

ADDRESSING CONCENTRATION AND CONSOLIDATION TO TRANSFORM THE FOOD SYSTEM

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ABSTRACT

From seed to supermarket, concentration and consolidation problems threaten the stability of our food and agricultural systems. This Article examines the history of concentration and consolidation in the food and agricultural sectors, the antitrust laws meant to address these issues, the impacts that concentration and consolidation have on the various players within the food supply chain, and efforts and opportunities to improve our food and agricultural systems going forward. Concentration and consolidation must be addressed throughout the food supply chain to transform the food system by holding agribusiness corporations accountable for anticompetitive practices and minimizing harm to farmers, farm workers, farm animals, and consumers.

I. INTRODUCTION

Concentration and consolidation problems are not new to the food supply chain. In the late nineteenth century, the controlling share of sugar and meatpacking companies, among others, were dominated by the monopolistic practices of the few.¹ The response in the United States was great among small farmers and ranchers advocating for legislation that supported regulation and oversight of the dominant large corporations.² Eventually, Congress passed several antitrust laws as part of an effort to curb anticompetitive practices and protect consumers.³ For a good part of the twentieth century, these statutes helped limit excessive industrial consolidation and served as a check on monopolistic conduct.⁴ However, within the span of a generation, the interpretation of antitrust laws has shifted, and enforcement has become lax.⁵ As a result, dominant trusts have reemerged and have gained equal, if not more, control over agricultural markets than they did before.⁶ Now, almost every part of food and agriculture is dominated by market consolidation.⁷

1. Cody McCracken, Note, *Old MacDonald Had a Trust: How Market Consolidation in the Agricultural Industry, Spurred on by a Lack of Antitrust Law Enforcement, Is Destroying Small Agricultural Producers*, 13 WM. & MARY. BUS. L. REV. 575, 583 (2022).

2. *Id.* at 584.

3. *Id.*

4. See TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 16 (2018).

5. *Id.* at 16–17.

6. See generally McCracken, *supra* note 1.

7. HANNAH ANDREW, VT. L. SCH. CTR. FOR AGRIC. & FOOD SYS., ADDRESSING CONSOLIDATION IN AGRICULTURE 2 (2022), <https://www.vermontlaw.edu/sites/default/files/2022-07/Addressing-Consolidation-in-Agriculture.pdf> [<https://perma.cc/FQ64-6CRF>].

The COVID-19 pandemic further highlighted how consolidation has exacerbated issues at nearly every link in the food supply chain and caused harm to consumers, workers, farmers, and the public. Such issues include: (1) food corporations failed to protect workers from COVID-19, leading to 86,000 meatpacking workers contracting COVID-19;⁸ 2) COVID-19 closures caused large-scale meat processing plant shutdowns, including 10% of beef processing plants and 25% of pork processing plants in the United States;⁹ 3) specialized supply chains with the purpose of moving food to schools and restaurants failed to meet increasing demands at grocery stores during quarantine, which lead to concurrent food waste and empty store shelves;¹⁰ and 4) net profit margins at food corporations skyrocketed, indicating companies passed increased costs onto consumers as well as padded their pockets.¹¹

As a result of consolidation, every phase of an agricultural operation becomes less profitable and farmers, farm workers, farmed animals, and consumers suffer while giant agribusiness corporations thrive.¹² Concentrated industries can collude to increase profits for their shareholders and management while excluding new entrants, keeping prices high, preventing wage growth for

8. Sky Chadde, *COVID-19 Cases, Deaths in Meatpacking Industry Were Much Higher Than Previously Known, Congressional Investigation Shows*, INVESTIGATE MIDWEST (Oct. 28, 2021), <https://investigatamidwest.org/2021/10/28/covid-19-cases-deaths-in-meatpacking-industry-were-much-higher-than-previously-known-congressional-investigation-shows/> [<https://perma.cc/QRV2-WXJL>].

9. Amelia Lucas, *Meatpacking Union Says 25% of US Pork Production Hit by Coronavirus Closures*, CNBC (Apr. 23, 2020, 6:23 PM), <https://www.cnbc.com/2020/04/23/meatpacking-union-says-25percent-of-us-pork-production-hit-by-coronavirus-closures.html> [<https://perma.cc/G8EL-2376>].

10. CLAIRE KELLOWAY & SARAH MILLER, OPEN MKTS. INST., *CONSOLIDATION IN AMERICA'S FOOD SUPPLY CHAINS: A KEY FACTOR IN PRICE GOUGING, SHORTAGES, AND INEQUALITY* 14 (2019), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/614a2ebeb7d510debfd53f3/1632251583273/200921_MonopolyFoodReport_endnote_v3.pdf [<https://perma.cc/K3SQ-2YYS>].

11. See Andrea Shalal, *Meat Packers' Profit Margins Jumped 300% During Pandemic – White House Economics Team*, REUTERS (Dec. 10, 2021, 3:20 PM), <https://www.reuters.com/business/meat-packers-profit-margins-jumped-300-during-pandemic-white-house-economics-2021-12-10/> [<https://perma.cc/F28C-T7VA>]; MOLLY KINDER ET AL., BROOKINGS METRO, *PROFITS AND THE PANDEMIC: AS SHAREHOLDER WEALTH SOARED, WORKERS WERE LEFT BEHIND* 2 (2022), https://www.brookings.edu/wp-content/uploads/2022/04/Pandemic_Profits_report.pdf [<https://perma.cc/FEJ7-CDPV>].

12. See McCracken, *supra* note 1, at 580–81.

workers, and cooperating politically to use the government to protect their profits.¹³

This Article examines the history of concentration and consolidation in the food and agricultural sectors, the antitrust laws meant to address these issues, the impacts that concentration and consolidation have on the various players within the food supply chain, and efforts and opportunities to improve our food and agricultural system going forward. Concentration and consolidation must be addressed throughout the food supply chain to transform the food system by holding agribusiness corporations accountable for anticompetitive practices and minimizing harm to farmers, farm workers, farmed animals, and consumers.

II. HISTORY OF CONCENTRATION AND CONSOLIDATION IN FOOD AND AGRICULTURAL SECTORS

Consolidation refers to the combination of several businesses or companies into a single, larger organization.¹⁴ Within food and agriculture, a pattern of mergers and acquisitions between companies, combined with other competitors leaving the market, has resulted in more concentrated markets dominated by fewer and larger players.¹⁵

Concentration refers to the extent that the market shares in a particular market are held between a small number of firms or businesses.¹⁶ Concentration measures like the four-firm concentration ratio and the Herfindahl-Hirschman Index (HHI) are commonly used to measure monopoly power in a market.¹⁷ The four-firm concentration ratio measures the sum of the market shares of the four largest firms within a particular industry.¹⁸ When the four-firm concentration ratio

13. WU, *supra* note 4, at 21; *see, e.g.*, Press Release, U.S. Dep't of Justice, No. 20-553, Former Bumble Bee CEO Sentenced to Prison for Fixing Prices of Canned Tuna (June 16, 2020), <https://www.justice.gov/opa/pr/former-bumble-bee-ceo-sentenced-prison-fixing-prices-canned-tuna> [<https://perma.cc/65SX-JM2K>].

14. *See* ANDREW, *supra* note 7, at 1.

15. *See id.*

16. *Market Concentration*, ORGANISATION FOR ECON. COOP. & DEV. (Mar. 28, 2024, 1:10 PM), <https://www.oecd.org/daf/competition/market-concentration.htm> [<https://perma.cc/7WKB-LCQV>].

17. *See* Will Kenton, *Concentration Ratio Definition, How to Calculate with Formula*, INVESTOPEDIA (Sept. 6, 2020), <https://www.investopedia.com/terms/c/concentrationratio.asp> [<https://perma.cc/9PH7-RLT6>].

18. *Id.*

exceeds 60%, that market is classified as a “tight oligopo[ly].”¹⁹ With high concentration levels, such firms are more likely to abuse their market power by engaging in anticompetitive conduct like price fixing, bid rigging, or market allocation schemes.²⁰ Comparatively, in a loose oligopoly where the top four firms control 40% or less of the market, price fixing collusion is virtually impossible.²¹

Calculating the HHI involves squaring the market share of every firm within a particular market and adding them together.²² When the market has many firms of relatively equal size, the HHI approaches zero.²³ The maximum HHI is 10,000 points, which would occur if the market was controlled by a single firm.²⁴ A market with an HHI between 1,500 and 2,500 is considered moderately concentrated while a market with an HHI over 2,500 is highly concentrated.²⁵ The United States Department of Justice (DOJ) and the Federal Trade Commission (FTC) use the HHI measure to evaluate proposed mergers and acquisitions.²⁶

This Part examines concentration and consolidation in the farmed animal sector, including in contract agriculture and meatpacking. Next, it examines concentration and consolidation in agricultural inputs. Finally, it examines concentration and consolidation in grocery stores.

19. See Nina Lakhani et al., *Revealed: The True Extent of America’s Food Monopolies, and Who Pays the Price*, THE GUARDIAN (July 14, 2021, 6:00 PM), <https://www.theguardian.com/environment/ng-interactive/2021/jul/14/food-monopoly-meals-profits-data-investigation> [<https://perma.cc/B4A4-BGTX>].

20. MARK COOPER, CONSUMER FED’N OF AM., MEGA-MERGERS IN THE U.S. SEED AND AGROCHEMICAL SECTOR 7 (2017), <https://consumerfed.org/wp-content/uploads/2017/11/agricultural-megamergers-report.pdf> [<https://perma.cc/PA2C-78RY>]; U.S. DEP’T OF JUST. ANTITRUST DIV., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR I (2021), <https://www.justice.gov/d9/pages/attachments/2016/01/05/211578.pdf> [<https://perma.cc/2H78-VXTQ>].

