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By electronic submission via www.regulations.gov

Chair Lina Khan
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

RE: Comment on Premerger Notification Rules | Docket ID: FTC-2023-0040

Chair Khan:

Farm Action appreciates the opportunity to comment¹ on the proposal from the Federal Trade Commission (“**FTC**” or “**the agency**”) to improve the premerger notification rules implementing the Hart-Scott-Rodino (HSR) Antitrust Improvements Act and the Premerger Notification and Report Form and Instructions.² Farm Action is a farmer-led advocacy organization dedicated to building a food and farming system that works for all Americans instead of a handful of powerful corporations. Headquartered in Missouri, Farm Action conducts research, develops policy, and undertakes advocacy efforts informed by the experience and priorities of its network, which includes farmers, ranchers, food system workers, consumers, and rural community leaders across the country. The Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF USA) joins Farm Action’s comments. With thousands of members in over 40 states, R-CALF USA is the nation’s largest cattle trade association exclusively representing the trade and marketing interests of cattle farmers and ranchers within the multi-segmented beef supply chain.

Many of Farm Action’s constituents — including one of Farm Action’s founders, Joe Maxwell — have been pioneers in the fight against monopolistic control of American agriculture since the 1980s. Over their lives, they have seen administration after administration — Democratic and Republican alike — ignore the letter of the nation’s antitrust laws, “letting giant corporations accumulate more and more power” through mergers and acquisitions.³

Farm Action’s expertise and experience in understanding the effects of consolidation in American agriculture reinforces our belief that the FTC’s proposal would enable the agency to collect the “documentary material and information relevant” to proposed acquisitions that is “necessary and appropriate to enable the” FTC to determine whether an acquisition may violate the antitrust laws.⁴

¹ Farm Action thanks Democracy Forward and Basel PLLC for their assistance in preparing this comment.

² Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42,178 (proposed June 29, 2023) (to be codified at 16 C.F.R. pts. 801, 803).

³ See Joseph R. Biden, Remarks on Signing an Executive Order on Promoting Competition in the American Economy and an Exchange With Reporters, *2021 Daily Comp. Pres. Doc.* (July 9, 2021).

⁴ 15 U.S.C. § 18a(d)(1).

Farm Action supports the FTC’s proposed updates, and we write to provide additional support for various aspects of the FTC’s proposal, highlighting dynamics in agriculture markets and providing supplemental research for the record to the agency that we hope will be helpful as the FTC finalizes its proposal.

I. The agriculture sector has become dominated by consolidated oligopolies, and a correction is necessary.

Agriculture markets today are defined by oligopoly. Markets throughout the U.S. food system see extraordinarily high four-firm concentration (CR4) ratios — in some cases as high as 90% — in such diverse sectors as soybean processing, beef processing, pork processing, poultry processing, cold cereal, soft drinks, beer, salty snacks, bread, ice cream, fresh cut salad, wine, retail grocery, and convenience stores.⁵

But even the breadth of this horizontal consolidation within particular markets does not capture the full extent of the economic power these corporations hold. Through a series of upstream and downstream mergers, dominant firms have gained extreme bargaining power over trading partners and unchallengeable capacity to foreclose or marginalize competition at every stage in various supply chains. Simultaneously, dominant firms have expanded across product markets — primarily through product-extension and conglomerate mergers — to insulate against cross-industry competition or to develop product-tying and other capacities for entrenchment and exclusion. Dominant beef processing firms, for example, have acquired cross-industry competitors in pork and poultry to become dominant protein conglomerates.⁶ Similarly, after a series of mergers in 2015 and 2016, the number of significant agrochemical companies reduced to four from six, and each acquired a dominant position in the adjacent seed market — creating a rigid interdependency between the two products.⁷

It is also important to note that concentration is often substantially more pronounced at the local or regional level. Many food system industries have geographic and transportation limitations; so, while an industry such as poultry processing may have a CR4 of 54% nationally,⁸ many poultry farmers have only one or, at most, two processors that they can access regionally — essentially stripping them of meaningful bargaining power and forcing them to accept the terms of whatever processing contract is offered.⁹

⁵ Respectively, the CR4 concentrations for each industry are: 80, 73, 67, 54, 83, 82, 77, 63, 58, 54, 50, 46, 45, and 43%. Mary K. Hendrickson et al., *The Food System: Concentration and its Impacts: Special Report to the Family Farm Action Alliance* 9 fig.4 (2020) <https://farmaction.us/concentrationreport/>.

⁶ See, e.g., *Brazil’s JBS Concludes Purchase of Cargill Pork Unit*, Reuters (Oct. 30, 2015), <https://www.reuters.com/article/us-jbs-m-a-cargill/brazils-jbs-concludes-purchase-of-cargill-pork-unit-idUSKCN0SO2OC20151030>.

⁷ See, e.g., James M. MacDonald, USDA Econ. Rsch. Serv., *Mergers in Seeds and Agricultural Chemicals: What Happened?* (Feb. 15, 2019), <https://www.ers.usda.gov/amber-waves/2019/february/mergers-in-seeds-and-agricultural-chemicals-what-happened/>.

⁸ See Hendrickson *supra* note 5.

⁹ See, e.g., Leah Douglas & Christopher Leonard, *Is the U.S. Chicken Industry Cheating its Farmers?* Food & Env’t Reporting Network (Aug. 2, 2019), <https://thefern.org/2019/08/is-the-u-s-chicken-industry-cheating-its-farmers/>.

