

September 18, 2023

Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Jonathan Kanter
Assistant Attorney General
Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Re: Draft Merger Guidelines for Public Comment, Docket No. FTC-2023-0043

Dear Chair Khan and Assistant Attorney General Kanter,

Food & Water Watch, Buffalo River Watershed Alliance, Farm and Ranch Freedom Alliance, Friends of the Earth, Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA), and Western Organization of Resource Councils (collectively, “Commenters”) appreciate the opportunity to comment on the proposed Merger Guidelines to improve enforcement of our antitrust laws. Commenters applaud the Federal Trade Commission and Antitrust Division of the Department of Justice (“the Agencies”) for moving to strengthen and clarify how mergers will be reviewed. As organizations representing farming, ranching, consumer, and environmental interests, we support these efforts because inadequate antitrust enforcement has allowed monopolistic trends and anticompetitive conduct to become rampant in food and agricultural markets, with devastating consequences for rural America and our food system. Commenters also submitted comments to the *Request for Information on Merger Enforcement* (Docket FTC-2022-0003); we incorporate them here as well.¹

As before, our comments focus on the importance of the Guidelines to rein in rampant consolidation in agribusiness markets, which have already eliminated competition and trended toward monopolies and monopsonies far beyond what Congress intended to avoid when passing the Sherman and Clayton Acts. President Biden’s Executive Order on Promoting Competition in the American Economy² is a critical opportunity for the Agencies to reinvigorate implementation of their statutory authorities to protect fair competition and foster more equitable markets. President Biden recognized that consolidation has already weakened many markets and “threatens basic economic liberties, democratic accountability, and the welfare of workers,

¹ Food & Water Watch et al., Comments on Request for Information on Merger Enforcement (Apr. 21, 2022) (included as Attachment A). Certain Commenters have also joined additional sets of coalition comments, including those submitted by Open Markets Institute and the Campaign for Family Farms and the Environment. We submit these comments as complimentary to those other comments.

² Executive Order 14036 (July 9, 2021), <https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy>.

farmers, small businesses, startups, and consumers.”³ Nowhere are these problems more readily apparent than in the food and agriculture sectors, where decades of lax enforcement have allowed mergers and acquisitions to proceed virtually unchecked, harming farmers, rural communities, and consumers in the name of supposed efficiencies. This Administration has an opportunity to create a new legacy in antitrust enforcement, distinguished from the Agencies’ past failures that have resulted in a small number of excessively large companies exerting overwhelming and predatory control over the markets in which agricultural products are produced and sold. We direct the Agencies to our April 2022 comments for a discussion of agribusiness merger case studies that have contributed to concentration in the food industry and that the Clayton Act was intended to prohibit.⁴ And now the Agencies are presented with the proposed Kroger-Albertsons merger implicating already highly concentrated grocery markets, a deal that FTC must block to avoid even more harm to consumers and their communities.⁵

As the food and agriculture-focused listening session the Agencies hosted made clear, this stranglehold over our food system means that farmers and ranchers cannot get fair prices for their crops and livestock, entry by new market participants is severely limited, and consumers do not have the choices they want at the grocery store.⁶ Moreover, this concentration has hollowed out the economies of rural communities, transferring wealth out of small towns to corporate headquarters hundreds or thousands of miles away.⁷

Commenters largely support and applaud the Agencies for updating the merger Guidelines to better align with the letter and spirit of the Clayton Act, and for presenting voluminous supporting case law. The Agencies’ new guidelines should set forth strong and straightforward parameters that empower enforcement and prohibit mergers or acquisitions that raise any “reasonable probability” of substantially lessening competition or tending to create monopolies in any relevant antitrust market.⁸

To support the Agencies in this critical antitrust work, Commenters first offer support for specific draft Guidelines while also recommending improvements. In particular, Commenters support the Guidelines establishing clear thresholds and presumptions indicating which mergers violate the Clayton Act and therefore should be blocked, and make recommendations to further strengthen that approach. Second, Commenters support returning to proper antitrust enforcement principals, under which claimed efficiencies cannot save an otherwise illegal merger or acquisition. Congress has already “resolved competing considerations” between protecting competition on the one hand and “costs and prices” on the other “in favor of decentralization.”⁹

³ *Id.*

⁴ See Attachment A at 2–7.

