/atr/public/workshops/ag2010/](http://www.justice.gov/atr/public/workshops/ag2010/).

However, anticompetitive mergers and discussions represented only a portion of the concerns voiced at the workshops. Participants identified an array of challenges facing the agriculture sector, many, if not most, of which fall outside the purview of the antitrust laws. The antitrust laws focus on competition and the competitive process, and do not serve directly other policy goals like fairness, safety, promotion of foreign trade, and environmental welfare. Many of the workshop issues may require public or private solutions beyond the antitrust laws. Through competition advocacy we can assist other public/private entities in finding solutions that maintain or enhance competition and do not, indirectly, retard such.

This paper aims to share with the agriculture and antitrust communities what the Division learned at the workshops. It starts, in Section I, with an overview of the workshop sessions. Next, in Section II, it delineates many of the major issues discussed at the workshops, using, to the extent possible, the words of those farmers and other participants who offered their time and expertise. Finally, in Section III, it offers thoughts on what role, if any, the Division can play in addressing those issues. In sum, the workshops reinforced the Division's commitment to vigorous antitrust enforcement in the agricultural sector and confirmed that the Division can promote competition further through competition-advocacy efforts, but made clear that many of the challenges facing the agricultural sector require broader efforts. Only through the cooperation of all the public and private entities can we achieve fully, in then AAG Varney's words, our "shared vision for fair and efficient agricultural markets."<sup>4</sup>

## **I. An Overview of the Workshops**

The Division had important goals for the workshops. Most simply, we wanted to learn from the real-world experiences of farmers, processors, members of cooperatives, academics, and others who make agriculture their lives' work. Additionally, we wanted to promote dialogue among interested parties and to foster legal and economic learning on issues in agriculture. Further, we hoped to cultivate our relationships with other public and private entities in the agricultural sector. Indeed, the series marked an unprecedented collaboration between the Division and USDA, bringing together the leadership and staff to exchange ideas, share expertise, and build relationships.

The departments hosted five separate workshops in 2010, featuring topics of wide interest, at locations across the country. The inaugural hearing, in March, in Ankeny, Iowa, covered a gamut of issues, with particular attention to issues facing row-crop and hog producers. The second workshop, in May, in Normal, Alabama, featured the poultry industry. The third workshop, in June, in Madison, Wisconsin, examined the dairy industry. The fourth workshop, in August, in Fort Collins, Colorado, dealt with the livestock industry. The final workshop, in December, in Washington, D.C., focused on margins at various levels of the supply chain across several agricultural industries. Hundreds with real-world experience attended each workshop, with a high of approximately 1,700 attendees at the Colorado workshop. In addition, we received more than 18,000 public comments from farmers, consumers, trade associations, and academics, among others. This high level of participation and outpouring of interest underscored the importance of the topics at hand.

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<sup>4</sup> Varney, *supra* note 1, at 11.

The workshops were structured to maximize participation and the diversity of perspectives. The workshops began with brief remarks from Secretary of Agriculture Tom Vilsack and Attorney General Eric Holder, joined by then AAG Varney. A keynote panel of elected officials, including members from both houses of Congress, governors, state attorneys general, and state agriculture secretaries and commissioners, followed. These keynote panels served as an opportunity for government leaders to welcome people to the event, as well as to describe available government resources and share their visions on the future of agriculture.

Next, a producer panel gave Secretary Vilsack and then AAG Varney the chance to explore particular issues with farmers, ranchers, and other producers. Many of the producers prepared a short statement, which they read or used excerpts from in answering questions. The majority of the panel, however, consisted of questions from the Secretary, targeted at the entire panel or particular producers. These questions ranged from personal experiences to thoughts on concrete actions that could improve agricultural competition. These panels gave the Division's and USDA's highest leadership the chance to explore particular agricultural issues with farmers and ranchers who brought first-hand experience and expertise from their fields, barns, and pastures.

The proceedings continued with additional panels (one to three per workshop), which included farmers, academics, businesspersons, and government officials, among others. These panels addressed specific topics, including market transparency, vertical integration, consolidation, developments in the seed industry, margins, and contracting. The panels brought an array of perspectives and talents to the issues at hand.

Finally, and very importantly, the workshops featured time for public testimony. Every attendee who wanted to could address Division and USDA representatives, raising any issues they felt merited consideration. Testimony came not just from farmers, ranchers, and cooperative members, but also from consumers, union members, businesspersons, and concerned citizens. Division staff and leadership came away from the workshops with an even greater regard for the dedication and pride of America's agricultural community and an even greater confidence in the future of American agriculture. More importantly, Division staff came away with a deeper and more nuanced understanding of how agricultural markets function that pays dividends each day in the Division's work.

## **II. What We Heard at the Workshops**

As evident from this overview, the Division and USDA heard a range of voices at the workshops. Reflecting their varied vantage points, participants saw different challenges and opportunities for themselves and for American agriculture broadly. Poultry growers in the South, for example, expressed different concerns than row-crop farmers in the Midwest, dairymen in California and New York, ranchers in the Plains States, and hog producers in the Southeast. Moreover, producers in the same line of business did not always share the same perspective. For example, a dairyman with 40 or so cows might have different challenges and priorities than a dairyman with several hundred cows. Likewise, non-producers, including processors, workers, consumers, academics, and others, brought their own unique perspectives to the discussion.

Certain themes recurred throughout the workshops. These themes included market concentration, merger enforcement, monopsony, bid rigging, potential market manipulation, market transparency, captive ownership, contracting, regulatory burdens, low or volatile prices for

agricultural commodities, high input prices, a lack of capital, and a variety of issues with genetically modified seeds. This section details these themes, drawing on the words of participants in the hopes of capturing a bit of the flavor of the rich discussions at the workshops.

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*Anticompetitive Mergers.* A topic of particular interest to the Division was mergers of processors, input suppliers, retailers, and other companies. A number of participants identified past mergers as a cause of high input prices, low commodity prices, or other hardships, having invested particular suppliers or buyers with greater market power, and they criticized antitrust enforcement as insufficient. For example, the Division heard during the public comments in Alabama that the “lack of antitrust enforcement in recent decades” has resulted in “a severely concentrated marketplace in which power and profit are limited to a few at the expense of countless, hard working family farmers.”<sup>5</sup> During the public comments in Wisconsin, an observer characterized the Division’s recent case challenging Dean Foods’ acquisition of plants from Foremost Farms as an anomaly, remembering “a lot of mega-mergers” that “have allowed a lot of concentration of market power” and finding it “appalling that our antitrust enforcement has not been more vigorous than it has been in the past.”<sup>6</sup> Finally, in Wisconsin, a panelist charged that “merger policy has been broken for 10 years, if not 20 or 30.”<sup>7</sup>

Some participants criticized particular enforcement decisions. For example, in Colorado, a panelist claimed that there was “a tremendous contraction when Whole Foods Markets was allowed to buy Wild Oats” and that “this contraction has given them such power that they will walk on the contract on the day you’re supposed to deliver the cattle.”<sup>8</sup>

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*High Market Concentration.* A recurring issue at the workshops was the level of concentration, irrespective of the cause, in agricultural markets. Producers across commodities and geography

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<sup>5</sup> Public Workshops Exploring Competition Issues in Agriculture: Poultry Workshop 216-17, May 21, 2010, available at [www.justice.gov/atr/public/workshops/ag2010/alabama-agworkshop-transcript.pdf](http://www.justice.gov/atr/public/workshops/ag2010/alabama-agworkshop-transcript.pdf) [hereinafter Alabama Tr.].

<sup>6</sup> Public Workshops Exploring Competition Issues in Agriculture: Dairy Workshop 375-76, June 25, 2010, available at [www.justice.gov/atr/public/workshops/ag2010/wisconsin-agworkshop-transcript.pdf](http://www.justice.gov/atr/public/workshops/ag2010/wisconsin-agworkshop-transcript.pdf) [hereinafter Wisconsin Tr.].

