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 Competition and the Intellectual Property System: Seeds and Other Agricultural Inputs (Doc. No. AMS–AMS–22–0025; F.R. 15198)

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 the Intellectual Property System for Seeds and Other Agricultural Inputs ("RFI"). The Chamber appreciates USDA's study of this important topic and agrees that America's intellectual property system must continue to incentivize innovation. Nevertheless, the RFI wrongly focuses on market concentration and mergers as competitive problems. Instead, USDA could increase competition, and help consumers and other suppliers, 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 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

[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.

suffering from insufficient competition is built on a weak empirical foundation and questionable assumptions."[3] As it explained:

> 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. For example, as the RFI notes, the supposedly overconcentrated seed industry has introduced "GM seeds [that] have generally been accompanied by higher productivity." Moreover, "R&D spending and new variety introductions by the private seed industry has generally grown in recent decades." Seed prices have "declined since 2015, with commodity price swings playing a significant factor." These facts suggest that the seed industry remains highly competitive and innovative.

II. Mergers Usually Enhance Competition and Benefit Consumers

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[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, 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.

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 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 (the RFI cites one merger from 1985); if those 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 with environmental laws and other regulations. As the RFI notes, it remains "important to ensure that private sector research continues to support innovations in development of seed genetics, chemical controls, and crop characteristics" – research that requires substantial investments in technology and personnel. Notably, enhanced innovation benefits both consumers and others in the supply chain. As the RFI notes, "One study estimated that 44 percent of the value

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[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.

[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.

added by enhanced productivity was retained by farmers, with the rest captured by seed companies as a return on their investment in R&D."[11]

III. IP & Competition

The RFI rightly points out that a "healthy IP system" supports research that drives innovation. It goes on to acknowledge that research in the agricultural sector has led to important advancements, such as genetically modified seeds that have translated into productivity increases that are needed to produce adequate food supplies to keep up with rising global demand. The RFI also acknowledges that private investment in R&D has risen, while public funding has either "flatlined" or "declined." However, the RFI then makes a vague and unsubstantiated assertion that simply industry concentration perhaps foretell harm to the IP ecosystem, not just for seeds, but animal genetics as well.

The Chamber agrees that it is important to maintain a "healthy IP system," where predictable and reliable intellectual property rights enable the long-term, high-risk, capital intensive investments in research and development that lead to agro-science innovation. Those intellectual property rights connect stakeholders, public and private, large and small, within the IP ecosystem by providing a value basis for partnerships, contracts and transactions. The very diversity of specialization and scale, know-how and capabilities are what make this network of partners an effective ecosystem. By the RFI's own admission, the facts are clear. We have seen increased production levels thanks to innovation, and increased R&D expenditures by the private sector. Both of these are clear signs of robust competition which expose the flawed premise behind the EO that industry concentration levels should become a proxy for evaluating market competition.

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.[12] 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 and companies.[13]

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[11] F. Ciliberto, G. Moschini, and E.D. Perry (2019), ''Valuing Product Innovation: Genetically Engineered Varieties in U.S. Corn and Soybeans,'' RAND Journal of Economics, 50: 615–644.

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

[13] E.g., https://www.uschamber.com/economy/u-s-chamber-urges-focus-on-energy-food-and-housing-to-combat-historic-

More fundamentally, USDA should continue to focus on protecting consumers and the competitive process, rather than particular entities in the supply chain:

> 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 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.[14]

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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

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inflation#:~:text=New%20findings%20from%20MetLife%20and,up%20from%2074%25%20last%20quarter.

[14] See https://www.wsj.com/articles/inflation-rises-antitrust-reformers-lower-prices-competition-consumer-benefit-brandeis-biden-11640032926?mod=article_inline.