

December 21, 2021

Hon. Tom Vilsack
Andrew Green
United States Department of Agriculture
1400 Independence Ave, SW Room 1643-S
Washington, DC 20250-3604

RE: Strengthening Enforcement Under the Packers and Stockyards Act

Dear Secretary Vilsack and Mr. Green:

We, the undersigned Attorneys General, write the United States Department of Agriculture and its Packers and Stockyards Division to provide information and insights as to various issues in livestock markets. We also offer potential solutions to aid USDA in its efforts to strengthen enforcement under the Packers and Stockyards Act.

For over a century, the Packers and Stockyards Act has served as an important tool to ensure fairness in livestock and poultry markets and protect the integrity of these markets. Structural changes in these markets, including increased concentration and changes in sales and marketing practices, have threatened producer viability, resulting in attrition, and reducing the number of producers participating in the livestock markets. We hope that with increased enforcement and government oversight, the promise of the Packers and Stockyards Act can be fulfilled and return competition to these vital American markets.

I. Market Concentration

Competition in meat processing is critical to ensure producers have access to fair and competitive markets, but corporate consolidation has led to fewer competitors and less competition for producers' livestock and poultry. The trend toward concentration has been substantial. In 1977, the four largest beef packers only accounted for 25% of the market, but as of 2018, the four largest packers controlled 85% of the market. The four largest processors of pork in 1976 controlled 33% of the market whereas in 2018 the largest four processors accounted for 70% of the market. The four largest chicken processors' share jumped from 35% in 1986 to 54% in 2018.¹ This trend is problematic for producers because the lack of competition weakens their ability to get the best price for their products, which forces many out of the market. Unsurprisingly, as markets have concentrated, the number of cattle, hog, and chicken farms have also dropped dramatically.

¹Claire Kelloway and Sarah Miller, *Food and Power: Addressing Monopolization in America's Food System*, Open Markets Institute. https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/614a2ebeb7d510debfd53f3/1632251583273/200921_MonopolyFoodReport_endnote_v3.pdf.

The Packers and Stockyard Act originated in 1921 due to concerns about the concentration in meat processing markets and the effect this concentration had on producers. The “Big 5” companies had “attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortune of their competitors in their hands.”² At that time, however, the five largest processors only controlled 70% of the market, indicating the concentration problems of today are worse than they were at the time of the passing of the PSA.

The Packers and Stockyard Act was a piece of antimonopoly legislation, separate and apart from the nation’s antitrust laws, in which Congress intended to “exercise, in the bill, the fullest control of the packers and stockyards which the Constitution permits...”³ This origin makes the PSA an important and powerful tool in bringing back competition and integrity to livestock markets.

One of the most important prohibitions under the Act is conduct which has the effect of “restraining commerce” or “creating a monopoly.”⁴ The prohibited conduct includes the act of combining, including through mergers, where it results in “any act made unlawful” by 7 U.S.C. 192.⁵ USDA should consider how increased concentration, both horizontal and vertical, has resulted in the packers ability to charge higher prices to consumers, while paying producers less for the livestock and poultry used in their products. In addition, USDA should conduct academic retrospective merger reviews to consider the effects of past mergers, so the USDA can inform itself on how best to use the powers vested by Congress moving forward.

To that end, USDA should consider using funds appropriated through the American Rescue Plan Act of 2021 to establish a grant that state antitrust enforcers could avail themselves of for the purpose of investigating and bringing actions in agricultural markets. State attorneys general have the potential to have significant impact on agriculture market concentration, but lack of resources is a perennial limitation on what states can do. Meanwhile, Congress has appropriated \$4B to USDA, part of which is to be used “to make loans and grants and provide other assistance to maintain and improve food and agricultural supply chain resiliency.”⁶ Aggressive antitrust enforcement is essential for improving food and agriculture supply chain resiliency, and grants from the USDA to states interested in investigating agriculture markets will bolster those efforts.

