

POLICY APPROACHES TO ADDRESS PROBLEMS ASSOCIATED WITH CONSOLIDATION AND VERTICAL INTEGRATION IN AGRICULTURE

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I. Introduction	34
II. Affect the Structure of the Industry	35
A. Prohibit Certain Businesses from Owning Certain Types of Businesses	35
1. Merger Review	36
2. Break Up Firms	37
3. Prohibit Certain Types of Business Entities from Owning Farmland or Engaging in Farming Activities	37
B. Increase Bargaining Rights	38
1. Cooperative Bargaining	38
2. Protecting Producers' Rights to Form Cooperatives. ...	39
III. Regulate the Behavior of the Participants	39
A. Contract Regulation	39
1. Implied Obligation of Good Faith	40
2. Disclosure of Risks	40
3. Readability	40
4. Right to Review the Contract	40
5. Confidentiality Provision Prohibited	41
6. Production Contract Liens	41
7. Investment Requirements	41
8. Right to Join Associations	42
9. Model Producer Protection Act	42
B. Prohibit Unfair Practices	43
C. Limit What Types of Contracts a Firm May Enter Into	44
D. Provide More Transparency in the Marketplace	44

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IV. Improve the Enforcement Mechanism	45
A. Possible Changes in Federal Enforcement.....	45
B. Private Enforcement.....	46
C. Dispute Resolution Issues	46
Appendix A—Recently Passed Federal Laws	47
Appendix B—Recent Legislation	48
Appendix C—Additional Sources	51

I. INTRODUCTION

For observers of the agricultural sector, the numbers have become familiar: eighty percent of steer and heifer slaughter is controlled by four firms; fifty-four percent of hog slaughter is controlled by four firms; more than sixty percent of soybean processing, wet corn milling, and cottonseed milling are controlled by four firms, while these same firms also control large shares of the agricultural chemical market.¹ Just as these industries have become more horizontally consolidated,² they have also increased the use of vertical arrangements.³ The swine industry appears to model the poultry industry, as hog packers now have eighty percent to ninety percent of their supply in some type of vertical arrangement.⁴ The aforementioned are examples of the increased consolidation and vertical integration in agriculture.

The essential problem with consolidation and vertical integration, when taken too far, is that such trends reduce choice in the marketplace.⁵ Problems arise when one player has choices and the other player does not.⁶ This lack of choice can lead to unequal bargaining power in business relationships.⁷ With unequal bargaining power, the more dominant firm will almost always take advantage of the more vulnerable party by squeezing price, shifting liabilities, or

1. JAMES M. MACDONALD & MARVIN L. HAYENGA, FARM FOUNDATION, CONCENTRATION, MERGERS, AND ANTITRUST POLICY 1-2, *at* http://www.farmfoundation.org/2002_farm_bill/macdonald.pdf (last visited Apr. 21, 2004).

2. JOHN CONNER ET AL., THE BAN ON PACKER OWNERSHIP AND FEEDING OF LIVESTOCK: LEGAL AND ECONOMIC IMPLICATIONS 1 (2003), *at* http://www.agribusinesscenter.org/docs/Farmer_3.pdf.

3. *Id.*

4. Jean Caspers-Simmet, *Hog Competition Fund Formed*, AGRICULTURE NEWS, Sept. 23, 2003, available at <http://webstar.postbulletin.com/agrinews/278714932700050.bsp>.

5. See MACDONALD & HAYENGA, *supra* note 1, at 5.

6. See generally *id.*

7. CONNER ET AL., *supra* note 2, at 1.

demanding certain things without paying an associated price.⁸ Consolidation and vertical integration provide this type of setting.⁹

The question for policy makers is how to deal with the possibility of abusive practices stemming from consolidation and vertical integration.¹⁰ This outline presents different ways to affect the power imbalance in the food and agriculture sector. The first set of techniques go to the heart of the problem, attempting to equalize the bargaining power of the players by (1) affecting the structure of the industry and reducing the power of the stronger party, or by (2) encouraging collective bargaining and increasing the power of the weaker party. The second set of techniques is closely related to the first set, yet seem to accept the existence of a power imbalance. These techniques simply try to minimize the negative consequences of increased consolidation by (3) regulating the behavior of participants and (4) improving the enforcement of competition or trade practice laws.

II. AFFECT THE STRUCTURE OF THE INDUSTRY

This approach will decrease power of one of the players, because it will provide more choices in the market place.¹¹ Proposed laws seek to accomplish this by limiting what certain firms may own or control.¹² However, critics argue that under this policy, the government might hinder the most efficient means of production¹³, and in any case, the government should not be in the business of dictating who owns what. Because these policies tend to have the most appreciable effect on certain market participants, they can also be the most controversial.

