U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 15, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Department of Justice (DOJ) has reviewed S. 1759, the "Agriculture Competition Enhancement Act of 2007." The Department works vigorously to ensure that the benefits of competition are maintained in all markets, including agricultural markets, to the benefit of American consumers. However, the Department believes that certain provisions included in the bill are constitutionally objectionable, and that the bill would not accomplish its stated goal of protecting rural communities and family farms and ranches, but instead would unnecessarily duplicate existing collaboration efforts, increase costs and uncertainty, and may hinder effective antitrust enforcement and harm competition in agriculture and other industries. Therefore, the Department strongly opposes several provisions in this bill.

I. Constitutional Concerns

Several provisions of the bill raise constitutional concerns. Section 4 would establish an Agriculture Competition Task Force "under the authority of the Attorney General" that is comprised of members appointed by both the Executive and Legislative Branches as well as by state officials. The bill provisions (sections 4 and 6) pertaining to the Task Force raise Appointments Clause, separation of powers, and Recommendations Clause concerns under the Constitution.

Appointments Clause. The bill provisions pertaining to the Task Force (sections 4 and 6) raise Appointments Clause concerns because they invest Task Force members with powers that the Constitution requires be performed by Officers of the United States and, in some instances, with powers that the Constitution requires be performed by such officers within the Executive Branch. As we discuss below, these concerns could be avoided by revising either the Task Force's composition or its authorities. The Appointments Clause of the Constitution, Art. II, § 2, cl. 2, requires that "Officers of the United States" be appointed to their posts in specific ways, the most common being either Presidential nomination followed by Senate confirmation, or appointment by the President or a "Head of Department" (cabinet head). A individual qualifies

as an "Officer of the United States" who must be selected in conformity with the Appointments Clause if he or she is vested "by legal authority with a portion of the sovereign powers of the federal Government" on a "continuing" basis. Memorandum Opinion for the General Counsels of the Executive Branch from Stephen G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Officers of the United States Within the Meaning of the Appointments Clause* at 1 (Apr. 16, 2007) ("Appointments Clause Memorandum").

The bill would vest Task Force members with various authorities that would satisfy this definition. For example, section 6 of the bill would vest Task Force members with the power to define the content of Executive Branch regulations implementing the statute. Section (b)(2)(D) would require the Assistant Attorney General and the Chairman of the Federal Trade Commission (FTC) to issue guidelines that "prevent any merger or acquisition in the agricultural industry, if the effect of that merger or acquisition may be to substantially lessen competition or tend to create a monopoly." And section 6(c) would require the Assistant Attorney General and the FTC Chairman, in issuing these guidelines, to "incorporate and implement the recommendations" of the working group of the Task Force. Moreover, the bill would vest Task Force members with authority to "coordinate Federal and State activities to address unfair and deceptive practices and concentration in the agricultural industry,"(section 4(c)(3)); make legislative recommendations to Congress, (section 4(c)(6)); and use (on a reimbursable or non-reimbursable basis) Government property and resources, (sections 4(h)(3), (4)). These authorities – most notably the authority to define the content of Executive Branch guidelines or regulations implementing a statute – involve the exercise of sovereign powers of the Federal Government and, as such, may constitutionally be exercised only by Officers of the United States appointed in conformity with the Appointments Clause. *See Buckley v. Valeo*, 424 U.S. 1, 126, 143 (1976); *see also, e.g.*, Appointments Clause Memorandum at 4 ("[A] federal office involves a position to which is delegated by legal authority a portion of the sovereign powers of the federal Government. Such powers primarily involve binding the Government or third parties for the benefit of the public, *such as by administering, executing, or authoritatively interpreting the laws*.") (emphasis added).

Task Force members who serve on the Task Force pursuant to congressional or state government designations, or who are chosen as academic or private sector representatives by someone other than the Attorney General, could not exercise the authority the bill currently gives the Task Force without violating the Appointments Clause. To avoid this concern, the Task Force provisions of the bill should be amended either to omit the foregoing duties and make the Task Force responsible solely for investigating and reporting on the issues identified in the bill, or to require the Task Force to be composed only of members who are selected by a method (such as Attorney General appointment) that satisfies the requirements of the Appointments Clause.

