CAMPAIGN FOR CONTRACT AGRICULTURE REFORM

a voice for contract farmers, ranchers and their communities

Written Testimony
of
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submitted to the
Subcommittee on Antitrust, Commercial, and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

for a hearing on

Reviving Competition, Part 5: Addressing the Effects of Economic Concentration on Americas Food Supply

January 19, 2022

Chairman Cicilline, Ranking Member Buck, and Members of the Subcommittee:

On behalf of the member organizations of the Campaign for Contract Agriculture Reform I thank you for holding this hearing and bringing needed attention to economic concentration in our nation's food system, and the negative impacts of that concentration on farmers, food chain workers, and consumers.

Currently, a handful of corporations control our food from farm to fork. Over the past fifty years, control of our food system has consolidated under the control of fewer and fewer multinational agribusiness corporations.

Unchecked consolidation and vertical integration create a dramatic imbalance of power between producers and corporations, allowing corporations to manipulate the marketplace, push down the prices paid to farmers and ranchers, and drive them out of business.

But the impact of consolidation goes beyond producers.

With fewer companies dominating the market, there is less competition and fairness for employees and the businesses that supply and service these companies, contributing to the destruction of rural economies.

All of us eat, and for eaters, extreme consolidation leads to fewer choices in the grocery aisle (despite the illusion of choice presented to us via marketing and branding), lower quality products, compromised food safety and higher prices.

And unbridled corporate power extends past the food system to our political system. Consolidation gives agribusiness corporations increasing political influence over the rules that govern our food system, devaluing farmers and ranchers, endangering worker and animal safety, damaging the environment and creating food safety concerns.

It doesn't have to be this way; corporate consolidation and concentration in the food system is not inevitable. With enforcement of existing laws, rules and regulations, as well as new, forward-thinking policies, agencies can create open, transparent and competitive markets that benefit independent producers, rural communities and eaters—not just corporate shareholders.

Agriculture is essential, and it is interconnected. How it is done affects not only the quality and safety of our food, but also our air, our water, our climate, the viability of rural economies, our relationships to the land, and the availability of natural resources to sustain generations to come.

The COVID-19 pandemic showed us clearly the critical value of our food system and the dangers of unchecked consolidation. The time for action to create and safeguard fair competition in our food system is now; we all depend on fair, open and transparent markets.

The Campaign for Contract Agriculture Reform (CCAR) is a national alliance of organizations working to advocate for the needs of farmers and ranchers involved in contract agriculture, and to promote federal policy reforms for fair and competitive markets in livestock and poultry more broadly. The member organizations of CCAR include Farm Aid, Farm and Ranch Freedom Alliance, Government Accountability Project/Food Integrity Campaign, National Family Farm Coalition, National Farmers Union, National Sustainable Agriculture Coalition, R-CALF USA, and Rural Advancement Foundation International (RAFI) USA.

CCAR believes

- Producers, communities and our country do better when we have a diversity of independent farmers and ranchers on the land.
- Fair, open and competitive markets are essential to a democratic and equitable food system.
- The impact of market concentration and monopoly power in the livestock sector is harmful to our country's farmers and ranchers, rural communities and eaters.
- Sound regulation is critical, and regulatory agencies have an obligation to farmers and ranchers, as well as eaters, to ensure a fair, open and competitive livestock sector.
- The U.S. Department of Agriculture (USDA), other agencies and Congress should work

> to increase competition; empower farmers to secure a fair price for their products; and protect farmers from unfair, deceptive and abusive practices in livestock markets.

The reason for CCAR's strongly held views on this issue is that the concentration of market control in the top four firms in U.S. food retailing, grain processing, red meat processing, poultry processing, milk processing, and nearly every category of food manufacturing is at an all-time high. Corporate mergers and buyouts have concentrated the power of these firms and increased their ability to unfairly manipulate market conditions in their favor. This unprecedented level of horizontal market consolidation effectively eliminates free market competition to the detriment of independent family farmers and consumers.

Compounding the problem associated with horizontal consolidation is the rapid trend toward vertical integration. Manufacturers, processors and packers increasingly control all stages of production and inventory through commodity ownership and one-sided contracts. This corporate control of production eliminates market transparency, creating an environment ripe for price manipulation and discrimination. It replaces farm-level decision making with centralized corporate planning and leaves farmers trapped in long-term debts tied to short-term, nonnegotiable production contracts. In addition, top retailers and packers increasingly engage in relationships with dominant suppliers that exclude smaller competitors and minimize price competition. Because the same few players in the market control both supply and demand, the basic principles of supply and demand cannot function.

A critical role of government is to protect competition and ensure fairness by facilitating properly operating markets and balance in the economic relationships among farmers/ranchers, consumers and food companies. Currently, inadequate federal legislation and the lack of enforcement of antitrust laws allow a handful of corporations to continue to consolidate market power, manipulate prices and create anti-competitive market structures. Federal government inaction has a dramatic, negative impact on not only farmers and ranchers, but also on rural communities, the environment, food quality, food safety and consumer welfare. The federal government's abdication of its oversight responsibilities undermines sustainable production practices and state and local laws that support family-scale, sustainable farm and ranch operations.

Policy makers often voice the laudable policy goals of maintaining a diverse, farm-and-ranch based production sector and providing consumers with a nutritious, abundant, and affordable food supply. However, government failure to redress industry concentration—both vertical and horizontal—is thwarting these policy goals and driving the earnings of farmers and ranchers down, consumer prices up, and very recently, leading to food shortages in U.S. grocery stores.

The food supply, and in particular the meat supply, in the United States has been vulnerable to disruption for decades due to the levels of corporate consolidation. This fragility has been exposed by the COVID-19 pandemic. Through this time, we've learned that what has been touted as "efficiency" in the food supply chain is often inversely related to resilience in the supply chain. For example, even as the CDC issued worker safety recommendations, the four major meatpacking companies continued to operate without adequate worker safety precautions

and their slaughterhouses became some of the worst COVID-19 hotspots in the country. When they had to close or slow down, their market dominance resulted in severe disruptions to the entire livestock supply chain. With just twelve slaughterhouses processing more than half the cattle in the country,[1] and similar concentrations in pork and poultry, problems in even just a few slaughterhouses can – and did – lead to a breakdown in the entire system nationwide.