21. COOPER, *supra* note 20, at 8.

22. *Herfindahl-Hirschman Index*, U.S. DEP’T OF JUST. ANTITRUST DIV. (Jan. 17, 2024), <https://www.justice.gov/atr/herfindahl-hirschman-index> [<https://perma.cc/E6F4-REAM>].

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

A. Concentration and Consolidation in Farmed Animal Sectors

The rise and expansion of concentrated animal feeding operations (CAFOs) has been one of the key drivers of consolidation in the farmed animal sector.²⁷ As producers moved farmed animal production indoors, confining large numbers of animals into a small area, their operating costs went down.²⁸ Combined with low-cost feed and subsidies, CAFOs have successfully pushed the risks of their production onto the consumer all the while making it more difficult for smaller producers to effectively compete.²⁹ Areas that have seen a significant increase in concentration and consolidation are contract agriculture (pork and poultry), meatpacking, and dairy.³⁰

1. Contract Agriculture

Contract agriculture is a legal agreement between farmers and buyers where the terms and conditions for the production and marketing of farm products specify the quantity and quality of the product and the date for delivery, among other terms.³¹ While contract agriculture may not be inherently problematic, in a concentrated market, powerful agribusinesses often set exploitative contract terms that take advantage of farmers and prey on their low bargaining power.³² The USDA Economic Research Service classifies agricultural contracts as marketing contracts or production contracts.³³ Under marketing contracts, the farmer owns the commodity throughout the production cycle and provides all of the inputs.³⁴

27. *Precautionary Moratorium on New and Expanding Concentrated Animal Feeding Operations*, AM. PUB. HEALTH ASS'N (Nov. 5, 2019), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2020/01/13/precautionary-moratorium-on-new-and-expanding-concentrated-animal-feeding-operations> [<https://perma.cc/6CYS-E7PC>].

28. *Id.*

29. *Id.*

30. Owen Walsh, *What is a CAFO (Concentrated Animal Feeding Operation)?*, THE HUMANE LEAGUE (May 23, 2022), <https://thehumaneleague.org/article/what-is-a-cafo> [<https://perma.cc/YEB9-8TAM>].

31. *What Is Contract Farming?*, FOOD & AGRIC. ORG. OF THE U.N.: CONTRACT FARMING RES. CTR. (Apr. 17, 2024, 1:24 PM), <https://www.fao.org/in-action/contract-farming/background/what-is-contract-farming/en/> [<https://perma.cc/4BZM-CKYU>].

32. *Id.*; *Understanding Contract Agriculture*, RURAL ADVANCEMENT FOUND. INT'L-USA (Mar. 28, 2024, 1:18 PM), <https://www.rafiusa.org/programs/contract-agriculture-reform/understanding-contract-agriculture/> [<https://perma.cc/556K-9P5K>].

33. *Farm Structure and Contracting*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV. (Mar. 28, 2024, 9:31 AM), <https://www.ers.usda.gov/topics/farm-economy/farm-structure-and-organization/farm-structure-and-contracting/> [<https://perma.cc/XDB2-GFKT>].

34. *Id.*

The marketing contract sets the price, product quantity and quality, and delivery schedule.³⁵ Marketing contracts for crops are finalized before harvest while livestock contracts are finalized before the animals are marketed.³⁶ Under production contracts, the contractor owns the commodity and provides inputs, services, production guidelines, and technical advice for the farmer.³⁷ The farmer is then paid a fee for providing things like labor, housing, and equipment.³⁸ Production contracts specify farmer and contractor responsibilities and are finalized before production of the commodity begins.³⁹

i. Poultry

As the poultry industry grew, particularly for broiler chickens, so did the prevalence of production contracts and vertical integration.⁴⁰ Traditionally, vertical integration referred to mergers within an industry or when companies within an industry expand vertically by purchasing an adjacent stage of production or marketing.⁴¹ Now, vertical integration is better described as the “coordination of the decision-making function of management in two or more vertically related processes.”⁴² When an integrator asserts more control over the process and assumes more risk, the degree of vertical integration is higher.⁴³ Vertical integration can be achieved by an integrator fully owning a specific stage, entering into contractual agreements between companies, or collaborating with others to gain control over another stage.⁴⁴ Poultry integrators often control every link in the supply chain and own the hatcheries, feed mills, slaughterhouses, and packing

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. STEVE MARTINEZ, U.S. DEP’T OF AGRIC. FOOD & RURAL ECON. DIV., VERTICAL COORDINATION IN THE PORK AND BROILER INDUS.: IMPLICATIONS FOR PORK AND CHICKEN PRODUCTS 7 (1999), https://www.ers.usda.gov/webdocs/publications/40999/17966_aer777_1_.pdf?v=7217.1 [<https://perma.cc/8PFZ-PSUP>].

41. HARLAN J. DIRKS & DARRELL F. FIENUP, U. MINN. AGRIC. EXPERIMENT STATION, TECH. BULL. NO. 249, TECH. AND MARKET FORCES AFFECTING VERTICAL INTEGRATION IN THE HOG INDUSTRY 6 (1965), <https://conservancy.umn.edu/bitstream/handle/11299/140012/TB249.pdf> [<https://perma.cc/G58Q-Z3G6>].

42. *Id.*

43. *Id.*

44. *Id.*

plants involved.⁴⁵ The integrators contract with poultry growers to provide chicks, feed, veterinary services, and transportation while the growers are responsible for feeding and growing the birds.⁴⁶

The first broiler chicken contract was signed in 1933 between a feed dealer and a chicken grower.⁴⁷ In 1950, 95% of broiler chicken production was still independent.⁴⁸ Within five years, 88% of broilers were raised under a production contract, 2% of broilers were raised in company-owned broiler facilities, and 10% of broiler producers remained independent.⁴⁹ By the 1970s, feed companies left the broiler industry because of high input prices and low broiler prices and were replaced by poultry processing companies.⁵⁰ Now, approximately 96% of chickens produced in the United States are currently raised under production contracts.⁵¹ Half of the chicken growers in the United States work in regions controlled by just one or two processors.⁵² Over half the broiler chickens raised in the United States are raised in Alabama, Arkansas, Georgia, Mississippi, and North Carolina, and the four largest poultry processors control 54% of the broiler chicken market.⁵³ According to a 2018 evaluation by the Small Business Administration Inspection General, the chicken processing monopolies hold such a strong grip over the industry that most chicken farmers are no longer considered independent

45. See SIENA CHRISMAN, FOODPRINT, THE FOODPRINT OF CHICKEN 7 (2018) [hereinafter CHRISMAN – CHICKEN], https://foodprint.org/wp-content/uploads/2020/11/2020_11_02_FP_ChickenReport_Final.pdf [<https://perma.cc/XD6W-34PL>].

46. MARTINEZ, *supra* note 40, at 14.

47. *Id.* at 3.

48. *Id.*

49. *Id.* at 3–4.

50. *Id.* at 7. Also in the 1970s, many of the major poultry breeders were bought out by pharmaceutical manufacturers including the Upjohn Company, which acquired Cobb's Pedigreed Chicks, the company that developed the most popular broiler chicken in the world, the Cobb 500 chicken. *Id.* In the early 1980s, Tyson Foods entered a joint venture with Upjohn to introduce the Cobb 500 into the United States market, purchasing 50% ownership in Cobb Company to prevent Tyson's competitors from monopolizing the breed. *Id.* However, in 1994, Tyson acquired Upjohn's 50% ownership share, bringing Tyson's ownership of the Cobb 500 breed to 100%. *Id.*

51. U.S. DEP'T OF AGRIC. NAT'L AGRIC. STATS. SERV., ACH17-15, POULTRY AND EGG PRODUCTION 2 (2020), <https://www.nass.usda.gov/Publications/Highlights/2020/census-poultry.pdf> [<https://perma.cc/3TY4-W86J>].

52. KELLOWAY & MILLER, *supra* note 10, at 3.

53. *Id.*

businesses.⁵⁴ This high level of concentration among poultry processors has led to longstanding fears of collusion.⁵⁵

Further, the production contracts in poultry farming often lack transparency, inflate the promises of returns, and require farmers to incur significant debt to build chicken houses based on an integrator's specifications while offering only short-term commitments often based on the life of the current flock.⁵⁶ To make matters worse, farmers are paid through a tournament system that ranks growers within a region against each other for how fast their chickens grow and how efficiently they use company inputs.⁵⁷ The price per pound guaranteed by the production contract is only paid to the middle-ranked grower.⁵⁸ A grower who costs the integrator less is paid more while those who cost the integrator more get paid less, despite the fact that the growers have little to no control over any of the variables during the growth cycle.⁵⁹

ii. Pork

The pork industry has followed the example of the poultry industry and become similarly vertically integrated.⁶⁰ Before the 1980s, most hogs were produced by raising the pigs on the same farm from birth until they were sent to market.⁶¹ Under production contracts, hog production begins at one site for breeding, gestation, and farrowing, moved to another nursery facility site for food and care until they are eight to 10 weeks old, and moved again to a finishing facility to be fed to market weight.⁶² The integrator provides the pigs, veterinary care, inputs, and management services, while the grower feeds and grows the pigs for a fixed payment.⁶³ In 1998, production contracts accounted for 19% of feeder pig

54. U.S. SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., REP. 18-13, EVALUATION OF SBA 7(A) LOANS MADE TO POULTRY FARMERS 1 (2018), <https://www.sba.gov/sites/default/files/2019-07/SBA-OIG-Report-18-13.pdf> [<https://perma.cc/494G-EWFG>] (“[I]ntegrators exercised comprehensive control over the growers through a series of contractual mandates and restrictions, management agreements, operating procedures, oversight, inspections, and market controls that overcame practically all of the grower’s ability to operate their businesses independent of integrator mandates.”).

55. *Id.* at 2.

56. CHRISMAN – CHICKEN, *supra* note 45, at 9.

57. *Id.*

58. *Id.*

59. *Id.*

60. *See generally* MARTINEZ, *supra* note 40.