Separation of Powers and Recommendations Clause. The provisions of the bill that would permit Task Force members appointed by Members of Congress, *see* section 4(b)(7), to serve on a body that has statutory authority to control or define the content of Executive Branch implementing regulations, *see* section 6(c), also raises constitutional separation of powers concerns. It is well settled that the placement of congressional agents or appointees in positions that involve enforcing or executing the law violate the separation of powers between the legislative and executive branches. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 132 (1996) (stating that the constitutional anti-aggrandizement principle long recognized by the Supreme Court applies to "for example, the placement of congressional agents on a body with prosecutorial or law enforcement powers"). To avoid this concern, the bill should be amended either to limit the Task Force members' duties to investigative and reporting work, or to ensure that Task Force members appointed by Congress do not have a role in the statute's execution or enforcement, either through participation in the formulation of implementing guidelines or regulations, or otherwise.

Finally, section 4(c)(6) of the bill raises concerns under the Recommendations Clause because it requires a Task Force that includes members of the Executive Branch to submit legislative recommendations to Congress. The Recommendations Clause, U.S. Const. art. II, § 3, grants to the President the authority to recommend for legislative consideration "such Measures as he shall judge necessary and expedient. . . ." The President's authority to formulate and to present his own recommendations includes the power to decline to offer any recommendation. And legislation that would require the President's subordinates in the Executive Branch to provide legislative recommendations to Congress (here, through a requirement for Task Force recommendations) without Presidential clearance infringes the powers reserved to the President by the Recommendations Clause. To avoid this concern, the bill should be revised to require only Task Force reporting to Congress.

II. Legal and Policy Concerns

Section 8(b)(2) of this bill would create a Special Counsel for Competition in the Department of Agriculture (USDA) and grant to the Special Counsel the authority to "investigate and prosecute violations of the Packers and Stockyards Act." We strongly oppose this provision because it would vest prosecutorial authority with a Department and Cabinet head other than the Attorney General. Our opposition is consistent with longstanding, bipartisan Executive branch opposition to similar provisions. The Special Counsel provisions would harm American agriculture by, without showing any need, shifting focus away from financial protection investigations and enforcement; creating an unnecessary, new bureaucracy that would duplicate functions and weaken the existing and effective enforcement arms within USDA; and harmfully circumventing the critical and longstanding authority and management roles of the Attorney General and the Solicitor General over litigation involving the Federal government.

Section 6 of this bill changes the standard for certain mergers, acquisitions, and other transactions under section 7 of the Clayton Act (15 U.S.C. §18). In particular, in all agriculture merger cases brought by the government (Federal or state) and in all private cases where the merging parties' combined market share is 20 percent or more, it puts the burden of proof on the defendant to show the transaction would not substantially lessen competition or tend to create a monopoly in any relevant market. Further, this section calls on DOJ to issue agriculture merger guidelines.

To date, the Federal antitrust laws apply unaltered to mergers across virtually all industries, with the overriding objective to protect competition to the benefit of consumers. Because the Department has not been prevented from challenging anticompetitive mergers in agriculture under the current legal standards, shifting the burden of proof is unnecessary. Introducing different legal standards unique to agriculture industries would shift the well-established focus of merger review, which could prejudice the analysis in both agriculture and non-agricultural mergers, decrease transparency of merger enforcement in agricultural industries, and lead to inconsistent conclusions, which would be harmful to consumers and competition in this important industry.

Similarly, there is no need for any industry-specific merger guidelines. The Horizontal Merger Guidelines (Guidelines) issued by the DOJ and Federal Trade Commission (FTC) apply consistently to mergers across the entire economy, and no need has been demonstrated to depart from that generally applicable approach. To the extent that there is a suggestion that monopsony is a problem specific to agriculture, the guidelines address monopsony and thus no industry specific guideline is warranted for that concern.