Millions of pigs and chickens were euthanized because the shutdowns left nowhere for them to be processed, and most farmers lacked any other options for selling the animals.[2] Those farmers that sold their livestock rather than euthanize them received next to nothing for the animals. Livestock and poultry farmers who operate through contract arrangements with large vertically integrated processing firms have also experienced significant economic disruption related to the pandemic. At the same time, consumers found empty grocery store shelves, limits on the amount of meat they were allowed to buy, and skyrocketing meat prices. Months later, farmers and ranchers are still reeling from precipitous drops in prices paid for their livestock, while consumers continue to pay more for meat than any time before the pandemic.[3]

Despite the unfair playing field and challenges faced by family farmers under the current system, they still were at least partially successful in responding to the crisis in a way that the large corporate integrators could not. Farmers who were already selling direct to consumers worked tirelessly to meet the demand from their customers, while many more quickly shifted to direct-to-consumer sales, whether through farmers markets, online orders, or delivery services. These family farmers and ranchers helped to ensure that high quality food was still available in their communities, despite the many systemic and regulatory barriers in their way.

We urge you to recognize the need to address corporate consolidation and restore truly competitive, fair markets in agriculture. Doing so is vital to avoid another breakdown during the next crisis, whether it is due to a human pandemic, animal disease, climate events, oil prices, cyberattacks, or any other of the numerous possible triggers. We cannot afford to continue to have food system actors that are "too big to fail" because of corporate consolidation, disproportionate market power, and captured regulatory agencies.

This is not only about averting or responding to crises. The same reforms that will build a resilient food system that will not crack during the next crisis will also provide numerous benefits on an ongoing basis and restore the economic opportunities and vitality that have been lost throughout rural America. Family farmers and ranchers are the bedrock of our country and, under fair conditions, can provide abundant, affordable, safe, and healthy food, conserve the natural resources for the future, and rebuild prosperity in rural communities.

Because of the long-term failure of the federal government to adequately address economic concentration in our nation's food supply, the backlog of legislative and administration actions needed to address the impacts of this concentration are numerous.

[1] USDA Livestock Slaughter 2019 Summary (April 2020) at page 60.

[2] https://www.reuters.com/article/us-health-coronavirus-livestock-insight-idUSKCN2292YS

[3] https://www.washingtonpost.com/business/2020/08/04/grocery-prices-unemployed/

In that regard, our recommendations fall into the following areas:

1) Temporary moratorium on mergers in food and agriculture sector;
2) Statutory reforms in antitrust statutes to strengthen the Department of Justice (DOJ) authorities under the Clayton Act with regard to monopsony power, to increase resources for DOJ's Antitrust Division and the Federal Trade Commission, and to shift the burden of proof onto those firms proposing merger or acquisition activities;
3) Packers and Stockyards Act reforms and enforcement related contract poultry and hog production, as well as clarification of applicability of "competitive injury" requirements to Section 202(a) and (b) of the Act;
4) Additional Packers and Stockyards Act reforms and enforcement related to independent cattle, sheep, and hog markets**;**
5) Administrative enforcement authority for poultry under the Packers and Stockyards Act;
6) Coordination Between USDA, U.S. Department of Justice, Federal Trade Commission and the Government Accountability Office on Cattle Market Price Manipulation Investigations;
7) Prevent retaliation against farmer associations under the Agricultural Fair Practices Act;
8) Expanding local and regional meat processing options;
9) Building transparency into the labeling of imported food products, through elimination of loopholes in mandatory country of origin labeling (M-COOL).

While not all of these policy recommendations fall directly under the jurisdiction of this Subcommittee, they are all part of the broader panoply of recommendations that must be addressed by Congress and the Executive Branch if we are to set our nation's food system on a fairer and more resilient course.

1. <u>Temporary Moratorium on Large Mergers in Food and Agriculture Sector</u>

We urge the subcommittee to take actions to place a temporary moratorium on large food and agribusiness mergers until an Anti-trust Review Commission is formed, and its recommendations are acted upon by Congress and/or the Executive Branch. The approach is consistent with the *Food and Agribusiness Merger Moratorium and Anti-Trust Review Act of 2019*, as introduced by Senator Booker (S. 1596) and Rep. Pocan (H.R. 2933) in 2019.

While this approach may seem like a blunt instrument to address the vagaries of antitrust law, we believe that the decades of federal inaction in this arena require strong measures to be instituted until stronger competition policies, procedures and safeguards can be established.

The findings of the Booker-Pocan bill, as excepted below, make the strong case for this bold approach. These data have not been updated since 2019, so they do not reflect any changes that may have resulted during the COVID-19 pandemic.

“Concentration in the food and agriculture economy, including mergers, acquisitions, and other combinations and alliances among suppliers, packers, integrators, other food processors, distributors, and retailers has been accelerating at a rapid pace since the 1980s, and particularly since the 2007 through 2009 recession.

The trend toward greater concentration in food and agriculture has important and far-reaching implications not only for family farmers, but also for food chain workers, the food we eat, the communities we live in, and the integrity of the natural environment upon which we all depend.

In the past three decades, the top 4 largest pork packers have seized control of 71 percent of the market, up from 36 percent. Over the same period, the top 4 beef packers have expanded their market share from 32 percent to 85 percent. The top 4 flour millers have increased their market share from 40 percent to 64 percent. The market share of the top 4 soybean crushers has jumped from 54 percent to 79 percent, and the top 4 wet corn processors control of the market has increased from 63 percent to 86 percent.

Today the top 4 sheep, poultry, and fluid milk processors now control 57 percent, 53 percent, and 50 percent of the market, respectively. The top 4 grain companies today control as much as 90 percent of the global grain trade.

During the past 2 years there has been a wave of consolidation among global seed and crop-chemical firms, 3 companies now control nearly two thirds of the world's commodity crop seeds. Those same 3 companies now also control nearly 70 percent of all agricultural chemicals and pesticides.