Consolidation has become a defining trait of the food system across all stages of production — globally, nationally, and regionally — and the trend towards further consolidation shows no signs of slowing down. Major mergers and acquisitions, with industry-shaping consequences, are proceeding. Just last year, Cargill and Continental Grain completed a joint acquisition of Sanderson Farms.¹⁰ Continental Grain already owns Wayne Farms, a vertically integrated poultry processor, so this combination will raise that industry’s CR4 from 54% to 60%.¹¹ Since Wayne Farms and Sanderson Farms are particularly dominant in the Southeast, the implications of this merger for the chicken integrator’s market power at the regional level are even more dire. Within days of the merger’s announcement in 2021, farmers in the Southeast received notices that functionally slashed their earnings by one third.¹²

Excessive consolidation in agriculture markets has dire implications for rural communities, our political system, consumer prices, innovation, farmers, workers, and small and independent businesses.¹³ Against this backdrop, we applaud the FTC’s proposal, which would provide the agency with new and necessary tools to fight key threats to competition in agriculture markets going forward.

II. Farm Action supports the FTC’s proposal, with particular emphasis on a number of changes that would help curtail harmful agricultural consolidation.

The 30-day waiting period enshrined in Section 7A of the Clayton Act¹⁴ provides a brief window of time for the FTC to evaluate a proposed merger and determine whether it will be viable or anticompetitive. It is essential that the premerger filings by merging parties enable the FTC to efficiently evaluate a proposed transaction within this brief window.¹⁵ Farm Action supports the FTC’s proposed changes, which would help modernize the premerger review process to better account for evolving complexities of modern mergers and address potential shortcomings of past merger reviews that have become more clear in retrospect. The additional information that the FTC seeks to collect would allow the agency to more rigorously evaluate proposed transactions and more quickly appreciate any potentially anticompetitive effects. This information collection is necessary and appropriate to carry out the purposes of Section 7A.

¹⁰ *Cargill and Continental Grain Complete Acquisition of Sanderson Farms*, Cargill (July 22, 2020), <https://www.cargill.com/2022/cargill-continental-grain-complete-acquisition-sanderson-farms>.

¹¹ *See Farm Action Responds to Cargill-Continental Acquisition of Sanderson Farms*, Farm Action (July 25, 2022), <https://farmaction.us/2022/07/25/farm-action-responds-to-cargill-continental-acquisition-of-sanderson-farms/>.

¹² *Reviving Competition, Part 5: Addressing the Effects of Economic Concentration on America’s Food Supply: Hearing Before the Subcomm. on Antitrust, Com., and Admin. Law of the H. Comm. on the Judiciary*, 117th Cong. 2 (2022) (testimony of Trina McClendon, Owner, Trinity Poultry Farm).

¹³ For an extensive survey of these effects, *see* Farm Action, Comment Letter on FTC’s Request for Information on Merger Enforcement (Apr. 21, 2022) <https://www.regulations.gov/comment/FTC-2022-0003-0724>.

¹⁴ 15 U.S.C. § 18a(c)(8), (e)(1)(A)..

¹⁵ *See* 15 U.S.C. § 18a(d)(1).

A. Farm Action supports the FTC’s proposals to collect more comprehensive information concerning the entities merging and the structure of the proposed transactions.

The FTC’s proposal includes a number of measures that would shed more light on the structures of proposed transactions and the entities involved. The FTC proposes creating an Ultimate Parent Entity (UPE) Information section to collect details about the corporate structures of the acquiring and acquired entities.¹⁶ The FTC also proposes requiring a Transaction Diagram detailing the relevant entities and individuals involved in a transaction, and a Transaction Description describing the mechanics of an acquisition.¹⁷ Farm Action strongly supports these proposals and believes that they are necessary and appropriate to enable the FTC to fully and fairly evaluate proposed mergers.

The FTC correctly concluded that “the very nature of HSR-reportable transactions has become more complex over time,” with a wide variety of entities having many different potential interests in a given transaction, with a variety of potential competitive impacts.¹⁸ The FTC’s concerns echo recent trends observed in agricultural markets.

Traditional “sector specific studies of agricultural monopolies and oligopolies, and likewise monopsonies and oligopsonies, overlook the extensive role of finance and the complex corporate, organizational structures that shape market power.”¹⁹ “Publicly traded, multi-layered subsidiary corporations utilize a web of dozens and even hundreds of subsidiaries to move capital between entities, reduce tax obligations, and reduce firm-level culpability for the riskiest operational components.”²⁰ Further, some conglomerates use Limited Liability Companies (LLCs) “as their go-to organizational form to reduce public accountability, tax liability, and responsibility for environmental wrongdoing,” with relationships between LLCs in “what can initially appear to be unrelated sectors” allowing these networks to “remain overlooked in studies of market power.”²¹

While traditional agricultural economists may take a “firm-centric” view that assumes that “firms act independently to maximize their utility or profit in any single farm market,” a more holistic and systems-level approach would examine the *networks* of firms involved in a market.²² Such an approach would seek to understand, for example, which companies can operate as bottlenecks to other

¹⁶ 88 Fed. Reg. 42,178, 42,187.

¹⁷ *Id.* at 42,193.

¹⁸ *Id.* at 42,179.

¹⁹ Loka Ashwood et al., *From Big Ag to Big Finance: a Market Network Approach to Power in Agriculture*, 39 Agric. and Hum. Values 1421, 1432 (2022).

²⁰ *Id.* at 1423.