⁵ See Mia DiFelice, *This Grocery Merger Would Be Bad News for Food Prices and Families*, FOOD & WATER WATCH (Nov. 7, 2022), <https://www.foodandwaterwatch.org/2022/11/07/kroger-albertsons-merger-grocery-prices/>.

⁶ FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions: Food and Agriculture (Mar. 28, 2022) (hereinafter “Food and Agriculture Listening Forum”), <https://www.ftc.gov/news-events/events/2022/03/ftc-justice-department-listening-forum-firsthand-effects-mergers-acquisitions-food-agriculture>.

⁷ See, e.g., Ann M. Eisenberg, *Distributive Justice and Rural America*, 61 B.C. L. REV. 189, 229–35 (Jan. 2020).

⁸ 15 U.S.C. § 18; *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 355 (1962); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2011); *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 858 (6th Cir. 2005).

⁹ *Brown Shoe*, 370 U.S. at 344.

1. Commenters' Support for and Recommendations to Improve Specific Guidelines

Commenters strongly support the Agencies' incorporation of presumptions establishing that a merger would violate the Clayton Act under certain circumstances. As the Agencies note, "structural presumption[s] provide[] a highly administrable and useful tool for identifying mergers that may substantially lessen competition."¹⁰ In our April 2022 comments, we called on the Agencies to "establish a strong presumption against any future agribusiness mergers or acquisitions that would increase concentration or any large firm's market power in any relevant market."¹¹ The Agencies should expand their identification and use of presumptions, both within and outside already highly concentrated markets. Relying on intensive, fact-specific inquiries for mergers outside already concentrated markets could reinforce the "extremely unsatisfactory state of our substantive merger law" in those cases.¹² Protracted litigation and an inability for the Agencies to resolve merger challenges in an effective and timely manner could result in less overall enforcement and encourages firms to attempt to push forward harmful mergers and acquisitions. It also leaves the door open to continued subversion of Congressional intent "by permitting a too-broad economic investigation."¹³ Commenters identify additional presumptions the Agencies should adopt below, but we also encourage the Agencies to consider any additional, supportable presumptions to streamline enforcement and create predictability for market participants.

Commenters believe that the draft Guidelines, if rigorously implemented, can ensure that no more megamergers are allowed to further compromise food and agricultural markets. Below, Commenters outline our support and recommendations for specific draft Guidelines.

- Guideline 1, establishing structural presumptions based on an HHI increase of greater than 100 in already concentrated antitrust markets. Commenters recognize that this proposed Guideline significantly strengthens the Agencies' position compared with prior guidance, which minimized the presumption by stating it was not a "rigid screen."¹⁴ The Agencies should ensure that this presumption remains strong in the final Guidelines. As explained in our April 2022 comments, the Agencies have allowed megamergers to proceed that far exceeded these thresholds under the previous Guidelines.¹⁵ Commenters request that the Agencies lower the presumption thresholds from a market share of greater than 30 percent to 15 percent or more, and the HHI threshold from 1,800 to 1,000. This will better align with the Clayton Act's goal of checking trends toward concentration and monopoly/monopsony in their incipency.¹⁶
- Guideline 2, recognizing that a merger should not have the effect of eliminating substantial competition between the merging firms. This is especially the case in

¹⁰ Draft Guidelines at 6.

¹¹ See Attachment A at 8.

¹² See Attachment A at n.60.

¹³ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963).

¹⁴ FTC & DOJ, Horizontal Merger Guidelines (2010) at Section 5.3.

¹⁵ See Attachment A at 5–6 & 10–12.

