The American Antitrust Institute

Jonathan Leibowitz, Chairman
J. Thomas Rosch, Commissioner
Edith Ramirez, Commissioner
Julie Brill, Commissioner
Maureen Ohlhausen, Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

January 3, 2013

Via Electronic Delivery

Re: Antitrust Review of ConAgra-Ralcorp Merger

Dear Chairman Leibowitz and Commissioners Rosch, Ramirez, Brill, and Ohlhausen:

I. Introduction

The American Antitrust Institute (AAI) has been active in supporting a strong response to threats to competition in all segments of the agricultural supply chain. This includes mergers, exclusionary conduct, and collusion that potentially harm competition and consumers in the retail and commercial food supply segment of the market.[1] The Federal Trade Commission (FTC or Commission) has addressed issues similar to those potentially raised by ConAgra's proposed acquisition of Ralcorp in previous food industry mergers. Within the limited scope of the relevant markets that are most likely to be defined, the ordinary antitrust evaluation of this proposed transaction may be unlikely to find substantial harm to competition that cannot be rectified by a limited number of divestitures. However, the AAI believes that the proposed acquisition raises important competitive issues beyond horizontal overlaps that should attract the attention of the Commission and can only be addressed through the second request process.

[1] The AAI is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. AAI is managed by its Board of Directors, which alone has approved this letter. For more information, see www.antitrustinstitute.org.

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II. A Merged ConAgra-Ralcorp will Likely be the Largest Supplier of Private Label Foods in the U.S.

Both ConAgra and Ralcorp are leading food companies, selling primarily in the United States and North America. Both have consumer and commercial foods divisions with penetration in grocery, convenience, mass merchandise, and club stores across a number of food categories. The merging companies also have a business-to-business presence in commercial foods, supplying foods to a variety of customers, including foodservice (e.g., restaurants and convenience stores), food manufacturing and distribution, and industrial consumers.

An important difference between ConAgra and Ralcorp for the purposes of evaluating the proposed merger is their participation in the private label segment of the consumer and commercial food markets. ConAgra sells branded, private label, and customized food consumer products across several categories: meals, entrées, condiments, sides, snacks, and desserts. In contrast, Ralcorp is the leading manufacturer of private (proprietary) label food products – developing, manufacturing, and marketing high quality "copycats" of various branded food products. Retail outlets such as supermarkets sell these private label products under their own "store" or value brands, but at a discount to comparable branded products. Ralcorp is also a leading supplier of private label food products to the foodservice channel.

Recent reports indicate that Ralcorp accounts for about 6 percent of the overall private label market but was the largest private label manufacturer across 12 food categories.[2] If the merger is allowed to proceed as currently structured, ConAgra-Ralcorp would be the largest producer of private label packaged food in North America, together accounting for private label sales of $4.5 billion.[3] In an increasingly concentrated retail food distribution market, the role of private labels in maintaining price competition grows ever greater. The essential question the AAI poses in this letter is whether it makes a difference for competition and consumers if private label suppliers are *independent*, as opposed to being part of a large food conglomerate with an installed base of branded products.

III. Could a ConAgra-Ralcorp Merger Alter Competition in the Important Private Label Space?

The AAI expects that the proposed merger of ConAgra and Ralcorp will create horizontal overlaps in a number of markets, including but not limited to peanut butter and snack foods. Based on past FTC actions in similar mergers, it is possible that the relevant markets could be defined to include both the sale of branded and private label products. However, there are also reasons why separate product markets might be defined. The geographic market will probably be the U.S. We assume that

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2 Angela Mueller, *Ralcorp Told 'Status Quo Unacceptable'*, ST. LOUIS BUSINESS JOURNAL, August 31, 2012, http://www.bizjournals.com/stlouis/print-edition/2012/08/31/ralcorp-told-status-quo-unacceptable.html?page=all and William P. Stiritz, *Ralcorp Board of Directors Agrees to Separate Ralcorp and Post Foods*, MODERN BAKING, July 15, 2011, http://modern-baking.com/news/ralcorp-board-directors-agrees-separate-ralcorp-and-post-foods.

3 Michal L. De La Merced and Stephanie Strom, *Conagra To Buy Ralcorp, Solidifying Market Share*, NEW YORK TIMES, November 27, 2012, http://Dealbook.Nytimes.Com/2012/11/27/Conagra-To-Buy-Ralcorp-Holdings-For-6-8-Billion-In-Cash-And-Debt/.

the Commission will define and evaluate relevant markets for the purposes of determining whether the merger is likely to substantially lessen competition and, if so, whether to block the merger or impose structural and/or behavioral remedies that would alleviate such concerns.

However, the AAI encourages the Commission *not* to limit its analysis of the proposed ConAgra-Ralcorp transaction to potential horizontal overlaps. From a more systemic perspective, the effect of the merger on eliminating Ralcorp as a current and potential private label competitor – thus allowing ConAgra potentially more control over competition – should also attract the attention of the Commission, for two reasons.

