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## Presidential candidates pitch progressive antitrust solutions to farmers

By **Max Fillion**

Wisconsin. Iowa. Michigan. Pennsylvania. Ohio. As the 2020 election drum beats on, it's clear Democrats will need to flip some of these states to win the presidency. And in an attempt to reach those voters, candidates have promised stronger antitrust enforcement in the agricultural sector.

The proposals, while good for sound bites and stump speeches, are quite vague and don't provide much detail on how they might be implemented if their respective candidates win the presidency.

Senators Bernie Sanders from Vermont and Elizabeth Warren from Massachusetts proposed breaking up America's large agribusinesses, noting large concentration in the meat packing and corn seed markets. But thus far, the only merger they've named as a target for unwinding is Bayer-Monsanto, which was approved earlier this year.

To successfully split the company, Warren said she would appoint "trustbusters to review — and reverse — anti-competitive mergers." Sanders, much in the same vein, would "enact and enforce Roosevelt-style trust-busting laws to stop monopolization of markets and break up existing massive agribusinesses." Besides listing increasing vertical integration as another industry concern, the senators didn't further detail how they would break up mergers they've deemed problematic.

Peter Carstensen, an antitrust law professor at the University of Wisconsin who previously served in the Department of Justice's antitrust division, said there are lots of options for a president with a progressive antitrust agenda.

"Once you're in, you select your attorney general, your [deputy] assistant attorney general for antitrust, people to run the Federal Trade Commission, people to run the Department of Agriculture, and there are lots of tools in that set of tool kits that could play a very dramatic role in bringing about some change going forward in how we assess mergers and other conduct in the food system," Carstensen told *FTCWatch*.

Breaking up Bayer-Monsanto certainly wouldn't be out of the question, he said. The deal was approved after the companies reached a settlement with the DOJ that included promises to sell approximately \$9 billion in assets to competing companies.

"Jurisdictionally, there's no problem," Carstensen said. "The technical pleading issue would be to say, 'Look, we've settled this case on the following terms ... It is now four years later and here's what we found: the consent decree did not work. It did not result in the restoration or preservation of competition, and so we're going back to court.'"

The trick, Carstensen said, would be finding a way to carve the company up that would re-create the level of competition that existed before the merger. The forced divestiture by the DOJ along with structural changes that occurred within the company could pose a barrier to that, he said.

— Moratorium —

While calls to dismantle already consummated mergers are growing in popularity — particularly in the tech sector — calls for an industry-wide halt on mergers entirely are less common. But Sanders and Senator Cory Booker of New Jersey, another Democratic presidential candidate, have already proposed a so-called moratorium on mergers in the agricultural sector. Booker hasn't officially announced such a moratorium as part of his campaign platform, although last year he introduced a Senate bill that would enact one.

Booker's bill would have placed an 18-month moratorium on mergers in the agribusiness, food and beverage manufacturing and grocery retail industries. The bill creates thresholds, too: any company with annual net sales or total assets of more than \$160 million can't acquire a company with more than \$16 million. On top of that, it would establish a commission to study antitrust issues in the industries with an end-goal of updating US antitrust laws based on its findings.

Sanders, in his proposal, again falls short on specifics. He proposes to "place a moratorium on future mergers of large agribusiness corporations" and doesn't specify an end-date for such a moratorium or any thresholds. Jay Levine, an antitrust lawyer who serves as editor of DC law firm Porter Wright's *Food and Agriculture Quarterly*, said agribusiness is a vague term that catches a lot of industries and doesn't set forth proper antitrust markets. That vagueness could open the door to constitutional challenges, he said.

"There seems to be some due process problems as you're taking away your ability to do business without articulating, 'What is the government interest in regulating?'" Levine said. "If a large agribusiness buys a small mom and pop that doesn't add to its concentration or market power a lick, I can't do it anyway? That seems penal in nature."

It's tough to see how a broad, vague proposal like Sanders' would make it through both chambers of Congress. But Carstensen said Booker's bill represents a much more concrete legislative proposal — one that could stand up well in the courts.

"Imagine you've got this kind of legislation getting through the Congress of the United States," Carstensen said. "Boy, that's a tough one for a court to overturn because it implies the existence of a broad public consensus to support that kind of legislation."

But the moratorium would be useless without meaningful follow-up, Carstensen noted. A report from an independent commission runs the risk of being buried, he said.

"The political argument is that you need something to dramatize for legislators and voters the significance of the problems that we face and identify the solutions, so you can gauge that kind of basis going forward," Carstensen said. "I think you can do much of that in a process of committee hearings with respect to a concrete legislative proposal, rather than sending it off to some commission of deep thinkers."

Still, it's difficult to tell whether antitrust proposals will translate to votes in these crucial states. Booker's proposal was endorsed by several farming organizations. A poll from March 2018 showed farmers' widespread concern over the Bayer-Monsanto merger.

"It's going to resonate with some," Carstensen said. "And remember, you're always looking at the margin here. A hell of a lot of farmers in Iowa, our first caucus state, are going to be Republicans and they're going to either show up for the Trump coronation or they're going to stay home."

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