¹⁶ See Attachment A at 6 & n.12.

the already highly concentrated agribusiness markets. As the Guidelines discuss, evidence of substantial competition between merging parties can establish that the merger may substantially lessen competition, and monitoring one's rivals is such evidence.¹⁷ Evidence of parties monitoring each other's pricing, facility locations, and output is readily available in the meatpacking industry where dominant market participants monitor their rivals through data and analytics firm, Agri Stats.¹⁸

- Guideline 3, recognizing that highly concentrated markets or prior anticompetitive coordination shows the relevant antitrust market is inherently vulnerable and presumes that a merger will further the risk of coordination and therefore may substantially lessen competition. As explained in our previous comments, coordination and parallel accommodating conduct has been widespread in agricultural markets in recent years, strongly supporting a presumption that any further concentration will aid yet further anticompetitive behavior.¹⁹
- Guideline 4, recognizing that mergers that eliminate a potential entrant, especially in an already concentrated market, can substantially lessen competition. Commenters note that entry barriers are already extremely high in the meat and poultry processing markets, with one maverick entrant explaining to the Agencies that his company is forced to buy imported meat because of the restrictive and anticompetitive market control exerted by the domestic “Big Four” beef packers.²⁰
- Guideline 5, recognizing that mergers resulting in a firm that controls products or services needed by rivals to compete leads to a lessening of competition. Commenters appreciate the Agencies’ broad application of this Guideline “to any transaction involving access to products, services, or customers.”²¹ This is a major problem in food and agriculture markets in part due to extreme vertical integration and concentration. For example, when the Agencies allowed the Bayer AG and Monsanto merger, it should have been extremely concerned that the merger created a firm with 34 percent control over the entire vegetable seed market, not to mention dominance in many other input markets that farmers rely on.²² Mergers like this can dramatically harm relevant antitrust markets because a very small number of firms (and sometimes only a single large firm for a particular geographic market) take control over the ability to provide essential inputs for growing crops and raising animals for production. As farm and food advocates warned at the time of the Bayer AG and Monsanto merger, allowing it to proceed would reduce sustainable farming options and consumer choice because the merged firm would be in a better position to homogenize their product lines in

¹⁷ Draft Guidelines at 8 & App’x 2.

¹⁸ See Attachment A at 11–12.

¹⁹ See Attachment A at 12–14.

²⁰ See Attachment A at 9 (citing to the Agencies’ Food and Agriculture Listening Forum).

²¹ Draft Guidelines at 14.

²² See Attachment A at 5.

favor of entrenched, industrial-scale agricultural operations and to the detriment of innovative or maverick rivals.²³

- Guideline 6, establishing a presumption that in vertical mergers a foreclosure share of 50 percent or greater is alone a sufficient basis that the merger may substantially lessen competition. While a good starting point, Commenters request that the Agencies lower this threshold to 25 percent.²⁴ We support the inclusion of “plus factors” when the foreclosure share is below 50 percent, but suggest that the Agencies elevate “The Relevant Market is Already Concentrated” to a structural presumption to harmonize Guideline 6 with Guidelines 1 and 7.
- Guideline 7, recognizing that in already concentrated markets a merger should not entrench or extend a firm’s dominant position or extend it to additional markets. Commenters especially appreciate and support the Agencies’ position that “merger enforcement should seek to preserve the possibility of eventual deconcentration”²⁵ since many food and agriculture markets are already so concentrated that merely preserving the status quo is unacceptable and will continue to result in harms to competition.²⁶ But we recommend that the Agencies adopt a presumption under this Guideline that when a firm has a dominant position in an antitrust market, any merger or acquisition involving that firm presumptively may lessen competition in that already dominated market. As for extending dominance to additional markets, the Agencies should consider any merger that would result in a currently dominant firm acquiring a dominant position in the additional market presumptively prohibited. It is only reasonable to assume that a firm which has accumulated dominance in one relevant market would seek to entrench that power and do the same in another market if enabled by a merger or acquisition. This Guideline should provide a clear indicator that any merger or acquisition involving a dominant firm in agribusiness markets presumptively violates the Clayton Act.
- Guideline 8, recognizing that mergers should not facilitate a trend toward highly concentrated markets. This is an important Guideline to complement Guideline 1 because of the Clayton Act’s purpose of arresting mergers when the trend toward high concentration is still in its incipency.²⁷ The Agencies cannot accomplish this

²³ *See id.*

²⁴ As explained in the separate comments submitted by Open Markets Institute, Food & Water Watch and others, Sherman Act case law supports a lower threshold. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239–40 (2d Cir. 2003) (finding that a 26% share of a highly concentrated market was sufficient to presume “power to control prices or exclude competition” (quoting *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) (“market share of 44 percent is sufficient as a matter of law to support a finding of market power” for an attempt-to-monopolize claim). The Clayton Act’s incipency standard warrants an even more protective threshold than used by courts under the Sherman Act.

