

June 15, 2022

Melissa R. Bailey  
Associate Administrator  
Agricultural Marketing Service, USDA  
1400 Independence Ave SW  
Washington, DC 20250

**RE: USDA Agricultural Marketing Service request for public comment; “Competition and the Intellectual Property System: Seeds and Other Agricultural Inputs”; Docket Number AMS-AMS-22-0025; Federal Register Pages 15198-15201**

Dear Associate Administrator Bailey:

On behalf of the nearly 20,000 family farmer, rancher, and rural members of the South Dakota Farmers Union (SDFU), thank you for the opportunity to comment on competition and the intellectual property system regarding seeds and other agricultural inputs. We are pleased to provide comments and information that will assist USDA in preparing a report connected to the Executive Order on Promoting Competition in the American Economy. These comments focus primarily on seeds and agricultural equipment.

### **Seeds and Intellectual Property**

SDFU and its national counterpart, the National Farmers Union (NFU), have, on several occasions, expressed concern and raised the alarm about corporate consolidation and market power in the seed and agricultural biotechnology industry. <sup>1</sup>The Farmers Union Fairness for Farmers campaign brings the devastating impact monopolies have had on family agriculture into

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<sup>1</sup> <https://nfu.org/fairness-for-farmers/>

the national spotlight.<sup>2</sup> Unchecked consolidation in the agricultural seed and biotechnology sector has led to a spate of mergers and acquisitions, culminating in three mega-mergers in 2016 and 2017.<sup>3</sup> Thus few, large companies control the markets and intellectual property for seeds for major crops. Consequences of this market power include reduced choices in seed for farmers, suboptimal innovation by seed companies, and higher prices paid by farmers for seed.

### *Reduced choice*

While the introduction of genetically-modified (GM) seeds has largely been accompanied by increased productivity for farmers, insufficient competition appears to have also reduced farmers choice of seeds, including for conventional and locally and regionally adapted options. Procurement of conventional corn, soybean, and cotton seed has become difficult, and is a more common concern as seed companies cut back on their non-biotech offerings.<sup>4</sup> While there are a wide variety of GM seed options available, in practice not all varieties are available in all parts of the country. Moreover, there would likely be a wider variety of offerings with more robust competition among seed companies.

### *Reduced innovation*

Increases in concentration do not persistently lead to greater incentives to innovate.<sup>5</sup> Larger firms may have more capacity to innovate through research and development because they hold greater capital resources to employ for these purposes than comparatively smaller firms. But corporate consolidation may stifle innovation since firms have less to gain from innovation without adequate competition, and new product development can cannibalize sales of a firm's existing product lines. With fewer firms, it is also easier to coordinate behavior, which

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<sup>2</sup> Letter from AAI, FWW, and NFU to Principal Deputy Assistant Attorney General Renata Hesse (May 21, 2016), [https://www.antitrustinstitute.org/wp-content/uploads/2018/08/AAI-FWW-NFU\\_Dow-Dupont\\_5.31.16\\_0.pdf](https://www.antitrustinstitute.org/wp-content/uploads/2018/08/AAI-FWW-NFU_Dow-Dupont_5.31.16_0.pdf); Letter from AAI, FWW, and NFU to Acting Assistant Attorney General Andrew Finch (July 17, 2018), [https://www.antitrustinstitute.org/wp-content/uploads/2018/08/White-Paper\\_Monsanto-Bayer\\_7.26.17\\_0.pdf](https://www.antitrustinstitute.org/wp-content/uploads/2018/08/White-Paper_Monsanto-Bayer_7.26.17_0.pdf); Letter from AAI, FWW, and NFU to Assistant Attorney General Makan Delrahim (October 3, 2017); and Testimony of Roger Johnson, President, NFU, Submitted to the US Senate Committee on the Judiciary, "Regarding Consolidation and Competition in the U.S. Seed and Agrochemical Industry," (September 20, 2016), <https://www.judiciary.senate.gov/imo/media/doc/09-20-16%20Johnson%20Testimony.pdf>.

<sup>3</sup> These mergers include Bayer-Monsanto, Dow-DuPont, and ChemChina-Syngenta.

<sup>4</sup> Lynn Grooms, "Non-Biotech Soybean Seed: Is there enough?" April 1, 2009, <https://www.farmprogress.com/non-biotech-soybean-seed-there-enough>.