We also support USDA’s announcement that it intends to invest \$500M to support and incentivize “new competitive entrants into meat and poultry processing” and more than \$150M to strengthen existing “small and very small” facilities.⁷ One way to evaluate the health of a market is to evaluate if new entrants are entering the market and whether existing market participants are expanding their output. Based upon this criteria, livestock markets are in poor health. Neither new entrants, nor existing participants have expanded output, including during periods in which demand for meat products is growing. The USDA’s announcement for funding new entrants is a welcome development to introduce

² Fed. Trade Comm'n, Report of the Federal Trade Commission on the Meat-Packing Industry pt. 1, 24 (1919).

³ H.R. Rep. No. 67-324, at 3 (1921).

⁴ 7 U.S.C. § 192(c), (d), (e) (2021).

⁵ 7 U.S.C. § 192(g).

⁶ 7 U.S.C. § 7501(b)(4).

⁷ *USDA Announces \$500 Million for Expanded Meat & Poultry Processing Capacity as Part of Efforts to Increase Competition, Level the Playing Field for Family Farmers and Ranchers, and Build a Better Food System*, USDA Press Release No. 0154.21. (July 9, 2021). <https://www.usda.gov/media/press-releases/2021/07/09/usda-announces-500-million-expanded-meat-poultry-processing>.

more competition and strengthen existing competition in these markets, which undoubtedly will help producers find alternative buyers for their livestock and poultry, along with reducing prices for consumers at grocery stores. In managing the distribution, attention should be paid to targeting long term investment in market diversification to ensure lasting impact.

II. Alternative Marketing Arrangements and Vertical Integration

One of the most notable effects of market power in these livestock markets is that packers and processors have introduced and promoted exclusive contracts creating captive supply chains. These Alternative Marketing Arrangements, or AMAs, deplete packer and processor demand in cash markets, which suppresses prices and makes producers more beholden to packers and processors. These producers participating in the cash market must await and accept limited bids for animals, whose cost increases and profit margin decreases the longer the producer must retain them. The Act itself, specifically in 7 U.S.C. § 192(b), prohibits any packer, swine contractor, or live poultry dealer from giving “any undue or unreasonable preference or advantage” to any person or locality. The USDA should consider whether the AMAs are being used in a way that distorts price discovery and other market conditions and may constitute an undue or unreasonable preference under the Act by using these tools as captive supply contracts.

AMAs may appear beneficial to producers because, at least initially, they provide a premium, or “bump,” over cash markets, but they do not provide a fixed price nor are they made publicly available for bidding by interested producers. Instead, they are exclusive offers to specific producers and tie directly to prices discovered through regional cash markets or other price indices, such as those provided by third party data services that the packers and processors can influence, and even manipulate with coordinated efforts. This creates a problem for all producers. Additionally, these contracts move demand away from the cash market, which not only decreases the market prices but also reduces the eventual price paid to the producers who entered AMAs tied to the cash market price.

Chicken markets began shifting in the direction of AMAs and vertical integration dating back as far as the 1960s, and since then has evolved into an industry where processors effectively control all aspects of production, even owning the animals and the feed, and paying farmers to raise the chickens, leaving them with the financial risk of facilities needed for production. This vertical integration has also led to dubious practices such as tournament pricing, which pits captive producers against each other and uses secretive formulas to “rank” producers and determine their final pay after chickens are delivered. This lack of transparency provides even greater power to the processors who, in addition to increasing their market power, can use the information disparity to harm producers.

Pork markets have quickly moved the direction of chicken markets, with producers increasingly finding themselves at the mercy of the processors. This move toward forward contracting and contract growing has significantly reduced the number of independent producers, who are dependent on a cash market, and made large scale hog feeding operations the norm. The monopsony power and captive supply of pork processors allow them to provide “take it or leave it” pricing and contract terms to farmers, who, without a robust cash market to rely upon, lose all means of leverage over the packers. Furthermore, these contracts create barriers to entry for producers and processors. Bank financing for hog producers is

often dependent on entering one of these AMAs with a processors and processors entering the hog market are deprived of supply that is tied up in multi-year contracts with other processors.⁸

In Beef, a similar trend is emerging with AMAs increasingly becoming the normal course of doing business with unintended consequences. In the last 15 years, the percentage of cattle purchased on the spot market plummeted from 52% to 23% in 2020.⁹ This is due to the emergence of these captive supply contracts which negate or significantly reduces the need for packers to participate in the cash market. This leads to less price transparency, and more uncertainty for cattle producers who try to utilize the spot markets the Packers and Stockyard Act was passed to protect and those whose contracts depend upon benchmarking pricing based on the spot market.

