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Competition Concerns and Proposed Remedies for Agriculture Labor, Seeds, Farm Equipment, and Meat and Dairy Processor Consolidation

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Introduction

Farming is critical to the United States economy and is the lifeblood of rural communities. However, the decline of agricultural competition has changed the farming landscape and contributed to the degradation of our rural communities. Over the past 30 years, monopolies and monopsonies have emerged across virtually the entire food production system, spanning production inputs, farms themselves, food processors, and retail distributors. More than half of current U.S. farm productions, for example, comes from farms with sales over $1 million, up from about one third in 1990.1

This increase in market power has created a stark imbalance between family farmers and the corporations that dominate most farms and the supply chain. Farmers have seen increasing costs for their inputs, such as seeds and equipment, while also receiving dwindling prices for their products. The impacts of this power dynamic stretch beyond the individual farmers to rural communities at large. Research throughout the 20th and early 21st centuries has consistently found a connection between an industrialized agricultural supply chain and the deterioration of rural well-being. Agriculture and food service contribute 22.2 million jobs to the U.S. economy,2 and one in five rural counties depends on this sector as its primary source of income.3 Corporate players have been allowed to suppress wages, which is disproportionately affecting people of color, as nearly 70% of farm laborers are non-white and nearly 60% are Mexican.4 Unsurprisingly, areas impacted by these corporations are associated with greater income inequality, higher unemployment, declining population size, increased health issues, and increased water and air quality problems.5

This brief highlights five sectors: the labor market, two on the input side (seeds and equipment), two on the output side (meat and dairy processing). This brief proposes the following areas for federal enforcement and reform:

- **Enforcement:**
  
  *There are some cases against monopolists and monopsonists in this sector already underway. We have highlighted a few areas where additional cases or investigations are warranted.*

  ○ Bring Sherman Act §2 monopolization cases against agrochemical companies, equipment manufacturers, and consolidated meat processors to increase choice among farmers

  ○ Bring Sherman Act §1 labor market monopsony cases against farmers and ranchers that use associations to fix wages and labor conditions

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3 Claire Kelowly & Sarah Miller, *Food and Power: Addressing Monopolization in America’s Food System 2, OPEN MARKETS INSTITUTE* (Mar. 2019)
• Investigate instances of potential collusion among poultry processors
• Give agencies the authority and resources to protect family farmers against unfair contracts and abusive practices on the part of monopolists and monopsonists

● Legislation:
  ○ Reform existing legislation to ensure cooperatives and checkoff programs work to the benefit of small farmers and market interests rather than consolidated interests
  ○ Introduce new legislation to protect farmers’ rights, such as the right to own their own data
  ○ Reform existing immigration regulation (8 U.S.C. § 1188(a)(1) specifically) that allows farmers and ranchers to import foreign workforce by fixing wages in the U.S.
  ○ Reform existing regulation (8 U.S.C. § 1188(d) specifically) that allows farmers and ranchers to form associations that act as employers on the labor market which creates considerable labor market power

While we do not present an exhaustive list of the anti-competitive issues in the agricultural sector, we believe the issues in this brief represent opportunities for targeted reforms to improve the lives of farmers and the health of the American food production system.

1. Problem: Labor Market Monopsony in the Agriculture Sector

The United States has a long legacy of importing labor, specifically relying on Mexico to provide workers in the Southwest.\(^6\) Labor market failures in the agriculture sector are rooted in decades of wage depression under the Bracero program, the predecessor to today’s H-2A program.\(^7\) Immigration law, as is, exacerbates labor market power and evades antitrust enforcement. The text of the immigration statute governing the H-2A program\(^8\) and its administration leads to anticompetitive conducts on employers’ end.

The statutory framework contributes to labor market monopsony. The first condition to qualify for petitioning to import an alien under H-2A program is to demonstrate that there is a labor shortage in the U.S.\(^9\) However, in economics, when the supply does not meet the demand for workers, wages rise. In sum, a true labor shortage should be rare, and the first strategy the employer should try is raising wages. Because of this regulation, farmers and ranchers are allowed to import foreign workforce when the wages they set are too low to attract domestic workers. Employers, by setting wages below the competitive level, artificially create “labor shortages” justifying the import of migrant labor at depressed wages.