<sup>7</sup> Wisconsin Tr., *supra* note 6, at 219-20; *see also* Public Workshops Exploring Competition Issues in Agriculture: Livestock Workshop 156 (Aug. 27, 2010), available at [www.justice.gov/atr/public/workshops/ag2010/colorado-agworkshop-transcript.pdf](http://www.justice.gov/atr/public/workshops/ag2010/colorado-agworkshop-transcript.pdf) [hereinafter Colorado Tr.] (public comment that DOJ and USDA have not “done a damned thing to try to control the monopolies in the agricultural industry” in the past 30 years).

<sup>8</sup> Colorado Tr., *supra* note 7, at 70; *see also* Wisconsin Tr., *supra* note 6, at 254-55 (commenting on the Dean/Suiza merger). *Compare* Public Workshops Exploring Competition Issues in Agriculture 114, Mar. 12, 2010, available at [www.justice.gov/atr/public/workshops/ag2010/iowa-agworkshop-transcript.pdf](http://www.justice.gov/atr/public/workshops/ag2010/iowa-agworkshop-transcript.pdf) [hereinafter Iowa Tr.] (stating that an enforcement action had preserved three cattle buyers in a particular geographic area); Colorado Tr., *supra* note 7, at 227 (stating that an enforcement action prevented a further decrease in competition for the purchase of fed cattle).

identified market concentration—a term describing a situation where only a few firms compete in a market—as a concern. A consistent complaint was that, at various stages of the food chain, there are only a handful (if that many) of buyers or sellers, resulting in a lack of options for producers and lower prices for their commodities or higher prices for supplies. Producers often contrasted today’s concentrated markets with the more atomized markets of past years, recalling times when they had plentiful trading partners.

Turning to specifics, many producers lamented a lack of options in buying seeds. For example, during the public comments in Iowa, a farmer and seed dealer related that “thirty-four years ago, there were fifty seed companies” but that “[a]t the present time there are four.” He opined that “it was way better to have more seed companies involved than to have fewer seed companies at present time and pay through the nose for a seed.”<sup>9</sup> Similarly, testimony indicated that grain producers have fewer competing local grain elevators, as well as higher rail transportation costs to reach other markets because of rail consolidation.<sup>10</sup>

Hog and cattle producers spoke about concentration in packing and retail. For example, at the Colorado workshop, a calf-cow producer described “empty” feedlots, “a tremendous loss of buyers,” “loss of access to the wholesale market,” and a lack of “access to the retail market.” He identified decentralization of meat packing as “a real key” and urged that “we bring the small, medium-sized meat packers back.”<sup>11</sup> Similarly, an independent producer stated that, when he started selling hogs in the 1980s and early 1990s, he received “good” premiums and “didn’t have to haul [hogs] far,” but “[t]hat’s disappeared now with concentration in [packing].”<sup>12</sup>

Many growers reported that concentration in poultry has left them with few—or only a single—bidder(s) for their services, rendering them powerless in negotiations with integrators. For example, during the public comments in Alabama, a grower stated that the “lack of competition in a given geographic region has led to integrators with all of the power” and left “the grower with little or no choice. The grower is given a contract, it’s one sided, it’s a take it or leave it situation.”<sup>13</sup>

Some dairy farmers complained about a paucity of processors in certain areas of the country. For example, at the Wisconsin workshop, a Vermont dairy farmer expressed concern with “market

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<sup>9</sup> Iowa Tr., *supra* note 8, at 132; *see also id.* at 159-60 (stating that the market for seed traits is “very highly concentrated” and that market for traited seeds “has more competition” but is still “very highly concentrated,” meaning “less choice” and “higher prices”).

<sup>10</sup> *See, e.g.,* Iowa Tr., *supra* note 8, at 248 (Steve Bullock, Montana Attorney General) (“For example, in 1984, the Montana landscape was dotted with almost 200 grain elevators. Today, there’s less than 50 even as production has risen.”); *id.* at 262 (Richard Cordray, Ohio Attorney General) (explaining that he has been pressing for repeal of antitrust immunity for railroads because grain producers are held captive to the transportation costs demanded by railroads).

<sup>11</sup> Colorado Tr., *supra* note 7, at 70-71.

<sup>12</sup> *Id.* at 68; *see also* Iowa Tr., *supra* note 8, at 98 (“So how do we help the cattle industry? Break up the beef packing monopoly.”); Colorado Tr., *supra* note 7, at 113 (rancher opining that “the federal government must take steps to prevent the concentrated beef packers and the concentrated cattle feeders from engaging in the practices that are eliminating opportunities for individual Indian operators”).

<sup>13</sup> Alabama Tr., *supra* note 5, at 167.

consolidation in processing and manufacturing and the retail end of the industry,” and said that “as a result [of] consolidation, there are fewer markets for my milk.”<sup>14</sup> Similarly, the head of a large dairy cooperative said, “I go out and look for processors and there’s a lot less of them than there used to be.”<sup>15</sup>

Finally, some participants pointed to retail concentration as an area of concern, charging that retailers are extracting a greater and greater share of the consumer food dollar, leaving producers with an ever decreasing share, and at the same time imposing price increases on consumers. For example, during public comments in Colorado, a union member charged that large retailers are “driving the change in the food dollar that’s hurting workers, that’s hurting ranchers, that’s hurting producers, that’s hurting the packing-house communities. They take too much and give us too little.”<sup>16</sup> Similarly, during the public comments in Iowa, one farmer stated that “the retailers have too much power” and “have taken an ever greater share of the retail dollar.”<sup>17</sup>

On the other hand, some producers, including some cattlemen in the High Plains and some dairy producers in the Upper Midwest, reported that they have an adequate number of competing buyers in their local market areas. For example, during the public comments in Wisconsin, a local dairy farmer remarked that “there is competition for my milk out in the countryside.” He identified a host of potential buyers and concluded “[s]o as far as I’m feeling, there’s nothing for you guys to look [at] there.”<sup>18</sup>

Additionally, some participants described how larger farming, processing, and retail operations have created efficiencies that have benefitted producers and consumers alike. For example, at the Colorado workshop, an economist observed that “there are significant economies of size in the packing business” and “that was the driving force” behind increased concentration.<sup>19</sup> At the Iowa workshop, a local pork producer asserted that we “can be very proud in this country of the products that we’re producing, the food and the quality of the food we’re producing all the way

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<sup>14</sup> Wisconsin Tr., *supra* note 6, at 163.

<sup>15</sup> *Id.* at 267; *see also id.* at 201 (“Wisconsin is probably one of those places where there are still a lot of options, but [in] a lot of parts of [the] United States, that’s not the case. If you’re not big enough, they’re not going to come and pick . . . up [your milk].”).

<sup>16</sup> Colorado Tr., *supra* note 7, at 123.

<sup>17</sup> Iowa Tr., *supra* note 8, at 332; *see also* Colorado Tr., *supra* note 7, at 169 (rural sociologist stating that “three or four dominant players” control the food supply chain “all the way from the seed down to the supermarket”).

<sup>18</sup> Wisconsin Tr., *supra* note 6, at 160; *see also* Alabama Tr., *supra* note 5, at 74 (poultry grower stating that he has “been very fortunate” and “competition has been pretty good”); Colorado Tr., *supra* note 7, at 211-12 (feedlot president) (“We have three to four packers out in the Texas Panhandle that participate on a very aggressive basis. We are lucky as a region because our packing community has excess capacity.”)

