

**OFFICE OF MANAGEMENT AND BUDGET
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
EO 12866 MEETING**

Requestor:

FARM ACTION

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**INCLUSIVE COMPETITION AND
MARKET INTEGRITY UNDER THE
PACKERS & STOCKYARDS ACT
(AMS-FTPP-21-0045)**

FINAL RULE STAGE

MEMORANDUM ON COMPETITION EFFECTS

Farm Action¹ submits this memorandum to aid the Office of Information and Regulatory Affairs (“OIRA”) in accounting for the competition effects of the protections for “market vulnerable” livestock producers contained in the U.S. Department of Agriculture’s (“USDA”) proposed rule on inclusive competition and market integrity under the Packers and Stockyards Act published in the Federal Register (87 FR 60010) on October 3, 2022 (the “Proposed Rule”). For sources of data and additional relevant information and analysis, please refer to Farm Action’s original comment on the Proposed Rule, which is attached as Exhibit A.

A. The baseline condition of livestock markets is characterized by horizontal consolidation, vertical restraint, and the absence of meaningful competition.

The Proposed Rule will primarily affect the local markets for livestock — the markets in which farmers sell, and processors buy, poultry, cattle, hogs, and other livestock animals. Because livestock is perishable and cannot profitably be shipped nationwide, the relevant markets for evaluating competition for and among livestock producers and processors are local and regional in nature.² In this memorandum, we focus on poultry and cattle markets.

¹ Farm Action is a farmer-led advocacy organization dedicated to building a food and farming system that works for all Americans instead of a handful of powerful corporations. Headquartered in Missouri, Farm Action conducts research, develops policy, and undertakes advocacy efforts informed by the experience and priorities of its Local Leaders network, which includes farmers, ranchers, food system workers, consumers, and rural community leaders across the country. The Proposed Rule will affect Farm Action’s mission and the interests of many of its Local Leaders in the ways described in the comment on the Proposed Rule submitted by Farm Action on January 16, 2023, via www.regulations.gov (Comment ID: AMS-FTPP-21-0045-0435).

² In the poultry processing industry, for example, the USDA has previously found that 90 percent of birds processed in poultry processing plants were sourced within 60 miles of the plant. *See* James M. MacDonald, *Technology, Organization, and Financial Performance in U.S. Broiler Production*, USDA ERS EIB No. 126, 29-30 (2014). In the beefpacking industry, the most recent study found that 53% of

Competition among processors for supplies of poultry and cattle in local and regional markets is substantially restrained due to high concentration, longstanding patterns of collusion, and asymmetries of information between buyers and sellers. Simultaneously, vertical restraints imposed by dominant processors create switching costs for poultry growers and fed-cattle producers while erecting barriers to entry and expansion for new and small competitors. The lack of competition among processors has had substantial negative consequences for the livelihoods of farmers over the past three decades. Compensation has declined in real terms. The number of independent poultry and cattle farms has plummeted. Consolidation of production, particularly in the cattle sector, has reached extreme levels, with around 2,000 large feedlots producing over 80% of U.S. cattle — and the largest 75 feedlots producing a full third. Diversity in livestock production and marketing methods has become a niche phenomenon.

Indeed, as dominant processors have subjected poultry growers and fed-cattle producers to greater control in how they raise and market their animals, they have not just diminished competition at the processing stage, but also at the production stage. Today, 95% of the nation's poultry supply under restrictive contracts with processors — contracts that require farmers to follow processors' orders in their methods of production and deprive farmers of the independence to compete in raising livestock more efficiently, in raising livestock of higher or distinctive quality, or in the pricing and marketing of livestock.³ In the cattle sector, around a third of U.S. cattle are being raised pursuant to dedicated production contractors with meatpackers. In addition, around 40% of U.S. cattle are marketed under forward-marketing contracts. While marketing contracts are less restrictive than production contracts, they also require cattle producers to align their methods with the preferences of the processors to maintain long-term market access.

In this context, it is not just farmers who are being deprived of the benefits of competition, but also consumers. Instead of having thousands of farmers competing with each other to produce higher quality, or less expensive, or more sustainable, poultry and cattle to appeal to a wide variety of processors, other marketers, and ultimate markets, today's beef or chicken consumer must settle for so-called "inter-brand" competition among dominant processors. Theoretically at least, if a downstream consumer market is competitive, sellers in that market would seek to differentiate their

cattle purchased by packers were purchased from sellers within 100 miles of the meatpacking plant, with an additional 32% purchased from sellers between 100-300 miles away. See Nathan Miller et. al, "Buyer Power in the Beef Packing Industry: An Update on Research in Progress" (Apr. 13, 2022) nathanhmilller.org/cattlemarkets.pdf. See also Oral Capps, Jr. et al, *Examining Packer Choice of Slaughter Cattle Procurement and Pricing Methods*, 28 Agric. and Res. Econ. Rev. 15, 17 (1999).