²¹ *Id.*

²² *Id.* at 1424. See also Harvey S. James Jr. et al., *Networks, Power and Dependency in the Agrifood Industry*, in *The Ethics and Economics of Agrifood Competition* (Harvey S. James, Jr., ed.) 99, 106-12 (2013) (explaining how networks of firms in the agrifood industry exercise power on and/or are subject to dependencies to one another and how structural or technological changes to the industry alter those dependencies).

actors from accessing broader markets, or which actors depend on one another for key resources.²³ Network analysis also seeks to disentangle the operating structures of corporate families.²⁴

In a network analysis of the pork market, researchers found that traditional measures of production understated the market influence of private firms like Prestage Farms and Christensen Farms, which “leverage more authority over more peripheral actors” in their markets than the largest publicly traded behemoths in the sector (JBS, Smithfield Foods, and Seaboard Foods).²⁵ These private firms exercised degrees of control over a variety of different types of businesses in their networks, like feeding, finishing, and gestation, as well as equipment manufacturing and even regional banking.²⁶ And these firms’ relationships with hog growers often take a variety of different forms — from direct ownership, to contracts, to advanced marketing agreements.²⁷

Agricultural firms are also intertwined with major financial firms: CitiGroup and Bank of America directly own and trade derivatives of agricultural commodities, and are simultaneously crucial players in a shrinking network of lenders upon whom agricultural firms are dependent for credit.²⁸ Further, as businesses and pension funds have begun investing in pooled assets (such as index funds) rather than individual corporate stocks, these “diversified investment funds may be having a detrimental effect on market competition in certain concentrated sectors,” particularly “in oligopolistic markets where competitors have shareholders in common,” resulting in the potential for higher prices, collusion, and management incentives towards industry rather than firm performance.²⁹

In such an environment, the effects on competition of any particular merger are difficult to grasp without a thorough understanding of not only the core business lines of the merging companies, but also how those business lines fit into the broader portfolios of financial firms and conglomerates with meaningful interests in the companies. These firms may be expected to use their ownership stakes, even if only minority shares, to influence merging companies to pursue strategies that could, for example, pursue “investment fund interests, to the detriment of market competition.”³⁰

Studying corporate networks requires labor-intensive research using costly corporate databases, and even then may not be sufficient to consistently identify the ultimate beneficial owners of firms being studied.³¹ But such information is readily available to merging parties, and there is no compelling reason to force the agency to spend valuable time during the 30-day review period investigating and untangling a corporate web that could simply be disclosed by the parties. These disclosures would help the FTC more quickly and reliably identify instances in which an entity may

²³ Ashwood, *supra* note 19, at 1424.

²⁴ *See id.* at 1425.

²⁵ *Id.* at 1426.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1428.

²⁹ Antonio Capobianco, OECD, *Common Ownership by Institutional Investors and its Impact on Competition* 5 (2017), [https://one.oecd.org/document/DAF/COMP\(2017\)10/en/pdf](https://one.oecd.org/document/DAF/COMP(2017)10/en/pdf).

³⁰ *Id.*

³¹ Ashwood, *supra* note 19, at 1431.

take a less-than-controlling interest in a firm in order to entrench its dominance in a particular market rather than in order to profit from the investment itself,³² or identify instances in which a single entity obtains non-controlling interests in multiple competitors within a market, creating incentives to coordinate profits across the firms rather than directly compete.³³

B. Farm Action supports the FTC’s proposal to require disclosure of more information and documentation of the strategic rationale for given transactions.

The FTC’s proposal would require the submission of a variety of records explaining firms’ strategic vision for a particular transaction. It would require the submission of a narrative transaction rationale (and relevant documentation of that rationale), as well as the submission of confidential information such as memoranda, studies, surveys, analyses, and reports prepared to evaluate the transaction. Farm Action strongly supports these proposals and believes they are necessary and appropriate to help the FTC evaluate the potentially anticompetitive effects of potential mergers.

Mergers may be beneficial to an acquiring company for anticompetitive reasons that might not be immediately apparent from a surface-level analysis of market shares and concentration in a particular market. As described in the previous section, sometimes mergers and acquisitions are intended to allow firms to influence behavior in a market beyond their core operations, due to the mixed incentives of conglomerates with interests across multiple industries or different levels of the same industry. Requiring a firm to submit its justification for the strategic wisdom of a particular transaction would help diminish the role of guesswork in the FTC’s review of a proposed merger.

The agriculture sector also contains examples of mergers with strategic rationales that may not be immediately apparent, but whose effects are anticompetitive. In 2019, for example, the nation’s fourth-largest meatpacker, National Beef, acquired Iowa Premium, the largest beef processor in Iowa and a critical competitor for fed cattle in the Iowa-Minnesota cattle procurement region.³⁴ At the time, this merger escaped appropriate scrutiny from the FTC and DOJ; perhaps because antitrust enforcers did not understand the acquisition to change the regional market’s Herfindahl-Hirschman Index (HHI),³⁵ or because prior merger review processes³⁶ tended to give “too much implicit weight to the existence of efficiencies” in their analysis,³⁶ without adequately examining broader effects on competition. A more detailed understanding of the rationale for that acquisition, which we discuss at

³² See, e.g., *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 602-06 (1957).

³³ See, e.g., *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850 (6th Cir. 2005).

³⁴ Claire Kelloway, *Beef Packing Merger Threatens America’s Last Competitive Cash Cattle Market*, Open Markets Institute, Apr. 11, 2019, <https://www.openmarketsinstitute.org/publications/beef-packing-merger-threatens-americas-last-competitive-cash-cattle-market>.