A. *Prohibit Certain Businesses from Owning Certain Types of Businesses*

A well-known example of this limited ownership concept is prohibiting packers from owning livestock. A similar approach was utilized in 1920, when the federal government forced packers to agree to no longer own or control mar-

8. See Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 WIS. L. REV. 531, 531-532.

9. See *id.* at 536-538.

10. See generally *id.*

11. See generally *id.* (discussing benefits of reducing the concentration of agricultural markets).

12. See, e.g., H.R. 719, 108th Cong. (1st Sess. 2003).

13. But cf. Carstensen, *supra* note 8, at 533 (arguing that the concentrated market structure is not necessary for efficient economy growth).

keting channels, including railroads and stockyards.¹⁴ The Packer Consent Decree of 1920 enjoined the “Big Five” meatpackers

“both severally and jointly from (1) holding any interest in public stockyard companies, stockyard terminal railroads, or market newspapers, (2) engaging in, or holding any interest in, the business of manufacturing, selling or transporting any of 114 enumerated food products, (principally fish, vegetables, fruit, and groceries), and thirty other articles unrelated to the meat packing industry; (3) using or permitting others to use their distributive facilities for the handling of any of these enumerated articles, (4) selling meat at retail, (5) holding any interest in any public cold storage plant, and (6) selling fresh milk or cream.”¹⁵

Because this policy prohibits certain types of vertical integration, it is an attempt to thwart market manipulation and encourage access to the market for other participants. This policy can be implemented in a variety of ways, as indicated by the following three examples.

1. *Merger Review*

The merger provisions included in the Clayton Act grant the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) the authority to either block a merger or to require a firm to first spin off certain assets before it can acquire another firm.¹⁶ For example, Smithfield Foods, the nation’s largest hog processor, recently purchased the pork processing facilities of Farmland Industries, a cooperative that was previously the nation’s sixth-largest pork producer and was involved in bankruptcy proceedings when the Smithfield acquisition was announced.¹⁷ Because of the magnitude of the acquisition, Smithfield was required to file merger review documents with the DOJ.¹⁸ A number of federal policy makers, especially those from the upper Midwest, urged DOJ to

14. See *United States v. Swift & Co.*, 286 U.S. 106, 111 (1932).

15. *Id.*

16. See 15 U.S.C. § 21(b) (2000).

17. John Everly, *Smithfield Buys Farmland Pork Operations: Many Expect the Merger Will Adversely Affect the Hog Market*, TELEGRAPH HERALD (Dubuque, Iowa), July 19, 2003, at A1.

18. See *id.* (stating that Sen. Charles Grassley, Iowa, asked the U.S. Department of Justice to scrutinize the buyout).

closely review the proposed acquisition for possible negative effects on the hog market.¹⁹ DOJ ultimately decided to not challenge the merger.²⁰

2. *Break Up Firms*

This approach may be the most drastic, because it forces firms to divest interests already owned. The Sherman Act provides the Department of Justice with this power, and DOJ has exercised the power in cases such as the break up of AT&T and the ongoing Microsoft case.²¹

3. *Prohibit Certain Types of Business Entities from Owning Farmland or Engaging in Farming Activities*

A number of states have promulgated laws that prohibit certain types of corporations from owning or controlling farms; these laws attempt to encourage family farm ownership of agricultural assets.²² Recently, however, parties have challenged the constitutionality of these laws on the basis of the Dormant Commerce Clause.²³ In essence, the claimants argue that state legislatures either intended, or the laws have the effect of, discriminating against out-of-state businesses.²⁴ Significantly, the Eighth Circuit recently held that Amendment E to South Dakota's Constitution, which prohibits certain corporations from acquiring land used for farming, was unconstitutional because it had a discriminatory purpose.²⁵

19. See Amy Shafer, *Farmers Worry About Smithfield Purchase of Farmland Foods*, THE CINCINNATI ENQUIRER, Jul. 21, 2003, available at http://www.enquirer.com/editions/2003/07/21/biz_wwwbiz2farm21.html.

20. See Shanon D. Murray, *Smithfield Sizzles with Farmland's Pork Shop*, DAILY DEAL, Oct. 14, 2003 (stating the "Department of Justice said it had dropped antitrust objections").

21. See 15 U.S.C. § 4 (2000); see also *United States v. AT&T*, 552 F. Supp. 131, 222-23 (D.D.C. 1982); ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST CASE FILINGS, *United States v. Microsoft*, available at http://www.usdoj.gov/atr/cases/ms_index.htm (this site provides a list of legal documents associated with the *United States v. Microsoft* proceedings).

22. See Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449, 494 (1999) (citations omitted).

23. See, e.g., *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 587 (8th Cir. 2003); *Smithfield Foods, Inc. v. Miller*, 241 F. Supp. 2d 978, 981 (S.D. Iowa 2003).

24. See *S.D. Farm Bureau*, 340 F.3d at 587-589; *Smithfield Foods*, 241 F. Supp. 2d at 981.

25. *S.D. Farm Bureau*, 340 F.3d at 596; see *Smithfield Foods*, 241 F. Supp. 2d at 993 (holding that an Iowa law that prohibited certain pork processors from owning hogs violated the Dormant Commerce Clause because the law had a facially discriminatory purpose).