61. *Id.* at 8.

62. *Id.*

63. *Id.*

operations and 34% of finished hog operations.⁶⁴ By 2017, 63% of hogs were produced under production contracts.⁶⁵ By 2018, 98% of all hogs in the United States were raised under contract.⁶⁶

The pork industry has also seen an increase in concentration.⁶⁷ Back in 1987, the top four pork producers were in control of about 30% of the hog market.⁶⁸ The top four pork producers' control of the market increased to 46% by the early 1990s.⁶⁹ In 2001, the top four producers controlled 59%.⁷⁰ By 2020, 61% of the hog market was controlled by three hog producers.⁷¹ Only 30 processing plants process 92% of all pork in the United States.⁷²

2. Meat Packing

The high level of concentration among the top meatpacking companies was one of the original concerns that led to the passage of many of the antitrust laws in existence today.⁷³ In the late nineteenth century, five meatpacking companies in Chicago, often referred to as the “Big Five,” dominated the market, controlling 80% of the cattle meatpacking industry and engaging in anti-competitive monopolistic behavior.⁷⁴ In the 1920s, after antitrust statutes like the Packers and Stockyards Act (PSA) were enacted, the market concentration in the beef packing

64. HARRISON M. PITTMAN, NAT'L AGRIC. L. CTR., MARKET CONCENTRATION, HORIZONTAL CONSOLIDATION, AND VERTICAL INTEGRATION IN THE HOG AND CATTLE INDUSTRIES: TAKING STOCK OF THE ROAD AHEAD 5 (2005), <https://nationalaglawcenter.org/publication/view/pittman-market-concentration-horizontal-consolidation-and-vertical-integration-in-the-hog-and-cattle-industries-taking-stock-of-the-road-ahead-national-aglaw-center-publications-2005/> [<https://perma.cc/SM4B-2VKL>].

65. Caius Z. Willingham & Andy Green, *A Fair Deal for Farmers: Raising Earnings and Rebalancing Power in Rural America*, CTR. AM. PROGRESS (May 7, 2019), <https://www.americanprogress.org/article/fair-deal-farmers/> [<https://perma.cc/M3M8-5MAB>].

66. SIENA CHRISMAN, FOODPRINT, THE FOODPRINT OF PORK 6 (2020) [hereinafter CHRISMAN – PORK], https://foodprint.org/wp-content/uploads/2020/10/2020_08_24_FP_Pork_Report_FINAL_downloadable.pdf [<https://perma.cc/3CQP-NZQL>].

67. See Willingham & Green, *supra* note 65.

68. See PITTMAN, *supra* note 64, at 5.

69. CHRISMAN – PORK, *supra* note 66, at 6.

70. PITTMAN, *supra* note 64, at 5.

71. CHRISMAN – PORK, *supra* note 66, at 7.

72. *Id.* at 4.

73. See McCracken, *supra* note 1, at 590.

74. *Id.*

industry began to decline.⁷⁵ The 1970s saw the lowest level of consolidation with the top four meatpackers slaughtering just 25% of cattle in the United States.⁷⁶ By the 1980s, the beef industry operated in an open competitive market.⁷⁷ Independent ranchers were able to breed and raise their own cattle to sell the cattle to independent feedlots and slaughterhouses.⁷⁸ Stakeholders were offered a fair price at every stage of production through competitive auctions.⁷⁹ However, mergers and acquisitions by the two largest slaughterhouse corporations in the late 1980s heavily consolidated the meatpacking industry again.⁸⁰ Cattle-feeding operations dropped 40% by the end of the decade.⁸¹ By 1998, the four largest beef-packers were responsible for slaughtering 70% of beef cattle.⁸² Now, the top four companies control over 85% of the beef industry, and only 50 beef plants process 98% of the United States beef supply.⁸³

3. Dairy

Consolidation in the dairy sector has outpaced most other areas of agriculture in the United States.⁸⁴ From 1987 to 2017, the average dairy herd size increased from 80 cows to 1,300 cows.⁸⁵ At the same time, the number of dairy farms

75. U.S. GOV'T ACCOUNTABILITY OFF., GOA/RCED-91-28, BEEF INDUSTRY: PACKER MARKET CONCENTRATION AND CATTLE PRICES 3 (1990), <https://www.gao.gov/assets/rced-91-28.pdf> [<https://perma.cc/EX9B-XSF5>].

76. McCracken, *supra* note 1, at 590.

77. KELLOWAY & MILLER, *supra* note 10, at 3.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Amelia Pollard, 'Big Four' Meatpackers Are Crushing Small Ranchers, AM. PROSPECT (June 9, 2021), <https://prospect.org/power/big-four-meatpackers-crushing-small-ranchers/> [<https://perma.cc/P7XX-YY8J>].

83. *See id.*; WIS. FARMERS UNION MEAT PROCESSING TASK FORCE, MEAT PROCESSING IN WISCONSIN CHALLENGES AND OPPORTUNITIES 3 (2020), https://www.wisconsinfarmersunion.com/_files/ugd/629d75_e65aec4a398a463d97fb6dddc6eaf99.pdf [<https://perma.cc/7HCK-X8PY>].

84. JAMES M. MACDONALD ET AL., U.S. DEP'T OF AGRIC. ECON. RSCH. SERV., ERR-274, CONSOLIDATION IN U.S. DAIRY FARMING 11 (2020), <https://www.ers.usda.gov/webdocs/publications/98901/err-274.pdf?v=843.4> [<https://perma.cc/3D3H-CG7N>] (noting the widespread consolidation of United States crop production where consolidation in crops doubled in 30 years, compared to the equivalent in dairy, which saw a 16-fold increase in 30 years).

85. *Id.* at 11 n.12.

declined significantly, from over 200,000 dairy farms in 1987 to 54,599 by 2017.⁸⁶ Small commercial farms with 10 to 199 cows account for 30,373 dairy farms, down from 146,685 dairy farms in the late 1980s.⁸⁷ Large operations of 1,000 or more cows made up nearly 29% of the dairy cows in the United States in 2002.⁸⁸ By 2017, approximately 2,000 large farms with at least 1,000 cows accounted for 55% of all dairy cows.⁸⁹ Geographically, these farms are primarily concentrated in just a few states.⁹⁰ As of 2022, the top five states that produce dairy milk—California, Wisconsin, Idaho, Texas, and New York—account for over 50% of the United States' dairy milk supply.⁹¹

B. Concentration and Consolidation in Agricultural Inputs

Farmers and ranchers rely on agricultural inputs to grow and sell their products. These inputs include seeds, feed, fertilizer, pesticides, and other agricultural chemicals, as well as farm equipment. High levels of consolidation are found throughout the agricultural input markets that in turn impact the supply chain.⁹²

The agrichemical and seed market operates in a very tight oligopoly.⁹³ A few large firms own over 60% of soy processing, wet corn and cotton seed milling, and the agricultural chemical market.⁹⁴ The seed market was once full of choice, and farmers had thousands of small seed companies to choose from when buying seeds.⁹⁵ As biotechnology advanced, large agribusiness chemical manufacturers

86. *Id.* at 1, 9. Despite the lower number of farms, milk production has steadily increased with overall production of milk approximately 50% higher than it was 30 years ago. *Id.* at 1.

87. *Id.* at 11.

88. *Id.* at 12 tbl.1.

89. *Id.*

90. *Dairy: Background*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV. (Oct. 31, 2023), <https://www.ers.usda.gov/topics/animal-products/dairy/background/> [https://perma.cc/UWK7-FV3S].

91. *Id.*

92. McCracken, *supra* note 1, at 592.

93. *Id.* at 588.

94. *Id.* at 591 (“In the milling of wheat flour, three firms account for over fifty percent of the market. In soybeans, four companies process about eighty-five percent of the market. . . . [f]or corn milling, the nation’s most produced crop, eighty percent of sales were attributed to the four largest firms.”).

95. Dan Charles, *Big Seed: How the Industry Turned from Small-Town Firms to Global Giants*, NPR: THE SALT (Apr. 6, 2016, 5:07 AM), <https://www.npr.org/sections/thesalt/2016/04/06/472960018/big-seed-consolidation-is-shrinking-the-industry-even-further> [https://perma.cc/8SCP-YHPK].

have taken over the seed industry.⁹⁶ Multibillion dollar mergers between these chemical manufacturers have led to concentrated control over both chemical and seed markets held by four firms: Bayer, BASF, Corteva, and the China National Chemical Corporation (ChemChina).⁹⁷ Three major mergers between 2017 and 2018 affected 70% of the agrochemical industry.⁹⁸ In 2017, ChemChina acquired Syngenta AG, a seed, agricultural, and biotechnology company, and Dow Chemical Company merged with E. I. du Pont de Nemours Company (DuPont).⁹⁹ In 2018, Bayer AG acquired Monsanto, a former agrochemical and agricultural biotechnology giant.¹⁰⁰ Now, Bayer, BASF, Corteva, and ChemChina hold control over 67% of seed sales worldwide, including 91% of cotton seed sales, 85% of corn seed sales, and 76% of soybean sales.¹⁰¹

C. Grocery Stores

As recently as the 1990s, most consumers purchased their groceries from local and regional supermarkets.¹⁰² In 1997, one-fifth of the groceries purchased in the United States came from the four largest grocery retail companies.¹⁰³ Stores like Walmart, Kroger, and Safeway began buying in larger quantities so they could offer products to consumers at a drastically lower price than local grocers.¹⁰⁴ To compete, the industry was forced to consolidate from hundreds of stores down to just a few.¹⁰⁵ Now, the four biggest grocery chains, Walmart, Kroger, Costco, and Albertsons, control 69% of the market.¹⁰⁶ Walmart alone captures one out of every

96. *Id.*

97. Allison Weber, *The Big Six to the Big Four: The Rise of the Seed and AgroChemical Oligopoly*, POL'Y REV. BERKELEY (Jan. 5, 2022), <https://www.ocf.berkeley.edu/~prb/the-big-six-to-the-big-four-the-rise-of-the-seed-and-agrochemical-oligopoly/> [<https://perma.cc/DJ3J-9XQ8>].

