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The American
Antitrust Institute

For Immediate Release

Date: **June 5, 2007**

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AAI Calls DOJ's Consent Decree in Monsanto's Proposed Acquisition of Delta and Pine Land a "Disappointing Development" in Merger Enforcement

On May 31, 2007, the Department of Justice (DOJ) Antitrust Division issued a consent decree outlining approval requirements for the proposed merger of Monsanto and Delta and Pine Land (D&PL). Monsanto has a virtual monopoly in commercial agricultural biotechnology, including genetic traits for cotton. Monsanto also sells about 16% of genetically modified cottonseed in the U.S. while D&PL sells about 50%. The settlement closes the Division's almost 10-month investigation of the controversial acquisition opposed by numerous consumer, farmer, and food safety groups.

In a White Paper released in December 2006, the AAI called on the Division to rigorously evaluate potential anti-competitive effects of the deal.[1] The AAI noted that the integration of Monsanto and D&PL would take place against the backdrop of the companies' large market shares, barriers to entry, and numerous competitive concerns about Monsanto's licensing practices. The AAI explained in the White Paper that the proposed merger could potentially harm farmers and U.S. buyers of cotton-based products through higher prices and reduced choice.

In the various documents accompanying its decision, the Division notes that the merger would adversely affect competition in the MidSouth and Southeast U.S. cotton-growing regions. Under the consent decree, Monsanto would divest its Stoneville cottonseed business, which accounts for only 8% of the Southeast cottonseed market and 17% of the MidSouth market. The consent decree also requires the "divestiture" of 20 mostly experimental lines of D&PL's cotton germplasm. The acquirer of Stoneville and D&PL germplasm is reportedly Bayer, which markets the "LibertyLink" herbicide tolerance trait and produces the "Fibermax" branded cottonseed popular in the Southwest.

In commenting on the proposed outcome, AAI Vice President Diana Moss noted a troubling mismatch between the magnitude of the competitive problem clearly described by the Division and the remedy. "We were heartened by what appeared to be a strong Competitive Impact Statement and Complaint issued by the Division," stated Moss.

[1] The White Paper can be found at http://www.antitrustinstitute.org/Archives/552.ashx.

But the AAI believes the remedy falls short. “It is designed to fix a horizontal problem by replacing the competition in cottonseed lost by combining Monsanto and D&PL. To do that, a suitable remedy would have to create a viable, vertically integrated platform capable of competing with a company the size and scope of Monsanto/D&PL,” explained Moss. The competing platform would require genetic trait development capabilities and a sizeable, high-quality collection of germplasm. All of this would need to be coupled with infrastructure, long-term R&D, and market experience necessary to develop commercial varieties. “The remedy doesn’t do this,” stated Moss.

The AAI points to a number of reasons why the quality of competition being jerry-rigged in the remedy is not likely to match what was present prior to the merger. For example, Bayer is a tiny player in biotechnology traits development and has little involvement in cotton markets in the Southeast or MidSouth. Even with Stoneville and the D&PL germplasm, Bayer will be a fringe competitor in markets dominated by Monsanto/DPL.

Moss also noted that the D&PL germplasm lines to be “divested” are either in development and not commercially viable or account for only about 1% of the cotton acres planted in the Southeast and MidSouth. The merged company will retain substantial and partially exclusive rights to continue to use the “divested” D&PL germplasm. “We’re at a loss to understand how nonexclusive licenses to D&PL germplasm constitute true divestiture,” stated Moss. Finally, there appears to be no infrastructure or human capital accompanying the divested or licensed assets. “The chances of such a fledgling, patchwork Bayer system becoming a viable competitor are highly questionable under these circumstances,” she concluded.

“This is a distinctly regulatory fix for a highly problematic merger that probably should have been stopped outright,” commented AAI’s President Albert Foer. “We are hard pressed to find a precedent for the remedy imposed here and to see how the remedy fulfills the legal requirement to fully restore competition,” Foer stated. “Perhaps the government has access to information that is not public, but we think much more explanation is necessary to justify this settlement. This decision is a disappointing development for competition and U.S. consumers.”

Asked how other market players might respond to the Division’s decision in this case, Moss predicted, “Probably not well--if you are not Bayer or Syngenta.” Syngenta will have the right to purchase commercially unproven lines of D&PL germplasm that contains the VipCot traits it has developed independently with D&PL. “The decision will consolidate Monsanto’s huge dominance in cotton by giving it control of D&PL’s industry-leading germplasm to deliver its cotton traits in genetically modified cottonseed. It does little or nothing to address the merger’s effect on rival traits developers who now face a behemoth Monsanto/D&PL,” she commented.

The AAI noted that the Tunney Act allows 60 days for members of the public to have an opportunity to comment on the proposed settlement before it is accepted by the court. “We would expect a lot of public comments in this case,” commented Foer. “This may be one of the rare Tunney Act procedures in which the discrepancy between the seriousness

of the complaint and the apparent weakness of the remedy will lead a court to find that the settlement is not in the public interest. We would also encourage state attorneys general to take up the matter themselves under applicable state laws."

The American Antitrust Institute is an independent non-profit organization that frequently comments on current developments in the field of antitrust. The AAI's website is www.antitrustinstitute.org.