

Congress of the United States
Washington, DC 20515

March 10, 2020

The Honorable Makan Delrahim
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Assistant Attorney General Delrahim:

We write to urge you to closely scrutinize the proposed merger of Cengage Learning Holdings II and McGraw-Hill Education due to our serious concerns with this merger's impact on the cost of higher-educational textbooks and the effect of the transaction on students' privacy.¹

Over the past several decades, the college textbook market has undergone significant consolidation. Three companies reportedly dominate more than 80% of the market, with Cengage and McGraw-Hill holding 24% and 21%, respectively.² The proposed merger would further consolidate this marketplace by combining two of the three major providers of college textbooks,³ creating a single company with control of over 40% of the market.

As you know, this excessive level of consolidation is presumptively illegal under the antitrust laws and the Department's horizontal merger guidelines. The Supreme Court held in Philadelphia National Bank that a merger causing a single company to hold more than a 30% market share "is so inherently likely to lessen competition" that it presumptively violates Section 7 of the Clayton Act.⁴ The Court further held that such a merger must be enjoined "in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive

¹ Josh Kosman, *Students howl as McGraw-Hill, Cengage textbook merger nears DOJ approval*, N.Y. POST (Dec. 16, 2019), <https://nypost.com/2019/12/16/students-howl-as-mcgraw-hill-pearson-textbook-merger-nears-doj-approval/>.

² MCGRAW-HILL EDUC., INC., ANNUAL REPORT (2018); PEARSON, LEARNING FOR LIFE: PEARSON ANNUAL REPORT AND ACCOUNTS 54 (2018); Tony Wan, *In Move to 'Unlimited' Pricing Model, Cengage Hopes for a Comeback*, EDSURGE (Apr. 24, 2018), <https://www.edsurge.com/news/2018-04-24-in-move-to-unlimited-pricing-model-cengage-hopes-for-a-comeback>.

³ Cara Lombardo, *McGraw-Hill to Merge with Rival Textbook Publisher*, WALL. ST. J. (May 1, 2019), <https://www.wsj.com/articles/mcgraw-hill-cengage-plan-all-stock-merger-11556683590>.

⁴ 374 U.S. 321, 363 (1963).

effects.”⁵ Additionally, the Justice Department’s horizontal merger guidelines state that mergers resulting “in highly concentrated markets . . . will be presumed likely to enhance market power.”⁶ Cengage-McGraw-Hill’s 40% market share appears to clearly cross that threshold.

We are deeply concerned that as a result of this significant reduction of competition, the proposed merger will likely drive up costs for students and families who are already facing financial barriers to achieving higher education. Textbook prices have risen 184% since 1998, in part because students are a captive market with virtually zero control over their textbook assignments.⁷ And because many students cannot afford their textbooks, about two-thirds of students do not acquire all of their required course materials, undermining their educational opportunities.⁸

Furthermore, it has also been reported that the merging companies are working to convert the market to all-digital course materials through an “inclusive access” model, in which students are automatically billed for subscription access to textbooks through deals struck between institutions, bookstore operators, and publishers.⁹ This will completely remove students’ ability to price-shop and will prevent students from reselling textbooks, destroying the cost-lowering effect of the secondary textbook market.¹⁰ A recent class action lawsuit against the two merging companies and other vendors has questioned the anti-competitive effects of this automatic billing model,¹¹ which are likely to be intensified by further consolidation in the market.

The proposed merger also threatens to create significant market power over higher-education data, putting students’ privacy at greater risk. Cengage and McGraw-Hill already have access to a massive amount of student data through their “digital courseware,” which tracks real time

⁵ *Id.*

⁶ U.S. DEP’T OF JUSTICE, HORIZONTAL MERGER GUIDELINES, at 19 (2010).

⁷ Mark J. Perry, *Chart of the day.... or century?*, American Enterprise Institute (Jan. 11, 2019), <http://www.aei.org/publication/chart-of-the-day-or-century/>.