In the United States, the 4 largest corn seed sellers accounted for 85 percent of the market in 2015, up from 60 percent in 2000. Over the past 20 years, the cost for an acre's worth of seeds for an average corn farmer has nearly quadrupled, and the cost of fertilizer has more than doubled. Yet corn yields increased only 36 percent over that time, and the price received for the sale of a bushel of corn increased only 31 percent.

A handful of firms dominate the processing of every major commodity. Many of them are vertically integrated, which means that they control successive stages of the food chain, from inputs to production to distribution. The growing number and scale of cross-border agribusiness and food mergers have put foreign firms, often with considerable government backing, into prominent and even dominant positions in the United States beef, hog, poultry, seed, fertilizer, and agrichemical sectors.

Growing concentration of the agricultural sector has restricted choices for farmers trying to sell their products. As the bargaining power of agribusiness firms over farmers increases, concentrated agricultural commodity markets are stacked against the farmer, with buyers of agricultural commodities often possessing regional dominance in the form of oligopsony or monopsony relative to sellers of such commodities.

The high concentration and consolidation of buyers in agricultural markets has resulted in the thinning of both cash and futures markets, thereby allowing dominant buyers to leverage their market shares to move those markets to the detriment of family farmers and ranchers.

Buyers with oligopsonistic or monopsonistic power have incentives to engage in unfair and discriminatory acts that cause farmers to receive less than a competitive price for their goods. At the same time, some Federal courts have incorrectly required a plaintiff to show harm to competition generally, in addition to harm to the individual farmer, when making a determination that an unfair, unjustly discriminatory, deceptive, or preferential act exists under the Packers and Stockyards Act of 1921.

The farmer's share of every retail dollar has plummeted from 41 percent in 1950, to less than 15 percent today, while the profit share for farm input, marketing, and processing companies has risen.

While agribusiness conglomerates are posting record earnings, farmers are facing desperate times. Since 2013, net farm income for United States farmers has fallen by more than half and median on-farm income was negative in 2017 and in 2018 and is expected to be negative again in 2019.

The benefits of low commodity prices are not being passed on to American consumers. The gap between what shoppers pay for food and what farmers are paid is growing wider.

The steadily rising price of food has outpaced growth in incomes for typical workers. Since the Great Recession, the annual growth of real prices for food at the supermarket have risen nearly 3 times faster than typical earnings.

There is growing consensus that economic consolidation contributes to the widening gap in economic opportunity in the United States and bigger, more dominant firms are more likely to deliver profits to investors than to raise wages or benefits. Mega-mergers in the food and agribusiness industries can lead to growing monopsony power abuse resulting in wage suppression, along with massive layoffs as companies shutter factories and facilities, harming working families and communities.

Concentration, low prices, anticompetitive practices, and other manipulations and abuses of the agricultural economy are driving small family farmers out of business. Farmers are going bankrupt or giving up, and few are taking their places; more farm families are having to rely on other jobs to stay afloat. Eighty-three percent of farm household income is expected to come from off-farm work this year, up from 53 percent in 1960.

Eighty-one percent of America's farmed cropland is now controlled by 15 percent of farms, and the number of farmers leaving the land will continue to increase unless and until these trends are reversed.

The decline of small family farms undermines the economies of rural communities across America; it has pushed Main Street businesses, from equipment suppliers to small banks, out of business or to the brink of insolvency.

Increased concentration in the agribusiness sector has a harmful effect on the environment; corporate hog farming, for example, threatens the integrity of local water supplies and creates noxious odors in neighboring communities. Concentration also can increase the risks to food safety and limit the biodiversity of plants and animals.

The decline of family farming poses a direct threat to American families and family values, by subjecting farm families to turmoil and stress. Farm advocates across the country are reporting an increase in farmer suicides over the past several years.

The decline of family farming causes the demise of rural communities, as stores lose customers, churches lose congregations, schools and clinics become under-used, career opportunities for young people dry up, and local inequalities of wealth and income grow wider.

These developments are not the result of inevitable market forces. Its problems arise rather from policies made in Washington, including farm, antitrust, and trade policies.

Past congressional action to remediate market failure, such as enacting country-of-origin labeling to provide transparency for domestic farmers, ranchers, and consumers regarding agricultural commodity origins, have been overturned for key commodities by oligopolistic conglomerates that use undifferentiated imports to reduce domestic farm prices.

To restore competition in the agricultural economy, and to increase the bargaining power and enhance economic prospects for family farmers, the trend toward concentration must be reversed."

Consistent with approach of the Booker-Pocan *Food and Agribusiness Merger Moratorium and Anti-Trust Review Act of 2019,* we urge the Subcommittee's support for legislation to:

a) Place a temporary moratorium on large agribusiness, food and beverage manufacturing, and grocery retail mergers.

b) Establish a Food and Agriculture Concentration and Market Power Review Commission to:

   -study the nature and consequences of concentration in America's food and agricultural economy; and

   - make recommendations on how to change underlying antitrust laws and other Federal laws and regulations to keep a fair and competitive agriculture marketplace for family farmers, other small and medium-sized agriculture producers, generally, and the communities of which they are a part.

c) Maintain the merger moratorium in place until actions are taken to implement the recommendations of the Commission.

2. **<u>Statutory Reforms to the Antitrust Statutes to Strengthen the Department of Justice (DOJ) and Federal Trade Commission (FTC) authorities and resources.</u>**

Congress should make statutory reforms to the core antitrust statutes to clarify DOJ's authority with regard to monopsony (buyer) power, to increase resources for DOJ's Antitrust Division and for the Federal Trade Commission, and to shift the burden of proof onto those firms proposing merger or acquisition activities.

Monopsony (buyer) power is much more relevant to farmers than monopoly (seller) power, because when the number of agribusiness buyers competing for farmers' products and/or services becomes too concentrated, the effect is to artificially reduce the prices farmers are paid, or to force farmers to agree to contracts of adhesion with terms that are grossly one-side and disadvantageous to the farmer or rancher. Unfortunately, antitrust regulators have historically been less attentive to monopsony power issues relative to monopoly power. The Clayton Act should, therefore, be amended to explicitly state that mergers and acquisitions that tend to create monopsony power are considered violations of the Act.