USDA has already indicated it intends to address issues facing these markets, proposing three new rules to remove obstacles to enforcement of the Act and to address the problems of tournament pricing in the chicken industry. These steps are important to rebalance power between producers and processors. However, additional reforms may be necessary to divert the troubling trend that AMAs and vertical integration pose to these industries.

Multiple proposals for reform have been put forward by producers' organizations, and we encourage USDA to explore each of these proposals and determine whether any can be achieved under PSA rulemaking. Cattle producers have proposed protecting the cash market through a mandated minimum percentage of cattle to be procured through the cash market. A similar proposal was put forward for pork nearly two decades ago, but never enacted, and now a pork cash market is virtually non-existent. Congress is currently considering legislation to set minimum procurement levels in cattle procurement, S. 3229. Despite the potential for Congressional action, the USDA should consider whether its rulemaking authority under the PSA can directly address this issue. The USDA should conduct a study in coordination with the USDA Chief Economist to determine appropriate national or regional mandatory minimums. Doing so could help inform any eventual legislative efforts and could provide a more immediate avenue for action.

Producers also push for these AMAs and vertical grower contracts to provide greater transparency, be established with a fixed base price, and be subject to public availability and bidding. If these contracts are present in the market, they should at least be subject to market forces and not be limited to select producers. By requiring these contracts to be publicly available and bid, it would bring much needed transparency to the practice and ensure that producers have equal access to the arrangements. But it should be noted that these reforms are no substitute for maintaining a vibrant and open spot market, especially to the extent the AMAs tie pricing to a cash market. If the cash market is suppressed due to lack of demand by packers and processors as a result of captive supply, then even the AMA producers lose in comparison to a robust and active cash market. USDA should ensure that as much competition and market principles apply to these captive supply contracts as allowed under the PSA.

⁸ Timothy A. Wise and Sarah E. Trist, Buyer Power in U.S. Hog Markets: A Critical Review of the Literature, (August 2010). <https://sites.tufts.edu/gdae/files/2020/03/10-04HogBuyerPower.pdf>.

⁹ Donnelle Eller, *Congressional leaders ask why Iowa cattle producers get low prices compared to Big Four meatpackers*, Des Moines Register (7/28/2021). <https://www.desmoinesregister.com/story/money/agriculture/2021/07/28/congressional-leaders-ask-why-iowa-cattle-producers-get-low-prices-compared-big-four-meatpackers/5390639001/>.

III. Data Sharing

Third party data services have emerged as key players in agriculture and livestock markets. These private companies provide subscription services to companies to collect data and provide highly detailed industry reports. Unlike USDA data, which is collected and publicly published, the reports are generally not made available to non-members, companies that purchase downstream packaged products, and the general public. Multiple antitrust lawsuits have alleged that information collected and reported by these data servicers, while not identifying companies by name in the reports, is so granular by region and segment of the supply chain that it provides enough information to deanonymize the data and glean key competitor information. Another crucial way in which third-party data services have integrated into agricultural market structures is through the processors' use of aggregate price index reports as a benchmark number in contracts with producers.

The USDA should renew efforts to update regulations through PSA rules on Livestock and Poultry Marketing Practices.¹⁰ The type of information that private entities are allowed to collect and share for profit should be closely examined and compared to the public information collected and disseminated by the USDA to ensure transparency that allows for market exploration, not market manipulation. We also support the USDA's plans to propose "a rule to clarify that parties do not need to demonstrate harm to competition in order to bring an action under section 202 (a) and 202 (b) of the P&S Act."¹¹ Such a change should make it easier to bring PSA actions addressing the problems resulting from data sharing platforms. These types of reforms aimed at the agriculture market data sharing industry could bring much needed clarity and direction to all involved parties as to the meaning and application of the Act in the rapidly changing livestock production and meat processing industries.

