U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

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U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20520

Re: Response to Request for Information Regarding Access to Fertilizer: Competition and Supply Chain Concerns (Doc. No. AMS–AMS–22–0027; F.R. 15191)

On behalf of the U.S. Chamber of Commerce ("the Chamber"), we are pleased to submit these comments to the U.S. Department of Agriculture ("USDA") in response to the Request for Information regarding Access to Fertilizer ("RFI"). The Chamber appreciates USDA's study of this important topic. Nevertheless, the RFI wrongly focuses on market concentration and mergers as drivers of fertilizer prices.

I. The U.S. Economy is Not Overconcentrated

Contrary to the assumptions of Executive Order 14036 and the RFI, the U.S. economy is not becoming more concentrated. In an exhaustive analysis of all available census data from the past two decades, Dr. Robert Kulick finds that since 2002, U.S. economic concentration has remained flat.[1] In fact, since 2007, the economy became *less* concentrated. Another study, also analyzing the most recent data, confirms that "census data show U.S. industries have not become more concentrated."[2]

Indeed, the Council of Economic Advisers itself rejected the overconcentration narrative. In 2020, CEA concluded that "the argument that the U.S. economy is suffering from insufficient competition is built on a weak empirical foundation and questionable assumptions."[3] As it explained:

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[1] Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017* (March 2022) ("Kulick study"), at https://www.uschamber.com/finance/antitrust/industrial-concentration-in-the-united-states-2002-2017.

[2] Robert D. Atkinson & Filipe Lage de Sousa, *No, Monopoly Has Not Grown* (June 2021), at https://itif.org/publications/2021/06/07/no-monopoly-has-not-grown). Similarly, a recent working paper by Stanford and Chicago economists finds "that product market concentration has been decreasing since 1994." Benkard et al, *Concentration in Product Markets*, at https://www.nber.org/papers/w28745. See also Rossi-Hansberg et al, Diverging Trends in National and Local Concentration (2020), U. Chicago Press Journals, at https://www.journals.uchicago.edu/doi/abs/10.1086/712317.

[3] CEA, 2020 Economic Report to the President, Chapter 6, at https://www.govinfo.gov/content/pkg/ERP-2020/pdf/ERP-2020-chapter6.pdf. See also Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. of Indus. Org. 714, at 722 (2018); Testimony of Carl Shapiro,

> Research purporting to document a pattern of increasing concentration and increasing markups uses data on segments of the economy that are far too broad to offer any insights about competition, either in specific markets or in the economy at large. Where data do accurately identify issues of concentration or supercompetitive profits, additional analysis is needed to distinguish between alternative explanations, rather than equating these market indicators with harmful market power.

The bottom line: the economy is not becoming more concentrated over time.

Moreover, concentration does not, by itself, suggest a lack of competition. According to the bipartisan Antitrust Modernization Commission, economic research finds procompetitive reasons to explain highly concentrated markets, namely, "that the most efficient firms were winning the competitive struggle and thereby achieving high market shares."[4] In a recent letter, the American Bar Association's Antitrust Law Section agreed that, "Size, in the sense of number of users or market capitalization, is not by itself evidence of market power."[5] Indeed, the Kulick study shows that rising industry concentration often was correlated with higher levels of economic output, more jobs, and higher wages. Although the RFI notes that a handful of firms have large shares in various markets, that fact reveals nothing about output, price, efficiency, innovation, ease of entry, and a host of other economic factors relevant to the inquiry of whether a market suffers from a lack of competition.

II. Mergers Usually Enhance Competition and Benefit Consumers

Most mergers are procompetitive. An entire library of empirical economic papers and case studies attests to the benefits of mergers and acquisitions in increasing efficiency, improving capital flows, and allowing companies to bring new and better products to consumers.[6] The Vertical Merger Guidelines acknowledge that "vertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm."[7] The Horizontal

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Committee on the Judiciary, U.S. Senate, The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?, Dec. 13, 2017, at 1:11:00.