First, Ralcorp is a leading current and potential supplier of private label foods in an important market. There may be importance in maintaining the independence of Ralcorp as a major private label manufacturer, as opposed to allowing it to become absorbed by a company that produces primarily brand name products. Private labels account for about 18 percent of the packaged food market and are a growing segment of the industry.[4] Ralcorp faces competition from branded manufacturers and other private label producers. Indeed, ConAgra produces a number of branded products that are capable of being replicated by a private label company such as Ralcorp, but which presently are not subject to such competition.

Ralcorp competes through a variety of mechanisms other than price, including relationships with supermarkets, product quality, innovation, a well-developed supply chain.[5] Sales of Ralcorp's private label products at a discount to branded items potentially divert sales from branded products, thereby serving as a constraint on branded product prices and providing choice and an important source of innovation to consumers.

Moreover, Ralcorp appears to be positioned to potentially enter additional private label markets. For example, the company already has leading positions in key product categories including pasta, cereal, jams, peanut butter, and crackers. The company has also reportedly expanded its position in private labels through recent acquisitions.[6] Therefore, Ralcorp's emphasis on private label products and entry into new markets raises substantive questions regarding the effect on the merger on eliminating it as an important potential competitor in private label product markets.

Second, ConAgra's internal calculus for competing its branded products against Ralcorp's private labels could be fundamentally changed after the merger in ways that are not necessarily pro-competitive and beneficial to consumers. ConAgra is often a second-tier competitor, not the market leader, in many branded product markets that are particularly susceptible to competition from private label competition. A brand leader may command sufficient consumer loyalty that it can compete comfortably against a proprietary label rival, whereas a second-tier brand is probably more susceptible to the pricing competition of private labels such as those produced by Ralcorp. Under

[4] In the United Kingdom, where food retailing is even more concentrated than in the U.S., proprietary brands reportedly play a larger role. Something may be gained by examining European experience in evaluating the potential competitive effects of the proposed ConAgra-Ralcorp transaction.

[5] Ralcorp Holdings, Inc. U.S. Securities and Exchange Commission 10-K filing. November 29, 2012, at 3.

[6] Katherine Hobson, *Analysts Brand Ralcorp a Winner in Private-Label Market*, THESTREET.COM, March 8, 1999, http://www.thestreet.com/story/722520/1/analysts-brand-ralcorp-a-winner-in-private-label-market.html.

these circumstances, ConAgra could have a strategic incentive to "manage" competition (assuming that ConAgra maintains Ralcorp as a business unit) between its branded products and Ralcorp's private label products.

For example, assume that ConAgra sells Brand X of a particular product to Kroger and there is no private label rival on Kroger's shelf. Would ConAgra be more profitable if it invites Kroger to add a Ralcorp private label in competition with Brand X, or would there be stronger incentives to limit the introduction of a private label? ConAgra's incentives to strategically encourage or limit entry of Ralcorp's private labels will likely depend on a number of factors. These include but are not limited to: (1) the potential for Ralcorp's private labels to undermine ConAgra's installed base of branded products; (2) retailers' potentially higher margins on sales of private label brands (relative to branded products) and, therefore, their incentives to favor them; (3) the extent to which – if there is a category in which a private label other than Ralcorp is already present – ConAgra might want to put Ralcorp forward as a possible substitute.[7] The merger could also change ConAgra's strategic decisions regarding plans to expand into multiple and growing private label market segments.[8]

Maintaining an independent Ralcorp would limit the opportunity for strategic post-merger internal decision-making. The changed competitive calculus of a merged ConAgra-Ralcorp should therefore be considered in balancing the costs of losing an important independent rival on competition and consumers, with the benefits (e.g., increased economies of scale) that could flow from a stronger private label competitor.

IV. The AAI Encourages the Commission to Issue a Second Request

In evaluating the antitrust implications of a ConAgra-Ralcorp combination, it is important for antitrust enforcers to carefully examine the likelihood and impact of merger-related changes that might alter the important role played by private labels. The question of whether there would be enough well positioned actual and potential entrants to render the loss of Ralcorp in the private label market segment unimportant is something that requires further investigation. This could require exploring the extent to which: (1) the two companies planned (or would be likely to plan) to enter various segments of private label markets and (2) the presence of either ConAgra or Ralcorp constrains the pricing of the other.

An antitrust analysis will also involve an analysis of the role of category management in this specific context – particularly the extent to which ConAgra acts in such a capacity for major retailers – in determining the potential for new entry, shelf positioning, promotional strategy, and pricing of proprietary labels. For example, if ConAgra is a category manager for Kroger, its recommendations not only as to the introduction of a new product but also the promotional strategy for the rival may be especially important. The information necessary to perform such an analysis and determine whether the transaction is likely to harm competition and consumers is only obtainable through a

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[7] *As ConAgra Buys Ralcorp, Store Brands Soar in Importance*, PRWEB, November 30, 2012, http://www.prweb.com/releases/2012/11/prweb10177938.htm. News reports have highlighted ConAgra's announced goal to be the "fastest-growing company in private label business" and to expand in more categories (e.g., snack foods) where it does not already produce branded products.

[8] Mueller, *supra* note 2.

second request. The AAI respectfully urges the Commission to use this HSR notification as an opportunity to explore the role of independence in the proprietary label market.

Sincerely,

Diana L. Moss

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cc: Richard Feinstein, Howard Shelanski