<sup>5</sup> James MacDonald, "Mergers and Competition in Seed and Agricultural Chemical Markets," April 3, 2017, Amber Waves. <https://www.ers.usda.gov/amber-waves/2017/april/mergers-and-competition-in-seed-and-agricultural-chemical-markets>.

could reduce research and development through tacit agreements among firms for each to focus on different segments of the marketplace.

### *Unfair prices*

As USDA notes in its request for comment, the rising cost of seed is a major concern; GM seed has increased in price more than 700 percent between 2000 and 2015. Additionally, there is evidence that seed companies wield their market power through price discrimination. For example, companies may label the same seed variety differently and offer different prices in different geographies and for different farm sizes.<sup>6</sup> Another example includes alleged price discrimination against Farmers Business Network (FBN), which claims that seed and chemical companies have conspired against it because of its promise to offer farmers better prices and more price transparency through its online retail marketplace.<sup>7</sup>

### **Agricultural equipment and intellectual property**

The main point of contention regarding farmers' right to repair their own agricultural equipment is farmers' inability to access, on fair and reasonable terms, the software tools they need to diagnose and repair their equipment. Equipment manufacturers like John Deere have claimed that giving farmers access to certain software tools could allow them to tamper with safety and emissions controls or infringe on the company's intellectual property.<sup>8</sup> Thus, equipment manufacturers have only provided farmers access to a limited set of tools. Farmers assert that these companies are deliberately locking farmers out of fixing their own equipment.

NFU and several state Farmers Union divisions and other organizations, have filed a complaint with the Federal Trade Commission (FTC) alleging that "John Deere withholds from its customers diagnostic software and other information necessary to repair the Deere equipment

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<sup>6</sup> Sally Krueger, "Do you know how much seed zone pricing actually costs you?" November 7, 2018, <https://www.fbn.com/community/blog/do-you-know-how-much-seed-zone-pricing-actually-costs-you>; Brian Paff, "How much are farmers in your state paying for ag chemicals," February 14, 2020, <https://www.fbn.com/community/blog/in-state-price-variation-ag-chemicals>.

<sup>7</sup> Claire Kelloway, "Farmers sue big ag for allegedly sidelining e-commerce startups," March 4, 2021, <https://www.foodandpower.net/latest/crop-inputs-retail-antitrust-suit>.

<sup>8</sup> Noah Wicks, "Lawsuits, legislation spur growing federal 'Right to Repair' debate," *Agripulse*, March 9, 2022. <https://www.agri-pulse.com/articles/17319-federal-right-to-repair-debate-grows>.

they own.”<sup>9</sup> Furthermore, the complaint alleges that this withholding violates the Sherman Act and constitutes an unfair and deceptive trade practice. Deere’s putative concerns about intellectual property theft are unreasonable, since Deere only needs to provide farmers with the embedded software required for diagnosis and repair, not the original source code. These issues are outlined at greater length in the complaint to the FTC.

Farmers are heavily reliant on equipment such as tractors, combines, sprayers, and other tools to do their jobs. The digitization of this technology has had multiple benefits for farmers, but it has also resulted in significant repair headaches and reduced options for repair due to the restrictions imposed by certain manufacturers. Paired with consolidation in authorized equipment dealership networks, farmers have fewer repair options, and may face higher costs and longer wait times for repair.<sup>10</sup>

## Conclusion

If you have any questions or would like to discuss SDFU’s position further, please contact Doug Sombke, SDFU President, via e-mail at [dsombke@sdfu.org](mailto:dsombke@sdfu.org) or by phone at 605-350-4211.

Sincerely,

Doug Sombke  
President

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<sup>9</sup> “Complaint requesting investigation and action to enjoin unfair methods of competition and trade practices by Deere & Company,” March 3, 2022, *Fairmark Partners, LLP*. [https://drive.google.com/file/d/1h6HVLfQ491dyAhcdYM-w5v\\_FpVKmtOB3/view](https://drive.google.com/file/d/1h6HVLfQ491dyAhcdYM-w5v_FpVKmtOB3/view).

<sup>10</sup> Kevin O’Reilly, “Deere in the Headlights II,” *U.S. PIRG Education Fund*. <https://uspirg.org/feature/usp/deere-headlights-ii>.