⁸ Ethan Senack, *Fixing the Broken Textbook Market*, U.S. PIRG Education Fund & The Student PIRGs, <https://uspirg.org/reports/usp/fixing-broken-textbook-market>.

⁹ Lindsay McKenzie, *Rival Publishers Join Forces*, INSIDE HIGHER ED (May 2, 2019), <https://www.insidehighered.com/digital-learning/article/2019/05/02/cengage-and-mcgraw-hill-merge>.

¹⁰ Timothy Z. LaComb, *Colleges, Students Tell DoJ McGraw-Hill/Cengage Merger Would Create a Textbook Duopoly*, NAT’L L. REV. (Sept. 3, 2019), <https://www.natlawreview.com/article/colleges-students-tell-doj-mcgraw-hillcengage-merger-would-create-textbook-duopoly>.

¹¹ Mike Leonard, *McGraw-Hill, Barnes & Noble Accused of Online Monopoly*, Bloomberg Law (Jan. 23, 2020), <https://news.bloomberglaw.com/mergers-and-antitrust/mcgraw-hill-b-n-accused-of-online-course-materials-monopoly>.

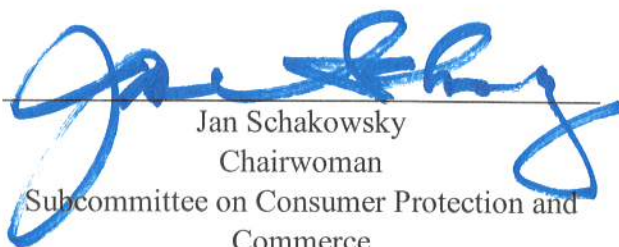
“content, usage, assessment data, and how different [students] understand different concepts.”¹² The breadth and variety of data the merged firm would be able to store could leave students’ information vulnerable to hacks, misuse, and exploitation. The concentration of data may also allow for the merged company to obtain an insurmountable lead in the of development machine learning tools for higher education.

In sum, it appears that the proposed Cengage-McGraw-Hill merger will significantly reduce competition in the college textbook market, creating a duopoly that may increase the financial burden on American students, jeopardize their privacy, and unduly influence their education. Accordingly, we respectfully request that the Antitrust Division closely scrutinize this merger to ensure that it does not result in harm to competition or students and their families.

Sincerely,



David N. Cicilline
Chairman
Subcommittee on Antitrust, Commercial and
Administrative Law
Committee on the Judiciary
U.S. House of Representatives



Jan Schakowsky
Chairwoman
Subcommittee on Consumer Protection and
Commerce
Committee on Energy & Commerce
U.S. House of Representatives

cc: The Honorable James F. Sensenbrenner, Jr., Ranking Member, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary

The Honorable Cathy McMorris, Ranking Member, Subcommittee on Consumer Protection and Commerce of the Committee on Energy & Commerce

¹² Andrew Albanese, *Frankfurt Book Fair 2018: Cengage CEO Michael Hansen on the Company's Digital Switch*, PUBLISHERS WEEKLY (Oct. 10, 2018), <https://www.publishersweekly.com/pw/by-topic/international/frankfurt-book-fair/article/78276-frankfurt-book-fair-2018-engage-ceo-michael-hansen-on-the-company-s-digital-switch.html>; see also Kim Mae Heussner, *McGraw-Hill's New Adaptive Ebooks Aim to Adjust to Students' Learning Needs*, GIGAOM (Jan. 8, 2013), <https://gigaom.com/2013/01/08/mcgraw-hills-new-adaptive-ebooks-aim-to-adjust-to-students-learning-needs/>; Zach Posner, *Artificial Intelligence Comes to Learning*, CHIEF LEARNING OFFICER MAGAZINE (Oct. 23, 2017), <https://www.mheducation.com/ideas/artificial-intelligence-comes-to-learning.html>.