²⁵ Draft Guidelines at 18.

²⁶ *See* Attachment A at 3–4, 7.

²⁷ Draft Guidelines at 21.

without attention to trends in markets not yet highly concentrated but on that trajectory.

- Guideline 11, explaining that mergers involving competing buyers can substantially lessen competition for workers or producers. Commenters strongly request that the Agencies incorporate a presumption into this Guideline similar to the presumption adopted in Guideline 1. This is a serious problem in agricultural markets, where producers are often at the mercy of only one or two buyers.²⁸ There is no reason to treat monopoly and monopsony trends differently. Therefore, the Agencies should include a presumption that any merger in an already highly concentrated market for sellers/producers, or a merger that will result in a highly concentrated market for sellers/producers may substantially lessen competition.
- Guideline 13, providing a catchall so that the Agencies retain sufficient flexibility to adapt to new market dynamics or new types of anticompetitive behavior than what the Agencies have investigated in the past. While the presumptions proposed by the Agencies and requested by Commenters herein are critical to streamlining enforcement and creating predictability, a broader tool to examine mergers on an individual basis even when the other Guidelines do not obviously apply is essential to robust enforcement of antitrust laws.

2. The Agencies Must Return to Proper Antitrust Enforcement Where Claimed Efficiencies Cannot Save an Otherwise Illegal Merger

As the Agencies note in proposed Guideline 11, the U.S. Supreme Court has made it abundantly clear that § 7 of the Clayton Act prohibits mergers that may substantially lessen competition, regardless of whether the merger may bring some degree of efficiency.²⁹ This express rejection of supposed benefits to justify an anticompetitive merger makes perfect sense given Congress' intent in enacting the Clayton Act.³⁰ The extreme concentration of food and agricultural markets and the virtually unchecked anticompetitive behavior of the largest agribusiness companies, exacerbated by megamergers allowed in part based on claimed efficiencies, is an unfortunate showcase of both the wisdom of Congress' intent and the Agencies' failure to effectuate it.

As we note in our April 2022 comments, Section 10 of the Horizontal Merger Guidelines treat claimed efficiencies in one part of the market as an offsetting factor capable of making a

²⁸ See Attachment A at 17.

²⁹ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963) (“a merger the effect which ‘may be substantially to lessen competition’ is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial”).

³⁰ S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950) (“[t]he purpose of the proposed bill . . . is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions.”); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 135–39 (1982); Wesley A. Cann, Jr., *Section 7 of the Clayton Act and the Pursuit of Economic “Objectivity”: Is There Any Role for Social and Political Values in Merger Policy?*, 60 NOTRE DAME L. REV. 273, 278 (1985).

merger that violates the Clayton Act acceptable.³¹ This has no basis in law and has proven to result in excessively concentrated and anticompetitive markets; the Agencies must reject it. Congress has already made this cost-benefit choice in favor of controlling harmful consolidation, and the Agencies cannot rewrite the law. Further, a claim of efficiency, for example in the form of reduced consumer prices, may entirely fail to account for impacts to competition upstream where farmers, ranchers, and other producers may be severely harmed by increased concentration.³² Also, shifting market power to a small number of large firms at the expense of producers likely has the effect of incurring nonprice harms such as reduced variety and quality.³³

In the final guidelines, Agencies must wholly reject past guidance that embraced a cost-benefit analysis in which claimed efficiencies tipped the scales in favor of allowing anticompetitive mergers and acquisitions. Therefore, Commenters request that the Agencies remove Section IV, dealing with rebuttal evidence, from the Guidelines. Inclusion of this section unnecessarily invites the same gamesmanship that has long plagued antitrust enforcement. Alternatively, if retained the Agencies should eliminate any consideration of supposed “cognizable efficiencies.” The Agencies already propose to eliminate consideration of claimed efficiencies for the monopoly prong of the Clayton Act and must do so for the “may substantially lessen competition” prong as well.³⁴

