

PUBLICATION

DOJ Signals Increased Antitrust Enforcement in Agribusiness

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On Friday, May 21, 2010, at Alabama A&M University near Huntsville, Alabama, the Department of Justice and the U.S. Department of Agriculture conducted a workshop focused on the poultry industry, the second of five workshops to explore competition and regulatory issues in the agriculture industry. In attendance were U.S. Attorney General Eric Holder, U.S. Agriculture Secretary Tom Vilsack and U.S. Assistant Attorney General for Antitrust Christine Varney. Attorney General Holder began the workshop by stating that "the Obama Administration is committed to protecting competition vigorously. This is a top priority for today's Justice Department. But I recognize that the vigorous enforcement of our antitrust laws, while critical, cannot fully address the concerns of many agriculture industry leaders and shareholders. That's why we're partnering with the [Department of Agriculture]. . . . That's why our agencies launched the Agriculture Competition Joint Task Force." Back in March, Assistant Attorney General Varney expressed her concern that small farms are being lost at an "astronomical" and "intolerable" rate.

The workshop's all-day proceedings consisted of a series of roundtable discussions and public testimony that focused on poultry grower issues and trends in poultry production. Interspersed between the roundtable discussions was public testimony from individuals involved in various levels of the poultry industry. Topics addressed included competition in the poultry industry, poultry contracting, contract terminations and upgrades for poultry houses. Another panel discussed changes in the structure of poultry production and enforcement under the Packers and Stockyards Act.

During the first roundtable on the workshop, Assistant Attorney General Varney alluded to the Packers and Stockyards Act, acknowledging that it is "very complex and exceedingly difficult to enforce." In that regard, there has been a spate of recent litigation and court decisions on the Packers and Stockyards Act. The Packers and Stockyards Act has been a major focus of litigation brought by poultry farmers and livestock farmers. Most recently, on May 10, 2010, the Sixth Circuit in *Perry v. Tyson Farms, Inc.*, dismissed a poultry farmer's lawsuit under the Packers and Stockyards Act and the Agricultural Fair Prices Act, which alleged that Tyson Farms, Inc. had engaged in unfair, discriminatory or deceptive practices. The Sixth Circuit affirmed dismissal of the suit based on the failure of the plaintiff poultry farmer to allege an adverse effect on competition as a result of Tyson's activities. In other words, the plaintiff's failure to allege an anticompetitive effect was fatal to his claims. The vast majority of other federal circuit courts have adopted a similar view.

The poultry industry workshop followed on the heels of a March 12, 2010 workshop geared towards farmers, which was held in Iowa. Three more workshops are scheduled to be conducted:

- June 7, 2010: A workshop on the dairy industry in Madison, Wisconsin, will focus on concentration, marketplace transparency and vertical integration in the dairy industry.
- August 26, 2010: A workshop on the livestock industry in Fort Collins, Colorado, with specific emphasis on beef, hog and other animal sectors and will likely include discussion of enforcement of the Packers and Stockyards Act.
- The workshops will close in Washington, D.C., on December 8, 2010, with a focus on the topic of margins, which will examine the discrepancies between the prices received by farmers and the prices paid by consumers.

A few days after the poultry workshop, Agriculture Secretary Vilsack announced that in June the USDA will issue proposed rules on fair play in livestock sales. According to the Secretary, the changes will be designed to allow USDA to "do a better job of responding to some of the complaints" heard from farmers, including claims that meatpackers unfairly favor big cattle feedlots, and to give poultry producers greater leverage.

The antitrust enforcement agencies' recent and upcoming workshops on antitrust issues in the agriculture industry underscore the stated intent of the Obama Administration to increase enforcement activities in several industries, including agriculture. Companies whose focus is on agriculture, or who deal with individuals or entities in the agriculture industry, should expect increased antitrust scrutiny of their activities. Sensitivity to this enhanced focus on enforcement can help to minimize the risks of antitrust exposure.

Effective antitrust compliance programs, as well as individual counseling, will go a long way towards minimizing risk and exposure to not only antitrust agency enforcement actions but also private civil litigation. Given the high stakes of prosecution under civil and criminal antitrust laws and the enormous litigation costs and treble damages involved in private civil litigation, companies will be best served by ensuring that they are adequately protected in this new atmosphere of enhanced antitrust enforcement under the Obama Administration in the sphere of agribusiness. If you have questions about these or other regulatory compliance issues, please contact your Baker Donelson attorney.