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. FOOD & WATER WATCH, GROCERY GOLIATHS: HOW FOOD MONOPOLIES IMPACT CONSUMERS 3–4 (2013), <https://foodandwaterwatch.org/wp-content/uploads/2021/03/Grocery-Goliaths-Report-Dec-2013.pdf> [<https://perma.cc/D8X5-C6DK>].

103. *Id.* at 3.

104. *Id.* at 3–4.

105. FOOD & WATER WATCH, THE ECONOMIC COST OF FOOD MONOPOLIES: THE GROCERY CARTELS 1 (2021) [hereinafter GROCERY CARTELS], https://www.foodandwaterwatch.org/wp-content/uploads/2021/11/IB_2111_FoodMonoSeries1-SUPERMARKETS.pdf [<https://perma.cc/R78T-H55C>].

106. *Id.* at 2.

three dollars consumers spend at the grocery store.¹⁰⁷ When a company is able to dictate the pricing structure down its entire supply chain, a free market no longer exists, the market has become a monopsony, or a market exists where one buyer is capable of influencing price.¹⁰⁸ The increase in concentration among supermarket retailers has led those retailers to set prices less competitively, coordinate pricing strategies with other chains, and limit consumer choice on both where to shop and what they can buy.¹⁰⁹

III. ANTITRUST LAWS

A. Antitrust Beginnings

In 1890, the Sherman Antitrust Act (Sherman Act) was the first law enacted to prohibit monopolistic business practices and to restore competition.¹¹⁰ Trusts dominated many major industries at the time and monopolized the market, which destroyed competition.¹¹¹ The Sherman Act prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade” and monopolization, attempted monopolization, or conspiracy or combination to monopolize.¹¹² The federal government was granted the authority under the Sherman Act to dissolve trusts and combinations that unreasonably restrain trade or commerce.¹¹³ The DOJ may penalize corporations who form such combinations with criminal penalties of up to \$100 million and individuals who form such combinations with criminal penalties of up to \$1 million and 10 years in prison.¹¹⁴ However, the Sherman Act proved difficult to enforce. It failed to define terms such as “trust,” “combine,” “conspire,” and “monopolize,” which led to narrow interpretation by the courts.¹¹⁵

107. Lisa Held, *As Grocery Stores Get Bigger, Small Farms Get Squeezed Out*, CIVIL EATS (Jan. 17, 2023), <https://civileats.com/2023/01/17/grocery-stores-consolidation-kroger-albertsons-small-farmers-supply-chain-market-demand/> [<https://perma.cc/A9SU-VFUD>].

108. Organisation for Econ. Co-op. & Develop., *Policy Roundtables: Monopsony and Buyer Power*, at 9, DAF/COMP(2008)38 (Dec. 17, 2009), <https://www.oecd.org/daf/competition/44445750.pdf> [<https://perma.cc/N7TQ-N9VA>].

109. See GROCERY CARTELS, *supra* note 105, at 5.

110. *Sherman Anti-Trust Act (1890)*, NAT'L ARCHIVES (Mar. 15, 2022), <https://www.archives.gov/milestone-documents/sherman-anti-trust-act> [<https://perma.cc/3CH7-JM4B>].

111. *Id.*

112. *Id.*

113. *Id.*

114. 15 U.S.C. § 2.

115. *Sherman Anti-Trust Act (1890)*, *supra* note 110; *Sherman Antitrust Act*, BRITANNICA (Apr. 19, 2024) [hereinafter *Britannica–Sherman Antitrust Act*], <https://www.britannica.com/event/Sherman-Antitrust-Act> [<https://perma.cc/CWB7-4UVK>].

Under President Theodore Roosevelt’s administration in 1914, the Clayton Antitrust Act (Clayton Act) was passed to supplement and strengthen the Sherman Act.¹¹⁶ The Clayton Act allows federal regulators to review proposed mergers or acquisitions and prevent deals that substantially reduce competition or tend to create a monopoly.¹¹⁷ Section 7 of the Clayton Act prohibits mergers “in any line of commerce or in any activity affecting commerce . . . [where] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”¹¹⁸ The Clayton Act is meant to preserve competition itself and “to protect overall market competition”—not to protect individual competitors.¹¹⁹ There are both civil and criminal penalties for violating the Clayton Act.¹²⁰

In 1936, the Clayton Act was amended by the Robinson-Patman Act to ban discriminatory pricing, services, and dealings between merchants.¹²¹ In the 1950s, a new wave of mergers prompted Congress to enact the Celler-Kefauver Antimerger Act, an act which amended the Clayton Act to prevent vertical mergers that disadvantaged other competitors by prohibiting anticompetitive stock and asset acquisitions that have the effect of substantially lessening competition or tending to create a monopoly.¹²² In 1976, the Hart-Scott-Rodino Antitrust Improvements Act required companies who planned a large merger or acquisition to provide pre-merger notice to the government.¹²³ This notice allows the DOJ and FTC more time to investigate any anticompetitive impacts the merger may have and decide whether to enjoin the merger.¹²⁴ If the DOJ and FTC do not address any

116. See *Historical Highlights: The Clayton Antitrust Act*, U.S. HOUSE OF REPRESENTATIVES: HIS., ART & ARCHIVES (Mar. 25, 2024, 4:41 PM), https://history.house.gov/Historical-Highlights/1901-1950/hh_1914_10_15_clayton_antitrust/ [<https://perma.cc/D9TZ-FGUU>].

117. See KATHLEEN ANN RUANE, CONG. RSCH. SERV., R44971, PRE-MERGER REVIEW AND CHALLENGES UNDER THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT 18 (2017), <https://crsreports.congress.gov/product/pdf/R/R44971/2> [<https://perma.cc/KZ3T-LXP8>].

118. 15 U.S.C. § 18.

119. KATHLEEN ANN RUANE, *supra* note 117, at 2.

120. See *The Antitrust Laws*, U.S. DEP’T OF JUST. ANTITRUST DIV. (Dec. 20, 2023), <https://www.justice.gov/atr/antitrust-laws-and-you> [<https://perma.cc/56PL-CW5E>].

121. *The Antitrust Laws*, FED. TRADE COMM’N (July 23, 2024, 9:00 PM), <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/C2XS-FSMA>].

122. 15 U.S.C. § 18; see generally Charles J. Steele, *A Decade of the Celler-Kefauver Anti-Merger Act*, 14 VAND. L. REV. 1049 (1961).

123. 15 U.S.C. § 18a(a); KATHLEEN ANN RUANE, *supra* note 117, at 3.

124. KATHLEEN ANN RUANE, *supra* note 117, at 3.

concerns or block the merger after a statutory waiting period runs, the business may complete the merger.¹²⁵

To further enforcement of antitrust laws, the Federal Trade Commission Act (FTC Act) was enacted in 1914, which established the FTC.¹²⁶ Section 5 of the FTC Act prohibits companies from engaging in unfair methods of competition and unfair or deceptive practices in or affecting commerce, including any action that violates Section 7 of the Clayton Act.¹²⁷ The FTC can prevent persons, partnerships, and corporations from engaging in such practices, except in foreign trade.¹²⁸ Anyone who violates the FTC Act can face civil penalties of up to \$50,120 per violation.¹²⁹ One of the first industries the FTC investigated was the meatpacking industry when the market was dominated by the Big Five.¹³⁰ The investigation uncovered major meat packers were violating antitrust laws by unlawfully restraining trade through profiteering activities.¹³¹

B. The Packers and Stockyards Act

The PSA was passed to address and curb rampant concentration in livestock, poultry, and meatpacking and to protect producers from anticompetitive practices by larger industrial players.¹³² After the PSA passed, concentration in the meatpacking industry fell for several decades. However, a revived increase of mergers and acquisitions in recent years has led to an even more heavily concentrated meatpacking industry than there was in 1921.¹³³

In 1921, Congress passed the PSA to ensure fair competition and trade practices in the livestock, meat, and poultry industries after the Big Five meatpacking companies engaged in anticompetitive practices that harmed producers and consumers.¹³⁴ The PSA was administered by the Grain Inspection,

125. *Id.* at 5.

126. 15 U.S.C. §§ 41–58.

127. *Id.* § 45.

128. *Id.* § 45(a)(3).

129. *Notices of Penalty Offenses*, FED. TRADE COMM’N (Mar. 25, 2024, 1:30 PM), <https://www.ftc.gov/enforcement/penalty-offenses> [<https://perma.cc/HJ76-UEEJ>].

130. See Kamila Lis, *Coalitions in the Jungle: Advancing Animal Welfare Through Challenges to Concentration in the Meat Industry*, 19 ANIMAL L. 63, 65 (2012).

131. See G. Cullom Davis, *The Transformation of the Federal Trade Commission, 1914-1929*, 49 MISS. VALLEY HIST. REV. 437, 441 (1962).

132. VERNE J. GILLES ET AL., U.S. GOV’T ACCOUNTABILITY OFF., GAO/RCED-92-36, OVERSIGHT OF LIVESTOCK MARKET COMPETITIVENESS NEEDS TO BE ENHANCED 2, 8 (1991), <https://www.gao.gov/assets/rced-92-36.pdf> [<https://perma.cc/M9QZ-KXJE>].

133. *Id.* at 15.

134. 7 U.S.C. §§ 181-229.