The draft Guidelines cite *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), seemingly for the proposition that the Agencies must allow consideration of a wide range of rebuttal evidence in all cases.³⁵ If so, the Agencies misread *General Dynamics Corp.* In that case, the trial court found that the government’s statistical evidence was inapplicable to the coal markets at issue and thus “insufficient to sustain its case.”³⁶ In other words, the government’s case applied and relied upon evidence (statistical sales data) that was not useful in light of unique shifts in the coal market; thus, the trial court unsurprisingly looked elsewhere to “other pertinent factors” for additional evidence to make a determination as to whether the mergers violated the Clayton Act. The Court went on to explain that in other circumstances, like in grocery or beer markets, “statistics involving annual sales naturally indicate the power of each company to compete in the future,”³⁷ emphasizing that in most markets well-supported presumptions remain an appropriate and favored enforcement tool. Thus, *General Dynamics Corp.* does not stand for the proposition that the Agencies must entertain claims of efficiencies or any rebuttal evidence in Clayton Act cases to question established presumptions or otherwise greenlight anticompetitive mergers or acquisitions. Instead, it is a narrow analysis of a fact pattern where the government’s prima facie evidence was weak and poorly applied to the specific antitrust market at issue. In the vast majority of cases, and almost certainly regarding any megamerger in an agribusiness market, *General Dynamics Corp.* presents no limitation to the Agencies’ authority to reject

³¹ DOJ/FTC, Horizontal Merger Guidelines (2010) 29–31.

³² See Attachment A at 18.

³³ See Attachment A at 15–16.

³⁴ See Draft Guidelines at 34 (“Cognizable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly.”).

³⁵ Draft Guidelines at 30 (noting the Court’s consideration of “other pertinent factors” presented by the merging parties).

³⁶ 415 U.S. at 501.

³⁷ *Id.* (citing *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966) and *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966)).

supposed efficiencies claims based on binding Supreme Court precedent rejecting an efficiency defense.³⁸

Conclusion

Commenters applaud the Agencies' effort to strengthen antitrust enforcement so that the decades-long trend towards extremely concentrated and overtly anticompetitive agribusiness markets may be brought to a halt, while also preserving the possibility of deconsolidation. The draft Merger Guidelines are an important step toward reviving the letter and spirit of the Clayton Act, and we respectfully request that the Agencies strengthen them further as explained here and in other comments. Commenters stress that an antitrust revival will require the Agencies to rigorously enforce the Guidelines. We encourage you to protect our families, farmers, ranchers, rural communities, and food system workers by halting any further mergers or acquisitions by dominant firms in agribusiness markets.

Sincerely,



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On behalf of:

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Buffalo River Watershed Alliance
Farm and Ranch Freedom Alliance
Friends of the Earth
R-CALF USA
Western Organization of Resource Councils

³⁸ *Brown Shoe*, 370 U.S. at 344; *Philadelphia National Bank*, 374 U.S. at 371; *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967). *General Dynamics Corp.* does not overturn these prior cases or their rejection of an efficiency defense.

Attachment A

April 21, 2022

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SUBMITTED VIA Regulations.gov, Docket FTC-2022-0003

Re: Request for Information on Merger Enforcement

Dear Chair Khan and Mr. Kanter,

Food & Water Watch and the undersigned organizations (collectively, “Commenters”) thank you for the opportunity to comment on how the Federal Trade Commission and Antitrust Division of the Department of Justice (“the Agencies”) can improve enforcement of our antitrust laws regarding mergers. President Biden’s Executive Order on Promoting Competition in the American Economy¹ is a critical opportunity for the Agencies to reinvigorate implementation of their statutory authorities to protect fair competition and foster more equitable markets. As the Executive Order recognizes, consolidation has already weakened many markets and “threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.” This is especially true in the agriculture and food industries, where decades of lax enforcement allowed mergers to proceed unchecked, harming farmers, rural communities, and consumers in the name of supposed efficiencies. The Agencies’ failure to enforce our antitrust laws has resulted in a small number of excessively large companies that exert overwhelming and predatory control over the markets in which agricultural products are produced and sold.

As the recent food and agriculture-focused listening session the Agencies hosted made clear, this stranglehold over our food system means that farmers cannot get fair prices for their crops and livestock, entry by new market participants is severely limited, and consumers do not have the choices they want at the grocery store.² Moreover, this concentration has hollowed out

¹ Executive Order 14036, <https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy>.

² FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions: Food and Agriculture (Mar. 28, 2022) (hereinafter “Food and Agriculture Listening Forum”), <https://www.ftc.gov/news-events/events/2022/03/ftc-justice-department-listening-forum-firsthand-effects-mergers-acquisitions-food-agriculture>.

the economies of rural communities, transferring wealth out of small towns to corporate headquarters hundreds or thousands of miles away.³

Due to this history of harmful mergers, and the existing level of concentration in nearly all parts of the food system, the Agencies' updated guidance must protect agribusiness markets from *any* further mergers that increase a dominant firm's market power or overall market concentration. The Agencies' new guidelines must set forth strong and straightforward parameters that empower enforcement, and prohibit mergers or acquisitions that raise a "reasonable probability" of substantially lessening competition or tending to create monopolies.⁴

Commenters collectively represent millions of members and work to combat the destructive impacts the industrial food system has on farmers, rural communities, consumers, and the environment. Because these highly concentrated food and agribusiness markets cripple rural economies, limit consumer access to diverse, high quality, and affordable food options, and contribute to environmental harms, Commenters have a strong interest in preventing any further corporate consolidation within this sector.

Therefore, Commenters respectfully provide the following recommendations and requests for the Agencies to strengthen their merger enforcement guidelines and to effectively enforce the law to protect agribusiness markets from becoming any more concentrated and anticompetitive. In Section I, Commenters explain that agribusiness markets already have become extremely concentrated and anticompetitive through decades of mega-mergers and the Agencies' failure to enforce the law, and provide specific examples. In Section II, Commenters call on the Agencies to establish a strong and supportable presumption that *any* further concentration or aggregation of market power by a dominant firm in agricultural markets is prohibited, and provide the evidence the Agencies should use to support that presumption. Section III outlines certain price and non-price considerations critical to the Agencies' assessment of agribusiness markets. And in Section IV, Commenters request that the Agencies clearly and categorically reject claimed market efficiencies as an offsetting factor capable of making an otherwise unlawful merger acceptable.

I. Countless Agribusiness Mergers Have Contributed to Concentration in the Food Industry that the Clayton Act Was Intended to Prohibit

The United States food system is heavily consolidated across all levels of the supply chain. Such consolidation affects all aspects of the U.S. food system, from the seeds farmers plant and the inputs they purchase, to the wholesale buyers of grains, to meat and poultry packing, to the grocery stores bringing those products to consumers. Today's farmers and ranchers buy from and sell into highly consolidated markets, resulting in rising costs, stagnant farmgate prices, and the loss of family farmers across the United States. Extreme consolidation now typifies the U.S. agriculture and food systems.

Decades of mergers and acquisitions have resulted in a handful of firms wielding extraordinary market power across U.S. agricultural sectors. This concentration in the food and agricultural economy has accelerated at a rapid pace since the 1980s, and particularly since the 2007–2009 recession. The four largest processors slaughter 83 percent of beef cattle, 66 percent

³ See, e.g., Ann M. Eisenberg, *Distributive Justice and Rural America*, 61 B.C. L. Rev. 189, 229–35 (Jan. 2020).

⁴ 15 U.S.C. § 18; *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 355 (1962); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2011); *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 858 (6th Cir. 2005).

of hogs and half of all broiler chickens.⁵ Just two companies—Arden Mills and ADM Milling—mill half of all U.S. wheat.⁶ These firms exercise their excessive market power through various means, including abusive livestock production contracts and alternative marketing agreements that circumvent price discovery, driving down farm income. Similarly, a few seed and agrochemical firms effectively control the global market, with the largest four companies controlling 67 percent and 70 percent of those sectors, respectively.⁷ Local and regional markets where farmers sell their products can be even more consolidated, with many farmers increasingly facing a monopsony.