³⁵ A common measure of market concentration and competitiveness.

³⁶ See Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting it Right*, 168 U. Pa. L. Rev. 1941, 1944 (2020). Farm Action hopes that these previous shortcomings will also be mitigated or remedied with the implementation of new proposed FTC-DOJ merger guidelines, which acknowledge that “[t]he level of concentration at which competition concerns arise may be lower in buyer markets than in seller markets,” and provide more clarity on the role of procompetitive efficiencies in analyzing proposed mergers. U.S. Dep’t of Justice & F.T.C., *FTC-DOJ Merger Guidelines (Draft for Public Comment)* 25, 33-34 (2023), <https://www.ftc.gov/legal-library/browse/ftc-doj-merger-guidelines-draft-public-comment>.

length below, may have enabled regulators to make an informed decision with respect to the proposed acquisition.

The strategic impact of the Iowa Premium acquisition likely went beyond basic questions of market share and efficiencies. A large portion of cattle are now sold via alternative marketing arrangements (AMAs): contracts between packers and producers for future delivery in which prices are determined at the time of delivery based on contemporaneous prices in the “spot” cash market for cattle.³⁷ In theory, such arrangements should allow for producers and packers to fairly distribute the risks of particularly high or low prices at the time of delivery.³⁸

In practice, however, AMAs as used today leave packers with a variety of tools to manipulate the prices they pay producers, allowing them to consistently put a thumb on the scale, forcing producers to assume the downside risks of changes in the spot market. Indeed, recent research found that every 1% increase in the fraction of cattle purchased under an AMA is associated with a nearly 6% reduction in the cash market price for cattle, consistent with packers’ incentives and ability to drive cash market prices down when taking delivery of cattle under an AMA.³⁹

Packers may sign AMAs with cattle producers while retaining direct ownership of some cattle that they can sell on the cash market, and can fluidly switch between the two sources of supply depending on which offers a more favorable price.⁴⁰ Further, in many regional markets, cash markets have become so “thin” and uncompetitive that they no longer provide reliable price signals for reference in AMAs. With extremely low spot market sales volumes reported, packers can exert substantial influence by conducting a small number of sales at lower spot market prices, which then drives down the prices they pay for cattle at the time of delivery.⁴¹ Further, in markets where large packers have minimal competition from other buyers, packers are able to set spot market prices via an “all or nothing” approach, putting out a request for a quantity of cattle at a particular price and forcing producers to either accept or reject the offer without engaging in a competitive negotiation.⁴²

Thus, packers who predominantly rely on AMAs are incentivized to make the cash market less robust so that more growers are forced to sign AMAs — which are in turn likely to provide favorable

³⁷ See, e.g., C. Robert Taylor, *Risk Shifting via Partial Vertical Integration: Beef Packers’ Acquisition of Slaughter Cattle* 1, 2 (Nov. 13, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4276805.

³⁸ Other theoretical benefits of AMAs include the predictability of available supply for packers and expanded access to credit for producers and feeders. However, many of the supposed benefits of AMAs are either illusory or not unique to the AMA structure. See Peter C. Carstensen, *Dr. Pangloss as an Agricultural Economist: The Analytic Failures of The U.S. Beef Supply Chain: Issues and Challenges* 7 (U. Wis. L. Sch., Legal Stud. Rsch. Paper Series, Paper No. 1741, 2022), <https://ssrn.com/abstract=4049230>.

³⁹ Francisco Garrido, et al., *Buyer Power in the Beef Packing Industry: An Update on Research in Progress* 12-13 (Apr. 13, 2022), <http://www.nathanhmilller.org/cattlemarkets.pdf>. See also Taylor, *supra* note 37 at 9 (finding that higher rates of captive supply, including contract sales, correlates with higher levels of volatility and risk in the cash markets, consistent with cash markets functioning as “an insurance market for packers” that has transferred risk to producers in captive arrangements without compensating them.).

⁴⁰ See C. Robert Taylor, *Harvested Cattle, Slaughtered Markets?* 1, 25-27 (May 10, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4094924.

⁴¹ *Id.* at 21-22, 25-26.

⁴² *Id.* at 30-31.

terms to packers — and so that packers may maximize their direct influence over cash market prices. Cash as a portion of cattle transactions has been in steady decline for decades.⁴³

These market dynamics are crucial to understanding the effects of the Iowa Premium acquisition, because in 2019, the Iowa-Minnesota region was the last region of the country where more than half of all cattle was still sold on the cash market.⁴⁴ In this particular region, small and midsize meatpackers like Iowa Premium were still a substantial factor, and they sourced their supply primarily on the cash market from independent feedlots.⁴⁵ The importance of this last competitive cash market to the nation’s small cattle feeders could not be overstated. The Iowa cash market directly sustained more than a quarter of the nation’s small feedlots (those with under 1,000-head capacity) — around 5,500 of them total — and maintained the least-consolidated cattle feeding industry in the country.⁴⁶ And, crucially, the existence of a functioning cash market where producers could get competitive prices for their cattle in the Iowa-Minnesota region gave producers in other regions a benchmark against which to compare the prices they were getting.⁴⁷

Cash market sales ranged from 60-75% of all sales in the Iowa-Minnesota market between 2005-2011, but that number began to decline in the mid-2010s.⁴⁸ After the Iowa Premium acquisition, in 2021, the percentage of cattle sales in cash dropped below 50% for the first time,⁴⁹ likely as a result of this merger continuing to thin the nation’s last robust cash market.