These issues, and many others, are addressed by legislation introduced in the Senate by Senator Klobuchar, the Competition and Antitrust Law Enforcement Reform Act (CALERA) (S. 225).

CALERA would do the following:

(1) enhance competition throughout the American economy by strengthening antitrust enforcement by the Department of Justice, the Federal Trade Commission, the State enforcement agencies, and private parties;

(2) revise the legal standard under section 7 of the Clayton Act to better enable enforcers to arrest the likely anticompetitive effects of harmful mergers in their incipiency, as Congress intended, by clarifying that the potential effects that may justify prohibiting a merger under the Clayton Act include lower quality, reduced choice, reduced innovation, the exclusion of competitors, or increased entry barriers, in addition to increased price to buyers or reduced price to sellers;

(3) amend the Clayton Act to clarify that an acquisition that tends to create a monopsony violates the Clayton Act;

(4) establish simple, cost-effective decision rules that require the parties to certain acquisitions that either significantly increase concentration or are extremely large bear the burden of establishing that the acquisition will not materially harm competition;

(5) prohibit and deter exclusionary conduct that harms competition, particularly by dominant firms;

(6) enable the Department of Justice and the Federal Trade Commission to seek civil monetary penalties, in addition to existing remedies, for violations of the Sherman Act;

(7) give the Department of Justice and the Federal Trade Commission additional financial resources and enforcement tools to craft remedies for individual violations that are effective to deter future unlawful conduct and proportionate to the gravity of the violation;

(8) provide further protections for those who provide evidence of anticompetitive conduct to government enforcers and potential financial rewards for whistleblowers who provide information to the government that leads to a criminal fine; and

(9) grant successful antitrust plaintiffs the right to obtain prejudgment interest on damages awards to further deter anticompetitive conduct and more fully compensate injured parties.

We urge the introduction of a House companion to the Senate CALERA bill, and for the Subcommittee to pass such legislation.

3. **Packers and Stockyards Act (PSA) Reforms and Enforcement for Contract Poultry and Hog Production, as well as clarification of applicability of "competitive injury" requirements to Section 202(a) and (b) of the Act.**

With the rapid acceleration of vertical integration in agricultural production, farmers are increasingly producing agricultural products under contract with large processors. In many cases, particularly in the livestock and poultry sector, the farmer never actually owns the animals they produce, but instead makes extremely large capital investments on their own land to build the facilities necessary to raise animals for an "integrator."

Under such arrangements, farmers and growers are often given take-it-or-leave-it, non-negotiable contracts, with language drafted by the integrator in a manner designed to maximize the company's profits and shift risk to the grower.

Today's agricultural markets are highly concentrated with less than a handful of national and multi-national firms controlling the majority of the market for many commodities. At the local level, this means a single processing firm is often the only marketing option for a farmer or rancher, completely eliminating any competition for the farmers' products or services.

In many parts of rural America, farmers have few options but to do business with livestock and poultry integrators. The combination of industry consolidation and vertical integration creates the opportunity for abusive contract terms. This same combination also creates bottlenecks in the supply chain that could be alleviated by having a more diverse set of processors, including cooperative processors, as well as encouraging production models that allow farmers more independence in their production decisions.

Due to the large investments made in a contract livestock facility, farmers often have little choice but to sign the contract presented to them, or accept bankruptcy. The legal term for such contracts is "contract of adhesion." As contracts of adhesion become more commonplace in agriculture, the abuses that often characterize such contracts are also becoming more commonplace and more egregious.

While the Sherman and Clayton Acts address the broader antitrust landscape that governs mergers as well as anti-competitive abuses of market power by firms, Congress later passed the Packers and Stockyards Act (PSA) in 1921 to give USDA authority to prohibit abusive practices by meatpackers, and later by live poultry dealers and swine contractors, against individual farmers. Sections 202(a)[4] and (b)[5] of the Act are particularly relevant in this regard. We therefore believe that the PSA is correct statute to use in addressing many of the abusive contacting issues in livestock and poultry markets.

We were very pleased, therefore, when President Biden signed a July 9, 2021 Executive Order (EO) Promoting Competition in the American Economy. The EO directed federal agencies, including the U.S. Department of Agriculture, to take action on 72 different policy initiatives to promote fair and competitive markets. Included in the EO is language directing USDA to publish a package of three Packers and Stockyards Act regulations. Those rules include:

a) A rule clarifying that a demonstration of harm to competition is not always required to prove a violation of the farmer protection parts of the Packers and Stockyards Act. If a meatpacker or poultry company abuses a farmer by using deceptive, unfair, or unduly preferential practices, the statute does not require the farmer to demonstrate that the harm they suffered also harms competition throughout the entire sector.

b) A rule to implement reforms to the payment system, deceptively called the “tournament” system, used by poultry companies to pay contract poultry growers. Reforms are needed because the current system unfairly shifts risk away onto poultry growers, and pays them based on the variable quality of inputs provided by the poultry company and out of the control of the grower.

c) A rule to provide more clarity about what meatpacker, swine contractor or poultry company conduct will be considered illegal under the Packers and Stockyards Act.

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[4] Section 202(a) of the Packers and Stockyards Act (PSA) states that it “shall be unlawful for 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, to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device;”

[5] Section 202(b) of the Packers and Stockyards Act (PSA) states that it is “unlawful for any packer or swine contractor with respect to livestock, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to make or give an undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.”

We greatly appreciate President Biden's commitment on this matter and applaud Secretary Vilsack's numerous public statements committing to issuing the three new proposed PSA rules later this year. We strongly support this effort, urge USDA to move as expeditiously as possible to promulgate the rules, and urge members of this subcommittee to support those efforts.

4. Additional Packers and Stockyards Act Reforms and Enforcement Related to Independent Cattle, Sheep, and Hog Markets

End Cattle Procurement Manipulation Resulting from Packer Ownership and Control of Livestock and Other Captive Supplies

The fewer packers there are to compete for cattle, hogs, and sheep the more control they have over the producers' ability to timely access the market and the greater their ability to drive down prices through the use of new livestock procurement tools. These new procurement tools allow packers to remove slaughter-ready livestock from the marketplace without ever establishing a price, thus thinning the very market that determines the base price for virtually all. As a result, livestock producers are relegated to selling into a market that not only lacks competition; but also, is highly susceptible to manipulation. These new procurement tools are known as "captive supplies" because the livestock are either owned or controlled by packers without ever contributing to price discovery.