B. Increase Bargaining Rights

This approach attempts to increase the bargaining power of the party who traditionally has relatively little choice in the marketplace.

1. Cooperative Bargaining

The Capper Volsted Act provides producers of agricultural products the right to collectively bargain, and in essence, agree to prices among themselves, so long as the agreement does not “unduly enhance” prices.²⁶ The law provides limited immunity from antitrust laws.²⁷ The trade-off is that the cooperative must comply with one or both of the following: (1) operate in a democratic manner, i.e., one member-one vote, regardless of the amount of investment *or* (2) limit the return on investment to eight percent per year; in addition, the majority of the cooperative’s business must come from its members.²⁸ Beyond the antitrust exemption, another advantage enjoyed by cooperatives is that income for a cooperative is taxed on *either* the cooperative or producer level.²⁹ This differs from regular, subchapter C corporations that pay income tax at both the cooperative and producer levels.³⁰ Many feel that producers seriously underutilize the opportunities afforded under the Capper Volsted Act.³¹ Nevertheless, critics of cooperatives complain that some cooperatives are not responsive to producer’s needs.³² Meanwhile, cooperatives point out that their viability is threatened by the burgeoning of business organizations such as limited liability companies, because cooperatives have trouble competing for capital.³³

26. See 7 U.S.C. §§ 291-292 (2000).

27. See 7 U.S.C. § 291 (2000) (granting producer associations the ability to have common marketing agencies).

28. 7 U.S.C. § 291 (2000).

29. See I.R.C. § 1382 (2000).

30. See I.R.C. §§ 301-385 (2000) (Double taxation occurs when the corporation pays taxes both on its taxable income and when the earnings and profits are distributed to shareholders. Note that the most recent tax cuts somewhat limit cooperatives’ advantage because of reduced taxes on subchapter C dividends).

31. The Capper-Volsted Act awarded both tax-exempt status and antitrust immunity to agricultural cooperatives. 7 U.S.C. §§ 291-292 (2000).

32. See generally, James Baarda, USDA, *Cooperative Directors Face Unique Challenges*, RURAL COOP. 10 (Nov./Dec. 2002).

33. See USDA, COOPERATIVE BENEFITS & LIMITATIONS: COOPERATIVE INFORMATION REPORT 1, SECTION 3 19 (Apr. 1980), available at <http://www.rurdev.usda.gov/rbs/pub/cir1sec3.pdf> (last visited Apr. 15, 2004) (noting the benefits of cooperatives to farmers, rural communities, and consumers).

2. *Protecting Producers' Rights to Form Cooperatives.*

Congress passed the Agricultural Fair Practices Act (AFPA) to protect a producer's right to join an association of producers.³⁴ The AFPA generally prohibits processors from discriminating against or intimidating producers who want to join, or are members of, an association.³⁵ A major limiting factor in the AFPA has become known as the "disclaimer clause."³⁶ This clause states that (1) a processor can refuse to deal with a producer for any reason other than the producer's relationship to an association, and (2) a processor may refuse to deal with any particular association.³⁷ This provision has largely gutted the law, because processors can usually point to some "legitimate" reason why it chooses to not deal with a producer. Legislative attempts have been made to address this problem. For instance, the Senate Chairman's Mark of the 2002 Farm Bill included a rewrite of the AFPA that deleted the disclaimer clause and made it unlawful for processors to not bargain in good faith with an association of producers.³⁸ No major amendments, however, have been made to the AFPA since its inception in 1968.³⁹

III. REGULATE THE BEHAVIOR OF THE PARTICIPANTS

This approach does not affect the actual structure of the industry; rather, it tries to limit the negative consequences of a consolidation through participant-behavior regulations. This approach addresses the problem of bargaining inequality, because it regulates the business relationship.

A. *Contract Regulation*

In the late 1990s, a number of state Attorneys General created model legislation entitled the Producer Protection Act (PPA).⁴⁰ State and federal policy

34. 7 U.S.C. § 2301 (2000).

35. 7 U.S.C. § 2303 (2000).

36. 7 U.S.C. § 2304 (2000); see Donald A. Frederick, *Agricultural Bargaining Law: Policy in Flux*, 43 ARK. L. REV. 679, 685 (1990) (stating "Section 5 of the Act, the so-called disclaimer clause, has proven to be the biggest obstacle to effective producer bargaining.").

37. See *Butz v. Lawson Milk Co.*, 386 F. Supp. 227, 237 (N.D. Ohio 1974).

38. Agriculture, Conservation, and Rural Enhancement Act of 2001, S. 1628, 107th Cong. § 201 (2001).

39. See Agricultural Fair Practices Act of 1967, 7 U.S.C. §§ 2301-2306 (2000).

40. Statement of State Attorneys General on "Producer Protection Act" (Sept. 13, 2000),

makers can look to the PPA for ideas on how to regulate agricultural contracting. The following lists some of the issues dealt with in the PPA.