<sup>19</sup> Colorado Tr., *supra* note 7, at 166; *see also* Iowa Tr., *supra* note 8, at 78-79 (hog farmer stating that his operation “is probably bigger than I would have envisioned 15 years ago, but in order to capture the economies of scale, in order to utilize the management techniques and embrace the production standards that were set in our industry, in order for us to compete, we didn’t have a lot of choice” and that there are fewer packers “now that are more efficient in terms of harvesting and processing product”).

through, and part of it is due to some of the efficiencies that we have gained through this consolidation process.”<sup>20</sup> Moreover, from the perspective of some retailers and observers, the emergence of different types of retail outlets with different cost structures has intensified competition and squeezed margins.<sup>21</sup>

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*Monopsony Power.* Many participants specifically raised the issue of monopsony power. An economic term of art, monopsony power, the converse of monopoly power, means market power on the buying side of a market as compared to market power on the selling side of a market. Participants contended that processors, acting singly or in concert, have sufficient market power to depress the prices of crops or animals below competitive levels. For example, in Iowa, one panelist expressed concern that “larger companies are able to exert more buyer power . . . over farmers . . . produce marketers, and even on consumers, so what we see is that even when grocery mergers occur that increase . . . efficiencies, those efficiencies aren’t really passed on to the consumers.”<sup>22</sup>

Some suggested that the antitrust laws are inattentive to the monopsony problem. For example, during the public comments in Washington, D.C., an individual remarked that “it’s the monopsony power of these concentrated purchases of farm goods that are stressing the people and the natural systems that are producing food” and that “[r]ight now antitrust jurisprudence isn’t solving the problem.”<sup>23</sup> Similarly, during the public comments in Alabama, a union member argued, “In competition we all know the word monopoly . . . . But I want us to learn a new word today. It’s monopsony. Monopsony is the tyranny of the retailer when all roads and all product goes to one place.”<sup>24</sup>

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*Price Levels.* Low commodity prices, high input prices, and price volatility were common concerns during the workshops. For example, at the Wisconsin session, a California dairyman reported “producers have never witnessed such dramatically low milk prices combined with skyrocketing production costs as they did for all of 2009.”<sup>25</sup> At the Colorado workshop, a former

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<sup>20</sup> Iowa Tr., *supra* note 8, at 311.

<sup>21</sup> See Workshop on Agriculture and Antitrust Enforcement Issues in our 21st Century Economy 183-84 (Dec. 8, 2010), available at [www.justice.gov/atr/public/workshops/ag2010/dc-agworkshop-transcript.pdf](http://www.justice.gov/atr/public/workshops/ag2010/dc-agworkshop-transcript.pdf) [hereinafter Washington Tr.] (Howard Shelanski, Deputy Director of the Bureau of Economics, the Federal Trade Commission) (“One important contributor, other than mergers and acquisitions, to the increased volume and share of the top 20 retailers over the past two decades [can be attributed to] nontraditional grocery retailers like Walmart, Target and Costco. . . . Many studies and commentaries show that this growth and consolidation has helped food retailers to reduce costs and made grocery retailing more efficient. Nontraditional grocery retailers have prices that are on average seven and a half percent below the prices of traditional supermarkets for identical products and packaging, according to a USDA Economic Research Service study.”).

<sup>22</sup> Iowa Tr., *supra* note 8, at 189.

<sup>23</sup> Washington Tr., *supra* note 21, at 349.

<sup>24</sup> Alabama Tr., *supra* note 5, at 178.

<sup>25</sup> Wisconsin Tr., *supra* note 6, at 83.



cow-calf rancher stated that the cash market “has persistently produced prices too low to cover their costs of production.”<sup>26</sup>

Producers have witnessed increases in a variety of production costs. For example, at the Alabama workshop, a poultry producer described increases in propane costs that “have dramatically affected profitability for the contract grower.”<sup>27</sup> At the Washington, D.C., session, a cattle producer from South Dakota reported a steep rise in the cost of diesel fuel that far outpaced increases in food prices.<sup>28</sup> Finally, during public comments in Colorado, a “cow-calf guy” explained that a “big problem in the ag industry is costs,” including “costs for fuel, costs for health insurance, [and] costs for inputs.”<sup>29</sup>

Compounding these challenges, price volatility has complicated planning for farmers and ranchers. At the Washington, D.C., session, an academic outlined price fluctuations in the dairy industry, stating that “[t]he past two to three years have been particularly challenging . . . with record high milk prices in 2007, and then not record low milk prices, but a very significantly bad combination of low milk prices and high feed costs.”<sup>30</sup> At the Colorado workshop, a lender offered a similar perspective, explaining that the livestock sector has experienced volatility “over the last 13 years . . . even . . . over the last 12 months” and offering as an example a producer who got “\$105 a pig last August” and “\$160 a pig today.”<sup>31</sup>

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*Lack of Capital.* Many participants commented on the difficulty that producers, particularly young producers, face in obtaining the capital they need to fund or expand their operations. For example, at the Wisconsin workshop, a dairy farmer explained, “Credit is sometimes more difficult for small farms to get. I went in our local bank . . . five or six years ago, to borrow money for fertilizer and they said well, you’ve got a pretty good credit rating and that shouldn’t be a problem, but you know, we’re really getting away from making farm loans.”<sup>32</sup> Similarly, at the Iowa workshop, a producer described the difficulties he encountered attempting to finance a facility to grow tilapia fish.<sup>33</sup> Finally, at the Colorado workshop, a veteran cow-calf producer mentioned a group of young ranchers she knew who were struggling to access capital, “especially now with the ever-increasing regulation when it comes to operating capital.”<sup>34</sup>

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<sup>26</sup> Colorado Tr., *supra* note 7, at 136.

<sup>27</sup> Alabama Tr., *supra* note 5, at 76.

<sup>28</sup> Washington Tr., *supra* note 21, at 37.

<sup>29</sup> Colorado Tr., *supra* note 7, at 263.

<sup>30</sup> Washington Tr., *supra* note 21, at 96.

<sup>31</sup> Colorado Tr., *supra* note 7, at 185.

<sup>32</sup> Wisconsin Tr., *supra* note 6, at 199.

<sup>33</sup> Iowa Tr., *supra* note 8, at 75.

<sup>34</sup> Colorado Tr., *supra* note 7, at 99; *see also id.* at 200-201 (economist observing that “capital is a huge issue for young farmers” and “is a tremendous obstacle to getting in the business”); Iowa Tr., *supra* note 8, at 233 (“[T]he only access to capital in agriculture is primarily debt capital. And no other industry in the country, folks, is primarily on debt capital. There’s very little equity that can come into this industry from outside.”).

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*Contracting.* Contracting was a hot topic at the workshops. Many participants claimed that a disparity of bargaining power between processors, on one side, and producers who grow or sell animals under contract, on the other side, leaves those producers powerless to resist unfair treatment, particularly in the poultry sector. One advocate summarized that “the processor sector has such total domination that producers are coerced . . . to sign one-sided take or leave it contracts.”<sup>35</sup> Likewise, an individual maintained that growers “have little or no choice” and are “given a contract, it’s one sided, it’s a take it or leave it situation.”<sup>36</sup> Other participants explained that many growers accumulate heavy debts, foreclosing options and limiting their ability to bargain.<sup>37</sup>

Producers stated that they are forced to accede to draconian contract terms, including open delivery terms, payment under a ranking system, and mandatory and expensive upgrades to their facilities.<sup>38</sup> Similarly, they described unfair or deceptive treatment at the hands of processors, including disguising or misrepresenting contract terms, changing the terms of the contract at will, and terminating contracts without adequate cause.<sup>39</sup> Some participants claimed that a fear of retaliation keeps many producers from reporting illegal conduct or advocating for reform.<sup>40</sup>

Other producers described the benefits of contracting, including, most notably, guaranteeing a buyer, enabling producers to access capital, and aligning high-quality producers and processors. For example, at the Colorado workshop, a hog producer and corn grower commented that “[c]ontracts are very important for . . . young people. That’s the only way the bankers are going to let them secure these loans.”<sup>41</sup> At the Iowa workshop, another hog producer explained that the “primary reason” he sold under contract was “because I fear not being able to market my pigs in a timely manner. For example, I have a barn that needs to be empty on Monday. I’ve got one load left of pigs in that barn. On Tuesday, the power washer shows up to wash, disinfect, and clean that

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<sup>35</sup> Alabama Tr., *supra* note 5, at 191-92.

<sup>36</sup> *Id.* at 167.

<sup>37</sup> *See, e.g., id.* at 81-82; *id.* at 120.

<sup>38</sup> *See, e.g., id.* at 192 (stating that growers are forced “to borrow as much as a million dollars to build facilities on their own farms for the right to grow the company’s chickens with merely a one flock, seven-week guarantee of payment”); *id.* at 158 (describing the ranking system as the “grandest Ponzi scheme” ever invented).