The second part of the legislation requires showing that employment of foreign workers will not adversely affect wages in the domestic market.\(^10\) Of course, by setting depressed wages and

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\(^8\) 8 U.S.C. § 1188 “there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition.”


\(^10\) 8 U.S.C. § 1188(a)(1)(B) “the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.”
importing foreign workforce, employers’ conduct necessarily negatively affects domestic workers’ wages. First, by giving the employers a means to avoid raising wages. Second, by preventing them from accessing jobs they would otherwise be able to obtain. Third, by depressing wages in the overall industry that employs H-2A workers, employers are under-paying domestic workers working in those industries.

**Agricultural associations are vehicles of collusion.** Congress has explicitly permitted agricultural associations to make collective decisions about hiring migrant labor, including decisions about their wages.11 Essentially, agricultural associations are allowed to act as a sole employer in the context of the H-2A certification.12 Associations have labor market power because they represent large shares of the labor market and allow employers to act in unison with regard to the certification process.13 When agricultural associations of ranchers decide who they want to hire and at what price, and when they have labor market power, they are effectively “restraining trade,” and violating Section 1 of the Sherman Act.

**Courts have misinterpreted the statute as carving an exception to antitrust law.** Claims of wage suppression brought under section 1 of the Sherman Act are rare,14 and in the context of H-2A workers, they are almost nonexistent. Recently, however, the *Llacua v. Western Range Ass’n* case has highlighted the general tension between the H-2A program and antitrust law. Section 1 of the Sherman Act reads: “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.”15 However, H-2A regulations allow farmers and ranchers to combine and hire H-2A temporary workers through associations.16 The court in *Llacua* explained the importance of the “regulatory overlay” that presumably justifies the contradictory goals of antitrust and immigration law in this context. The court held that the existence of the association alone was not persuasive evidence of collusion because “the regulatory scheme permit[ted], and in places require[d], the very actions the Shepherds contend[ed] support[ed] the inference of a conspiracy.”17 To the *Llacua* court, these provisions undermined the plaintiff’s assertions that the mere use of a trade association to assist in hiring shepherds constitutes evidence of a conspiracy to control wages, as the association was following practices condoned by Congress.

**Legislative Solutions:**

- **Congress should change the requirements of Section 1188(a)(1)(A),** which requires domestic workers to be “able, willing, and qualified,” but adds the constraint that they be “at the time and place needed.” These statutory constraints allow employers to easily and artificially create labor shortages and to depress wages. By setting wages below the

11 See *Llacua v. Western Range Ass’n*, 930 F.3d 1161, 1178 (10th cir. 2019) (explaining that the two associations at issue hire 91 percent of shepherds, giving them considerable labor market power).
13 930 F.3d 1161 (10th Cir. 2019).
17 *Llacua v. Western Range Ass’n*, 930 F.3d 1161, 1181 (10th cir. 2019).
competitive level, they can claim that no domestic worker is “able” or “willing” to work. It is important to remove such wording from the statute to encourage competition on the labor market.

- **Congress should change the requirements of Section 1188(d).** Disallow an association of farmers or ranchers to act as an employer on behalf of its members. Not only might such associations behave anti-competitively, but they also benefit from increased labor market power which is harmful. Making sure that the law disallows associations from acting as an employer will prevent courts from holding that 1188(d) acts as a carveout to antitrust law.

**Enforcement Actions:**
- **Creating procedural safeguards** to prevent employers from artificially creating labor shortages justifying the import of migrant labor at depressed wages.
  - Preventing employers from including signals in their job postings that they are only looking for H-2A workers.
  - Making sure that when the Office of Foreign Labor Certification (OFLC) approves a migrant worker’s petition, the petition is not defaillant and the agency has verified migrant workers’ working conditions.