Agribusinesses have also vertically and horizontally integrated, meaning that they control multiple stages of the food chain. Many livestock farmers rely on a single firm from start to finish, from genetics to feed to the slaughterhouse. Vertical integration can undermine competitive markets by distorting and concealing prices, making it difficult for new entrants to secure suppliers, and by allowing firms to exercise unfair buying power over livestock producers. It also gives rise to one-sided contracts that require farmers to take on enormous amounts of debt, pits farmer against farmer, and can result in unfair and abusive practices.⁸ These contractual arrangements between meatpackers and growers also short-circuit price discovery functions of the marketplace by avoiding commodity spot markets and auctions.⁹ The larger livestock operations are now “tightly linked” to the meat production industry through “formal contracts, alliances, and joint financing.”¹⁰

This trend toward extreme concentration has important and far-reaching implications for farmers, food chain workers, food safety, community health, and the integrity of the natural environment upon which we all depend. For example, consolidation and vertical integration have enabled agribusinesses to exert their market control to maximize corporate profits at the expense of producers and local economies, depriving rural communities of crucial revenue. Today, the farmer’s share has declined to just 16 cents per food dollar.¹¹ And the median farm household income in 2019 was a mere \$297—the first time the figure has been positive in over 20 years.¹²

More and more revenue from rural economies is funneled to corporate headquarters and Wall Street investors, causing local infrastructure like processing plants and flour mills to shutter and bankrupting Main Street businesses. Moreover, consolidation impacts every consumer and is a threat to food security and access: just four firms control two-thirds of all grocery sales, and supermarket mergers have raised food prices and wiped out local grocery stores in rural and

⁵ U.S. Dep’t of Agric., Agric. Mktg. Serv., Packers and Stockyards Division: Annual Report 2018 (2018) 9.

⁶ Stefan Vogel, *The Milling Industry Structure in Key Regions—Fragmented Versus Consolidated Markets*, Rabobank (June 2017), https://research.rabobank.com/far/en/sectors/grains-oilseeds/The_Milling_Industry_Structure_in_Key_Regions.html.

⁷ Kristina Kiki Hubbard, *The Sobering Details Behind the Latest Seed Monopoly Chart*, Civil Eats (Jan. 11, 2019), <https://civileats.com/2019/01/11/the-sobering-details-behind-the-latest-seed-monopoly-chart/>.

⁸ Rural Advancement Foundation International USA, *Big Chicken Companies Own or Control Everything Except the Farm, But Why?* (July 14, 2016), <https://www.rafiusa.org/blog/big-chicken-companies-own-and-control-everything-except-the-farm-why/>.

⁹ Alan Barkema, Mark Drabenstott, & Nancy Novack, *The new U.S. meat industry*, 86 *Economic Review* 33, 36 (2001).

¹⁰ James M. MacDonald & William D. McBride, USDA Econ. Res. Serv., EIP-43, *The Transformation of U.S. Livestock Agriculture: Scale, Efficiency, and Risks* (Jan. 2009) 1.

¹¹ USDA Econ. Res. Serv., *Food Dollar Series: Documentation* (updated Mar. 31, 2022), <https://www.ers.usda.gov/data-products/food-dollar-series/documentation/>.

¹² USDA Econ. Res. Serv., *Farm Household Income Forecast for 2021 and 2022* (Feb. 4, 2022), <https://www.ers.usda.gov/topics/farm-economy/farm-household-well-being/farm-household-income-forecast/>.

urban areas alike.¹³ While agribusiness mergers have been justified on the basis of cost savings for consumers, the Justice Department’s recent indictments of poultry executives for price-fixing reveal that large food corporations have power to conspire together and cheat consumers.¹⁴ Private litigators have also levied price-fixing charges against meatpackers in every major protein sector.¹⁵

In sum, throughout the entire food and agriculture supply chain, examples of anticompetitive practices abound, fueled by the relentless pace of DOJ-approved agribusiness mergers. Per the Agencies’ request for examples of past mergers with anticompetitive impacts, below are just a few representative examples of problematic agribusiness mergers that have created highly concentrated markets and harmed competition, farmers, rural economies, and consumers.

A. Agrochemical and Seed Company Mergers Have Lessened Competition in Vegetable Markets

The 2017 merger between Bayer AG (“Bayer”) and Monsanto Seed Company (“Monsanto”) created the world’s biggest agrochemical and seed company and typifies the anticompetitive market concentration at play in the seed and chemical input markets, which has ripple effects throughout food production markets. The vegetable seed industry is dominated by a small number of large, vertically integrated companies that produce pesticides and herbicides; research, breed, and manufacture seed varieties; and distribute and market them to farmers.¹⁶

Even prior to the Bayer-Monsanto merger, the industry was already highly consolidated, in no small part due to Bayer and Monsanto’s long history of pursuing aggressive merger and acquisition strategies.¹⁷ The 2017 merger only exacerbated this market concentration. As of 2015, the U.S.