[4] AMC Report 34, at https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[5] See https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at-comments/2022/comments-aico-act.pdf.

[6] E.g., Antitrust Modernization Commission Report 57-60 ("AMC Report"), at https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. See also Statement of Ass't Att'y Gen. Christine Varney, *Merger Guidelines Workshops*, Third Annual Georgetown Law Global Antitrust Enforcement Symposium, Sept. 22, 2009 ("Let me start by pointing out that the vast majority of mergers are either procompetitive and enhance consumer welfare or are competitively benign.").

[7] Vertical Guidelines, at https://www.justice.gov/atr/page/file/1290686/download.

Merger Guidelines recognize that the antitrust agencies should avoid "unnecessary interference with mergers that are either competitively beneficial or neutral."[8]

To the extent that a merger raises competitive concerns, existing laws and processes already require that transaction to undergo antitrust review.[9] Although the RFI identifies several mergers that reduced the number of competitors in particular markets, those transactions would have received antitrust scrutiny had they raised competitive concerns. Indeed, agriculture markets have long been the subject of scrutiny from USDA, the Department of Justice, and others; in 2010, for instance, USDA and DOJ held five workshops examining different agriculture markets.[10] It is highly unlikely that an anticompetitive merger would have escaped scrutiny. Moreover, many of those referenced mergers happened many years ago; if those mergers caused price hikes or otherwise impaired competition, they would have done so long before the current surge in prices. On the other hand, those mergers likely generated efficiencies that enhanced competition; for example, larger companies have the scale to devote more resources to compliance with environmental laws and other regulations. Indeed, as the RFI itself acknowledges, these mergers did not result in a reduction in spending on research and development.

III. USDA Should Focus on Beneficial Ways to Increase Competition

Rather than focus on the false narrative that concentration and mergers are raising prices, USDA should focus on constructive ways to increase competition.[11] The RFI itself notes that supply and demand factors help to drive fertilizer costs, including world events, weather, rising energy prices, export restrictions by major global suppliers, and trade sanctions. For instance, the RFI notes that nitrogen prices have risen recently, but acknowledges that many factors, some related to COVID disruptions, have contributed to those increases ("natural gas makes up 80 percent of the cost to produce ammonia for nitrogen fertilizer. Prices for natural gas are up four to five times higher than normal"). A literature review reveals that economists focus on these factors, rather than mergers or concentration, as the drivers of high fertilizer prices.[12]

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[8] Horizontal Guidelines, at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

[9] See https://www.uschamber.com/finance/antitrust/chamber-comments-on-ftc-and-doj-merger-enforcement-guidelines.

[10] See https://www.justice.gov/atr/events/public-workshops-agriculture-and-antitrust-enforcement-issues-our-21st-century-economy-10.

[11] See https://www.uschamber.com/assets/documents/220118_FoodSupply_CompetitionHearing_HouseJudiciary.pdf.

[12] E.g., https://www.fb.org/market-intel/too-many-to-count-factors-driving-fertilizer-prices-higher-and-higher; https://cap.unl.edu/crops/fertilizer-costs-what-driving-increase-and-how-can-growers-manage-it.

Accordingly, USDA should adopt and advocate for policies that would genuinely help consumers and farmers. These policies include reducing regulations to expand domestic energy production and reduce barriers to entry, reducing taxes to increase the supply of labor, and reducing tariffs to open new markets for American farmers.[13]

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Thank you for the opportunity to comment. We would be happy to discuss these issues further.

Sincerely,

Sean Heather
Senior Vice President
International Regulatory Affairs & Antitrust
U.S. Chamber of Commerce

[13] E.g., https://www.uschamber.com/economy/u-s-chamber-urges-focus-on-energy-food-and-housing-to-combat-historic-inflation#:~:text=New%20findings%20from%20MetLife%20and,up%20from%2074%25%20last%20quarter.