There are two main types of captive supplies:

1) cattle, sheep, and hogs owned by packers in feedlots and confinement facilities; and

2) cattle, sheep, and hogs procured by packers through several types of forward contracts and marketing agreements, collectively known as alternative marketing arrangements.

In our concentrated livestock markets, buyers (the packers) can—and do—use captive supplies to manipulate markets. By calling on captive supplies to fill slaughter needs, packers avoid having to bid for cattle, sheep, or hogs in an open, public manner. This creates a false period of low demand causing prices to be driven lower. Contracting cattle for future delivery is not, in itself, anticompetitive. However, packers use a contract method known as "formula pricing" in which feeders are enticed to commit their cattle through a contract that does not contain a negotiated price. Instead, the contract price is determined by a formula that is itself tied to a previous cash price and that is only determined after the cattle are removed from the competitive marketplace. For example, a packer might offer the producer 50 cents per hundredweight over the average cash market price paid by the packer during the week before the producer's cattle are actually delivered. Meanwhile, packers either own or have forward contracted enough cattle so they do not need to purchase significant numbers of cattle during the week before delivery, thus reducing the average cash market price upon which the contract is based. The result is that the cattle feeder receives a price lower than what a competitive market would predict, even with what appeared to be a premium offered to the cattle feeder.

In an unpublished 2014 investigative report by the Packers and Stockyards Division (PSD) of the U.S. Department of Agriculture (formerly the Grain Inspection Packers and Stockyards Administration, or GIPSA), titled *Investigation of Beef Packers' Use of Alternative Marketing Arrangements*, the agency, which has historically refused to interfere with the packers' use of captive supplies, nevertheless found that, based on 2009 data, when the volume of cattle procured in the competitive cash market was approximately 40% – meaning approximately 60% of the cattle were procured through captive supplies – that the captive supplies depressed the prices paid for cattle in the competitive cash market. Based solely on PSD's findings, we estimate that nationwide domestic cattle prices in the cash market were reduced by as much as $33.28 per head (based on a 1,300 lb. steer) in 2009, which resulted in an estimated $869 million loss to the nation's cattle producers in that year alone (based on 26.1 million head of steers and heifers slaughtered in 2009).

Since 2009, the volume of cattle procured through captive supply arrangement has increased dramatically. In 2018 the volume of captive supplies reported by USDA was approximately 75%.

Two events occurred since 2019, a fire in a Tyson-owned packing plant and the COVID-19 pandemic, that brought intense awareness to the ongoing lack of competition in the nation's livestock procurement market, which manifested as historically high consumer beef prices while cattle prices remained seriously depressed. This outcome resulted in the introduction of bipartisan legislation by Senators Grassley and Tester (S. 949) to prevent packers from achieving captive supply levels above 50%, which represents a meaningful solution to the chronic erosion of competition in the U.S. cattle market.

We recommend that Congress:

a) Strongly support the Grassley-Tester bill (S. 949) to prevent packers from achieving captive supply levels above 50%, which represents a meaningful solution to the chronic erosion of competition in the U.S. cattle market.

b) Prohibit the use of unpriced forward contracts, *i.e.*, any contract, including a formula contract, that does not contain a firm base price for livestock that can be equated to a fixed dollar amount on the day on which the forward contract was entered into.

c) Prohibit packers owning multiple plants from owning or controlling livestock for more than seven days before slaughter.

5. Amend the Packers and Stockyards Act to Grant USDA Administrative Enforcement Authority for Poultry

The Packers and Stockyards Act (P&SA) makes it unlawful for a livestock packer or live poultry dealer "to engage in or use any unfair, unjustly discriminatory or deceptive practice or device," or "to give any undue or unreasonable advantage to any particular person or locality..." [Section

202(a) and (b)]. However, USDA Agricultural Marketing Service's Packers and Stockyards Division (PSD) has no administrative enforcement authority to stop the prohibited practices or penalize poultry dealers.

When violations of the P&SA are discovered in the *livestock* industry, PSD has the authority to take administrative actions, including holding hearings and assessing civil and criminal penalties. When violations of the Act are discovered in the *poultry* industry, PSDA can only issue an order to cease illegal conduct. After an investigation, PSD can send a complaint to the Justice Department for prosecution, but such individual poultry cases are rarely considered a priority by the DOJ. From the poultry company's perspective, breaking the law and increasing company profits through fraudulent or deceptive practices carries little financial or legal risk.

The Clinton, Bush and Obama Administrations each supported legislation to give PSD (formerly GIPSA) full enforcement authority over poultry, to parallel the agency's authority to address unfair and deceptive trade practices in the livestock and swine sectors.

In addition, the poultry provisions of the Packers and Stockyards Act have been misinterpreted by GIPSA, and now PSD, to apply only to protections for growers of broilers, to the exclusion of growers of breeder hens and pullets, an important part of the poultry production chain. Poultry production has several stages. Before a group of breeder hens are of laying age, they are raised on a pullet farm. After the pullets reach laying age, they are moved to a breeder farm where the hens produce eggs that are collected and trucked to the hatchery. Once the eggs hatch, the chicks are delivered to a broiler farm where they are raised until ready for processing.

In this regard, we recommend that Congress pass legislation to give:

a) Grant USDA administrative enforcement authority over live poultry dealers, similar to Section 10202 of the Senate version of the 2008 Farm Bill (H.R. 2419); and

b) Grant the authority and discretion to any district court of the United States of competent jurisdiction by amending (7 USC § 209) to allow reasonable attorney's fee as part of the costs of the prevailing party. This change would be consistent with the powers previously granted district courts under the Agricultural Fair Practices Act.

c) Clarify, either through regulatory change or through proposed statutory change, that the protections of the PSA apply equally to breeder hen and pullet growers, as they do to broiler growers.