USDA has found that as cash markets thin, asymmetries of information can develop that systematically benefit processors over producers:

Market observers and regulators find less data to use, analyze, and publish, and producers are left to wonder whether they are being paid a fair price in a shrinking cash market or in contracts where price benchmarks may not be available. Additionally, because the contracting process involves real transactions costs, it poses several new risks to some thin-market producer.⁵⁰

⁴³ U.S. Gov’t Accountability Off. [GAO], GAO-18-296, *Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market* 33-34 (2018), <https://www.gao.gov/assets/gao-18-296.pdf>.

⁴⁴ Letter from Bill Bullard, CEO, R-CALF USA to William P. Barr, Attorney General, Re: Request to U.S. Department of Justice to Block the Proposed Acquisition of Iowa Premium by National Beef Packing Company at 2 (Mar. 28, 2019), <https://www.r-calfusa.com/wp-content/uploads/2019/03/190328-Letter-to-DOJ-re-National-Beef-and-Iowa-Premium-Beef-Merger.pdf>; Kelloway, *supra* note 34.

⁴⁵ Kelloway, *supra* note 34.

⁴⁶ Iowa Beef Center, *Economic Importance of Iowa’s Beef Industry*, Iowa state University (2017) 9 <https://store.extension.iastate.edu/product/Economic-Importance-of-Iowas-Beef-Industry>.

⁴⁷ Bullard, *supra* note 44 at 2-3.

⁴⁸ See *Annual LMR Live Cattle Purchase Type Breakdown by Region*, USDA, <https://www.ams.usda.gov/sites/default/files/media/LMRLiveCattleAnnualPurchaseTypeBreakdown.pdf>.

⁴⁹ *Id.* In 2022 and 2023, cash share of sales ticked back over 50%, but only in the context of an extraordinary western U.S. drought, which forced mass liquidation of cow herds. See, e.g., Tom Polansek, *Update 1-U.S. Beef Cow Herd Falls to Lowest Level Since 1962, USDA Says*, Reuters (Jan. 31, 2023), <https://www.reuters.com/article/usa-cattle-herd-idAFL1N34G2JD>; Vanessa Yurkevich, *Farmers Forced to Sell Their Cows as Drought Conditions Worsen across U.S.*, CNN Bus. (July 25, 2022), <https://www.cnn.com/2022/07/25/business/drought-farmers-cows/index.html>.

⁵⁰ Michael K. Adjemian et al., USDA Econ. Rsch. Serv., *Thinning Markets in U.S. Agriculture: What Are the Implications for Producers and Processors?* 2 (Bull. No. 148, 2016), https://www.ers.usda.gov/webdocs/publications/44034/56926_eib148.pdf?v=0.

Further:

because thin market prices may not be disclosed publicly, processors who interact with several producers have an advantage during negotiation—for example, processors who successfully contracted with nearby producers have a clearer picture of a similar producer’s likely costs and the lowest price they are willing to accept.⁵¹

Current premerger notification requirements do not require companies to provide the agency with transparency into the rationale for any particular merger. As a result, a premerger review of the National Beef - Iowa Premium acquisition may have merely surfaced that a national meatpacker sought to acquire a mid-size meatpacker in a transaction that didn’t dramatically reorient first-order concentration or market share in the regional market. But more visibility into National Beef’s strategic rationale may have surfaced the consequences for regional negotiating power, price transparency, and uptake of AMAs that would have provided the FTC with a stronger understanding of the competitive consequences of the proposed merger. Farm Action strongly supports more fulsome disclosure of transaction rationales from merging companies, to strengthen the FTC’s ability to identify all relevant competitive effects during premerger review.

C. Farm Action supports the FTC’s proposal to require disclosure of more information concerning competition and overlaps of the merging parties.

The FTC’s proposal would require that merging parties submit information concerning products, services, workers, supply and distribution relationships, licensing, and industry and geographic overlaps as part of their filing.⁵² Farm Action strongly supports this proposal, as this information would enable the FTC to quickly assess how a particular merger would likely affect competition. We believe that this additional information concerning the structure and dynamics of competition in a given industry — like the information discussed in the previous two sections — is necessary to help the FTC evaluate the effects of a merger more thoroughly and efficiently, and identify potential threats to competition.

As described extensively in Section II.A., entity-level analysis of industries is insufficient to capture the ways in which a particular corporation may exercise or benefit from power exercised by its larger conglomerate or networks of relationships affecting access to finance, inputs, or markets.⁵³ The FTC’s proposal to require submission of competition analysis information would help illuminate these dynamics.

Growing consolidation in the seed market provides a useful case study for the complex ways in which market power can be built and exercised. After the Supreme Court ruled that genetically modified seeds could receive patent protection,⁵⁴ major biotech companies developed incentives to

⁵¹ *Id.* at 14.

⁵² 88 Fed. Reg. at 42,214-15.

⁵³ See, e.g., Ashwood, *supra* note 19, at 1426-28.