<sup>39</sup> *See, e.g., id.* at 82 (“what is said in the contract and what is verbally communicated or verbally implied is oftentimes two different things”); *id.* at 169 (“Congress should stop poultry companies from cancelling grower contracts without adequate faults.”); *id.* at 256 (“It might say 15 years, but two months from now they might decide to change that contract.”); *id.* at 314 (“[A]s a general rule, the figures that growers get when the companies are trying to talk them into building houses are misrepresented.”).

<sup>40</sup> *See, e.g., id.* at 101 (stating that the threat of retaliation “is the single most important fact that keeps growers from filing complaints”); *id.* at 143 (opining that growers “are afraid to get too involved with anything that would go against the status quo because of their debt”); *id.* at 165 (claiming that numerous growers were afraid of retaliation if they attended the workshop).

<sup>41</sup> Colorado Tr., *supra* note 7, at 102.

barn. On Wednesday or Thursday I reload it. I do not have the benefit of time because if you know anything about biology, biology doesn't wait.”<sup>42</sup>

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*Market Transparency and Captive Supply.* Timely and accurate pricing information is essential to well-functioning agricultural commodity markets. Producers across industries raised concerns about the increasing difficulty they are having obtaining timely and accurate information about current market prices. For example, a third-generation beef producer stated that “there is no [price] transparency. We're at the mercy of whatever they want to give us out there.”<sup>43</sup> A crop and livestock farmer from Minnesota echoed these sentiments, stating, “We need real discovery of price in terms of sales being offered for livestock.”<sup>44</sup> A California dairyman concurred, stating, “We need to [ensure] transparency in all markets accessed by producers.”<sup>45</sup>

Dairy producers commented on a lack of transparency and predictability in the pricing system administered by USDA. During the public comments in Wisconsin, a dairy farmer from Utah summarized, “Our system is convoluted, unduly complicated and antique.”<sup>46</sup> A number of dairy producers claimed that the milk-pricing system is subject to manipulation.<sup>47</sup> They also asserted

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<sup>42</sup> Iowa Tr., *supra* note 8, at 80; *see also* Colorado Tr., *supra* note 7, at 320 (South Dakota hog producer) (“But the majority of producers are happy with the way our contracts operate, protecting us from the wild swings in the livestock and grain markets.”); Wisconsin Tr., *supra* note 6, at 283 (cooperative officer) (“Our farmers have a lot invested, as all farmers do, but with the organic feed and the organic grain and the organic cost of production, they have a great deal invested and if we're not able to return that to them because we've lost a place to market their milk, it deeply hurts them in the pocketbook. And so some longer term contracts allow us to secure that over a period of time and we work with supply forecasting models of the customers, of what they think they're going to need and our contracts actually come ahead of our internal branded sales.”).

<sup>43</sup> Washington Tr., *supra* note 21, at 71.

<sup>44</sup> *Id.* at 138.

<sup>45</sup> Wisconsin Tr., *supra* note 6, at 86; *see also* Washington Tr., *supra* note 21, at 147 (representative of Wisconsin dairy cooperative) (“Price discovery and transparency in those systems needs improvement and they need improvement because the fabric and backbone of America that we know being agriculture, will not survive without it.”).

<sup>46</sup> Wisconsin Tr., *supra* note 6, at 156; *see also id.* at 163 (“The volatility in the federal pricing policy we currently have makes planning and budgeting hard.”).

<sup>47</sup> *See, e.g., id.* at 104 (“We need a better system for pricing milk that cannot be manipulated by thinly traded CME markets.”); *id.* at 111-12 (“USDA needs to strongly reconsider relying on the NASS survey, which is the vehicle of all fabricated market information going to USDA that is used in the milk pricing formula.”).

that the system does not always produce prices that reflect demand for milk.<sup>48</sup> Workshop participants offered a variety of proposed reforms of milk pricing.<sup>49</sup>

Producers of hogs and cattle raised concerns about the decline in recent years of local cash spot markets, an important source of current price information. As several witnesses explained, the decline of cash spot markets—and with it the decline of local cash-sales price information—results from a trend toward “captive supply,” meaning processors filling their needs with animals they own or purchase under forward contracts, rather than animals purchased on the spot market. Many producers charged that the thinning of spot markets reduces market transparency, denies producers opportunities, reduces their bargaining power, and yields prices not accurately reflecting underlying supply and demand. Moreover, many producers stressed that thinner markets are more susceptible to manipulation, and suggested that, because forward contracts often are indexed to current spot-market prices, buyers might have the incentive and ability to attempt manipulative or strategic behaviour.

To stem the decline of spot markets, some producers at the workshops called for limits on the percentage of goods cleared on cash markets.<sup>50</sup> Other participants responded that vertical integration produces efficiencies that result in lower consumer food prices, among other positive effects, and that contracting gives producers certainty, protects them from market volatility, positions them to access capital, and aligns high-quality producers and processors, among other benefits.<sup>51</sup>

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*Market Manipulation.* Another issue raised regularly at the workshops was “market manipulation.” Some producers raised suspicions of bid rigging—for example, buyers of agricultural commodities agreeing to limit competition between themselves by agreeing on prices to offer or rotating bids.

Other producers sketched more elaborate schemes to manipulate commodity or cash spot-market prices. At the Wisconsin workshop, dairy farmers raised concerns about processors lowering

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<sup>48</sup> See, e.g., *id.* at 108 (“Today, the market signals we receive can be affected by the activity of a handful of buyers on the cheese exchange, and frankly, sometimes that activity does not fairly represent true marketplace dynamics across our nation and, yes, even the world.”).

<sup>49</sup> See, e.g., *id.* at 118-19 (advocating use of a consumer price index in milk-pricing formula); *id.* at 320-28 (proposing system incorporating dairy prices from actual market transactions in certain regions).

<sup>50</sup> See, e.g., Iowa Tr., *supra* note 8, at 87-88; *id.* at 210-11.

<sup>51</sup> See, e.g., Alabama Tr., *supra* note 5, at 74 (poultry farmer) (“Vertical integration, I think, has been key to the poultry industry for the last 40 years and has provided a stable income for the poultry farmer in a stable market.”); Colorado Tr., *supra* note 7, at 312 (“As a person who grows sugar beets and has been involved in witnessing the sugar industry in this country—the sugar beet industry—transform itself from mostly a privately owned industry into a farmer-owned cooperative system, it has worked very well and there’s great promise there for livestock producers as well to look forward to trying to form more co-ops and take advantage of that vertical integration and get those profits back into their pockets from selling to the end user.”).

prices paid to dairy producers by buying or selling large amounts of surplus cheddar on the Chicago Mercantile Exchange.<sup>52</sup> At the Colorado workshop, cattle producers suggested that beef packers use captive supplies of cattle to lower cash spot-market prices in various market areas.<sup>53</sup> Concomitant to these complaints are concerns that the markets being manipulated are susceptible to manipulation because there are so few traders using the markets regularly (in other words, these markets are thinly traded).

In a similar vein, some livestock producers complained that packers manipulated the mandatory reporting system administered by USDA by delaying reports of sales that might affect prevailing reported prices and forward contracts that have prices based on those daily prices.<sup>54</sup> Many such complaints also posit that manipulation results in greater volatility in commodity or input prices.<sup>55</sup>

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*Genetically Modified Seeds.* The rise of genetically modified seeds generated intense and extensive discussion. Many farmers spoke about the high price of genetically modified seeds, restrictions on the use of genetically modified seeds, and a dearth of choices of genetically modified and conventional seeds. For example, during the public comments in Iowa, there was testimony that “many farmers say that the prices they’re paying are indeed out of hand for seed,” that “farmers say that their choice, their seed options are dramatically reduced, especially in the way of conventional corn and soybean varieties,” and that “farmers fear that the best and newest genetics will only be introduced with expensive patented traits stacked into them.”<sup>56</sup> A farmer echoed these

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<sup>52</sup> See, e.g., Wisconsin Tr., *supra* note 6, at 104 (“We need a better system for pricing milk that cannot be manipulated by thinly traded CME markets.”); *id.* at 111 (“If supply and demand were true indicators of the market, there should be a strong relationship between American cheese stocks and the price of block cheddar on the CME. There is not. All volatility in milk pricing is caused by the CME. The CME cheese trading is a highly leveraged, thinly traded market with few players.”); *id.* at 77-78 (advocating a ban on trading against interest because “what’s happening on this market, is somebody will buy too much product at a low price and when prices start coming up which will reflect a higher price for farmers, they sell it to drop the price to the farmers”).