1. *Implied Obligation of Good Faith*

This obligation generally requires that parties to the contract deal with each other honestly. For example, Minnesota state law implies a promise of good faith by all parties to an agricultural contract.⁴¹

2. *Disclosure of Risks*

This requires the contract be accompanied by a clear written disclosure statement, setting forth certain contractual rights and obligations of the producer. For instance, the contract might need to be accompanied with a written disclosure, clarifying factors used in determining payment or parties responsible for possible environmental liability.⁴²

3. *Readability*

This encourages the contract drafter to avoid complex language so a person of average intelligence can understand the contract terms. The PPA includes a provision that would allow a state official, typically the state agriculture department or state attorney general's office, to review the contract for readability.⁴³

4. *Right to Review the Contract*

Under this method of behavior regulation, a producer has at least three days to review and cancel a contract.⁴⁴ The producer is protected from being pressured into a contract, without the ability to seek counsel. While this approach may work well for production contracts and other long-term marketing contracts, it may not suit spot market sales, as the buyer may need to hedge at the

available at <http://www.state.ia.us/government/ag/agcontractingstatement.htm>.

41. MINN. STAT. § 17.94 (2002).

42. See MINN. STAT. § 17.91 (2002).

43. MODEL PRODUCER PROT. ACT § 4(b), (c) (2000).

44. *Id.* § 5.

same time as the purchase or may want to sell the product within the typical three day spot market window.⁴⁵

5. *Confidentiality Provision Prohibited*

Behavior is regulated under this approach through the prohibition of any confidentiality clause.⁴⁶ The 2002 Farm Bill included a provision providing that, regardless of confidentiality contract terms, certain poultry and livestock contract parties have the right to share their contract with family, close advisors, and federal and state agencies.⁴⁷ As an example of state law in this area, Iowa law does not merely void confidentiality clauses in production contracts, but actually makes it a criminal, fraudulent practice to execute a production contract with a confidentiality clause.⁴⁸

6. *Production Contract Liens*

This method of behavior regulation allows the producer to file a lien with priority over other liens filed by the contractor's lenders, much like a veterinarian's or mechanic's lien.⁴⁹ As with most laws that provide lien protections, the key to this provision is the farmer must take the affirmative step of filing the lien.⁵⁰

7. *Investment Requirements*

Behavior may also be regulated by imposing specific requirements on producer investments. For example, under the Model Producer Protection Act, if the producer makes a certain amount of investment in relation to a production contract (\$100,000), the firm that the producer contracts with may not terminate the contract without providing at least 90 days notice.⁵¹ If the contracting firm does terminate the contract, the farmer is entitled to reimbursement for his lost

45. See MINN. STAT. § 17.941 (2002) (providing a three day window in which a producer may cancel an agricultural contract).

46. MODEL PRODUCER PROT. ACT § 6 (2000).

47. 7 U.S.C.A. § 229b(b) (West Supp. 2003).

48. IOWA CODE § 202.5 (2001).

49. See, e.g., *id.* §579A.2 (2001).

50. MODEL PRODUCER PROT. ACT § 7(c)(1) (2000).

51. *Id.* § 8(b)(1) (2000).

investment.⁵² Minnesota law requires contractors to provide 180 days notice before termination of a contract and to reimburse the producer “for damages incurred by an investment in buildings or equipment that was made for the purpose of meeting minimum requirements of the contract” if no breach has occurred; if the contractor does allege a breach, the contractor must provide 60 days for the producer to cure the breach.⁵³

8. *Right to Join Associations*

Behavior regulations may include the prohibition of discrimination against producers for choosing to join a bargaining association.⁵⁴ Albeit, the Agriculture Fair Practices Act has a similar provision to this Model Act approach; however, the main difference between this PPA provision and the Agricultural Fair Practices Act is the PPA provision does not include the AFPA disclaimer clause discussed above.⁵⁵

9. *Model Producer Protection Act*

As the aforementioned methods of behavior regulation make reference to the Model Producer Protection Act (PPA), it is important to note that federal⁵⁶ and state⁵⁷ policy makers have introduced a number of pieces of legislation that incorporate at least some of the PPA provisions.

52. *Id.* § 8(b)(2) (2000).

53. MINN. STAT. § 17.92 (2002).

54. 7 U.S.C. § 2303(b) (2000).

55. *See* MODEL PRODUCER PROT. ACT § 9 (2000).

56. *See generally* Securing a Future for Independent Agriculture Act of 2001, S. 20, 107th Cong. (2001); Agriculture, Conservation, and Rural Enhancement Act of 2001, S. 1628, 107th Cong. (2001).

