U.S. Chamber of Commerce

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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 Competition in Food Retail and Distribution Markets and Access for Agricultural Producers and Small and Midsized Food Processors (Doc. No. AMS–AMS– 22–0026; F.R. 15194)

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 Food Retail and Distribution Markets ("RFI"). The Chamber appreciates USDA's study of this important topic. Nevertheless, the RFI wrongly focuses on market concentration and mergers as impediments to competition, and on laws that prohibit price discrimination as a potential remedy to competitive concerns. Instead, USDA could increase competition by advocating for policies that would reduce regulatory costs.

I. The U.S. Economy is Not Overconcentrated

Contrary to the assumptions of Executive Order 14036 and the RFI, the overall 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.[3]

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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,

Although the data shows that overall retail concentration has risen, that rise does not raise competitive concerns. As the Kulick study shows, retail concentration has risen since 2002, but to a point "approximately equal to concentration in the rest of the economy." More fundamentally, in many retail industries, rising concentration "is a sign of increasing market competition," particularly in retail industries that sell specialized consumer goods. E-commerce platforms have disrupted many of these industries in ways that enhance competition for consumers.

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

Antitrust in a Time of Populism, 61 Int'l J. of Indus. Org. 714, at 722 (2018); Testimony of Carl Shapiro, 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] Any 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, much of the increase in concentration happened years ago; if any mergers caused price hikes or otherwise impaired competition, they would have done so many years ago. 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.

III. USDA Should Not Seek to Increase Enforcement of Laws that Ban Price Discrimination

In a recent editorial in the Wall Street Journal, Noah Phillips, a current commissioner on the Federal Trade Commission, and Josh Wright, a former commissioner, explained that "antitrust activists are pushing to bring back old ideas that will exacerbate inflation in healthcare, groceries, consumer products and beyond."[11] These ideas would penalize companies for lowering prices: "The Robinson-Patman Act of 1936 sought to protect small retail businesses from larger, more efficient chain stores. As the Justice Department concluded in 1977, the unfortunate result was that American consumers paid more for groceries and household goods." Indeed, in 2007, the bipartisan Antitrust Modernization Committee recommended repealing the Robinson-Patman Act.

More fundamentally, the Robinson-Patman Act and similar agriculture statutes have the goal of protecting various competitors in the supply chain, rather than consumers or the competitive process itself. As a result, these statutes harm consumers and ultimately the U.S. economy itself:

> Antitrust laws protect competition. Competition benefits society—and consumers—by spurring innovation, improving quality and lowering prices. Companies and industries rise and fall, but the competitive process ensures that American consumers benefit. That is why antitrust focuses on whether a

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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.wsj.com/articles/inflation-rises-antitrust-reformers-lower-prices-competition-consumer-benefit-brandeis-biden-11640032926?mod=article_inline.

merger or other business conduct harms consumers. Yet some argue for jettisoning “consumer welfare”—the lodestar of U.S. antitrust laws—to promote other interests like protecting less efficient competitors and organized labor and reducing income inequality.[12]

USDA will not help, and should not attempt to help, farmers or others in the supply chain by raising food prices for American families.

IV. 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.[13] 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.[14]

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

Sincerely,

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U.S. Chamber of Commerce

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[12] Id.

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

[14] 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.