Packers, and Stockyards Administration (GIPSA) until 2017 when it was moved to the Packers and Stockyards Division of the Fair Trade Practices Program at the USDA's Agricultural Marketing Service.¹³⁵

The PSA prohibits monopolistic, unfair, deceptive, and discriminatory practices by “any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry. . . .”¹³⁶ Anyone who markets their own livestock or buys livestock for their own stocking or feeding purposes are not covered by the PSA.¹³⁷ Generally, the PSA protects livestock producers, poultry growers, consumers, and “businesses engaged in marketing, processing, and distributing livestock, meat, and poultry.”¹³⁸ Prohibited trade practices under the PSA include:

- (a) Engag[ing] in or us[ing] any unfair, unjustly discriminatory, or deceptive practice or device; or
- (b) Mak[ing] or giv[ing] any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject[ing] any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or
- (c) Sell[ing] or otherwise transfer[ring] to or for any other packer, swine contractor, or any live poultry dealer, or buy[ing] or otherwise receiv[ing] from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or
- (d) Sell[ing] or otherwise transfer[ring] to or for any other person, or buy[ing] or otherwise receiv[ing] from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating

135. *The Packers and Stockyards Act: An Overview*, NAT'L AGRIC. L. CTR. (Mar. 26, 2024, 1:56 PM), <https://nationalaglawcenter.org/overview/packers-and-stockyards/> [<https://perma.cc/54JK-7X3K>].

136. 7 U.S.C. § 192.

137. U.S. DEP'T OF AGRIC. AGRIC. MKTG. SERV., THE PACKERS AND STOCKYARDS ACT 2 (2020) [hereinafter PACKERS AND STOCKYARDS ACT FACTSHEET], <https://www.ams.usda.gov/sites/default/files/media/PSActFactSheet.pdf> [<https://perma.cc/R83N-WGA6>].

138. *Id.*

a monopoly in the acquisition of buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engag[ing] in any course of business or do[ing] any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspir[ing], combin[ing], agree[ing], or arrang[ing] with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

(g) Conspir[ing], combin[ing], agree[ing], or arrang[ing] with any other person to do, or aid[ing] or abet[ting] the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e).¹³⁹

One of the main protections the PSA provides for sellers is the requirement that packers, market agencies, and dealers promptly pay livestock sellers after purchasing livestock.¹⁴⁰ Packers, market agencies, and dealers who purchase livestock—regardless of whether the livestock is purchased directly from the owner, at an auction, from a stockyard, from another dealer, or through a market agency—must pay the seller before the end of the next business day unless the seller has waived prompt payment through a written agreement.¹⁴¹ A prompt payment provision for live poultry dealers requires packers to pay sellers by the close of the next business day for sales and within 15 days for contract dealers.¹⁴² No similar prompt payment provision exists for swine contractors.¹⁴³

To protect cash livestock sellers, a statutory trust was established under the PSA that gives cash sellers the rights to certain assets of the packer legally superior to the interests of other secured lenders to whom the packer offered the assets as collateral.¹⁴⁴ The trust serves to protect the public interest from inadequate financing arrangements that burden and obstruct commerce in livestock.¹⁴⁵ Livestock purchased by a packer in cash and all inventories, receivables, or

139. 7 U.S.C. § 192.

140. See *The Packers and Stockyards Act: An Overview*, *supra* note 135.

141. 7 U.S.C. § 228b(a).

142. U.S. DEP'T OF AGRIC. AGRIC. MKTG. SERV., PROMPT PAYMENT FOR LIVESTOCK PURCHASES (2018), <https://www.ams.usda.gov/sites/default/files/media/PromptPaymentFactsheet.pdf> [<https://perma.cc/ET6R-8UKH>].

143. *The Packers and Stockyards Act: An Overview*, *supra* note 135.

144. 7 U.S.C. § 196(a).

145. *Id.*

proceeds from meat food products or livestock products are among the assets required to be held in trust.¹⁴⁶ The seller is responsible for preserving their trust under § 196(b) via written notice to the packer and filing that notice with the Secretary within 30 days of the final date eligible to make the payment, if it has not been received or within 15 business days after the seller received notice that the payment has been dishonored.¹⁴⁷ An unpaid seller loses the benefit of the trust if it is failed to be preserved by payment.¹⁴⁸ Packers whose annual purchases are less than \$500,000 are exempt from these provisions.¹⁴⁹

Under a similar statutory trust established for poultry dealers, if a poultry grower or cash seller receives a payment that is dishonored, then the payment is not considered to have been made.¹⁵⁰ An unpaid seller loses the benefit of the trust if they do not preserve their trust under § 197(d), which requires the same conditions as detailed in § 196(b).¹⁵¹ Poultry dealers with less than \$100,000 in annual sales, value of purchases, or by growing arrangement of live poultry are exempt; and there are no statutory trusts for swine contractors.¹⁵²

Under another provision of the PSA, livestock buyers, including market agencies and dealers, must be bonded to protect livestock sellers against non-payment.¹⁵³ The bond amount necessary is dependent on the scale of the enterprise; for instance, an average two days of business can have a bond of \$10,000 depending on the seriousness of the offense, the size of the operation, or the effect the non-payment had on the seller.¹⁵⁴ Packers whose purchases are not over \$500,000 of livestock annually are exempted from these provisions.¹⁵⁵

Under § 197(a) of the PSA, poultry growers and swine production contract growers have the option to cancel their production contracts.¹⁵⁶ A grower who wishes to cancel their contract must mail a cancellation notice to the live poultry dealer or swine contractor no later than three business days after the execution of their contract or cancellation date specified in the contract.¹⁵⁷ The contract must

146. 7 U.S.C. § 196(b).

147. *Id.*

148. *Id.*

149. *Id.*

150. 7 U.S.C. § 197(c).

151. *Id.* § 197(d).

152. *Id.* § 197(b).

153. *Id.* § 204.

154. *Id.* § 213.

155. *Id.* § 204.

156. *Id.* § 197(a).

157. *Id.*

disclose the grower's right to cancel the contract, the method and deadline to cancel, and identify additional capital investments a grower may be required to make under the contract term.¹⁵⁸

To ensure livestock, poultry, and feed has been weighed properly, the PSA requires stockyard owners, swine contractors, market agencies, dealers, packers, and live poultry dealers to have their scales tested at least twice every year.¹⁵⁹ The first test must be completed between January 1 and June 30, and the second test must be completed between July 1 and December 31, with at least 120 days between the two tests.¹⁶⁰ Reports of the test must be filed with the Packers and Stockyards regional office where the scale is located.¹⁶¹

Enforcement of the PSA may be carried out through the USDA or DOJ, or by a private cause of action.¹⁶² The Secretary of Agriculture can issue a complaint for any violation by packers and swine contractors and start formal adjudications against them.¹⁶³ Possible outcomes include a cease and desist order and civil penalties of up to \$10,000 per violation against the violator and appeals can be made to the federal court of appeals.¹⁶⁴ Additionally, the USDA, through the DOJ, can take legal action against anyone who violates the PSA, which may result in penalties such as permanent injunctions, fines, or jail time for the violator.¹⁶⁵ For live poultry dealers, the Secretary of Agriculture can only issue a complaint for violations of the prompt payment or statutory trust provisions.¹⁶⁶ The USDA lacks the authority to investigate claims of violations other than prompt payment or statutory trust violations.¹⁶⁷ Possible outcomes for violators include a cease and desist order and civil penalties of up to \$29,270 per violation, or up to \$85,150 for violation of poultry payment provisions, and appeals can be made to the federal court of appeals.¹⁶⁸ Anyone who has been harmed by violators of the PSA may file a private action in any United States judicial district or through the Secretary of Agriculture, so long as they can show direct harm.¹⁶⁹ Yet, without updates and

158. *Id.* § 197a(a)(2)–(b)(1).

159. 9 C.F.R. § 201.72(a) (2024).

160. *Id.*

161. *Id.* § 201.72(b).

162. 7 U.S.C. § 210.

163. *Id.*

164. *Id.* § 213.

165. *Id.*

166. *Id.* § 228b.

167. PACKERS AND STOCKYARDS ACT FACTSHEET, *supra* note 137, at 1.

168. *Id.*

169. 7 U.S.C. § 209.

increased enforcement, the PSA falls short in its intended protection of farmers against anticompetitive practices by larger corporate players in livestock, poultry, and meatpacking.¹⁷⁰ As the PSA currently stands, most farmers are unable to successfully bring a private cause of action against violators for certain activities because most circuit courts require that the farmer show harm to competition.¹⁷¹

IV. IMPACTS OF CONCENTRATION AND CONSOLIDATION

Agriculture provides over 22 million jobs across the United States.¹⁷² Output from farms and ranches alone contribute \$164.2 billion to the nation's economy.¹⁷³ One in five rural counties depends on farming.¹⁷⁴ Therefore, the success or failure of local producers has a critical impact on local businesses, industries, schools, and on the survival of towns nationwide.¹⁷⁵ As different sectors of agriculture have consolidated, the total number of farms has significantly declined, from a peak of

170. *Id.* § 192.

171. *See, e.g.,* *Philson v. Goldsboro Milling Co.*, 164 F.3d 625, at *4 (4th Cir. 1998) (unpublished table decision) (holding a practice is unfair if there is a likelihood that an action will result in competitive injury); *Wheeler v. Pilgrim's Pride Corp.*, 536 F.3d 455, 460 (5th Cir. 2009), *rev'd on reh'g en banc*, 591 F.3d 355, 357 (5th Cir. 2009) (finding en banc that a proof of injury, or likelihood of injury, to competition was required for a plaintiff to bring an action under the PSA); *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277–78 (6th Cir. 2010) (finding a plaintiff must show a practice will likely adversely affect competition to show a defendant violated the PSA); *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968) (holding Section 202(a) of the PSA requires an adverse impact on competition); *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985) (holding Section 202(a) requires a plaintiff to show “the likelihood that an arrangement will result in competitive injury to establish a violation”); *De Jong Packing Co. v. U.S. Dep't of Agric.* 618 F.2d 1329, 1337 (9th Cir. 1980) (holding Section 202(a) of the PSA requires “a reasonable likelihood that . . . the result [of an unfair practice] will be an undue restraint of competition”); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007) (finding that proof of a practice injuring or likely to injure competition is required to find a violation of the PSA); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005) (holding that “in order to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition”).