57. Arkansas Livestock and Poultry Growers Protection Act, H.B. 2573, 84th Gen. Assem., Reg. Sess. (Ark. 2003) (providing for the regulation of livestock and poultry contracts); Fair Farming Act, H.B. 1498, 146th Gen. Assem., Reg. Sess. (Ga. 2002) (amending Title 13 of the Official Code of Georgia Annotated relating to contracts); Agricultural Production Contracts, S.B. 533, 146th Gen. Assem., Reg. Sess. (Ga. 2002) (amending Title 2 of the Official Code of Georgia Annotated relating to agriculture); Agricultural Production Contract Code, H.B. 264, 93rd Gen. Assem., Reg. Sess. (Ill. 2003) (creating the Agriculture Producer Protection Act) (enacted); H.F. 547, 79th Gen. Assem., Reg. Sess. (Iowa 2001) (discussing the Agricultural Fair Contracting Act); S.F. 254, 79th Gen. Assem., Reg. Sess. (Iowa 2001) (discussing the Agricultural Fair Contracting Act); Kansas Poultry Producer Protection Act, S.B. 355, 2001 Leg., Reg. Sess. (Kan. 2001); Producer Protection Act, S.B. 2987, 2002 Leg., Reg. Sess. (Miss. 2002); Poultry Producer Protection Act, H.B. 1967, 91st Gen. Assem., Reg. Sess. (Mo. 2002); Producer Protection Act, S.B. 162, 46th

B. Prohibit Unfair Practices

The most familiar example used in agriculture to prohibit unfair trade practices is the Packers and Stockyards Act (“PSA”) of 1921.⁵⁸ Beyond providing financial protection for livestock sellers, this law generally prohibits packers, live poultry dealers, swine production contractors, livestock auction markets and livestock dealers from engaging in unfair, unjustly discriminatory or unduly preferential practices.⁵⁹ The scope of this law has been narrowed by federal court application of the “rule of reason” to determine what is unfair.⁶⁰ Essentially, the rule of reason analysis involves looking at a practice’s intent and the likelihood the practice will cause competitive injury.⁶¹ This rule assigns the plaintiff the daunting task of proving likelihood of injury; a packer can rebut a showing of injury with proof that the practice is simply a legitimate business practice.⁶² For example, a small producer may argue a packer unduly prefers a larger producer and provides the larger producer volume-based premiums. The packer would argue the practice is justified, because the packer has a business interest in a large, consistent supply for its production scheme.

Courts have limited the scope of the PSA by stating that the PSA was not intended to affect parties’ freedom of contract.⁶³ Nevertheless, critics of the Packers & Stockyards Program point out that legislative history indicates that Congress intended the PSA to be used more aggressively than any other law in protecting producers and consumers.⁶⁴ Some argue that the USDA could more forcefully utilize the rulemaking process to clarify what practices are unfair.⁶⁵

Leg., Reg. Sess. (Okla. 2001).

58. Packers and Stockyards Act, 1921, 7 U.S.C. §§ 181-231 (2000).

59. 7 U.S.C. § 192 (2000).

60. *Armour & Co. v. United States*, 402 F.2d 712, 717 (7th Cir. 1968).

61. *Id.*; *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (finding contract terminology, providing the packer a right of first refusal, did not violate the PSA because there was no substantial evidence to show the right of first refusal actually suppressed or reduced competition).

62. *Armour & Co.*, 402 F.2d at 722-25 (discussing Armour’s practices as they relate to predatory intent and business territory adjustments).

63. *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1455 (8th Cir. 1995) (finding that failure to offer the plaintiff the same kind of contract offered to other turkey growers did not violate the PSA as a matter of law).

64. See Current Legislation, *The Packing Industry and the Packers Act*, 22 COLUM. L. REV. 68, 70 (1922) (discussing Senate Agriculture Committee Report that addressed PSA provisions and enforcement (citations omitted)).

65. See generally Michael C. Stumo & Douglas J. O’Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. AGRIC. L. 91 (2003) (con-

Federal policy makers could also amend the PSA to make it more effective. The 2002 Farm Bill did make one significant change to the PSA by providing producers with PSA hog production contract protections.⁶⁶

C. *Limit What Types of Contracts a Firm May Enter Into*

Under this approach, a law could provide that a firm cannot buy more than a certain percentage of supplies in closed contracts, i.e., the firm must buy a specific quantity of supply on the cash (i.e., spot) market.⁶⁷ This approach attempts to ensure a market for producers who choose not to use contracts. Proposed legislation also addresses concerns that the spot market has become so thin it is prone to manipulation and is no longer a reliable bell weather for supply and demand.⁶⁸

D. *Provide More Transparency in the Marketplace*

One of the essential elements in any competitive market is access to information. Given increasing consolidation and vertical integration, many producers fear they no longer have access to critical market information.⁶⁹ In the late 1990s, a determined movement to improve price reporting in the states resulted in the Federal Livestock Mandatory Price Reporting Act (“MPRA”) of 1999.⁷⁰ This law provides a fairly specific regime of reporting and public dissemination of price information for cattle, hogs, and sheep.⁷¹ Reception to enforcement of the law has been mixed, because some producers are concerned that even less information about certain markets is now available.⁷² The law will “sunset” in

cluding the legislative history of the PSA provides USDA more discretion to further define the definition of “unfair practices”).

66. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171 (codified as amended in scattered sections of 7 U.S.C.A. §§ 181-229b (West Supp. 2003)).

67. See S. 325, 108th Cong. § 260(a)(4) (2003).

68. See S. 325, 108th Cong. § 260 (b),(c) (2003).

69. *Agricultural Competition: An Overview: Hearing on S.2252 Before the Subcomm. on Antitrust, Bus. Rights, and Competition of the Comm. on the Judiciary*, 106th Cong., 2d Sess. 2 (2000) (statement of Hon. Daniel Glickman, Secretary, USDA).

70. See generally Livestock Mandatory Reporting Act, Pub. L. No. 106-78, 7 U.S.C. §§ 1635-1636h (2000).

71. See 7 U.S.C. § 1635 (2000).

72. CHERYL J. WACHENHEIM, THE LIVESTOCK MANDATORY REPORTING ACT OF 1999 7, available at

October 2004, so federal policy makers will need to consider reauthorization over the next year.⁷³ The MPRA also included a provision requiring the USDA to establish a swine contract library to provide producers with information about contract terms in swine marketing contracts.⁷⁴ The USDA recently announced the final rule to implement this program.⁷⁵ The 2002 Farm Bill addressed the transparency of contract information by providing that regardless of contract terms, parties to a livestock or poultry contract have the right to share their contract with their advisors and family members.⁷⁶

IV. IMPROVE THE ENFORCEMENT MECHANISM

Many argue that strong laws already exist, and the most effective approach to improving competition policy is not to change the substantive law, but to improve the enforcement regime. Currently, three different agencies in the federal government serve as the primary enforcers of competition and trade practice policy in agriculture. The Department of Justice enforces the Sherman Act⁷⁷ and Clayton Act⁷⁸, the Federal Trade Commission enforces the FTC Act⁷⁹ (designed primarily to protect consumers) and the USDA enforces the PSA, the Perishable Agricultural Commodities Act⁸⁰ and the AFPA.⁸¹

A. Possible Changes in Federal Enforcement

Some have suggested that enforcement of certain laws should be handed over to different agencies. For instance, in the past some have argued that the

<http://www.aaec.vt.edu/rilp/Policy%20Papers%20Market%20Intervention/Wachenheim%20Paper.pdf> (last visited Apr. 22, 2004).

73. *See id.* at 3.

74. *See* 7 U.S.C. § 198a (2003).

75. *See generally* Swine Packer Marketing Contracts; Contract Library, 68 Fed. Reg. 47,802 (Aug. 11, 2003) (to be codified at 9 C.F.R. pt. 206); *see also* GRAIN INSPECTION PACKERS & STOCKYARDS ADMIN., USDA, SWINE CONTRACT LIBRARY, at <http://scl.gipsa.usda.gov/> (last visited Apr. 22, 2004) (USDA website containing swine contract library links).

76. 7 U.S.C.A. § 229b(b) (West Supp. 2003).

77. 15 U.S.C. §§ 1-7 (2000).

78. 15 U.S.C. §§ 12-14, 19-22, 27(2000); 29 U.S.C. §§ 52-53 (2000).

79. 15 U.S.C. §§ 41-58 (2000).

80. *See* 7 U.S.C. §§ 499a-499s (2000).

81. 7 U.S.C. §§ 2301-2306 (2000).

DOJ should enforce the PSA, due to its expertise in antitrust litigation.⁸² Others point out that the DOJ does not promulgate rules, and given the other sectors on which DOJ focuses, it may not spend the required resources for effective enforcement.⁸³ The Senate Chairman's Mark of the 2002 Farm Bill included a provision that would have reorganized enforcement within the USDA by creating the Office of Special Counsel for Competition Matters.⁸⁴ This office would have provided the Secretary the ability to consolidate the enforcement of competition and trade practice laws under one roof. Another suggestion would be to allow USDA to seek outside counsel for large, complex competition cases.

B. *Private Enforcement*

As another alternative to government enforcement, policy could encourage private actors to enforce the law and serve as "private attorneys general." For example, federal antitrust laws, such as the Sherman Act, provide for attorney's fees or treble damages if the plaintiff prevails.⁸⁵ These types of provisions would encourage the private bar to take cases that otherwise might not be economically viable. Currently, the PSA does include a private right of action for direct damages,⁸⁶ but does not include attorney's fees or any type of increased damages.⁸⁷ For instance, if a farmer suffers \$5,000 of injury caused by a PSA-prohibited practice, and it would cost \$6,000 in legal fees to litigate the matter, the farmer is likely to simply swallow the \$5,000 loss. If, however, the award were to include attorney fees, the farmer would be much more likely to defend his statutory right against unfair practices.