³ The poultry sector provides the most striking example of vertical restraint in livestock production. Poultry processors (called "integrators" in the field) own and control every stage of and input into chicken production, from genetic lines and hatcheries to feed mills and medication to transportation and processing — essentially every activity except raising the birds. They outsource that part to contract poultry growers. Under these purported independent-contractor arrangements, however, the integrator tells the grower how to build, maintain, and renovate their chicken growing facility, places a flock of chicks of the integrator's choice with the grower, and then provides the food and medicine the grower must use in raising it. When the flock matures, the grower must return the chickens to the integrator for processing, accept compensation according to a formula, and wait on the integrator to give them a new flock. Indeed, contract growers have so little independence in the production and marketing of "their" chickens that, in 2018, the Small Business Administration found they were *de facto* employees of their integrators. Because no open market for live poultry ready for processing remains, conventional (non-specialty) poultry growers have no viable alternatives to the contract growing system. As a result, more than 95 percent of the nation's poultry productions occurs under the kinds of restrictive contractual arrangements with integrators described above. Since these arrangements give integrators control over the most important factors in the chicken production process, growers have limited, if any, agency to compete in the production of cheaper or better chicken. They cannot meaningfully compete in raising chicken more efficiently, in raising chicken of higher or distinctive quality, or in the pricing and marketing of live chicken.

“brands” in response to consumer “signals,” and any vertical restraints they impose on producers would be “transmissions” of those “signals” up to the production stage. But that theory is only true — if it is true at all⁴ — where the downstream consumer market is, in fact, competitive. That is not the case in beef and poultry markets. Just weeks ago, the Justice Department accused processors accounting for 90% of broiler chicken sales, 80% of pork sales, and 90% of turkey sales in the United States of participating in a decades-long conspiracy to share sales prices, costs such as worker and farmer compensation, and per-facility information about product output and variety — and of using this information to raise prices, throttle supply, and otherwise harm consumers.⁵ To put things more plainly: When is the last time any one went to the grocery store and bought a Perdue chicken instead of a Tyson chicken because it was cheaper — or better?

B. The Proposed Rule will significantly enhance the competitive baseline in livestock markets, drive more efficient allocations of resources, and improve the welfare of both farmers and consumers.

The Proposed Rule prohibits regulated entities — livestock processors — from prejudicing, disadvantaging, inhibiting market access, or otherwise taking adverse action against a livestock producer based on their status as a “market vulnerable individual” or a cooperative. A “market vulnerable individual” is “a person who is a member . . . of a group whose members have been subjected to, or are at heightened risk of, adverse treatment because of their identity as members of the group without regard to their individual qualities.”⁶ Since the category of MVIs is likely to include livestock farmers whose operations are situated in monopsony or near-monopsony markets for their animals, the Proposed Rule will likely prohibit dominant processors from exploiting their buyer power and subjecting farmers to prejudicial discrimination based on their lack of alternative buyers. However, even if the Proposed Rule is drafted and interpreted liberally to reach both disparate-treatment and disparate-impact discrimination based on market vulnerability (as Farm Action recommended in its original comment), a processor would still be able to justify their conduct by showing that (1) discrimination was not a motivating factor for their conduct, and (2) their conduct was truly necessary to achieve an important, legitimate, non-discriminatory business interest. By establishing this nuanced prohibition, the Proposed Rule will enhance competition in the production and procurement of livestock, drive more efficient allocations of resources, and improve the welfare of both farmers and consumers.

A. The Proposed Rule will prevent dominant processors from exploiting farmers based on their location in monopsonized or near-monopsonized livestock markets.

To begin with the obvious, by prohibiting processors from subjecting livestock producers in monopsonized or near-monopsonized markets to prejudice or disadvantage based on their lack of alternative buyers, the Proposed Rule will enhance the welfare of those producers. Since around half of poultry

⁴ Longstanding assumptions about the economic function and effects of vertical restraints have been challenged by recent publications. See, e.g., Brian Callaci et al., Vertical Restraints and Labor Markets in Franchised Industries (2023), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155571

⁵ See Complaint, *United States v. Agri Stats, Inc.*, No. 0:23-cv-03009 (D. Minn. 2023);

⁶ 87 Fed. Reg. at 60,054.

growers and a substantial portion of fed-cattle producers and other livestock farmers are situated in such markets, any calculation of the enhancement to their welfare is bound to be substantial. For example, AMS has already found that, compared to poultry growers who have access to multiple dealers in their area, growers operating in monopsony localities receive lower payments for their flocks and are given less favorable terms with respect to contract duration, guaranteed flock placements, hold-up time between flocks, and required capital investments. In light of the legislative purposes of the Packers & Stockyards Act — namely, to “free [producers] from the fear that the channel through which [their] product passe[s]” might, “through discrimination, exploitation, overreaching, manipulation, or other unfair practices,” deprive them of “a fair return for [their] product”⁷ — the alleviation of this discrimination against powerless chicken farmers is necessarily a cognizable welfare benefit in and of itself.