172. *Ag and Food Sectors and the Economy*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV. (Mar. 25, 2024, 10:25 AM), <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/> [https://perma.cc/4UKB-7PYH].

173. *See* Willingham & Green, *supra* note 65.

174. *Id.*

175. McCracken, *supra* note 1, at 579.

6.8 million farms in 1935 down to 2 million farms in 2022.¹⁷⁶ The farmers who are left have little choice over buyers for their products as there is little room for negotiation with giant meatpackers and processors.¹⁷⁷ Poultry or hogs farmers have little power or ability to negotiate their production contract with the integrator.¹⁷⁸ In geographic regions where there is only one grower, poultry growers were paid 7%–8% less on average than in regions where there were at least four integrators.¹⁷⁹ When poultry companies integrated and different stages of the supply chain were consolidated under a single poultry producer, the growing stage was purposely left out of the integration model and left in the hands of farmers.¹⁸⁰ This is because the growing stage is the riskiest stage of production.¹⁸¹

When there is little to no competition, integrators may take advantage of farmers through unfavorable contract terms.¹⁸² Farmers who try to negotiate with the integrators run the risk of intimidation by threat of contract termination or retaliation by the integrator providing the farmer with unsatisfactory feed or animal stock.¹⁸³ In meatpacking, the top four packers hold such a stranglehold on the market they “are seemingly able to control prices at their will, or even defy expectations of market fundamentals” suggesting that anticompetitive practices are at play.¹⁸⁴

176. *The Number of U.S. Farms Continues to Decline Slowly*, U.S. DEP’T OF AGRIC. ECON. RSCH. SERV. (Apr. 1, 2024, 10:33 AM), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58268> [https://perma.cc/G3W8-5VRU].

177. Press Release, White House, Fact Sheet: The Biden-Harris Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain (Jan. 3, 2022) [hereinafter Press Release, The Biden-Harris Plan], <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/> [https://perma.cc/49VY-CU27].

178. *Understanding Contract Agriculture*, *supra* note 32.

179. *Id.*

180. *Big Chicken Companies Own or Control Everything Except the Farm, but Why?*, RURAL ADVANCEMENT FOUND. INT’L-USA (July 14, 2016), <https://www.rafiusa.org/blog/big-chicken-companies-own-and-control-everything-except-the-farm-why/> [https://perma.cc/JBN9-GVS6].

181. *Id.*

182. *Id.*

183. Willingham & Green, *supra* note 65.

184. David Murray, *Are the Big Meatpackers Corrupt? Growing Consensus in Congress*, GREAT FALLS TRIB. (June 8, 2021, 2:45 PM), <https://www.greatfallstribune.com/story/news/2021/06/08/montana-senators-call-sweeping-changes-meatpacking-industry/7506780002/> [https://perma.cc/SNQ4-8H9Y].

As the number of farms has dwindled, the consolidation of farms raising farmed animals has increased.¹⁸⁵ Large industrial processors inflict systemic abuse on farmed animals through the CAFO model.¹⁸⁶ Millions of animals are confined in densely populated structures where they never step foot in a pasture or field.¹⁸⁷ Animals like chickens are bred to grow very large in a small time frame, leaving them too heavy for their legs to support them.¹⁸⁸ Cows are forced to stand in knee-deep manure and pools of urine.¹⁸⁹ It has never been more important to ensure small producers are not absorbed by or driven out of business by CAFOs, lending more market power to an already overly concentrated sector of our food and agricultural supply chain.

The heavy consolidation of supermarkets through mergers that create mega-grocery stores leaves vast buying power in the hands of a few retailers.¹⁹⁰ The retailers are then able to squeeze the suppliers and shrink farmer and worker shares of the food dollar while passing on a higher price to the consumer.¹⁹¹ Independent grocers and farmers are driven out of business and the community is left with fewer jobs as stores consolidate and superfluous locations close, worsening the presence of food deserts.¹⁹² Both administrative action and legislative action are necessary to ensure market power does not continue to consolidate further in this area.

185. Walsh, *supra* note 30.

186. *Id.*

187. *Id.*

188. See Nicholas Kristof, *Abusing Chickens We Eat*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/opinion/nicholas-kristof-abusing-chickens-we-eat.html>.

189. See *Cows Forced to Live in Their Own Waste at Dairy Farm*, PETA INVESTIGATES (Mar. 28, 2024, 9:27 AM), <https://investigations.peta.org/north-carolina-dairy-farm/> [<https://perma.cc/ER6V-RMGL>].

190. See Nathaniel Meyersohn, *What This Mega Supermarket Merger Could Mean for Your Grocery Bills*, CNN BUS. (Oct. 17, 2022, 3:40 PM), <https://www.cnn.com/2022/10/17/business/kroger-albertsons-merger-groceries/index.html> [<https://perma.cc/49YC-SV67>].

191. Jessica Cusworth et al., *Retail Consolidation: Crisis Across the Food Chain*, FARM ACTION (June 8, 2023), <https://farmaction.us/2023/06/08/retail-consolidation-crisis-across-the-food-chain/> [<https://perma.cc/YGA6-NEPU>]; Shelby Vittek, *Why Supermarket Monopolies Are Bad for the Farm Economy*, AMBROOK RSCH. (Jan. 20, 2023), <https://ambrook.com/research/supply-chain/kroger-albertsons-merger-farmer-opposition> [<https://perma.cc/YK6Y-KMLX>].

192. Jenn McMillen, *Kroger, Albertsons and Food Desserts: Yes, We Should Worry*, FORBES (Nov. 9, 2022, 11:05 AM), <https://www.forbes.com/sites/jennmcmillen/2022/11/09/kroger-albertsons-and-food-deserts-yes-we-should-worry/?sh=724dfcc26e1e> [<https://perma.cc/TXC6-RGVQ>].

V. EFFORTS AND OPPORTUNITIES

Simply strengthening the antitrust laws alone will not solve the problem of excess private power or “cure the curse of bigness,” but it can restart the engines of the law and begin to restore the necessary check on private power.¹⁹³ The Obama Administration pledged to shift away from “lax enforcement” of antitrust laws.¹⁹⁴ The mid-2000s saw the DOJ and FTC charge industry titans who engaged in anticompetitive practices such as colluding to raise prices and creating monopolies.¹⁹⁵ However, little was done to tackle the continual rise of consolidation. In 2010, the USDA hosted five workshops on competition to hear farmers’ perspectives on the concentration of power in agricultural inputs, livestock slaughter, poultry production, and food retail.¹⁹⁶ Farmers pushed for updates to the PSA to protect farmers from retaliation by large companies.¹⁹⁷

The value of merger deals for a single year made history in 2015 with a record-breaking total value of over \$4.3 trillion.¹⁹⁸ In response, the Obama Administration issued an Executive Order on “Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy.”¹⁹⁹ The Executive Order sought to “ensur[e] that consumers and workers have access to the information needed to make informed choices” and promote competitive markets.²⁰⁰ It stressed that these goals must be shared across executive departments and agencies as a priority and could be achieved through “pro-competitive rulemaking and regulations, and by eliminating regulations that create barriers to or limit competition.”²⁰¹ Agencies and executive departments with the authority to enhance competition were directed to identify specific actions

193. WU, *supra* note 4, at 18.

194. Elizabeth Wasserman & Jonathan Allen, *Barack Obama, Trustbuster?*, POLITICO (Aug. 16, 2012, 12:23 PM), <https://www.politico.com/story/2012/08/barack-obama-trustbuster-079796> [<https://perma.cc/4PWP-78H2>].

195. *Id.*

196. Press Release, U.S. Dep’t of Just. Off. of Pub. Affs., Justice Department and USDA Set Dates for Workshops to Explore Competition and Regulatory Issues in the Agriculture Industry (Nov. 13, 2009), <https://www.justice.gov/opa/pr/justice-department-and-usda-set-dates-workshops-explore-competition-and-regulatory-issues> [<https://perma.cc/7ZKQ-ZYW7>].

197. See Leah Douglas, *Consolidation Is Eating Our Food Economy*, NEW AM. (May 5, 2016), <https://www.newamerica.org/weekly/consolidation-is-eating-our-food-economy/> [<https://perma.cc/9STY-BMJX>].

198. See Maureen Farrell, *2015 Becomes the Biggest M&A Year Ever*, WALL ST. J. (Dec. 3, 2015, 6:58 PM), <https://www.wsj.com/articles/2015-becomes-the-biggest-m-a-year-ever-1449187101>.

