CFA Consumer Federation of America

April 26, 2017

Dear Chairman Grassley,
Ranking Member Feinstein
and members of the Senate Antitrust Subcommittee

The Consumer Federation of America (CFA) is an association of more than 250 nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. We have been deeply involved in antitrust matters in a variety of industries, including several that have major proposed mergers pending before the Department of Justice.

We are writing to express our concern about the dramatic increase in market power enjoyed by a handful of corporations that affect commodities and services essential to American households. We urge the Committee to explore this matter with Makan Delrahim, who President Trump has nominated to lead the Antitrust Division of the Department of Justice. The Antitrust Division is the front line of consumer protection against the abuse of market power in the U.S. economy, and plays a vital role in preventing excessive concentration of market power through merger review.

While we realize that the nominee will not opine on specific mergers pending before the agency, there are three active reviews at present – ATT-Time Warner, Bayer-Monsanto, and Dow-DuPont – that are alarming indicators of an underlying trend about which the nominee must be examined. They raise concerns about excessive concentration and the abuse of market power that go far beyond the traditional antitrust framework and require a vigorous response if we are to avoid an economy where a handful of corporate giants dominate every sector. The communications and agricultural sectors, which constitute extremely important household expenditures, [1] are important examples of a powerful and deeply troubling trend.

Over the last twenty years a merger wave has brought the markets touched by these mergers to a precarious state from the point of view of competition. They have all become highly concentrated, as measured by the recently revised *Merger Guidelines* as applied to the properly defined product and geographic markets. They are also tight oligopolies by traditional economic standards, where four firms control more than 60% of the market.

The market power of these tight oligopolies is magnified by strong complementarities between markets. Controlling unique choke points, dominant firms can foreclose competitors, control the direction and pace of innovation, and set prices even higher than economic theory would predict. The ability of the dominant firms to create platforms that integrate markets

[1] According to the most recent consumer expenditure survey groceries (food at home) and household communications services account for about $6,000 per year of household expenditures.

vertically greatly increases market power. The result is what we have called in an extensive analysis of the communications market, a "tight oligopoly on steroids."[2]

There is a third aspect of the merger waves that requires antitrust authorities to take a more aggressive approach. Generally, mergers are assessed individually, with calculations of specific price impacts over relatively brief time periods (SSNIP), but that narrow view is no longer sufficient. The likelihood of merger waves and long-term harm to the market structure is now a prominent impact of mergers that cannot be ignored.

With multiple pending mergers in the agricultural sector, the overall post-merger market must be considered and it is an ugly picture.[3] Not only would there be a "tight oligopoly on steroids" dominating each of the product markets, but each would be dominated by a different set of firms. This technological specialization and product segmentation makes it easier to coordinate and engage in reciprocal behavior that dampens any rivalry between firms. We documented this aspect of the market structure problem in our recent report on the communications sector.

The pending mergers would lead to high market share of key components of bundles of complementary products, which in turn would afford leverage over the bundle. The substantial national market share and the scale of nationwide sales would give the dominant firms massive clout, making it more profitable to leverage their ownership of the key components and harm competitors. In both the communications and agricultural sectors, the problem also afflicts a vitally important intermediate good that gives it added importance.

In the communications space, AT&T controls key services, wireless and business data services, over which content flows. By sweeping content ownership into its bundles, it has a strong incentive, and ability, to frustrate competition in all the markets in which the content or the access to the customer are sold. Business data services have become a vital link, not only for other communications services, but for all commercial sectors that need reliable, high speed and always-on connections, like schools and hospitals, banks and data networks.

In the agriculture space, dominant firms combine control over genetic traits, chemicals and seeds. Farmers are locked into the bundles and independent competitors are locked out, when access to any of the complementary components is denied. In the agricultural sector, the trait, seed, chemical bundle is the key input for the farmer that affects the product sold to consumers.

The unique challenge for antitrust authorities is to recognize in their analysis the incentives and ability to leverage market power created by the strong complementarities between

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[2] *Mark Cooper, Overcharged and Underserved: How a Tight Oligopoly on Steroids Undermines Competition and Harms Consumers in Digital Communications Markets,* Consumer Federation of American and Public Knowledge, December 2016, Http://Consumerfed.Org/Wp-Content/Uploads/2016/12/Overcharged-And-Underserved.Pdf

[3] The long term trend in the agricultural sector is described in Diana L. Moss, Transgenic Seed Platforms: Competition Between a Rock and a Hard Place?, October 23, 2009 and Hope Shand, The Big Six: A Profile of Corporate Power in Seeds, Agrochemicals and Biotech, The Heritage Farm Companion, Sumer 2012.The impact of recent and proposed mergers w described in the following sources: Drew Harrell, "Dow and Dupont, Two of America's Oldest Merge in Jaw-Dropping Megadeal," Washington Post, December 11, 2015; Greg Roumeliotis and Ludwig Burger, "Bayer Clinches Monsanto with Improved $66 billion bid," Morning Briefing, September 15, 2016; Competition law and policy and the food value chain, Concurrences, No1., 2016.

markets, and to craft remedies that prevent these abuses. Sometimes only denying mergers, where the competitive harms outweigh potential efficiency gains, can repair the competitive harm. Sometimes applying strong conditions on access to the complementary input to preserve the potential for competition in vertically related markets can preserve and promote competition.

The hope that competition between very small numbers of platforms would replace vigorous competition for each component has been dashed. As dominant platforms occupy more and more of a product space, consumer choice declines, prices rise and innovation slows. This is a key moment when America will choose between competition and an economy dominated by a handful of corporate giants.

Sincerely,

Mark Cooper
Research Director

Thomas Gremillion
Director of Food Policy