⁵⁴ *Diamond v. Chakrabarty*, 447 U.S. 303 (1980)

enter the seed market (because they could develop and license new patented genetically-modified seeds), as well as to “consolidate patent portfolios” to avoid patent infringement litigation, leading to “extensive mergers and acquisitions.”⁵⁵ The result was an explosion of biotechnology investment in the seed market, as well as a series of mergers over decades that would result in extraordinarily high concentration. One study notes that “by 2002, 95% of patents originally held by seed or small ag-biotech firms had been acquired by large chemical or multinational corporations.”⁵⁶ This trend continued apace throughout the 2000s and 2010s; between 2015 and 2020, “the sector underwent another round of major restructuring, with mergers reducing the number of major firms in the sector from six to four and the number of major U.S.-based companies from three to one.”⁵⁷ CR4 concentration ratios reached over 75% across major seed groups by the mid-2010s.⁵⁸

Intellectual property (IP) and licensing regimes mean that the “big four” dominant seed and agrochemical corporations — Bayer, BASF, Corteva, and Sinochem — don’t simply accumulate and exercise power through sales but also act as gatekeepers for other industry participants at various levels of the market. Independent seed companies still depend on the big four for particular traits that they may wish to breed into their own offerings; they may be required to license those traits, and in doing so lock themselves into agreements that restrict their ability to work with other competitors or require them to use a big four company’s traits in a minimum number of their seeds.⁵⁹ The big four (particularly Monsanto, which has since been purchased by Bayer) are also known to aggressively litigate to protect exclusive licensing agreements or target farmers who may have unknowingly planted seeds with patented traits, meaning that “farmers almost exclusively had to use Monsanto’s products to avoid liability.”⁶⁰ And by bundling patented GMO crops with herbicides engineered to avoid harming those crops, these companies can compel farmers to purchase both halves of an interdependent seed and agrochemical package.⁶¹

Consolidation in seed inputs has also given rise to exotic supply arrangements mirroring the sorts of complex contracts that poultry, cattle, and hog farmers are increasingly subject to in livestock markets. Seed companies are beginning to experiment with risk-sharing agreements instead of flat rates for agricultural inputs, which would allow them to claim portions of farmers’ profits if their products overperform expectations.⁶² These contract structures give seed companies unprecedented access to

⁵⁵ Irene Musselli Moretti, U.N. Conf. on Trade and Dev. [UNCTAD], *Tracking the Trend towards Market Concentration: The Case of the Agricultural Input Industry*, at 25, UNCTAD/DITC/COM/2005/16 (2006).

⁵⁶ *Id.* at 26 (citing David Schimmelpfennig & John King, *Mergers, Acquisitions and Flows of Agbiotech Intellectual Property*, in *International Trade and Policies for Genetically Modified Products* 208 (R.E. Evenson & V. Santeniello eds., 2006).

⁵⁷ James M. McDonald et al., USDA Econ. Rsch. Serv., *Concentration and Competition in U.S. Agribusiness* 7 (Econ. Info. Bull. No. 256, 2023), <https://www.ers.usda.gov/publications/pub-details/?pubid=106794>.

⁵⁸ *Id.* at 10.

⁵⁹ Caius Z. Willingham & Andy Green, Center for American Progress *A Fair Deal for Farmers: Raising Earnings and Rebalancing Power in Rural America* 13 (2019), <https://www.americanprogress.org/article/fair-deal-farmers/>.

⁶⁰ Bethany Sumpter, *The Growing Monopoly in the Corn Seed Industry: Is it Time for the Government to Interfere?* 8 *Tex. A&M L. Rev.* no. 3, 633, 651 (2021).

⁶¹ *Id.*

⁶² Claire Kelloway, *Big Ag Eyes Cut of Farmers’ Profits in New Pricing Program*, *Food & Power* (Mar. 12, 2020), <https://www.foodandpower.net/latest/2020/03/12/big-ag-eyes-cut-of-farmers-profits-in-new-pricing-program#:~:text=Agribusiness>

information about their customers’ operations and profitability, while the systems that seed companies use to set benchmark performance levels are largely a “black box” to farmers, leaving them to negotiate for inputs in the context of deep information asymmetries with increasingly fewer — and in some cases, with no — viable alternative suppliers to turn to.⁶³

Over decades of consolidation, prices for genetically modified seeds have “risen sharply,” driven in large part by “the market power that firms derive from their [intellectual property rights] over new, commercially viable crop varieties.”⁶⁴ In the past 20 years, the price of commodity-crop seeds has risen faster than the price for any other farm input — and those price increases have generally outpaced yield increases over the same period.⁶⁵ Consolidation in the industry has likely resulted in less R&D expenditure, suggesting there is less need for innovation, and fewer choices for farmers sourcing seeds.⁶⁶

While topline concentration in the seed industry is concerning in and of itself, market power in that market could not be understood without a full examination of the industry’s unique supply, distribution, and licensing dynamics. The FTC’s proposal would require, for example, the disclosure of horizontal licensing arrangements, as well as supply relationships between the merging parties and with third parties, and a variety of other contractual relationships⁶⁷ that would help illuminate more of the ways that a proposed merger might affect competition in a market separate and apart from bare market share movement. The FTC’s proposal would help to ensure that the agency is able to understand such dynamics more thoroughly and quickly in the future as it is evaluating proposed mergers.

D. Farm Action supports the FTC’s proposal to expand street-level reporting of entities’ geographic operations to include various agricultural markets.