2. **Problem: Lack of Competition Among Seed Suppliers**

Four agrochemical companies control 60% of global proprietary seed sales and 70% of global pesticide sales. In the 1970s, thousands of small, family-owned companies cultivated and distributed seeds in the United States. Dramatic consolidation, primarily between seed and chemical companies, has shrunk these options to four dominant players: Corteva (the agricultural spinoff of DowDuPont), Bayer (completed a merger with Monsanto in 2018), ChemChina, and BASF. These four companies control both the sale of seeds and their development, including patents on genetically engineered (GE) traits. This consolidation has contributed to several harms:

**High seed prices are squeezing farmers’ margins.** Farmers’ overall cost of inputs is increasing at a faster rate than prices for their crops. Rising seed prices are contributing to this squeeze; between 1995 and 2015, the prices for corn and soy seeds increased by 300% and the cost of cotton seeds increased by 500%. Some of these price increases are due to the significant advantages, and cost savings, that GE seeds offer to farmers through improved yields and better resistance to

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23 Philip H. Howard, *How Corporations Control our Seeds in BITE BACK: PEOPLE TAKING ON CORPORATE FOOD AND WINNING* 15 (Saru Jarayaman & Kathryn De Master, eds. 2020)
insects and herbicides. Nonetheless, seed companies capture the majority of these benefits,\(^{24}\) and industry consolidation has contributed to higher seed prices that are not attributable to genetic improvements.\(^{25}\) Moreover, the restrictions agrochemical companies place on patented seeds prohibit farmers from saving and replanting seeds, a traditional cost-saving mechanism.\(^{26}\)

**American agriculture is inching towards monoculture.** For any particular crop, farmers have increasingly fewer varietal options. As part of cost-cutting initiatives, consolidated agrochemical companies have dropped regional varieties from their catalog, especially those native to low-income regions.\(^{27}\) Another common target of cost-cutting initiatives are seeds with less complex GE-traits, and local seed dealers often incentivize farmers to purchase the most complex seed variety, which is the most profitable to the agrochemical company, even if the farmer prefers a simpler seed.\(^{28}\) Non-GE seeds are increasingly rare. For example, in 2016, non-GE sugar beet seeds were virtually impossible to buy in the United States, increasing the United States reliance on foreign beet sugar as a source of organic sugar.\(^{29}\) Finally, corn and soybeans dominate the agricultural landscape, constituting more than 50% of U.S. farmland acreage.\(^{30}\)

**Innovation in areas of public interest, such as nutrition and conservation, is stagnating.** Agrochemical companies predominantly focus their research on commodity crops, such as corn and soybeans, and chemical resistance, rather than other potentially desirable traits.\(^{31}\) Meanwhile, public financing for agricultural research, which is more likely to focus on health or the environment and other crop varieties, has been in decline since the early 2000s.\(^{32}\) The agrochemical companies’ aggressive enforcement of intellectual property rights in seed traits has contributed to the stagnant state of research. The big four agrochemical companies charge extremely high licensing fees to nascent competitors seeking to use a patented trait, while more freely cross-licensing these traits among each other.\(^{33}\) Moreover, agrochemical companies have imposed barriers to “stacking” genetic traits, making it difficult to create seeds that combine traits from multiple companies.\(^{34}\) Finally, the licensing agreements often include conditions that

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\(^{27}\) Howard, *How Corporations Control our Seeds* at 22.

\(^{28}\) Id. at 22-23

\(^{29}\) Rebecca Bratspies, *Owning All the Seeds: Consolidation and Control in Agbiotech*, 47 ENVTL. L. 583, 602 (2017).


\(^{31}\) Bratspies, *Owning All the Seeds: Consolidation and Control in Agbiotech* at 605-06.


\(^{33}\) Howard *supra* 23 at 20.