IV. Increased Coordination Cooperation

Numerous regulators have a role to play in ensuring that agricultural markets are fair and competitive. The DOJ, FTC, and State Attorneys General have enforcement authority under the nation's antitrust laws, which due to the market concentration issues described above, are as important as ever. In addition to protecting competition in these markets, it is also important to ensure that the markets operate with integrity and are fair and equitable. The power of the USDA to enforce the Packers and Stockyards Act and the power of the Commodity and Futures Trading Commission to regulate these same and related markets are critical to ensuring that these agricultural markets are functioning fairly and equitably.

Because each of these enforcement agencies have particular roles to play to protect these markets, we should all be eager to coordinate and cooperate to ensure that issues within these markets are brought to the attention of the enforcers and/or regulators most likely able to investigate and remedy the issues.

To that end, USDA should consider establishing an Agricultural Markets Integrity Working Group, bringing together leaders from the various agencies to discuss issues in the market and share ideas and information to facilitate the proper agencies addressing each issue as it emerges. In our experience, the use of working groups among federal and state enforcers has worked well to identify and address

¹⁰ Joel L. Greene., *USDA's "GIPSA Rule" on Livestock and Poultry Marketing Practices*, Congressional Research Service R41673 VERSION 20 (January 7, 2016). <https://crsreports.congress.gov/product/pdf/R/R41673/20>.

¹¹ *USDA to Begin Work to Strengthen Enforcement of the Packers and Stockyards Act*, USDA Press Release Release No. 0130.21. (June 11, 2021). <https://www.usda.gov/media/press-releases/2021/06/11/usda-begin-work-strengthen-enforcement-packers-and-stockyards-act>.

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consumer protection issues. We believe that similar cooperation and coordination in an agricultural market competition context will be equally successful.

We thank you for the opportunity to share our insights with as you work to strengthen enforcement under the Packers and Stockyards Act.

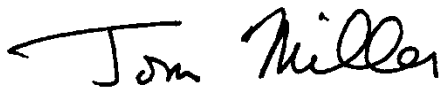
Respectfully,



Keith Ellison
Minnesota Attorney General




Bridget Hill
Wyoming Attorney General



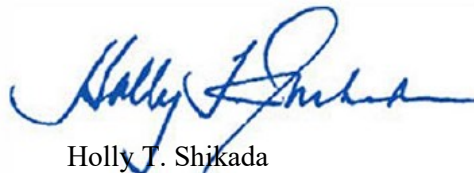
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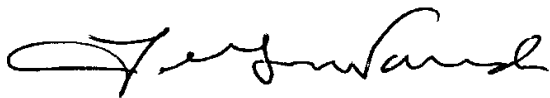
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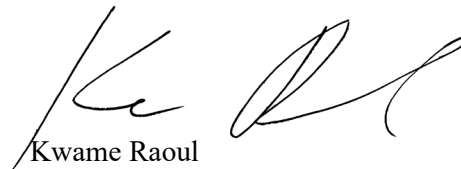
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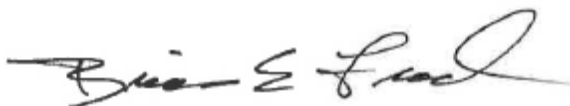
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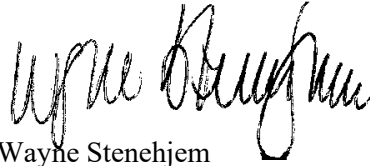
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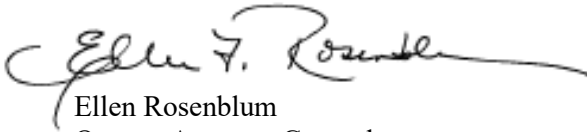
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