The FTC’s proposal would require more granular information collected concerning the geographic scope of entities’ operations where the acquiring and acquired entities have overlapping North American Industry Classification System (NAICS) codes in certain industries. These industries

%20wants%20to%20dramatically%20change,second%20bite%20at%20producer%20profits.; Gil Gullickson, *Get Set for Outcome-Based Pricing*, Successful Farming (Sept. 26, 2019), <https://www.agriculture.com/technology/crop-management/get-set-for-outcome-based-pricing>

⁶³ Kelloway, *supra* note 62; See also USDA Agric. Mktg Serv., *More and Better Choices for Farmers: Promoting Fair Competition and Innovation in Seeds and Other Agricultural Inputs* 48-50 (2023), <https://www.ams.usda.gov/sites/default/files/media/SeedsReport.pdf>; U.S. Dep’t of Agriculture *Listening Session on Competition and the Intellectual Property System: Seeds and Other Agricultural Inputs* (2022) 2-3 (statement of Sarah Carden, Policy Advocate, Farm Action), <https://farmaction.us/wp-content/uploads/2022/08/SC-testimony-listening-session-seed-competition.pdf>.

⁶⁴ McDonald et al., *supra* note 57, at 25.

⁶⁵ Sarah Carden Statement, *supra* note 63; *Consolidation and Competition in the U.S. Seed and Agrochemical Industry: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 5 (2016) (testimony of Diana L. Moss, President, American Antitrust Institute); *FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions: Food and Agriculture* 8-9 (2022) (testimony by Todd Leake, Farmer), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-DOJ%20Merger%20Guidelines%20Listening%20Forum_FTC_March%2028%202022.pdf; Am. Antitrust Inst., *Comment Letter on Notice on Competition and the Intellectual Property System: Seeds and Other Agricultural Inputs* 9 (May 16, 2022), <https://www.antitrustinstitute.org/wp-content/uploads/2022/05/USDA-Comment-Agbiotech-5-16-22-FINAL.pdf>.

⁶⁶ See Sumpter, *supra* note 59, at 654 (noting that Bayer’s R&D budget after acquiring Monsanto is substantially less than the prior combined budgets of the two companies).

⁶⁷ 88 Fed. Reg. at 42,193.

include NAICS codes 3115** (Dairy Product Manufacturing), 311611 (Animal [except Poultry] Slaughtering), 311613 (Rendering and Meat Byproduct Processing), and 311615 (Poultry Processing).⁶⁸ Farm Action supports these proposals and believes they are necessary and appropriate to enable the proper performance of the FTC’s merger oversight.

Given the perishable nature of agricultural products, the relevant markets for evaluating competition and market power tend to be local and regional; few producers are able to profitably serve national markets. In the poultry processing industry, USDA has previously found that 90% of birds processed in poultry processing plants were sourced within 60 miles of the plant, and most poultry growers have three or fewer integrators in their area.⁶⁹

In the cattle processing industry, similarly, one study found that packers purchased 53% of cattle from sellers within 100 miles of their meatpacking plant, with an additional 32% purchased from sellers between 100-300 miles away.⁷⁰ Studies have shown that competition levels can vary substantially from region to region, and that less competition by packers in given regions is associated with lower purchase prices of cattle from growers.⁷¹

Similarly, raw milk typically travels very short distances to a processing plant; as one regional group noted, “[f]or 80 percent of Colorado’s milk, the journey from farm to plant is 40 miles or less.”⁷²

In this context, street-level data concerning operations as proposed by the FTC is absolutely necessary for evaluating possible effects on competition from mergers in the agricultural sectors the FTC has identified. When most farmers sell their products to buyers within a few hundred miles, national or state-level markets are not meaningful to understanding competitive dynamics. Without local data on operations and competition, the FTC would not be able to understand whether mergers in these industry codes would be likely to reduce competition at the regional level, which is of particular import for agricultural products.

E. Farm Action supports the FTC’s proposals to expand information collected concerning merging parties’ prior acquisitions.

The FTC’s proposal would significantly expand the universe of information concerning prior acquisitions that merging parties are required to submit as part of premerger review. Specifically, these changes would require merging parties to include prior acquisitions by the acquired party; to provide details of prior acquisitions over an expanded time frame; to report additional deals by eliminating the

⁶⁸ 88 Fed. Reg. at 42,201, 42,216.

⁶⁹ James M. MacDonald, USDA Econ. Rsch. Serv. *Technology, Organization, and Financial Performance in U.S. Broiler Production* 29, 30 tbl.12 (EIB No. 126, 2014), https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=0.

⁷⁰ Oral Capps, Jr. et al, *Examining Packer Choice of Slaughter Cattle Procurement and Pricing Methods*, 28 Agric. & Res. Econ. Rev. 11, 17 (1999), <https://ageconsearch.umn.edu/record/31491/files/28010011.pdf>; see also A.L. Beam et al., *Distance to Slaughter, markets and feed sources used by small-scale food animal operations in the United States*, 31 Renewable Agric. And Food Sys. 49, 49 (2015) (survey of 7,925 food animal operations found that 95 percent of food animal operations transported animals less than 90 miles for slaughter).

⁷¹ GAO, *supra* note 42, at 15-16.

⁷² Jenna Allen, DairyMAX, *The Art & Science of Dairy from Farm to Table: Raw Milk Transport* (Apr. 30, 2019), <https://www.dairymax.org/blog/art-science-dairy-farm-table-raw-milk-transport>.

minimum thresholds for reporting; and to provide clearer information by eliminating distinctions between the acquisition of assets and securities.⁷³ Farm Action supports these proposals.