C. *Dispute Resolution Issues*

State or federal policy can affect how a dispute is resolved. Dispute resolution policies attempt to address the possibility that agricultural contracts, written by a more powerful party, may make it difficult for the weaker party to effectively participate in the dispute resolution. For instance, federal legislation has

82. See Carstensen, *supra* note 8, at 534 (discussing the Justice Department's challenge to the "old meat packers oligopoly").

83. See *id.* (stating that in the 1980s, "the government failed to police the mergers among these firms").

84. 147 CONG. REC. S11,417 (2001) (statement of Sen. Harkin).

85. See, e.g., 15 U.S.C. § 15(a) (2000).

86. 7 U.S.C. § 209 (2000).

87. See 7 U.S.C. § 210(e) (2000).

been introduced to prohibit the use of mandatory arbitration clauses in livestock and poultry contracts.⁸⁸ This approach responds to concerns that a producer may feel compelled to enter into contracts that take away the farmer's right to go to court and would force the parties into arbitration. Some have complained that some of the arbitration programs are skewed in favor of the contract drafter.⁸⁹ The chief criticism of this approach is it takes away the parties' right to limit the risk of high litigation costs.⁹⁰ Other proposals that ensure producer dispute resolution rights are protected include (1) requiring certain contracts are controlled by the producer's state law, or (2) requiring that if the dispute goes to court, the case must be held in the producer's state.⁹¹

APPENDIX A—RECENTLY PASSED FEDERAL LAWS

The 2002 Farm Bill included two provisions dealing with competition in agriculture. The bill brought hog production contractors (producers that contract with a grower to raise hogs) under the Packers and Stockyards Act (PSA).⁹² Prior to the promulgation of the amendment, those who raised hogs that were owned by others had no statutory protections under the PSA.⁹³ The bill also included a provision stating that parties to certain poultry and livestock contracts have the right to share their contract with family, close advisors, and federal and state agencies, regardless of contract terms dealing with confidentiality.⁹⁴

The 2003 Omnibus Appropriations Bill provided USDA \$4.5 million to conduct studies addressing packer ownership and captive supplies.⁹⁵ The USDA Grain Inspection, Packers and Stockyards Administration (GIPSA) published a notice and request for comments on the framework of the study on May 30, 2003.⁹⁶

88. Fair Contracts for Growers Act of 2003, S. 91, 108th Cong. (2003).

89. Christopher R. Kelly, *Notes on an Agricultural Production Contract, with a Model Contract Attached*, 2001 ARK. L. NOTES 11, 12 (2001).

90. *See id.* at 21.

91. *See id.* at 28.

92. *See* Farm Security and Rural Investment Act of 2002, Pub. L. No. 106-472 (codified in scattered sections of 7 U.S.C.)

93. *See* 7 U.S.C. §§ 181-229 (2000).

94. *See* 7 U.S.C.A. § 229b(b) (West Supp. 2003).

95. Livestock and Meat Marketing Study, 68 Fed. Reg. 32455, 32456 (May 30, 2003).

96. *Id.*

APPENDIX B—RECENT LEGISLATION

Recent Legislation to Address Problems Arising from Agricultural Consolidation and Vertical Integration.

A. *108th Congress*

1. *To Amend the Packers and Stockyards Act, 1921, to Make it Unlawful for a Packer to Own, Feed, or Control Livestock Intended for Slaughter. S. 27; H.R. 719.*

Amends the PSA, making it unlawful for a packer to own, feed, or control livestock prior to seven days before slaughter with exemptions for smaller packers and cooperatives that are majority owned by active cooperative members who own and raise livestock.

2. *Fair Contracts for Growers Act of 2003. S. 91.*

Provides that if a livestock or poultry contract requires arbitration to resolve a controversy, arbitration may be used only if, after the controversy arises, both parties consent in writing to use arbitration to settle the controversy.

3. *To Amend the Agricultural Marketing Act of 1946 to Increase Competition and Transparency Among Packers that Purchase Livestock from Packers. S. 325.*

Requires packers to purchase twenty-five percent of their daily production supply on the spot market; requires cooperative-owned packers to purchase twelve percent of their daily supply on the spot market; exempts packers that own only one plant.

4. *Captive Supply Reform Act. S. 1044.*

Prohibits use of livestock marketing agreements, unless the contract contains a firm base price, is offered for bid in a public manner, and only contracts for a maximum of 40 cattle or 30 swine; allows for carcass quality-based premiums in futures contracts.

5. *To Amend the Packers and Stockyards Act, 1921, to Provide the Secretary of Agriculture with Administrative Authority to Investigate Live Poultry Dealers, and for Other Purposes. H.R. 582.*

Amends PSA to provide USDA administrative enforcement authority over live poultry dealers (integrators); provides growers of breeding hens protections under PSA.

B. *107th Congress*

1. *Securing a Future for Independent Agriculture Act of 2001. S. 20.*

- Prohibits unfair, unjustly discriminatory, or deceptive practices in the marketing, receiving, purchasing, sale, or contracting for the production of any agricultural commodity; provides whistleblower protections to those who report unlawful conduct by a contractor; prohibits the use of the right of first refusal in agricultural commodity contracts; expressly prohibits price discrimination in agricultural commodity transactions; establishes a Farmer and Rancher Claims Commission to consider claims made under the Act.