B. The Proposed Rule will prevent dominant processors from using their monopsony or near-monopsony power to manipulate livestock markets.

The Proposed Rule will also prevent *de facto* manipulation of livestock markets, safeguarding producers from economic harm while improving the allocation of resources. The cattle sector illustrates how this benefit would bear out.

Over the past three decades, the Big Four meatpackers (and their predecessor entities) have offered alternative marketing arrangements (AMAs) to favored, typically large, fed-cattle producers while denying such arrangements to small and disfavored ones. AMAs are contracts between packers and producers for future delivery in which prices are determined at the time of delivery based on contemporaneous prices in the “spot” cash market for cattle. Today, in the majority of regional cattle markets today, the volume of sales transacted in open, spot-negotiated cash markets is relatively miniscule. With extremely low spot market sales volume, cash markets have become so thin and uncompetitive that packers can exert substantial downward influence spot-market prices by conducting a small-number of strategic transactions. Indeed, where large meatpackers have minimal or no competition from other buyers, packers have been observed to fix spot market prices via an “all or nothing” approach — putting out a request for a quantity of cattle at a particular price and forcing producers to either accept or reject the offer without engaging in a competitive negotiation.⁸ Consistent with packers’ incentives and ability to drive cash market prices down through strategic conduct, recent research has found that every 1% increase in the fraction of cattle purchased under an AMA is associated with a 6% reduction in the cash market price for cattle.⁹

These strategic practices — which large meatpackers deploy only in markets where they possess buyer power — drive down prices for both the independent producers who sell their cattle directly on the cash markets, and the larger producers who sell their cattle via AMAs pegged to the cash market. By prohibiting meatpackers from taking actions that prejudice or disadvantage producers based on their

⁷ *United States v. Donahue Bros* 59 F.2d at 1023.

⁸ See Farm Action, Comment on Premerger Notification Rule 7-8 (September 27, 2023), available at: farmaction.us/wp-content/uploads/2023/09/HSR-Form-Update-Comment.pdf

⁹ See *id.*

location in monopsonized or near-monopsonized markets, the Proposed Rule will prevent such *de facto* market manipulation. It will also require dominant meatpackers to demonstrate that discriminations that operate to inhibit producers' access to, and therefore producers' ability to compete in, ultimate markets — such as the denial of an AMA to a small producer and their relegation to the cash market — are justified by real and legitimate business interests. This, in turn, will serve to ensure that competition for access to consumers among livestock producers takes place on the merits, rather than mere assumptions or the arbitrary interests of middlemen.

C. Conclusion

More than 100 years ago, Congress enacted the Packers and Stockyards Act to register its will that farmers and ranchers should not be “submerged” into “cogs in the wheel” of giant corporations with distant headquarters — that the people who toil on the land in this country should not be subjugated into “mere servants” of processing middlemen who have “no voice in shaping business policy” and are “bound to obey orders issued by others.”¹⁰ The Proposed Rule will serve that purpose. It will enhance market access for producers by preventing the abuse of power by the gatekeepers who stand between those producers and consumers.

¹⁰ See Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 Wis. L. Rev. 531, 532 (2000) (quoting *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897)) (explaining that, “in the first substantive decision interpreting the Sherman Act, Justice Peckham, no liberal or protectionist” noted that the antitrust laws reflected the wisdom that “It is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man . . . into a mere serve or agent of a corporation . . . having no voice in shaping the business policy . . . and bound to obey orders issued by others”); William E. Rosales, Comment, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening*, 2004 Wis. L. Rev. 1497, 1497-98 (“Congressmen on both sides of the aisle during the debates on the legislative proposal — now known as the Packers and Stockyards Act of 1921 (‘P&S Act’) — expressed concerns about the increasing consolidation in the agricultural sector and fear of a rising food dictator. Congressman Marvin Jones proclaimed that, although a food dictator would be efficient in its centralized control of the channels of trade of meat products and might be desirable in order to sustain life in the country, it would be unwise for the same reasons that it would be unwise for this country to have a dictator or a king as its head of government. Congressman Jones argued that the ‘primary necessity’ of government was the ‘making of men’ and posited the theory that ‘if every line of endeavor had one dictator at its head with all other men working for him, the manhood of [the] country . . . and vital force of the men who make up this country would be submerged and would become mere cogs in the wheel.’”).