\(^{34}\) Bratspies, *Owning All the Seeds: Consolidation and Control in Agbiotech* at 604.
restrict research conducted by farmers, academics, and, in at least one documented instance, regulators.35

Solutions:
1. Congress should pass legislation that limits the ability of large agrochemical companies to leverage seed patents to block competition and innovations.
   - Agrochemical companies should be required to license critical traits and hybrid seed varietals at FRAND terms to competitors and researchers. Traits that must be licensed at FRAND terms should include traits developed to be resistant to a particular agrochemical company’s herbicides or insecticides. When agrochemical companies license hybrid seeds to competitors, they should do so with minimal restrictions, allowing competitors to modify the seed or incorporate new traits.
   - Allow farmers to gather and sell data from their own farms. Data collected by farmers on their own farms with seeds and equipment they purchased should belong to farmers and not to the companies that supply the inputs.
   - Allow farmers to save and replant seeds. Patent law should be clarified to disallow the current prohibition on saving and replanting seeds. Patent-holders can charge reasonable licensing fees on FRAND terms for the re-use of patented seeds.
   - Allow independent researchers at qualified academic institutions to conduct research on GE seeds without permission from the patent-holder.
   - Public funding for research in seeds, both GE and non-GE, should increase, as new entry will increase competition with monopoly incumbents. Research should focus on areas of public interest often ignored by the private sector. Patents produced through this research will be made available to all seed companies at FRAND terms, with the opportunity for license-free usage, particularly for new entrants focusing on under-served parts of the market.

2. Litigation to challenge consolidation in the agrochemical/seed market. As long as the seed industry remains concentrated, agrochemical companies will have the power and incentive to raise prices and exert undue control over farmers. The DOJ should launch investigations, with discovery, to determine whether agrochemical companies have engaged in anti-competitive conduct. The investigations should cover:
   - Illegal tying: The practice of “bundling” seeds and chemicals might constitute illegal tying under §2 of the Sherman Act and §3 of the Clayton Act. Bundling occurs through pre-coating a seed with an herbicide/ insecticide, contractually requiring a particular herbicide’s usage with the seed, or bundling programs that incentivize the joint purchase of the seed and chemical.36 The effect is that farmers must use the company’s herbicide/ insecticide with a particular crop rather than a cheaper generic alternative. This practice leverages agrochemical companies’ market power in GE seeds to harm competition in agricultural chemicals.

35 Id., at 606-07.
Monopolization through acquiring rivals: Most small seed research and development companies have been acquired by one of the big four agrochemical companies. Indeed, there have been more than 400 ownership changes in the seed industry in the past 25 years. The DOJ should investigate these acquisitions for a Sherman Act §2 violation to determine whether these acquisitions constituted a strategy of eliminating, suppressing and deterring the growth of rivals in order to maintain their monopoly in seed development and production.

Investigation into dealer/distributor relationships: A common pathway through which monopolists block the entrance of competitors is through exclusive control of intermediaries, such as exclusive deals. There are indications that such control of intermediaries might be occurring through seed company control of dealers and local seed companies. The DOJ should investigate the seed company/distributor relationship and nascent competitor’s access to distribution networks.

3. Problem: Monopolization of Farm Equipment

The market for agricultural equipment is dominated by two firms: Deere (“John Deere”) and CNH Industrial. John Deere controls 53% of the North America market share for large tractors and 60% for combines, while CNH Industrial controls 35% of the large farm tractors’ share and 30% of the share of combines. Farm equipment is increasingly a software business, and high-tech tractors can deliver precision and time-savings that would have been unimaginable a generation ago. However, this growing sophistication trades off with the time-old agricultural practice of farmers repairing, rebuilding and customizing their own farm equipment.

John Deere places software restrictions on equipment that blocks farmers from repairing or updating machines themselves. John Deere’s “Service Advisor” system will shut down equipment at the onset of even minor errors and require farmers to repair equipment with licensed John Deere service representatives. Due to these restrictions, farmers cannot change engine settings, retrofit old equipment or modify tractors to meet new environmental standards without going through the manufacturer. To justify these restrictions, John Deere claims that farmers have purchased a license to operate a tractor or combine rather than the full control implied by ownership, despite farmers often paying up to $800,000 for these machines. These restrictions increase the cost of equipment repairs, with even minor repairs costing thousands of dollars. Moreover, this system also costs farmers time, which they often can’t afford during a limited window for harvesting or planting. Self-repairs or local repairs are often significantly faster than taking tractors to a John Deere representative.