6) <u>Ensure Coordination Between USDA, U.S. Department of Justice, Federal Trade Commission and the Government Accountability Office on Cattle Market Price Manipulation Investigations</u>

The USDA Packers and Stockyards Division (PSD) (formerly Packers and Stockyards Administration (P&SA)), together with the Government Accountability Office (GAO) have

completed numerous investigations into the cattle market since at least 1996 and concluded in each investigation that they could not find any unlawful conduct by the packers. However, in the agency's most recent investigations, they disclose that they lack the substantive investigative and enforcement tools necessary to conduct a thorough and probing investigation into the packers' purchasing conduct.

For example, in its July 2014 investigative report *Investigation of Beef Packers' Use of* Alternative *Marketing Arrangements, Investigation of Beef Packers' Use of Alternative Marketing Arrangements* the P&SA (now the PSD) concluded, as it did in many previous investigative reports, that its investigation did not find any violations of the law. However, in its July 22, 2020 *Boxed Beef & Fed Cattle Price Spread Investigation Report,* the P&SA stated it did not "examine potential violations of the Packers and Stockyards Act." It later explained that it lacked the substantive investigative and enforcement authority with which to determine whether the packers were violating the law: "For example, the ability to issue Civil Investigative Demands ("CIDs") with respect to unfair or deceptive acts or practices would bring USDA's authorities in line with those of the Federal Trade Commission (FTC) and DOJ."

Similarly, in its 2018 report of the unprecedented 2015 collapse of U.S. cattle prices, the GAO in its innocuously titled report *Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market* stated the scope of its analysis "did not include a review of whether packers engaged in anticompetitive behavior," and further stated that "[s]uch specific investigations would typically be carried out by entities with subpoena authority such as the Federal Trade Commission or the Antitrust Division in the Department of Justice."

In other words, U.S. cattle producers, for longer than a decade, have been relying on agencies that purported to have sufficient authority to issue their conclusions that the cattle markets were functioning properly and in accordance with the law while, in fact, those agencies lacked the substantive investigative and enforcement tools necessary to substantiate those conclusions. This systemic problem has caused Congress to ignore for decades the complaints that were regularly submitted by America's farmers and ranchers, and further preempted any congressional efforts to remedy serious structural problems within livestock markets. Rhetorically, why should they seek any reforms when the agencies purporting to oversee the marketplace consistently conclude that all is well?

Beginning after the market-disrupting fire in a Tyson-owned packing plant in August 2019, and the additional market disruptions occurring after the onset of the COVID-19 pandemic, there is now an unprecedented focus on the livestock industry's fundamentally broken market and state attorneys general, members of Congress, and even the former President of the United States have called for new investigations by the USDA PSD, the DOJ, and the FTC into the cattle market in particular. While these calls for new investigations are welcome, these efforts are "too little too late" to achieve the stated goal of supporting and strengthening America's family farm and ranch system of agriculture because, today, only a skeleton of that system remains.

Therefore, we recommend that Congress:

a) Ensure that the USDA Packers and Stockyards Division (PSD), the DOJ, and the FTC utilize all available resources to conduct thorough, probing investigations into all U.S. livestock and poultry markets and to take rigorous enforcement action against any entities found to be in violation of U.S. antitrust laws and other laws intended to protect, preserve, and foster competition.

b) Ensure that investigations by the above-mentioned agencies are sufficient to additionally identify conditions, practices and conduct in U.S. livestock and poultry markets that impede the United States' ability to strengthen the United States' family farm and ranch system of agriculture for purposes of informing the Administration as to the need to institute statutory and regulatory reforms to eliminate such impediments.

7. <u>Prevent Retaliation Against Farmer Associations Under Agricultural Fair Practices Act</u>

Historically, one of the ways that farmers have been able to gain and maintain leverage in the marketplace is to join together in cooperatives and associations. Understanding this dynamic, processors and handlers during the 1950s and 1960s sought to discourage farmers from forming producer associations that would allow them to gain bargaining power.

Responding to the retaliatory practices of processors, the Agricultural Fair Practices Act (AFPA) of 1967 was passed by Congress to ensure that family farmers could join together in associations and cooperatives to market their produce without fear of interference or retribution from processors. Unfortunately, loopholes in the legislation and changes in markets are making it increasingly difficult for producers to organize and attain a fair price for their products.

One of the biggest shortfalls of the AFPA is that handlers are not required to bargain in good faith with producer associations. Legislation requiring good faith bargaining will give associations the leverage to compel negotiations. It provides farmers a means of participation in contract negotiations with processors, participation that is reflective of the farmers' substantial financial investments in the industry.

While the Act prohibits processors from discriminating against producers simply because they are part of an association, it includes a disclaimer clause permitting the processors to refuse to do business with a producer for *any* other reason. This makes discrimination based on a producer's membership in an association extremely easy to disguise.

Therefore, we recommend that Congress:

a) take actions to require USDA to start monitoring compliance with the Agricultural Fair Practices Act (AFPA) and take enforcement action for clear instances where growers are being retaliated against based on their leadership or membership in producer associations.

b) Pass legislation to amend the Agricultural Fair Practices Act, to repeal the disclaimer clause and require good faith bargaining by processors and handlers with producer associations.

8. Expanding Local and Regional Meat Processing Options

Build a Resilient Meat Processing Supply through USDA's Food Safety Inspection Service (FSIS) Regulatory Flexibilities and Inspection Fee Financial Relief for Small-and-Very-Small Plants Serving Local and Regional Markets, including Differentiated Markets

One of the top concerns of smaller independent meat producers is the unavailability of meat processors, due to the combination of industry consolidation and one-size-fits-all regulations that make it difficult for farmers and ranchers to produce and sell meat.

The top four beef processors control approximately 80-85 percent of the U.S. meat supply. The top four pork processors account for approximately 71 percent of the U.S. market. This consolidation of our meat supply in the hands of a few large companies is reflected in consolidation of meat processing in fewer and larger slaughter and processing facilities.

COVID -19 has exposed the problems with this system. With just twelve slaughterhouses processing more than half the cattle in the country[6], and similar concentrations in pork and poultry, problems in even just a few slaughterhouses can – and did – lead to a breakdown in the system nationwide. The closure of one or more of the nation's large plants can dramatically impact livestock markets and have a serious impact on the nation's meat supply.