This bill is animated by concerns that "a substantial and diverse family farm and ranch sector" is being jeopardized by the increasing consolidation of food packers and processors who are the main buyers of the products produced by these farms. The concern is that these large buyers are exercising monopsony power through the exertion of strong downward pressure on the prices paid to farmers. However, the antitrust laws already enacted by Congress are sufficient to protect the beneficiaries of the proposed legislation, farmers, from these types of practices.

The Department believes that current merger policy is sufficiently flexible to address market conditions that may be unique to agricultural markets. For example, the Department and FTC recently issued a Commentary to the Horizontal Merger Guidelines (2006), which provides several examples of how agricultural matters are reviewed. This commentary, the Department's merger challenges in matters such as General Mills/Pillsbury (2001), Archer-Daniels-Midland/Minnesota Corn Processors (2002), Syngenta/Advanta (2004), and Monsanto/DPL (2007), competitive impact statements issued as part of those challenges, and the closing statements the Department has issued for certain agricultural matters, demonstrate that merger policy under the Guidelines is effective at protecting consumers and maintaining competition in

agriculture industries. Changing the well-established standard is not necessary and could deter efficiency enhancing transactions that would benefit consumers by resulting in lower prices.

Section 9 of S. 1759 requires notification of the USDA of Hart Scott Rodino (HSR) filings with the FTC and DOJ as well as the sharing with the Secretary of any second request materials obtained under such merger reviews. Under this section, USDA may submit and publish comments on mergers' impact on "rural communities or the family farm and ranch sector," regarding whether further review by DOJ or the FTC is warranted. Congress provided essential confidentiality for HSR filings and for productions of documents under that process, and no need has been shown to change that important protection. Through the existing Memorandum of Understanding between the Department, the FTC and USDA, the antitrust agencies seek expertise and information from USDA on agriculture matters, and as part of that cooperative relationship, USDA expresses its views regarding antitrust merger enforcement matters, and thus no need for radical change is shown. In addition, concurrent jurisdiction likely would increase costs and time delays inherent in duplicative review and has the potential for inconsistent standards and outcomes.

Section 3 of S. 1759 creates in the Antitrust Division of the Department the position of "Deputy Assistant Attorney General for agricultural antitrust matters." The Department opposes this provision. Such a position is unnecessary since the Department already has a Special Counsel for Agriculture in its Antitrust Division who reports directly to the Assistant Attorney General for Antitrust. This new bureaucracy would duplicate functions within DOJ and circumvent the crucial and longstanding authority and management roles of the Attorney General and the Assistant Attorney General in structuring the Antitrust Division, and in directing resources to anticompetitive conduct as needed.

Section 4 of this bill creates an Agriculture Competition Task Force, made up of representatives from DOJ, FTC, USDA, state governments and attorneys general, small and independent farming interests, and academics or other experts. The Task Force is charged with devoting additional resources focused solely on agriculture industries to investigate competition issues, coordinate Federal and state activities to address "unfair and deceptive practices" and concentration, and work with representatives from rural communities to "identify abusive practices." In addition, the task force shall "define and focus the national public interest in preserving an independent family farm and ranch sector," and report on the state of family farmers and ranchers. The Department believes such a Task Force would at best duplicate existing enforcement activities, and at worst could impede existing coordination between the Department, USDA, and state governments by creating a bureaucratic structure that would increase the cost to the American taxpayer without any benefit to competition or independent farmers. Furthermore, to the extent the bill requires consideration of the effects on "rural communities" there is no clear explanation regarding how this factor should be considered, and such consideration could be inconsistent with overall antitrust objectives.

The Department shares the concern of the bill's sponsors that agriculture, as a key part of our economy, should maintain its competitive nature so that producers and consumers alike benefit from adequate supply and choice of agricultural products at competitive prices. Moreover, we take seriously concerns expressed in the agriculture community about competitiveness in the agriculture sector. However, S. 1759 currently is not written to remedy these concerns or to accomplish the goal of competitiveness and its benefits. Because S. 1759 has several provisions that raise concerns for the Department, both about unintended consequences as well as about competition and public policy, the Department strongly opposes these provisions.

Thank you for the opportunity to provide our views on this proposed legislation. The Office of Management and Budget has advised us that there is no objection to this letter from the perspective of the Administration's program.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Member