Time and again, various agricultural markets have seen significant concentration built through a lengthy series of roll-up acquisitions of small firms, in which each individual transaction may seem relatively harmless, but in aggregate substantially hamper competition. The seed market described in Section {II.C} above is a prime example. Professor Phil Howard has maintained a powerful chart visualizing consolidation in the seed industry between 1996 and 2022 that illustrates the vast web of acquisitions by large companies over decades.⁷⁴ As the United Nations Conference on Trade and Development (UNCTAD) noted:

[A]grochemical giants went on a buying spree in [] plant biotechnology and seed
[B]etween 1995 and 1998 approximately 68 seed companies were acquired by or entered into joint ventures with a handful of large multinational companies. This trend became more apparent in the late 1990s and early 2000s, when the largest agrochemical and biotechnology companies reached out to envelop virtually all the largest seed firms in North America. Similarly, small ag-biotech firms became acquisition targets by the new agronomic system giants.⁷⁵

Similar dynamics played out in America's dairy industry, which has been marked by expansive acquisition sprees followed by mega-mergers. In the 1990s, Suiza Foods entered the U.S. dairy market and built its footprint by acquiring 20 other milk companies;⁷⁶ similarly, Dean Foods, a longstanding major milk processor, went on its own "acquisition spree" during this period, acquiring 14 other milk companies in 1997 and 1998.⁷⁷ These companies would then themselves merge in 2001 after over 40 individual acquisitions built them into a consolidated juggernaut.⁷⁸ After becoming the largest dairy producer in the country, Dean went on to be acquired in 2020 by dairy cooperative Dairy Farmers of America.⁷⁹ Rapid consolidation transformed America's dairy industry; as USDA has noted, "[t]hirty years ago, over 200,000 farms had milk cows, with most of those cows in herds of 80 or fewer. Today, even though total U.S. milk production is about 50 percent greater than it was 30 years ago, the

⁷³ 88 Fed. Reg. at 42,202-04, 217.

⁷⁴ Phil Howard & Amos Strömberg, *Seed Industry Structure 1996-2022*, philhoward.net (Jan. 2023), <https://philhowardnet.files.wordpress.com/2023/01/seed2022.png>.

⁷⁵ Moretti, *supra* note 55, at 26.

⁷⁶ W.D. Dobson & Paul Christ, *Structural Change in the U.S. Dairy Industry: Growth in Scale, Regional Shifts in Milk Production and Processing, and Internationalism 4-5*, (Univ. Wis.-Madison Staff Paper No. 438, 2000), <https://ageconsearch.umn.edu/record/12611/files/stpap438.pdf>.

⁷⁷ *Id.*; see also Eric Gardner, *Why Did Dean Foods Go Bankrupt? A Porter Model Analysis reveals the truth*, Substack: The Slotting Fee (Jan. 31, 2020), <https://www.slottingfee.com/p/dean-foods-bankruptcy-why-are-all-the-dairy-companies-going-bankrupt> (Dean Foods "kicked off the 1990s with a torrent of acquisitions." Its "strategy was simple. It purchased an established regional brand, modernized the processing plant with cutting edge technology, and folded the operations into the company's existing infrastructure. The result was more leverage against suppliers, retailers, and the ability to expand into new geographies. The company repeated that strategy throughout the decade.").

⁷⁸ *The Fall of Dean Foods*, Bismark Trib., (Nov. 22, 2019), https://bismarcktribune.com/the-fall-of-dean-foods/article_b8a8e84d-3ebb-5032-8b41-3f2d0208e786.html.

⁷⁹ Amelia Lucas, *Dairy Farmers of America agrees to buy Dean Foods, America's biggest milk producer, for \$425 million*, CNBC (Feb. 17, 2020), <https://www.cnbc.com/2020/02/17/dairy-farmers-of-america-agrees-to-buy-dean-foods-america-biggest-milk-producer-for-425-million.html>.

number of dairy farms has fallen by three-quarters, and most cows are on farms with well over 1,000 cows.”⁸⁰

Farm Action is heartened by the FTC’s growing vocal commitment to scrutinizing “roll-up” or “serial acquisition” strategies to “accrue market power.” As explained in Section D, the extremely local nature of many agriculture markets lends itself to reliance on smaller businesses, which may be acquired individually in non-reportable transactions without necessarily triggering scrutiny by antitrust enforcers.⁸¹ Requiring more expansive disclosure of prior acquisitions than what is currently available to the FTC during premerger review will allow the agency to better identify serial acquisition strategies and their potentially anticompetitive effects.

III. Conclusion


After decades of lax merger enforcement, Farm Action strongly supports the FTC in making these important changes to HSR forms — the first since their implementation 45 years ago — to ensure they provide sufficient information to understand the potentially anticompetitive effects of proposed mergers in the modern economy.

We encourage the FTC to quickly adopt these proposed changes, allowing those charged with enforcing our antitrust laws to effectively challenge deals that might harm competition and negatively impact American farmers, ranchers, and consumers. Thank you for the opportunity to provide our thoughts on this important matter.

Sincerely,



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Farm Action



Bill Bullard
Chief Executive Officer
R-CALF USA

⁸⁰ James M. MacDonald, Jonathan Law, & Roberto Mosheim, USDA Econ. Rsch. Serv. *Consolidation in U.S. Dairy Farming* 1 (ERR No. 274, 2020), <https://www.ers.usda.gov/webdocs/publications/98901/err-274.pdf?v=2515>.

⁸¹ F.T.C., *Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya In the Matter of JAB Consumer Fund/SAGE Veterinary Partners* 3, F.T.C. File No. 2110140 (June 13, 2022); see also F.T.C., *Statement of Commissioner Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress*, F.T.C. File No. P110014 (July 8, 2020); *FTC Challenges Private Equity Firm’s Scheme to Suppress Competition in Anesthesiology Practices Across Texas*, F.T.C. (Sep. 21, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across>.