Independent farmers can be a large part of the solution to the nation's meat supply, yet they lack feasible access to approved processing facilities. First, there are multiple challenges and roadblocks for USDA-inspected facilities. USDA should prioritize measures to support small-scale slaughter and processing facilities, which would benefit small farmers, help decentralize the country's meat supply and reduce processing bottlenecks, and help producers meet the demand for pasture-based, humanely raised, organic, and/or locally and regionally produced meat and poultry products. The measures specified below would reform FSIS' inspection system, regulations, technical assistance initiatives, and label approval system.

Second, there is the issue of federal limitations on state-inspected facilities. FSIS allows states that meet the strict requirements to inspect meat and poultry. FSIS conducts annual reviews of state inspection programs to ensure they are "at least equal to" federal inspection. Yet meat processed under state inspection is limited to intrastate commerce only. Twenty-seven states have a state inspection program, but products processed at these approximately 1,900 small state-inspected plants are not allowed to be sold across state lines. Allowing for interstate sales of meat processed in state-inspected facilities would open new market opportunities for farmers and ranchers that rely on state-inspected plants to process their products. These products are safe

[6] USDA Livestock Slaughter 2019 Summary (April 2020) at page 60.

and fully traceable back to the processor and will provide consumers with more local and regional meat and poultry options.

In this regard, we recommend that Congress:

a) Expand options for state-inspected plants by supporting legislation to allow state-inspected meat to be sold across state lines. Specifically, Congress should pass legislation such as New Markets for State-Inspected Meat and Poultry Act (S.107), or the Expanding Markets for State-inspected Meat Processors Act of 2021 (H.R. 1998 and H.R. 5246) In addition, USDA should ask states that are eligible, but not yet a part of the Cooperative Interstate Shipment (CIS) program, for input on the barriers to, or concerns with, adoption of the program and report this information to the House and Senate Agriculture Committees.

b) Ensure Fair Inspections and Address the Bias Against Small USDA-Inspected Plants

The USDA's Food Safety Inspection Service (FSIS) regulations cover very small processing plants that process a dozen animals a week, as well as mega-plants that process hundreds of animals each hour. It is vital that the agency ensure that its regulations are interpreted and applied in a manner that does not inappropriately or unfairly burden the small processors. FSIS should take the following steps to help reach that goal:

a) Allow state-inspected plants to be federally inspected on a specific day(s) of the week, depending on the capacity and needs of small plants;
b) Develop a continuing education program for inspectors specific to small-and-very-small plants, and include plant operators in the design of the program;
c) Incorporate the scale of risk into testing requirements and incorporate product volume as the testing determinant. Revise the pathogen-testing and process-control regimes to ensure sample size proportions are the same for large and small plants;
d) Reduce the expense and difficulty in developing HACCPs by:
-identifying HACCP control points for different types of products and ensure consistent application across the country;
-creating model HACCP plans for multiple types of small plants, including models for different types of operations and different products, and make available on the FSIS website; and,
-establishing a searchable database of all the peer-reviewed validation studies, which are currently expensive and difficult for small plants to find because they are often behind journal paywalls.
e) Research restructuring the FSIS Public Health Veterinarian (PHV) in-plant positions to allow professionals with a relevant masters or PhD, including an Animal Science, Food Science, Meat Science or Public Health degree, to fill empty PHV in-plant positions in small and very small plants.

f) Ensure the National Advisory Committee on Meat and Poultry Inspection has at least an equal number of independently owned, small plant stakeholders serving on the Committee as the largest meat and poultry companies.
g) Ensure consistent enforcement of the humane slaughter requirements. Provide outreach to small plants who do not have a robust systematic approach and assist them to create one. There should be clear guidance addressing what constitutes a "robust systemic approach" for small plants, including clear instructions on what Inspection Program Personnel look for when assessing a robust systematic approach plan.
h) Convene a task force of FSIS personnel, small processors, leading authorities on the implementation of Humane Slaughter (livestock) and Good Commercial Practices (poultry) requirements, to evaluate training, implementation, and enforcement considerations for humane handling requirements at small and very small plants.
i) Create an Implementation Plan focused on the study required by Section 12107 of the 2018 Farm Bill, which requires USDA to enter into a contract with a college or university "to review the effectiveness of existing Food Safety and Inspection Service guidance materials and other tools used by small and very small establishments." Many of the recommendations above were developed during the discussions related to the report. The final report is expected in early 2021 and we encourage the Administration to focus on developing a plan to implement all recommendations in the report by 2025.
j) Improve enforcement of meat label claims. Inconsistent labeling misleads and confuses consumers. It also disadvantages high-quality producers, since products labeled with the same claim are not necessarily produced under the same standards. In contrast, consistent, clear, stakeholder-supported labels can help to facilitate safe, fair, and competitive marketplaces.

2) Address Funding Issues Related to Inspection Costs

FSIS faces ongoing funding and staffing issues that are particularly damaging for small-and very-small plants. The failure to fill inspector positions creates a sometimes-insurmountable barrier for small-and-very-small plants to be approved and operate, since they must have an inspector on-site at all times. Moreover, the shortage of inspectors reinforces agency bias in favor of large-scale operations. Finally, requiring plants to pay inspectors' overtime fees creates a financial burden on small and very small plants. The agency should take the following steps:

a) Designate funding specifically for inspections of small-and-very-small plants, to reduce the budgetary incentives to focus on large plants.
b) Implement a plan to increase professional and salary growth within the FSIS inspector workforce.
c) Take immediate action to reduce small-and-very-small plant overtime fees within the current funding. Develop a decision memo for the Secretary with a range of possible approaches to reducing the financial burden of inspector overtime charges for very small plants.

d) Overtime due to travel time should be paid by the agency, not the processor, so as not to discourage the establishment of plants in remote areas where processing capacity is needed.
e) Set in motion a four-year plan to reduce small-and-very-small plant overtime fees by requesting the funds needed to eliminate fees for very small plants and reduce fees by 75% for small plants by 2025.