<sup>53</sup> See, e.g., Colorado Tr., *supra* note 7, at 290 (“But the point is they strategically place those cattle in [the] market [and] that tips the market over.”).

<sup>54</sup> See, e.g., *id.* at 133 (“And when we talk about all the technology that’s out there, there is no technology until about five minutes on Friday afternoon when they finally post the price maybe; sometimes not until Monday.”).

<sup>55</sup> See, e.g., Iowa Tr., *supra* note 8, at 214-15 (“[T]he reality is on the hog sector, you’re talking about 10 percent of the trades that are on the open market, and they are influencing the prices on the formula side that could be half or more of the marketplace, so that also creates some kind of situations where a tiny number of buyers on the spot market can really manipulate a thin market like hogs pretty easily here actually, so we’re concerned about all of these things.”); Colorado Tr., *supra* note 7, at 137 (“As a result, more and more producers leave the cash market. It becomes thin, highly susceptible to manipulation.”).

<sup>56</sup> Iowa Tr., *supra* note 8, at 300.

comments, asserting that the advent of genetically modified seeds “has reduced my options for non-GMO seeds” and “increased my costs to raise corn.”<sup>57</sup>

Participants argued that seed traits or “nature” should not be patentable. They asserted that the current patent landscape stifled innovation and competition.<sup>58</sup> Many also voiced philosophical objections to the patenting of seed technology and lamented that licensing restrictions imposed by seed companies upset centuries-old folkways. As one rice and soybean farmer put it, “We lost the thing [that as] farmers and inhabitants of this planet . . . is most precious to us, and that is the intellectual property rights to our food.”<sup>59</sup>

Other participants extolled the virtues of genetically modified seeds, including, they stated, higher yields and less environmental impact. One crop farmer summarized, “The use of GMO seeds makes economic and agronomic sense and provides efficacy with less trips across the field, less fuel, and a safer environment for us farmers, our families, and the environment.”<sup>60</sup>

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*Other Concerns.* A number of participants pointed to long-standing state and federal policies ranging from food safety to immigration restrictions that purportedly disadvantage particular groups of farmers or impair the operation of agricultural markets generally. These concerns fall outside the reach of antitrust laws. For example, participants critiqued labeling requirements, trade laws, tax laws, energy policy, and record keeping requirements.

Many of the concerns were industry-specific. For example, at the Wisconsin workshop, a dairy farmer criticized animal care requirements and licensing requirements.<sup>61</sup> At the Alabama workshop, a poultry producer stated that conflicting regulations made it difficult for her to process chickens on her farm.<sup>62</sup> In Iowa, a niche soybean producer described how allegedly lax food-labeling laws hampered his ability to market a trans-fat free product in competition with products that should not have been labeled as trans-fat free.<sup>63</sup>

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<sup>57</sup> *Id.* at 298; *see also id.* at 94 (claiming that seed technology is “being sold with little or no consideration for the ill-effects caused by the products” and that the effectiveness of new technology is “overstated at the expense of the farmer”); *id.* at 127 (“The issue is that all of the research, all of the breeding, is going into proprietary genetically modified versions of [seeds].”).

<sup>58</sup> *Id.* at 303-05; *see also id.* at 304 (“[T]he utility patent is the strongest tool that’s creating monopolies and inhibiting the development of regional diverse seed companies that can be competitive.”).

<sup>59</sup> *Id.* at 309; *see also id.* at 296 (“I see this as an unjust law. I’m not certain that they have a right to [a] patent on a living organism.”).

<sup>60</sup> *Id.* at 64.

<sup>61</sup> Wisconsin Tr., *supra* note 6, at 209-10.

<sup>62</sup> Alabama Tr., *supra* note 5, at 128-29 (“Processing birds on farm under USDA exemption was not a viable option as USDA has a 20,000 bird exemption under PO90-942, but the North Carolina Department of Agriculture only allows a thousand . . . chickens to be slaughtered out from under inspection.”).

<sup>63</sup> Iowa Tr., *supra* note 8, at 73; *see also* Colorado Tr., *supra* note 7, at 152 (cattle producer stating that EPA regulations raise the cost of production).

Participants touched on additional issues. For example, a number of participants proposed changes to the tax laws that could ease the transition of farming operations from older farmers to the next generation.<sup>64</sup> Many participants discussed trade policy, proposing ways to promote the export of American agricultural products and identifying unfair advantages afforded importers of agricultural products.<sup>65</sup>

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This section, it bears repeating, has provided only a necessarily truncated overview of the proceedings at the workshops. Numerous participants, each with his or her own distinct perspective, spoke to the issues identified above, and this summary, by definition, cannot capture every aspect or nuance of the discussions. Moreover, participants raised issues in addition to those listed above, and it is beyond the scope of this paper to catalogue every topic of discussion. Importantly, though, the Division has made transcripts of the sessions, along with the public comments, available on its website,<sup>66</sup> and these materials are rich reading for those interested in America's agricultural economy.

### **III. A Role for Vigorous Antitrust Enforcement and a Need for Other Public and Private Solutions**

The balance of this report considers what role antitrust law and the Division have to play in addressing the issues raised in the workshops. The sessions confirmed that a healthy agricultural sector requires competition and, consequently, vigorous antitrust enforcement. The Division has emerged from the workshops with an enhanced understanding of agricultural markets, a greater appreciation of how anticompetitive practices in these markets can harm producers and consumers, and stronger relationships with the agricultural community. Bolstered by these resources, the Division is committed to taking all appropriate investigatory and enforcement action against conduct threatening harm to competition in agricultural markets.

At the same time, many of the issues raised during the workshops are outside the scope of the antitrust laws. The antitrust laws focus on competition and the competitive process, and do not serve directly other policy goals like fairness, safety, promotion of foreign trade, and environmental welfare. Many of the workshop issues, then, require public or private solutions beyond the antitrust laws. Importantly, though, the Division, in a number of cases, may be able to help advance these other solutions through competition advocacy and sharing our expertise with other public or private

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<sup>64</sup> See, e.g., Iowa Tr., *supra* note 8, at 313 (proposal during public comments to create tax incentives for younger farmers to acquire the operations of older farmers); Colorado Tr., *supra* note 7, at 145 (proposal during public comments to modify the inheritance tax).

<sup>65</sup> See, e.g., Colorado Tr., *supra* note 7, at 179 (“Let’s get Japan open 100 percent. Let’s get China open 100 percent.”); *id.* at 263 (“How can we make rural America strong again? And I think the answer to that, number one, is USDA needs to aggressively go after export business. Since 2003, since the mad cow and we lost our export business, I think it’s cost us \$100 a head on average.”); Washington Tr., *supra* note 21, at 82 (CEO of a California agricultural cooperative explaining the challenge of competing against imports not subject to the same environmental regulations and labor demands).

<sup>66</sup> [www.justice.gov/atr/public/workshops/ag2010/](http://www.justice.gov/atr/public/workshops/ag2010/).

entities, with the aim of ensuring that legislation, regulation, or other efforts do not impede competition unnecessarily or have other unintended consequences.

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*Anticompetitive Mergers.* Responsibility for enforcing the antitrust laws against anticompetitive mergers (and other conduct) rests with the Division and the Federal Trade Commission (the FTC) (together, the Agencies). Section 7 of the Clayton Act, which works in tandem with other provisions of the antitrust laws, bars mergers that may lessen competition substantially, including mergers that would engender higher prices for consumers, lower prices for sellers, or lower quality or service.<sup>67</sup> In general terms, the Division enforces section 7 and other antitrust laws in the producing and processing sectors, while the FTC generally takes the lead in the retail sector (including groceries).