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38 E.g., Howard, How Corporations Control our Seeds at 22-23.
40 Id.
42 Id.
43 Horton, John Deere's Attempted Monopolization of Equipment Repair at 2.
John Deere controls the data collected with its farm equipment, giving farmers no control over how this data is used or who gets to use it. This takes surplus from farmers. Farmers created this data on their property, with their labor and management, and with equipment they purchased; they should have ownership and control of this data. Indeed, data from precision agriculture is highly valuable in agriculture commodities futures trading. There is a risk that John Deere and the agrochemical companies to whom it frequently sells the data will gain an informational edge in futures markets, potentially allowing them to take positions against farmers. Moreover, by sharing this data with agrochemical companies rather than making it available to independent researchers, like the USDA and university agricultural extensions, this practice harms innovations in agriculture. Data-hoarding also creates a barrier to entry for nascent rivals anticipating entering the market.

Solutions:
1. Congress should pass legislation that gives farmers greater control, information and ownership over their equipment and data.
   - **“Right to Repair” legislation**: Legislation should ban the practice of requiring farmers go through a licensed service representative, giving farmers the right to take their equipment to an independent dealer or attempt to repair the equipment themselves. To ensure the competency of these repairs, John Deere should be required to provide independent repair shops the same repair information they provide to licensed John Deere repair representatives (a framework modeled on a similar 2014 agreement reached in the auto industry). Finally, Congress should consider creating an exemption to 17 U.S.C. §1201(a), which John Deere argues prohibits circumvention of software protections.
   - **Information on the cost of repairs**: Farm equipment manufacturers should be required to provide upfront information about the average lifespan of equipment, average lifetime cost of repairs, and average time to repair for a relevant geographical area before a farmer purchases a machine. Given John Deere’s monopoly in repairs, John Deere should possess this information. If greater competition is introduced, government resources can be allocated to assist data collection for repairs from independent shops and farmers.
   - **Data control legislation**: Farmers should be given ownership and control over data collected on their farms with their equipment and labor.

2. The DOJ should bring a §2 monopolization case against John Deere for its anti-competitive practices in the markets for equipment, after-market repairs, and agricultural data.
   - **Aftermarket repairs**: John Deere uses its monopoly power in farm equipment to give it an advantage in the market for repairs, foreclosing competition from farmers and independent repair shops. Key anticompetitive actions include the requirement that

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44 Id., at 5-7.
45 Neal Rasmussen, From Precision Agriculture to Market Manipulation: A New Frontier in the Legal Community, MINN. J. OF LAW, SCI. AND TECH. 489 (2016).
46 Horton, John Deere's Attempted Monopolization of Equipment Repair at 5-7.
48 There is precedent for an antitrust violation when a company controls the market for repairs of its own products. Eastman Kodak Co. v. Image Tech. Servs (1992). The antitrust case against John Deere is even stronger in this instance, because John Deere has market power in both original farm equipment sales and after-market repairs.
farmers repair machinery with licensed service representatives and software that blocks farmers from performing repairs or overriding minor service warnings.

- **Agricultural data:** John Deere uses its monopoly power in equipment to give it an advantage in the market for agricultural data. Farmers should be allowed to share in this surplus, as they contribute to the production of this data. Equipment company control over this data also forecloses competition from rival equipment manufacturers.

4. **Problem: Output Issues in Meat Processing and Dairy**

**History of Consolidation and Ensuing Harms:** Over the last several decades, the agriculture industry has seen significant vertical and horizontal consolidation of meat production. Roughly fifty plants across the United States are responsible for 98% of slaughtering and processing.49 Half of chicken farmers work in areas dominated by only one or two chicken processors,50 and more than 8 in 10 hogs were sold to packer conglomerates since 2001.51 As a result, farmers are increasingly offered low prices for their animals, pushing many—primarily small farmers—to the brink of financial instability and even business failure. Since 1980, about 17,000 cattle ranchers have gone out of business each year,52 and nearly 70% of hog farmers have gone out of business since the mid-1990’s.53 Although newly-appointed agriculture secretary Tom Vilsack has opposed breaking up conglomerate meatpackers because of the jobs it would cost,54 a truly jobs-conscious approach would reach an opposite conclusion: breaking up meatpacking conglomerates combats monopsony power55 and will raise output and payments to farmers.