199. Exec. Order No. 13725, 81 Fed. Reg. 23417 (Apr. 15, 2016).

200. *Id.*

201. *Id.*

they could take to improve efforts to detect anticompetitive behavior like price fixing, exclusionary conduct, and blocking access to resources needed for market entry.²⁰² Likewise, agencies were directed to consult with interested parties to find ways to promote competition through rulemaking and regulations, to provide information necessary for informed decision-making, and to eliminate regulations that restrict competition without providing any benefit to the public.²⁰³

The Biden Administration has revisited the need to strengthen antitrust laws and increase competition for farmers and consumers alike. In July 2021, President Biden signed Executive Order 14036 on “Promoting Competition in the American Economy.”²⁰⁴ The Executive Order called federal agencies to order, setting 72 initiatives for federal agencies to carry out to address competition issues associated with corporate consolidation, particularly in the agricultural sector.²⁰⁵ The USDA was directed to consider promulgating new rules under the PSA to: (1) identify unfair, unjustly discriminatory, or deceptive practices in the livestock, meat, and poultry industries; (2) reinforce the fact that a farmer is not required to show industry-wide harm to establish a violation of the PSA; (3) prohibit unfair practices in poultry tournament systems; (4) update definitions for undue or unreasonable preferences, advantages, and disadvantages; and (5) adopt protections for farmers against retaliation.²⁰⁶ The Executive Order also established a White House Competition Council to execute a whole-of-government approach to promoting competition by “coordinat[ing] the federal government’s response to the rising power of large corporations in the economy.”²⁰⁷

In July 2023, the White House Competition Council announced two new actions aimed at promoting competition and lowering prices in food and agriculture.²⁰⁸ The first action, the Agricultural Competition Partnership, creates a

202. *Id.*

203. *Id.*

204. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

205. See ANDREW, *supra* note 7, at 4.

206. Exec. Order No. 14036, 86 Fed. Reg. at 36992–93.

207. Press Release, White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/> [https://perma.cc/2FZJ-TD9M].

208. Press Release, White House, Fact Sheet: White House Competition Council Announces New Actions to Lower Costs and Marks Second Anniversary of President Biden’s Executive Order on Competition (July 19, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/19/fact-sheet-white-house-competition-council-announces-new-actions-to-lower-costs-and-marks-second-anniversary-of-president-bidens-executive-order-on-competition/> [https://perma.cc/NA3X-M5FU].

partnership between the USDA and a bipartisan group of state Attorney Generals from 31 states and the District of Columbia that will have the authority to use all available state and federal legal enforcement tools to eradicate price-gouging and other anticompetitive practices in agricultural markets.²⁰⁹ The goal of the Agricultural Competition Partnership is to help lower food prices and promote competition in grocery, meat, poultry processing, and other agricultural markets where anticompetitive market structures have significantly contributed to increased prices and limited choices for consumers and producers.²¹⁰

For the second action, the FTC and the DOJ released proposed updated Merger Guidelines, open for public comment for 60 days.²¹¹ The Merger Guidelines “describe and guide the agencies’ review of mergers and acquisitions to determine compliance with federal antitrust laws” through a framework of 13 principles.²¹² The agencies may use a combination of principles when analyzing the competitive effects of a merger, as well as other guidelines the agencies see fit.²¹³ The proposed Merger Guidelines aim to expand and provide clarity on how mergers and acquisitions will be evaluated for competitive effect based on updated economic conditions.²¹⁴ The last time the Merger Guidelines were updated was in 2010.²¹⁵

The proposed Merger Guidelines aim to lower the HHI threshold for “highly concentrated” markets and the threshold for change in index due to a particular

209. *Id.*

210. Press Release, U.S. Dep’t of Agric., USDA Launches Historic Partnership with Bipartisan State Attorneys General to Help Reduce Anticompetitive Barriers Across Food, Agriculture Supply Chains (July 19, 2023), <https://www.usda.gov/media/press-releases/2023/07/19/usda-launches-historic-partnership-bipartisan-state-attorneys> [<https://perma.cc/E9V6-R27J>].

211. Press Release, Fed. Trade Comm’n, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023) [hereinafter Press Release, FTC and DOJ Seek Comment], <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines> [<https://perma.cc/L2L5-E6L2>].

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* *But see* Press Release, Fed. Trade Comm’n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary> [<https://perma.cc/979J-7LNV>] (in 2020, Vertical Merger Guidelines were issued, however, they were later withdrawn due to “unsound economic theories that are unsupported by the law or market realities” that contravened the Clayton Act).

merger that the agencies would find concerning.²¹⁶ In a press release on the proposed Merger Guidelines, Assistant Attorney General Jonathan Kanter from the Antitrust Division stated,

As markets and commercial realities change, it is vital that we adapt our law enforcement tools to keep pace so that we can protect competition in a manner that reflects the intricacies of our modern economy. Simply put, competition today looks different than it did 50 — or even 15 — years ago.²¹⁷

Additionally, the proposed Merger Guidelines aim to combine the guidelines for horizontal and vertical mergers, which have historically been analyzed separately.²¹⁸ Firms that produce multiple products have found it difficult to categorize certain mergers as only horizontal or only vertical.²¹⁹ By combining the guidelines, the merger analysis will look at how competition manifests in a particular market and whether the merger risks substantially lessening competition at that time or in the future.²²⁰

Federal agencies directed to take action against concentration and consolidation through strengthened antitrust enforcement have begun to step up. In July 2022, the DOJ, in close partnership with the USDA, filed a lawsuit against poultry growers to end a wage suppression conspiracy at poultry processing plants.²²¹ The alleged conspiracy involved three poultry processors and a data consulting firm that exchanged wage and benefit information and collaborated with competitors to make compensation decisions, actions that violated the Sherman Act.²²² Two of the poultry producers, Sanderson Farms and Wayne Farms, allegedly violated the PSA by pitting chicken growers against each other in a tournament system form of compensation.²²³ Additionally, consent decrees were filed with multiple poultry processors which, if approved, would:

216. *Protecting Competition Through Updated Merger Guidelines*, THE WHITE HOUSE COUNCIL OF ECON. ADVISERS (July 19, 2023), <https://www.whitehouse.gov/cea/written-materials/2023/07/19/protecting-competition-through-updated-merger-guidelines/> [<https://perma.cc/A872-PYRC>].

217. Press Release, FTC and DOJ Seek Comment, *supra* note 211.

218. *Protecting Competition Through Updated Merger Guidelines*, *supra* note 216.

219. *Id.*

220. *Id.*

221. Press Release, U.S. Dep't of Just., Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers (July 25, 2022), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy> [<https://perma.cc/FD58-MVUK>].

222. *Id.*

223. *Id.*

prohibit [poultry producers] from sharing competitively sensitive information about poultry processing plant workers' compensation. It would also:

Impose . . . a court-appointed compliance monitor who, for the next decade, will ensure their compliance with the terms of the decree;

Grant the court-appointed [compliance] monitor broad authority to ensure their compliance with all federal antitrust laws [related to] poultry processing facilities, workers at their poultry processing plants, . . . integrated poultry feed, hatcheries, transportation of poultry and poultry products, and the sale of poultry . . . ;

Permit the Antitrust Division to inspect the processors' facilities and interview employees to ensure compliance with the consent decree; and

Require the [poultry processors] to pay \$84.8 million, collectively, in restitution for poultry processing plant workers who were harmed by the information exchange conspiracy.²²⁴

Consent decrees specific to Sanderson Farms and Wayne Farms would prevent them from penalizing chicken growers based on performance when the processors control nearly all the inputs that determine a grower's success, require them to increase transparency in grower contracts, and prohibit them from retaliating against growers who alert the compliance monitor to antitrust concerns.²²⁵

It is encouraging to see the concerted effort among the Biden Administration and agencies like the USDA, the DOJ, and the FTC to address the deep-seated competition issues prevalent throughout the food supply chain.²²⁶ By continuing this trend of strengthening antitrust laws and increasing competition for farmers and consumers through proactive initiatives that focus on enforcement, the conduct that harms workers, farmers, other producers, and consumers throughout the food supply chain can be minimized.²²⁷

224. *Id.*

225. *Id.*

226. *See generally* Press Release, The Biden-Harris Plan, *supra* note 177; Press Release, FTC and DOJ Seek Comment, *supra* note 211.

227. *See generally* Press Release, The Biden-Harris Plan, *supra* note 177; Press Release, FTC and DOJ Seek Comment, *supra* note 211.

A. The Farm Bill

The Farm Bill is one of the major food and agricultural policy tools of the United States government.²²⁸ Every five years, Congress passes an omnibus bill, known as the Farm Bill, that reauthorizes a multitude of agricultural and food programs.²²⁹ Hearings and listening sessions are held across the country to gain input from the public about what they want to see in the next Farm Bill.²³⁰ Members of Congress who sit on the House Committees on Agriculture, Nutrition, and Forestry and the House Committee on Agriculture then draft the provisions of the bill.²³¹ The process provides an opportunity for stakeholders and coalitions to push for a better food and agricultural system.²³² Many organizations publish platforms on recommendations they have for programs and policies for Congress to consider when drafting the next Farm Bill.²³³ Several of these Farm Bill platforms have recommended strengthening antitrust enforcement and increasing competition for the 2023 Farm Bill.²³⁴ It has never been more important for Congress to fund provisions through the Farm Bill that address rising concentration and consolidation in the food system and hold agribusiness corporations accountable for anticompetitive practices while minimizing harm to farmers, farm workers, farmed animals, and consumers.²³⁵

To break up monopolies, enforce antitrust laws, and restore competition to the marketplace, policies such as merger moratorium bills, PSA rulemaking developments, and decreasing line speeds in meat processing plants should be included in the Farm Bill.²³⁶ Policies that further strengthen antitrust enforcement

228. RENÉE JOHNSON & JIM MONKE, CONG. RSCH. SERV., IF12047, FARM BILL PRIMER: WHAT IS THE FARM BILL? 1 (2024), <https://crsreports.congress.gov/product/pdf/IF/IF12047> [<https://perma.cc/HN5B-2MXG>].

229. *Id.*

230. *See The Farm Bill*, U.S. SENATE COMM. ON AGRIC., NUTRITION, & FORESTRY (Mar. 25, 2024, 4:33 PM), <https://www.agriculture.senate.gov/farm-bill> [<https://perma.cc/Q72W-QHL5>].

231. *See What Is the Farm Bill?*, NAT'L SUSTAINABLE AGRIC. COAL. (Apr. 1, 2024, 10:31 AM), <https://sustainableagriculture.net/our-work/campaigns/fbcampaign/what-is-the-farm-bill/> [<https://perma.cc/D57H-7Z8C>].

232. *Id.*

233. *See, e.g.*, LAND STEWARDSHIP PROJECT, LSP 2023 FARM BILL PLATFORM (2022), <https://landstewardshipproject.org/wp-content/uploads/Farm-Bill-Platform-2023-Final.pdf> [<https://perma.cc/3CDF-NTUG>].