In evaluating a merger, the relevant Agency undertakes a case-specific analysis to determine whether the transaction would lessen competition and adversely affect prices, quality, or innovation. Mergers can harm competition by eliminating competition between the merging parties—“unilateral effects” in antitrust lingo—or by enabling coordinated, accommodating, or interdependent behaviour among the remaining firms—“coordinated effects.”<sup>68</sup> In its investigations, the Division pursues any and all theories of harm, novel or workaday, suggested by facts of the particular transaction. For example, in a recent investigation of a merger of chicken processors, the Division investigated a “multi-market contact” theory of coordinated effects, which postulated that processors may find it more feasible to coordinate on contract terms as they interact in more numerous regions.<sup>69</sup> Verifiable and merger-specific efficiencies figure in the calculus, and, in the right circumstances, can reverse the merger’s potential harm, meaning that the merger likely will not have anticompetitive effects.<sup>70</sup>

The Division recognizes that, historically, farmers and others have voiced concern about the level of merger enforcement in the agricultural sector, and this perspective was communicated in person to Division staff and leadership at the workshops. As a result of the workshops, the Division has redoubled its efforts to prevent anticompetitive agricultural mergers and conduct. The workshops have enhanced the Division’s efforts to enforce the antitrust laws. The insights shared by participants and those who submitted public comments have helped Division staff and leadership to better understand how particular agricultural marketplaces operate, and have highlighted issues for the Division to consider. Equally important, Division staff and leadership built important relationships with members of the agriculture community and with fellow federal and state officials, allowing the Division to draw on their information and expertise to sharpen our enforcement activities.

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<sup>67</sup> 15 U.S.C. § 18 (2006).

<sup>68</sup> See generally U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES §§ 1, 6-7 (2010) (discussing competitive effects).

<sup>69</sup> See U.S. Dep’t of Justice, Statement of the Department of Justice’s Antitrust Division on its Decision to Close its Investigation of Perdue’s Acquisition of Coleman Natural Foods (May 2, 2011), available at [www.justice.gov/atr/public/press\\_releases/2011/270591.htm](http://www.justice.gov/atr/public/press_releases/2011/270591.htm).

<sup>70</sup> See generally U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 71, § 10 (discussing the role of efficiencies in the Agencies’ merger analysis).



Recent challenges to agricultural mergers illustrate the role that the Division plays in safeguarding competition in agricultural markets. In January 2010, the Division, joined by a group of states, filed a lawsuit challenging Dean Foods Company's acquisition of Foremost Farms USA's Consumer Products Division, including its dairy processing plants in Wisconsin.<sup>71</sup> The plaintiffs alleged that the transaction would eliminate substantial competition between the two companies in the sale of milk to schools, grocery stores, convenience stores, and other retailers in Illinois, Michigan, and Wisconsin. Dean Foods and Foremost Farms were the first- and fourth-largest milk processors in northeastern Illinois, the Upper Peninsula of Michigan (the UP), and Wisconsin, and Foremost Farms was an aggressive competitor. Dean Foods and Foremost Farms were the two processors best situated to serve numerous school districts in the UP and Wisconsin, and the transaction would have left some districts with a single, monopoly provider and others with only two choices. Additionally, the transaction would have caused a loss of head-to-head competition between Dean Foods and Foremost Farms in the sale of milk to supermarkets, grocery stores, and other commercial customers, and made it easier for Dean Foods to coordinate with the remaining milk processors. On March 29, 2011, the Division settled with Dean Foods, requiring it to divest a plant and related assets such as the Golden Guernsey brand name.

Additionally, the Division recently challenged George's Foods' acquisition of a chicken-processing facility from Tyson Foods. The Division filed suit in May 2011.<sup>72</sup>

As another example of recent merger enforcement in agriculture, in October 2008, the Division and a number of states filed a challenge to the acquisition of National Beef, then the fourth-largest U.S. beef processor, by JBS, then the third-largest beef packer.<sup>73</sup> The deal would have eliminated a competitively significant packer (National) and placed more than 80 percent of domestic fed-cattle processing capacity in the hands of three firms. The complaint alleged that the transaction would have lessened competition for the production and sale of boxed beef nationwide. It further alleged that the transaction would have lessened competition among packers for the purchase of fed cattle (cattle ready for slaughter) in the High Plains and the Southwest, two important geographic regions. After approximately four months of litigation, in February 2009, the parties abandoned the transaction.

It bears mention that the antitrust laws do not invest the Division with the authority to block a merger (or take other enforcement action) on non-competition grounds. The antitrust laws stand as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade,"<sup>74</sup> establishing "a regime of competition as the fundamental principle governing commerce in [the United States]."<sup>75</sup> A court or an antitrust enforcer "focuses directly on the challenged restraint's impact on competitive conditions," and the law "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason."<sup>76</sup> For example, applying these principles, the Supreme Court has rejected

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<sup>71</sup> See Complaint, *United States v. Dean Foods Co.*, No. 10-00059 (E.D. Wis. Jan. 22, 2010).

<sup>72</sup> See *infra* note 88 and accompanying text.

<sup>73</sup> See Complaint, *United States v. JBS S.A.*, No. 08-5992 (N.D. Ill. Oct. 20, 2008).

<sup>74</sup> *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

<sup>75</sup> *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 398 (1978).

<sup>76</sup> *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

appeals to public safety as a defense to an antitrust violation, rejecting a professional engineering society's argument that its ban on competitive bidding was necessary to further the public interest in safe bridges and buildings.<sup>77</sup>

Consequently, the Division could not challenge a merger or a practice solely on the ground that, for example, it would endanger food safety, would threaten environmental harm, or would devastate a rural community.<sup>78</sup> This limitation reflects the role of antitrust law and antitrust enforcement in our system of government. Introducing non-competition concerns into the antitrust calculus would compel courts and antitrust enforcers to balance competition against other interests and, the law does not give antitrust enforcers the authority to include such factors in its analysis. It is important to stress, however, that the antitrust laws often, and perhaps usually, complement other legal and regulatory regimes that further non-competition policy goals.

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*High Market Concentration.* The Agencies “normally consider measures of market shares and market concentration as part of their evaluation of competitive effects” of a merger.<sup>79</sup> Critically, though, while the antitrust laws bar mergers that harm competition, they do not impose rigid limits on the degree of concentration in particular markets or empower courts or enforcers to break up large firms in order to create an idealized economic landscape. As the Supreme Court held nearly a century ago, “the law does not make mere size an offence” absent unlawful conduct, and “does not compel competition, nor require all that is possible.”<sup>80</sup>

At the hearings, a number of farmers and ranchers spoke of days when small farms and ranches dotted the countryside and they sold their crops and animals to one of a number of modest-sized local grain elevators or packers.<sup>81</sup> However desirable, today's antitrust laws do not permit courts or enforcers to engineer an optimal market structure, breaking up firms simply because one might prefer there be more of them (or for other similar reasons). Rather, the antitrust laws prohibit illegal acts by specific parties that have the effect of reducing competition.<sup>82</sup>

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*Monopsony Harm.* It bears emphasis that, contrary to the apparent perception of some workshop participants,<sup>83</sup> both the antitrust laws and the Division target monopsony harm. Specifically, the antitrust laws proscribe mergers that reduce buy-side competition, agreements

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<sup>77</sup> *Id.*

<sup>78</sup> *Cf.* *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 462-63 (1986) (concluding that a group of dentists who agreed not to provide dental x-rays to insurers, and thereby restrained competition with respect to services provided to their customers, could not defend this restraint on the ground that it was necessary to protect the welfare of patients).

<sup>79</sup> U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 71, § 5.

<sup>80</sup> *United States v. U.S. Steel Corp.*, 251 U.S. 417, 451 (1920).

<sup>81</sup> *See supra* notes 9-15 and accompanying text.

<sup>82</sup> *See, e.g., U.S. Steel Corp.*, 251 U.S. at 451 (Antitrust law “requires overt acts, and trusts to its prohibition of them and its power to repress or punish them.”).

<sup>83</sup> *See supra* notes 22-24 and accompanying text.

among buyers that unreasonably restrain competition, and exclusionary conduct enabling the acquisition or maintenance of monopsony power,<sup>84</sup> and the Division stands vigilant against these offenses.