Financial Assistance for Constructing New Meat Processing Plants or Expanding Existing Plants

To address the supply chain bottlenecks associated the concentration in U.S. meat processing, we recommend USDA financial resources (both grants and loans) be dedicated to:

a) Expand existing state-inspected and federally inspected meat processing plants.
b) Build new plants to expand geographic diversity of meat processing

Prior to any financial assistance being provided for meat processing infrastructure expansion, USDA should conduct an assessment of the market needs, with a particular focus on ensuring adequate access to meat processing facilities in all regions of the country. Priority should be given to farmer-owned cooperative models of meat processing, to allow the livestock farmers whose animals are processed at the facility to retain a greater share of the value of their product. USDA funding should also be made available for feasibility studies to be conducted by those entities exploring the construction of a new plant or expansion of an existing plant.

9. Eliminate Loopholes in Country-of-Origin Labeling

With increased globalization, food products produced by U.S. farmers and ranchers face ever increasing competition from imported food products that are hard to distinguish from domestic products. As a result, U.S. farmers and ranchers are relegated to mere suppliers of generic commodities, rather than producers of high-quality products produced under United States' production standards. Consumers from any country, who value transparency in the marketplace, similarly are relegated to mere purchasers of generic commodities, unable to exercise choice regarding the country or countries where they want their food grown.

The solution to this impediment to competition and transparency is to distinguish food products according to their origin with a mandatory country-of-origin label (M-COOL). With M-COOL, U.S. farmers and ranchers can promote their domestic products based on their U.S. attributes, including being produced under U.S. production, safety and quality standards. There are many reasons why consumers want greater transparency about where their food is raised. Some may prefer to support their local economy and their domestic food industry, to choose products created in countries in which they have the most confidence, to shorten the supply chain from farm to plate, to mitigate climate change, to have more confidence in worker treatment, etc. In short, COOL facilitates competition by differentiating products based on their origins and it empowers consumers to exercise choice in the marketplace based on origin information.

Without mandatory country-of-origin labeling, meatpackers and retailers are unilaterally deciding from which country or countries domestic supply chains they will source their beef. With M-COOL, consumers are empowered to choose from which country's domestic supply chain the meatpackers and retailers must source their beef based on consumer purchasing decisions. Thus, country of origin labeling empowers consumers to choose to strengthen the U.S. supply chain by purchasing meat exclusively born, raised, and harvested in the United States. And doing so will increase demand for U.S. livestock, causing an increase to both the number of livestock in the domestic supply chain and the number of producers that raise livestock. Increasing both domestic livestock numbers and producers of livestock will make the domestic meat supply chain more resilient with respect to the availability of livestock as well as the geographical distribution of where those livestock are raised (presuming the additional producers will fan-out from existing livestock production locations).

A broad-based coalition of consumer, farmer/rancher, commodity, faith-based and rural groups successfully supported a mandatory COOL law in the 2002 Farm Bill. However, COOL was outwardly opposed by the Bush Administration and by food-processing industries and their affiliated trade associations. By 2008, only COOL for fish and shellfish had been implemented. Congress then amended the COOL law in the 2008 Farm Bill by adding additional commodities, simplifying and reducing record keeping requirements, and by reducing penalties to no more than $1,000 per violation.

On March 16, 2009, COOL was finally implemented for a wide range of covered food commodities. Covered commodities include fresh and frozen fruits and vegetables; wild and farm-raised fish and shellfish; muscle cuts and ground meat: beef, pork, lamb, chicken, and goat meat; macadamia nuts; pecans; ginseng; and peanuts. It excluded commodities sold in food service establishments, and for meat, the COOL law reserved the USA label only for meat derived from animals that were exclusively born, raised and slaughtered in the United States.

In a 2012 ruling on a complaint filed by Canada and Mexico, along with third parties (Australia, Brazil, Colombia, European Union, Guatemala, Japan, and South Korea), the World Trade Organization (WTO) ruled that the manner by which the COOL law was implemented discriminated against imported live cattle and hogs from Canada and/or Mexico. The U.S. Department of Agriculture (USDA) responded by amending its regulations on May 23, 2013 to, among other things, require that meat labels designate each of the three production steps for meat: where the animal had been born, raised, and slaughtered.

This amendment prompted a 2013 federal lawsuit by COOL opponents, primarily the meatpacking trade associations, including the National Cattlemen's Beef Association (NCBA) and the North American Meat Institute (formerly American Meat Institute). The federal district court decision, upheld by the federal appellate court, determined that the amended COOL law complied with the U.S. Constitution and USDA had the statutory authority to issue the amended rule.

But the ongoing WTO dispute nevertheless proved fatal to the COOL law's application to labeling beef and pork as to their country of origin. In 2015 the WTO upheld its previous determination and authorized Canada and Mexico to institute retaliatory tariffs on commodities not a part of the WTO dispute in an effort to pressure the United States to capitulate by eliminating beef and pork from among the commodities subject to the COOL law.

In its 2016 omnibus appropriations bill passed in December 2015, Congress did just that by eliminating beef and pork from the COOL statute. The USDA followed with a final rule on March 2, 2016, effectively eliminating beef and pork from its COOL regulations.

Presently, beef and pork are the only outlying commodities no longer subject to the COOL law's requirement that consumers be informed of the country of origin of the food they purchase for themselves and their families at retail.

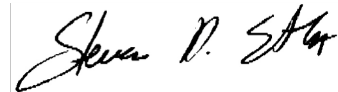
We recommend that Congress pass the Mandatory Country-of-Origin Labeling (M-COOL) (S. 2716), as introduced in the Senate by Senators Thune, Tester, Rounds, and Booker. No house companion bill has been introduced yet.

S. 2716 bill reinstates beef as among the numerous food commodities currently subject to the United States mandatory country-of-origin labeling (M-COOL) law that was originally passed by Congress in the 2002 Farm Bill.

To address the WTO compliance concerns, the reinstatement of beef into the existing M-COOL law will occur no later than one-year after S.2716 is enacted. In the event the U.S. Trade Ambassador and U.S. Secretary of Agriculture develop a means of implementing S.2716 in a manner compliant with World Trade Organization (WTO) rules, the bill authorizes the two presidential cabinet members to implement the measure any time after the bill's enactment, but no later than its one-year anniversary date.

Thank you for the opportunity to provide testimony on this important matter.

Sincerely,



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