- Provides that before a merger or acquisition with another agribusiness, a large agribusiness must file merger documents with the Secretary of Agriculture, and the Secretary must report the possible impacts, and remedies addressing negative consequences of the proposed merger, to DOJ and FTC.

- Requires large agribusinesses to file an annual report with USDA describing strategic alliances, ownership in other agribusiness firms or agribusiness-related firms, joint ventures, subsidiaries, brand names, and interlocking boards of directors with other corporations, representatives, and agents that lobby Congress on behalf of the covered person.

- Includes a number of contract regulations for agricultural contracts, including a requirement of good faith, disclosure and readability standards, a producer's three-day right-to-review-and-cancel, prohibition of confidentiality clauses, provision for producer-contract liens, and the ability to recoup damages from large investments required by production contracts.

- Amends the Agricultural Fair Practices Act requiring good faith bargaining, deleting the disclaimer clause, providing for the accreditation of producer associations, and providing for the assignment of association dues.

2. *Agriculture Competition Enhancement Act. S. 1076.*

- Establishes a Special Counsel for Competition Matters in USDA to analyze agribusiness mergers and bring civil actions under the Act; provides Special Counsel the authority to review agribusiness mergers for effects on producers and family farmers, as well as authority to file suit blocking or changing the provisions of the merger.

- Prohibits unfair, unjustly discriminatory, or deceptive practices in the marketing, receiving, purchasing, sale, or contracting for the production of any agricultural commodity.

- Requires large agribusinesses to file an annual report with USDA describing the strategic alliances, ownership in other agribusiness firms or agribusiness-related firms, joint ventures, subsidiaries, brand names, and interlocking boards of directors with other corporations, representatives, and agents that lobby Congress on behalf of the covered person.

- Prohibits confidentiality clauses in livestock and grain production contracts.

- Amends PSA, providing USDA administrative enforcement authority over live poultry dealers (integrators); provides growers of breeding hens protections under PSA.

- Establishes an Assistant Attorney General for Agricultural Antitrust Matters within the Antitrust Division of DOJ.

3. *Agriculture, Conservation, and Rural Enhancement Act of 2001: Agricultural Competition. S. 1628, Title X.*

- Establishes an Office of Special Counsel for Competition Matters in USDA to investigate and prosecute violations of this Act and any other Act the Secretary determines to be appropriate and serve as a liaison between USDA, the Department of Justice, and the Federal Trade Commission, with respect to competition and trade practices in the food and agricultural sector.

- Requires large agribusiness to file annual reports with USDA describing strategic alliances, ownership in other agribusinesses, joint ventures, subsidiaries, brand names, and interlocking boards of directors with other covered persons.

- Rewrites the Agricultural Fair Practices Act to prohibit any unfair, unjustly discriminatory, or deceptive practice in the marketing or contracting for production of agricultural commodities; deletes the “disclaimer clause”; makes it an unfair practice to fail to disclose certain terms in an agricultural contract.

- Provides certain regulations of production contracts, including the three-day right-to-review-and-cancel, creation of production contract liens, and ability for a contract grower to recoup investment required by production contract.
- Provides for a private right of action and attorney's fees for those injured by violations of the Act; provides that venue and choice of law will be the state in which the producer resides; gives USDA the authority to appoint outside counsel for litigation.
- Allows a producer to assign sale proceeds or production contract proceeds to an association of producers.
- Amends PSA, providing USDA administrative enforcement authority over live poultry dealers (integrators); provides growers of breeding hens protections under PSA.

4. *Agriculture Competition Enhancement Act of 2001. H.R. 1526.*

Requires that before a large agribusiness may acquire or merge with another agribusiness, the agribusiness must file notice with USDA; prohibits agribusiness mergers if it will negatively affect prices received by producers; establishes an Office of Special Counsel for Agriculture within DOJ.

5. *Livestock Ownership Fairness Act of 2002. H.R. 3810.*

Prohibits packers from owning livestock; requires large packers to file notice with USDA before merging with other agribusinesses.

APPENDIX C—ADDITIONAL SOURCES

For additional information on the topic of agricultural consolidation and integration, see:

Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 WIS. L. REV. 531 (2000).

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Edward P. Lord, Comment, *Fairness for Modern Farmers: Reconsidering the Need for Legislation Governing Production Contracts*, 33 WAKE FOREST L. REV. 1125 (1998).

David R. Moeller, *The Problem of Agricultural Concentration: The Case of the Tyson-IBP Merger*, 8 DRAKE J. AGRIC. L. 33 (2003).

Douglas J. O'Brien, Note, *The Packers & Stockyards Act of 1921 Applied to the Hog Industry of 1995*, 20 J. CORP. L. 651 (1995).

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Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. AGRIC. L. 91 (2003).