Monopsony harm was at the center of the Division's case challenging George's Foods' acquisition of Tyson Foods' Harrisonburg, Virginia, chicken-processing plant. The suit, filed on May 10, 2011, alleged that the acquisition likely would have the anticompetitive effect of reducing the prices paid to Shenandoah Valley-area farmers who raise chickens for processors such as George's and Tyson.<sup>85</sup> The transaction reduced the number of competitors in the relevant market from three to two, and left George's with about 40 percent of the processing capacity in the market. The reduction in processors, the Division alleged, would have enhanced George's ability and incentive to force growers to accept lower prices and less favorable contractual terms for grower services. The Division reached a settlement that requires George's to make capital improvements to the Harrisonburg plant that the Division anticipates will lead to a significant increase in the number of chickens processed at the facility. With these improvements, George's will have the incentive and ability to increase local poultry production at both of its Shenandoah Valley facilities, thereby increasing the demand for grower services and averting the likely adverse competitive effects arising from the acquisition.<sup>86</sup>

In another matter, the Division challenged JBS's acquisition of National Beef because of competitive concerns on both the buying side and selling side.<sup>87</sup> The Division concluded that the acquisition, if completed, would raise costs for consumers and drive down prices paid to ranchers and feedlots. The merger posed a competitive threat to persons buying goods from the merged entity (grocery stores buying boxed beef) and to persons selling goods to the merged entity (ranchers and feedlots selling cattle).<sup>88</sup>

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<sup>84</sup> See, e.g., U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 71, § 12 (discussing how the Agencies evaluate mergers of competing buyers); Competitive Impact Statement, United States v. Ariz. Hosp. & Healthcare Ass'n, No. 07-1030 (D. Ariz. May 22, 2007) (stating that a group of hospitals agreed to set uniform bill rates and other contract terms for the purchase of temporary nursing services from staffing agencies in violation of Section 1 of the Sherman Act); Brief for United States as Amicus Curiae Supporting Petitioner 16, Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co., Inc., No. 05-381 (Aug. 2006) (explaining that the Sherman Act "is concerned with competition on the buy-side of the market as much as on the sell-side of the market" (internal quotation omitted)).

<sup>85</sup> See Complaint, United States v. George's Foods, LLC, No. 11-00043 (W.D. Va. May 10, 2011).

<sup>86</sup> See also U.S. Dep't of Justice, Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigation of Perdue's Acquisition of Coleman Natural Foods (May 2, 2011), available at [www.justice.gov/atr/public/press\\_releases/2011/270591.htm](http://www.justice.gov/atr/public/press_releases/2011/270591.htm) (explaining the closure of an investigation into whether the acquisition of Coleman Natural Foods by the parent of Perdue Farms would harm competition among chicken processors for the purchase of services from chicken growers).

<sup>87</sup> See note 76 and accompanying text.

<sup>88</sup> See also Competitive Impact Statement, United States v. Cargill, Inc., No. 99-01875 (D.D.C. July 23, 1999) (explaining that Cargill, Inc.'s acquisition of Continental Grain Company's Commodity Marketing Group would have reduced competition for grain purchasing services to farmers,

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*Price Levels, Regulatory Burdens, and Lack of Capital.* Many of the concerns raised at the workshops do not have an answer in today’s antitrust laws. For example, a number of participants singled out alleged legal or regulatory burdens, including labelling requirements, environmental regulations, immigration restrictions, trade laws, record-keeping requirements, ethanol policy, tax laws, and food safety rules.<sup>89</sup> Primary responsibility for evaluating the appropriateness and effectiveness of these regulations rests with the relevant regulatory authority and Congress.

Similarly, high input prices, low commodity prices, or price volatility that result from market forces—and not from anticompetitive practices—are not the concern of the antitrust laws. As one federal circuit court has noted, “the antitrust laws are not a price-control statute or a public utility or common-carrier rate-regulation statute.”<sup>90</sup> Likewise, the antitrust laws cannot provide farmers and ranchers with the capital they require to sustain and grow their businesses.

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*Contracting.* As detailed above, many participants charged that producers who raise or sell animals under contract are subjected to unfair or abusive treatment.<sup>91</sup> The antitrust laws “were enacted for the protection of competition, not competitors,”<sup>92</sup> and do not provide redress for these abuses. The laws apply only if a practice diminishes competition in the market as a whole, although there may be abuse of a single producer. The Supreme Court has stated that “[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws” and that “those laws do not create a federal law of unfair competition.”<sup>93</sup>

However, here, as in many other contexts, there are other legal or regulatory measures that complement the antitrust regime. In particular, the Packers and Stockyards Act<sup>94</sup> (the PSA) reaches certain practices outside the ambit of the antitrust laws. Enacted in 1921, the PSA comprehensively regulates the activities of packers, stockyards, marketing agents and dealers, and other parties in order to, among other ends, protect producers from unfair treatment and protect consumers from high food prices. It contains a number of specific provisions, including a statutory trust, disclosure requirements for production contracts, rules governing arbitration, and record-retention requirements, as well as broad prohibitions of unfair, deceptive, and unjustly discriminatory practices. USDA administers the Act.

The workshops accelerated cooperation between the Division and USDA, including cooperation in regards to the PSA. Division attorneys and economists, along with attorneys from

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resulting in lower grain and oilseed prices for farmers, and how divestitures in the settlement forestalled the competitive harm).

<sup>89</sup> See *supra* notes 32-36 and accompanying text.

<sup>90</sup> *Blue Cross & Blue Shield of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995).

<sup>91</sup> See *supra* notes 43-48 and accompanying text.

<sup>92</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (internal quotations omitted).

<sup>93</sup> *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).

<sup>94</sup> 7 U.S.C. § 181 et seq. (2003).

the DOJ's Civil Division, assisted USDA's Grain Inspection, Packers & Stockyards Administrator in developing a set of PSA regulations, proposed in June 2010 and finalized this past December. The new regulations govern, among other matters, the suspension of delivery of birds to poultry growers, the termination of contracts, and required capital investments.<sup>95</sup>

Additionally, the formation of the Agricultural Competition Joint Task Force, which was announced by then AAG Varney at the Iowa workshop, is a concrete product of the workshops. This group comprises Division attorneys, Civil Division attorneys, and USDA representatives. A primary purpose is to find ways to best use the resources at the disposal of both DOJ and USDA. To date, the working group has considered the handling of complaints from poultry growers under the PSA (which are made to USDA with any enforcement action brought by the Civil Division), DOJ support for USDA rulemaking and other processes, and USDA support for DOJ litigation.

Finally, though the antitrust laws do not proscribe individual abuses of contract growers, the Division does protect contract producers more generally by policing mergers and other conduct potentially giving rise to monopsony power. For example, a processor that acquires market power on the buying side could exercise that power by, among other ways, negotiating more onerous terms (for the growers) than it could have in the more competitive environment that had prevailed. Indeed, the Division challenged George's acquisition of a chicken-processing facility from Tyson because, among other reasons, the transaction would have enhanced George's ability and incentives to force poultry growers to accept lower prices and less favorable contract terms for grower services.<sup>96</sup>

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*Market Transparency and Captive Supply.* Although adequate market transparency and fulsome price discovery are crucial to competitive agriculture markets, the antitrust laws do not directly counteract the broad economic trends outlined above that seemingly have reduced transparency<sup>97</sup> and also do not, in the absence of a specific violation, typically mandate greater disclosure of price information. Generally, that is the province of regulation rather than antitrust enforcement. Parenthetically, USDA endeavours to collect and publish current price information for a vast array of commodities.

In any industry, transparency and the sharing of information, under the right circumstances, can benefit competition, for example, driving competitors to achieve production efficiencies or enabling sellers to, or buyers from, those competitors to act more knowledgably. However, transparency also can be a guise for the sharing of competitively sensitive information for anticompetitive ends. The sharing of price and similar information can facilitate collusion or otherwise reduce competition.<sup>98</sup> In such a circumstance, the Division will take the appropriate action to challenge such information exchanges, whether in the agricultural sector and or any other area.