The harm of meat processor consolidation is not just borne by farmers. **Consumers also pay increasingly high prices for meat and are at risk of greater food insecurity** due to market power on the selling side, which meat processors also have.56 Disruptions at a single, conglomerate meat processing plant can negatively affect millions of people, which was precisely the case during

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50 Claire Kellowy & Sarah Miller, Food and Power: Addressing Monopolization in America’s Food System 3, Open Markets Institute (March 2019); Claire Kellowy & Sarah Miller, Food and Power: Addressing Monopolization in America’s Food System 2, Open Markets Institute (March 2019).
54 Alan Rappeport and Michael Corkery, “Biden’s Choice of Vilsack for U.S.D.A. Raises Fears for Small Farmers.” N.Y. Times (Dec. 21, 2020), https://www.nytimes.com/2020/12/21/us/politics/vilsack-usda-small-farmers.html (In response to policies being promoted by other Democratic presidential candidates that would break up corporate agriculture conglomerates, Mr. Vilsack stated that “There are a substantial number of people hired and employed by those businesses here in Iowa...You’re essentially saying to those folks, ‘You might be out of a job.’ That to me is not a winning message.”)
55 See supra, Problem 1: Labor Market Monopsony in the Agriculture Sector, pp. 2-3
the COVID-19 pandemic when public health outbreaks at processing plants left farmers with thousands of poultry that could not be processed or delivered.\textsuperscript{57}

Further, chicken producers have been able to limit chicken supply to maintain prices with the help of data company Agri Stats. The independent company collects data from 95\% of poultry processors in real time and disseminates unusually detailed reports to its members.\textsuperscript{58} This information sharing among competitors allows them to anticipate each others’ strategies and predict future supply in the market. It also creates a necessary condition for collusion in that each company would have a way of knowing if its competitors were following through with any agreement.

A similar phenomenon of consolidation has occurred in the dairy industry, where massive milk cooperatives, such as Dairy Farmers of America or Land O’Lakes, team-up with milk processors and take advantage of small-scale producers. Using their combined power, these groups push down the price that small producers receive for their milk and leaving them little negotiating room. The result is that since 2014, the price farmers receive for their milk has fallen by a whopping 40\% and about 4,600 dairy farms have closed every year for the past two decades.\textsuperscript{59} Beyond the harm to dairy farmers, these anti-competitive practices also have environmental costs. Large, consolidated dairy farms have a higher environmental footprint, from groundwater pollution and air pollution, compared to smaller farms.\textsuperscript{60}

**The Legal and Regulatory Scheme:** These trends in the meat and dairy industries have been facilitated by relaxed regulatory schemes and underenforcement of the antitrust laws. For example, the Packers and Stockyards Act, passed in 1921 and expanded several times to protect farmers from unfair contracts and abusive practices on the part of meatpackers, has historically been underenforced.\textsuperscript{61} In 1994, the Grain Inspection, Packers, and Stockyards Administration (GIPSA) was established in order to help enforce the Act. Since GIPSA’s founding, however, it has lacked the funding and, at times, the will to operate effectively. During the Clinton administration, the agency closed the regional Packers and Stockyards offices, centralizing operations in just three cities,\textsuperscript{62} and the agency under George W. Bush deliberately suppressed investigations.\textsuperscript{63} The Obama administration introduced a set of rules to give GIPSA more teeth, including regulations prohibiting any conduct that is unfair, discriminatory, or deceptive, and explicit affirmations that proof of harm to competition is not necessary to establish a violation of

\textsuperscript{57} Rian Wanstreet & Savannah McKinnon, Meating the COVID Moment: Creating a Stronger Processing System, Big Ag & Antitrust Conference, Yale Law School (Jan. 16, 2021); see also https://www.nytimes.com/2020/12/21/us/politics/vilsack-usda-small-farmers.html (“The closure of just a few slaughterhouses, even for a few weeks in April, reduced pork production by as much 5 percent, leading to the mass killings and waste of thousands of hogs that could not be processed”).