234. *Id.* at 12.

235. *Id.* at 13.

236. *Id.* at 12.

include blocking anticompetitive mergers and acquisitions under the Clayton Act and providing full enforcement of the PSA.²³⁷

The Farm Bill can “increase corporate accountability [and] address food system consolidation” by holding the handful of industrial animal agriculture corporations that control the majority of livestock and poultry production accountable for the harms caused by the factory farm model.²³⁸ Supporting policies include “[c]reating transparency and allowing producers to participate in checkoff programs” voluntarily, placing a moratorium on new and expanding CAFOs, investing in higher-welfare farming, and providing funding for farmers to transition out of CAFOs.²³⁹

Reforming farm safety net programs could also help promote fair competition.²⁴⁰ First, traditional crop insurance requires a farmer to insure each crop individually, which benefits large monoculture producers rather than small to mid-sized farms.²⁴¹ An alternative safety net program called Whole Farm Revenue Protection (WFRP) insurance covers the revenue of all crops grown and livestock raised on an individual farm.²⁴² The Farm Bill should expand the WFRP program and increase accessibility for small and mid-sized farms.²⁴³ Such expansion would help those farms survive increasingly common extreme weather events and subsequent bad harvests, minimizing further concentration among large monoculture producers.²⁴⁴

Second, commodity and crop insurance programs disproportionately benefit larger established producers, many of whom grow commodity crops like corn, soy, or wheat.²⁴⁵ The current system has allowed such producers to expand further, amass greater resources, and all but guarantee their income through subsidies.²⁴⁶ As a result, the price of farmland has risen significantly, and it has become

237. FARM BILL L. ENTER., FARM VIABILITY 42 (2022), <https://www.farmbilllaw.org/wp-content/uploads/2022/07/Farm-Viability-Report.pdf> [<https://perma.cc/RZ26-6R9D>].

238. AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, BUILDING A MORE HUMANE FOOD SYSTEM THROUGH THE FARM BILL 4 (2023), https://www.aspc.org/sites/default/files/2023_farm_bill_policy_platform_final_digital_v5_1523_1.pdf [<https://perma.cc/F3JA-Q5M8>].

239. *Id.* at 4–6.

240. FARM BILL L. ENTER., *supra* note 237, at 28.

241. *Id.* at ii.

242. *Id.*

243. *Id.*

244. *See id.*

245. *Id.* at 29.

246. *Id.* at iv.

increasingly more difficult for small to mid-sized and beginning farmers to compete in agricultural markets.²⁴⁷ Congress can rebalance the system by reallocating funding to small and mid-sized farms that genuinely need the support and lowering the adjusted gross income cap to ensure producers with the highest incomes are not subsidizing their income.²⁴⁸

B. Other Legislative Efforts

Congress has a significant role in addressing consolidation and concentration in food and agriculture. It has the power to create new laws, or change existing ones, that promote competition and ensure consumer protection through legislation that minimizes or eliminates monopolistic practices and holds those who engage in anticompetitive behavior accountable for their actions. Significant recent activity aimed at addressing consolidation and concentration in food and agriculture in Congress align with the Biden Administration's approach to promoting competition.²⁴⁹ Many of the recent legislative proposals include provisions for strengthening enforcement of antitrust laws or increasing competition, several of which could be included in the 2023 Farm Bill.²⁵⁰

In May 2022, Senator Cory Booker (D-NJ), sponsored Senate Bill 4245, the Food and Agribusiness Merger Moratorium and Antitrust Review Act.²⁵¹ One of the major provisions of the bill would place a moratorium on large agricultural business acquisitions and establish a Food and Agriculture Concentration and Market Power Review Commission (the Commission).²⁵² The Commission would provide a report to both Congress and the President regarding the impact and effects of market concentration in the food and agriculture industry.²⁵³ Furthermore, the Commission would suggest legal and regulatory recommendations to combat market concentration.²⁵⁴ The moratorium would give Congress a chance to pass more comprehensive legislation to address market concentration in food and agriculture based on recommendations it receives from the Commission, at which time the moratorium would be lifted.²⁵⁵

247. *Id.*

248. *Id.* at 19.

249. *Id.* at 38.

250. *Id.* at 41.

251. S. 4245, 117th Cong. (2022).

252. *Id.* § 101.

253. *Id.* § 203(a).

254. *Id.* § 101.

255. Press Release, Cory Booker, Booker, Tester, Merkley, Warren Introduce Bill to Impose Moratorium on Large Agribusiness Mergers (May 18, 2022),

On February 2, 2023, a package of agricultural reform bills with provisions to address concentration and consolidation were introduced, including the Farm System Reform Act and Protecting America's Meatpacking Workers Act.²⁵⁶ Senate Bill 271, Title II of the Farm System Reform Act, and Senate Bill 270, the Protecting America's Meatpacking Workers Act, would amend definitions under the PSA related to poultry growing arrangements and add definitions for formula prices and forward contracts.²⁵⁷ Title II of the Farm System Reform Act would also strengthen the PSA by prohibiting unclear pricing terms in livestock contract sales; prohibiting unfair, discriminatory, and deceptive practices by packers, swine contractors, or live poultry dealers; prohibiting the use of tournament systems in poultry production; and prohibiting retaliatory action, coercion, or intimidation against livestock producers, swine production contract growers, or poultry growers.²⁵⁸

On February 9, 2023, Senator Jon Tester (D-MT) sponsored Senate Bill 346, the Meat and Poultry Special Investigator Act, that would establish an Office of the Special Investigator for Competition Matters (the Office) within the USDA.²⁵⁹ The Office would be required to "use all available tools, including subpoenas, to investigate and prosecute violators of the [PSA] . . . by packers and live poultry dealers with respect to competition and trade practices in the food and agriculture sector."²⁶⁰ Additionally, the Office would consult with the DOJ and the FTC on competition and trade practices and the Department of Homeland Security on national security and infrastructure security in food and agriculture.²⁶¹ The Special Investigator would have the authority to bring civil or administration actions against packers or live poultry dealers who violate the PSA.²⁶²

On February 28, 2023, Senator Mike Lee (R-UT) sponsored Senate Bill 557, the Opportunities for Fairness in Farming Act.²⁶³ Senate Bill 557 would require, among other things, greater transparency in agricultural commodity checkoff programs and prohibit employees and agents of a board that carries out a checkoff

<https://www.booker.senate.gov/news/press/booker-tester-merkley-warren-introduce-bill-to-impose-moratorium-on-large-agribusiness-mergers> [<https://perma.cc/8GLQ-UGZ5>].

256. S. 270, 118th Cong. (2023); S. 271, 118th Cong. (2023).

257. S. 270; S. 271.

258. S. 270 § 202; S. 271 § 202.

259. S. 346, 118th Cong. (2023); *Senator Jon Tester*, CONGRESS.GOV (Apr. 3, 2024, 10:29 AM), <https://www.congress.gov/member/jon-tester/T000464> [<https://perma.cc/68ZY-QPKT>].

260. S. 346 § 217(c)(1).

261. *Id.* § 217(c)(2)–(3).

262. *Id.* § 217(d)(1).

263. S. 557, 118th Cong. (2023); *Senator Mike Lee*, CONGRESS.GOV (Apr. 3, 2024, 10:39 AM), <https://www.congress.gov/member/mike-lee/L000577> [<https://perma.cc/ST93-HE44>].

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program from engaging in anticompetitive activities or unfair or deceptive practices.²⁶⁴

In March 2023, Senator Tina Smith (D-MN) sponsored Senate Bill 1020, the Livestock Consolidation Research Act.²⁶⁵ Senate Bill 1020 would “require the Administrator of the Economic Research Service to conduct research on consolidation and concentration in the livestock industry. . . .”²⁶⁶ The Administrator would be required to publish a report on concentration and consolidation in livestock, including beef, dairy, pork, and poultry (broilers, eggs, and turkeys), within a year of the publication of each Census of Agriculture.²⁶⁷ The report would include changes to the size and location of ranches, farms, processing facilities, and packers across the United States, as well as the financial impacts, market entry impacts, access to resource and input impacts, and dietary impacts such changes would have on farmers, ranchers, and downstream customers.²⁶⁸ The data for the report would come from data available to the Secretary of Agriculture, Food Safety and Inspection Service inspection records, and Packers and Stockyards Division packing plant data.²⁶⁹

A provision in Senate Bill 96, the Justice for Black Farmers Act of 2023, aims to help existing Black farmers and new Black farmers succeed by reforming our broken food system on a broad scale.²⁷⁰ Senate Bill 96 would substantially strengthen the PSA to stop abusive practices by meatpacking companies.²⁷¹ Proposed changes include changing the tournament systems in vertically integrated poultry production, altering spot markets for non-contract farmed animals, eliminating requirements for farmers or other plaintiffs to provide harm to competition to recover under the PSA, and allowing farmers who bring claims under the PSA to recover attorney fees.²⁷²

VI. CONCLUSION

A transformation of the food supply chain is needed to minimize harm to farmers, farm workers, farmed animals, and consumers and hold agribusiness corporations accountable for anticompetitive practices. Antitrust laws meant to

264. S. 557.

265. S. 1020, 118th Cong. (2023).

266. *Id.*

267. *Id.* § 2.

268. *Id.* § 2(a).

269. *Id.* § 2(b).

270. S. 96, 118th Cong. (2023).

271. *See generally id.*

272. *Id.*

address such practices have been weakened over time, but the efforts of the Biden Administration and the opportunities provided by the Farm Bill are a step in the right direction. The future looks promising for strengthening antitrust laws and enforcement mechanisms. Tackling the widespread competition and consolidation issues throughout the food supply chain will require a collaborative effort between agencies, industry players, and food and agricultural advocates alike. The impacts that concentration and consolidation have on the various players within the food supply chain must continue to be a priority to improve our food and agricultural system going forward.