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<sup>95</sup> See 76 Fed. Reg. 76,874 (Dec. 9, 2011).

<sup>96</sup> See *supra* note 88 and accompanying text.

<sup>97</sup> See *supra* notes 51-58 and accompanying text.

<sup>98</sup> See generally U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 49-52 (1996).

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*Market Manipulation.* There is not just one answer as to how the antitrust laws address “market manipulation.” Bid rigging falls squarely within the proscriptions of the antitrust laws. Naked agreements among buyers of agricultural commodities to limit competition—for example, agreements on bid prices or to rotate bids—are no different than other instances of bid rigging and plainly violate section 1 of the Sherman Act.<sup>99</sup> The Division prosecutes such conduct criminally or civilly.

However, in general, strategic or manipulative trading conduct by a single firm or an uncoordinated group of firms is largely the province of other laws and regulations, particularly regulation or enforcement by USDA or the U.S. Commodity Futures Trading Commission (the CFTC). The CFTC, which enforces the Commodity Exchange Act, and which appeared on panels at the Iowa and Wisconsin workshops, is an independent agency with the mandate to regulate commodity futures and options markets in the United States.<sup>100</sup> Its enforcement authority extends to certain conduct by traders designed to bid the spot market up or down in order to increase the value of a position held outside the spot market, such as futures contracts in the same commodity.<sup>101</sup> For example, in December 2009, the CFTC fined Dairy Farmers of America and two former executives \$12 million for attempting to manipulate the price of the Chicago Mercantile Exchange’s (CME) June, July, and August 2004 Class III milk futures contracts through purchases of block cheddar cheese on the CME Cheese Spot Call market in excess of the position limits set by the Commission. This trading activity violated the Act, the CFTC found.<sup>102</sup>

Similarly, details concerning how and when consummated cash, forward-contract, or other types of transactions are reported for pricing purposes in livestock is the subject of extensive oversight by USDA, under mandatory price-reporting regulations authorized by statute.

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<sup>99</sup> See, e.g., *Swift & Co. v. United States*, 196 U.S. 375, 394 (1905) (defendant packers violated section 1 by, among other conduct, agreeing not to bid against each other in livestock markets and to bid up prices for a few days in order to induce cattlemen to send their stock to stockyards); U.S. Dep’t of Justice, *SK Foods Former Owner and CEO Indicted on Additional Charges* (Apr. 29, 2010) (describing the prosecution of a conspiracy to fix prices and rig bids for the sale of processed tomato products). However, if there is a regulatory scheme in place, and if there is a conflict between that scheme and the antitrust laws, a court may find that the regulatory scheme creates implied immunity from the antitrust laws. See *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 271 (2007).

<sup>100</sup> See *Iowa Tr.*, *supra* note 8, at 269-70 (Stephen Obie, Director, Division of Enforcement, Commodity Futures Trading Commission) (explaining that the CFTC works “to protect market users and the public from fraud and manipulation and abusive practices” and “to foster an open, competitive, and financially sound futures and options markets”).

<sup>101</sup> See *id.* at 290.

<sup>102</sup> See *Order, In re Dairy Farmers of Am., Inc.*, No. 09-02 (Commodity Futures Trading Comm’n Dec. 16, 2008).

*Genetically Modified Seeds.* The issue of genetically modified seeds implicates the careful balance of the antitrust laws and the intellectual property laws. These regimes employ different means to the same ends of enhancing consumer welfare and promoting innovation. The antitrust laws preserve the competitive spur to innovation, and the intellectual property laws create incentives for innovation.<sup>103</sup> Antitrust law recognizes the critical role that intellectual-property rights play in driving innovation and values those rights.<sup>104</sup> For example, antitrust law typically does not limit the prices that a patent holder may charge to license that patent. As the Seventh Circuit held, the “price of” a patented product “cannot violate the Sherman Act: a patent holder is entitled to charge whatever the traffic will bear.”<sup>105</sup>

However, if conduct goes beyond the appropriate use of intellectual property and harms competition, it should be disciplined by appropriate antitrust enforcement. The Division stands ready to take the appropriate action in those cases. Thus, if the patent holder has crossed the bounds of the antitrust laws and abused his rights in a manner that leads to competitive harm, the Division is prepared to challenge that action. There may also be opportunities for clarification of how patent and antitrust law should align.

#### **IV. Conclusion**

At the workshops, farmers, ranchers, and others described the many challenges they face. They also described how they are meeting those challenges with vigour and resolve, just as their forbearers have throughout our nation’s history. Among many examples, they are thinking about ways to add value to their products, exploring new marketing channels, and considering ways to open new markets.<sup>106</sup> This is crucial because, as then AAG Varney observed at the final workshop, “a healthy, competitive agricultural sector is vitally important to our nation’s economy as well as a matter of national security and public health.”<sup>107</sup>

The Division emerges from the workshops better prepared and rededicated to fulfilling its important role in fostering a healthy and competitive agricultural sector. Vigorous antitrust enforcement is imperative, and the Division has redoubled its already active enforcement activities. The insights of those who earn their livelihoods in agriculture have given Division staff and leadership a better understanding of how agricultural marketplaces function, as well as a greater appreciation of the types of anticompetitive practices that can impact those marketplaces. This knowledge already has enhanced our enforcement efforts, as reflected in recent Division investigations and cases.

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<sup>103</sup> See generally U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 1-2 (2007).

<sup>104</sup> See Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, Promoting Innovation Through Patent and Antitrust Law and Policy 2 (May 26, 2010), available at [www.justice.gov/atr/public/speeches/260101.htm](http://www.justice.gov/atr/public/speeches/260101.htm).

<sup>105</sup> Schor v. Abbott Labs., 457 F.3d 608, 610 (7th Cir. 2006).

<sup>106</sup> See, e.g., Colorado Tr., *supra* note 7, at 104.

<sup>107</sup> Washington Tr., *supra* note 21, at 302.

The anticompetitive practices proscribed by the antitrust laws are manifold,<sup>108</sup> and it is impossible, not to say inappropriate, to make any predictions about the investigations and cases the Division might pursue in the future. That said, drawing on theory, the Division’s experience, and the lessons of the workshops, one can identify types of practices in the agricultural sector that hypothetically could give rise to antitrust issues in the years to come. Mergers, of course, are regular events, and, in certain circumstances, a merger can dampen competition in the sale of inputs, in the purchase of agricultural commodities or grower services, in the sale of food products downstream, or in other markets. Likewise, despite the Division’s aggressive criminal and civil enforcement, competitors in various industries continue to undertake schemes to fix prices.

Additionally, there are any number of practices, not so commonly known, that, under the right conditions, can create antitrust issues. For example, as mentioned above, the sharing of price or other competitively sensitive information can facilitate collusion or otherwise reduce competition. Also mentioned above, conduct that goes beyond the appropriate use of intellectual property, and harms competition, raises antitrust concerns. For instance, the increased importance of intellectual property in the agricultural space raises the possibility of anticompetitive licensing practices. Another possible source of antitrust concern is conduct, beyond information sharing, that could facilitate collusion in the purchase or sale of agricultural products. Further, agreements to limit bidding competition or divide territories would trigger antitrust scrutiny. The Division will take all appropriate enforcement action against any practices—those mentioned or the many and varied unmentioned—that threaten to harm the competitive process.

As this paper has made clear, efforts to foster a healthy and competitive agricultural sector do not end with antitrust enforcement. Other public and private entities are pursuing legislative, regulatory, and other initiatives relating to agriculture. Division staff and leadership have built important relationships with these entities, and we are better positioned to lend our expertise to their efforts to promote “free and fair competition” in agriculture. “Together,” Attorney General Holder observed at the inaugural workshop, “we can address the 21st century challenges that the agriculture industry now faces.”<sup>109</sup>

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<sup>108</sup> *Cf.* *Appalachian Coals v. United States*, 288 U.S. 344, 360 (1933) (stating that the Sherman Act “has a generality and adaptability comparable to that found to be desirable in constitutional provisions” and “does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape”).

<sup>109</sup> Holder, *supra* note 2.