\textsuperscript{58} Christopher Leonard, Is the Chicken Industry Rigged?: Inside Agri Stats, the poultry business’s secretive info-sharing service, Bloomberg Businessweek (Feb. 15, 2017)


\textsuperscript{60} Id.

\textsuperscript{61} United States Department of Agriculture, The Packers and Stockyards Act, Agricultural Marketing Service (July 2020)


\textsuperscript{63} Lina Khan, Obama’s Game of Chicken, Washington Monthly (November 2012)
the Act. However, due to lobbying efforts by meatpackers, these rules did not go into effect until Obama’s last year in office. Even so, with the onset of the Trump presidency, these rules were promptly withdrawn and GIPSA was dissolved into the Agricultural Marketing Service, severely undermining its enforcement capabilities and the effectiveness of the Packers and Stockyards Act.

Similarly, the Sherman Act has also been underenforced against monopsonists and processing plants with too much buying power. Even though monopsony is a cognizable violation under the antitrust laws, courts have effectively limited the laws’ applicability to monopsonies by recognizing cases only where there has been tangible injury to the consumer. If the harm is limited to the farmer, by receiving low prices for goods due to a lack of buyer options, antitrust violations are rarely recognized. Indeed, in 2012, the Department of Justice (DOJ) and the U.S. Department of Agriculture (USDA) convened a multi-day workshop to address deficiencies in the prosecution of monopsonies and the harms of buyer power in the seed, hog, livestock, poultry, and dairy industries. Although the DOJ has since reiterated a commitment to preventing harmful buy-side monopsonies in agriculture, few prosecutions have been pursued.

Solutions

Executive Actions:

- Restore the Grain Inspection, Packers, and Stockyards Administration with adequate funding
- Reinstate the Obama-era Farmer Fair Practices Rules for GIPSA to 1) delineate the unfair practices that clearly violate the Packers and Stockyards Act, including unjustified breach of contract and retaliatory actions, and 2) establish that the USDA’s position is that unfair practices need not harm competition to violate the Act
- Have DOJ attorneys work together with GIPSA to help pursue cases; authorize DOJ to pursue cases independently under the antitrust laws if GIPSA fails to take appropriate and timely action
- Reopen regional Packers and Stockyards offices to give GIPSA officials the local context and access needed to adequately investigate potential violations

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66 John D. Shively, When does Buyer Power become Monopsony Pricing, 27 Antitrust 87 (2012).
67 DOJ, Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in Our 21st Century Economy and Thoughts on the Way Forward 7 (2012), available at www.judiciary.gov/atr/public/reports/ 283291.pdf (describing the concern by some participants that "retailers are extracting a greater and greater share of the consumer food dollar, leaving producers with an ever decreasing share, and at the same time imposing price increases on consumers").
68 Monopsony issues in agriculture: buying power of processors in our nation's agricultural markets: hearing before the Committee on the Judiciary, United States Senate, One Hundred Eighth Congress, first session, October 30, 2003, p. 36
70 Department of Agriculture, Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, Federal Register National Archives (December 2016), available at https://www.federalregister.gov/documents/2016/12/20/2016-30424/scope-of-sections-202a-and-b-of-the-packers-and-stockyards-act
Enforcement Actions:

- Bring monopolization and monopsony cases against consolidated meat processors under Sherman Act §2 and carefully investigate proposed mergers in the future
- Ensure the FTC and DOJ pay heightened attention to monopsony buyers that manipulate prices for farmers, even where there is no downstream harm to the consumers
- Open a DOJ investigation into potential violations of the Sherman Act §1 in the poultry industry

Legislative Actions:

- Provide greater clarity and guidance on the legal standards for Sherman Act monopsony claims.\(^{71}\)
- Reform Capper-Volstead Act to prohibit dairy cooperatives (which are protected from antitrust laws) from teaming up with corporate interests (e.g., dairy processors) at the expense of member interests.\(^{72}\)
- Revive debate on the Opportunities for Fairness in Farming Act of 2019 to prohibit the use of checkoff program funds for political use, anticompetitive activity, deceptive practices, or to disparage other agricultural products.\(^{73}\)


\(^{73}\) Opportunities for Fairness in Farming Act of 2019, S.935, 116th Congress (2019)