	Global Sales (\$M)	Market Share	Est. U.S. Sales (\$M)	Est. U.S. Market Share
Monsanto	\$816	22%	\$204	24%
Syngenta	\$616	17%	\$154	18%
Vilmorin	\$765	21%	\$191	22%
Bayer	\$443	12%	\$111	13%
Rijk Zwaan	\$431	12%	\$108	13%
Global CR-4		71%	Est. U.S. CR-4	77%
			Current HHI	1,543
			Post-Merger HHI	2,310

¹³ FWW, The Economic Cost of Food Monopolies: The Grocery Cartels (Nov. 2021) 2–4, https://www.foodandwaterwatch.org/wp-content/uploads/2021/11/IB_2111_FoodMonoSeries1-SUPERMARKETS.pdf (attached here as Exhibit 1).

¹⁴ Press Release, DOJ, Senior Executives at Major Chicken Producers Indicted on Antitrust Charges (June 3, 2020), <https://www.justice.gov/opa/pr/senior-executives-major-chicken-producers-indicted-antitrust-charges>.

¹⁵ Victor Graham, *Turkey Remains Rare Meat Not Embroiled in Antitrust Probes*, Bloomberg Law (Nov. 26, 2019), <https://news.bloomberglaw.com/mergers-and-antitrust/turkey-remains-rare-meat-not-embroiled-in-antitrust-probes>; Leah Douglas, *Lawsuit Alleges Turkey Companies Conspired to Keep Prices High*, Food & Env’t Reporting Network (Dec. 19, 2019), https://thefern.org/ag_insider/lawsuit-alleges-turkey-companies-conspired-to-keep-prices-high/.

¹⁶ Ioannis Lianos et al., *The Global Seed Market, Competition Law and Intellectual Property Rights: Untying the Gordian Knot*, CLES Research Paper Series 2-2016 (Feb. 2016) 3.

¹⁷ See FWW, Bayer and Monsanto Merger Trees (attached here as Exhibit 2).

vegetable seed market was worth \$860 million,¹⁸ with the top four firms controlling at least 77 percent of the U.S. market (see Table 1).¹⁹ As a result of the merger, Bayer-Monsanto increased its market share to 34 percent, and the Herfindahl-Hirschman Index (HHI) measuring overall market concentration increased by nearly 800. The Agencies’ current merger guidelines classify mergers causing an increase in HHI of more than 200 points as “highly concentrated markets” that raise “significant competitive concerns,” and are “presumed to be likely to enhance market power.”²⁰ But the guidelines have allowed companies to purport to rebut this presumption such that the Agencies allowed this mega-merger to proceed in the face of clear and defensible evidence that the merger violated the Clayton Act.

According to a pre-merger analysis of the anticompetitive effects of the Bayer-Monsanto deal, the potential negative impacts on farmers and consumers were far-reaching. Some of the impacts identified by food and farm organizations included rising seed prices for farmers, increased vulnerability to vertical coordination between seed companies, distributors, and retailers, and reduced sustainable farming options and consumer choice. The full analysis, submitted to the DOJ Antitrust Division during its merger review, is attached to this comment.²¹

B. Meatpacking Mergers Have Also Created Highly Consolidated and Anticompetitive Livestock Markets

The meatpacking industry has also experienced a series of mergers that have resulted in extreme concentration. Indeed, meatpacking “concentration levels are among the highest of any industry in the United States, and well above levels generally considered to elicit non-competitive behavior and result in adverse economic performance.”²² This sector is both horizontally concentrated, with a small number of very large firms buying, slaughtering, and processing the majority of beef cattle, hogs, and broiler chickens,²³ as well as vertically integrated, with producers trapped between these dominant firms’ control of inputs and outputs and often subject to draconian demands on their own business practices via contractual relationships they must enter if they wish to access packer and processor facilities.²⁴

¹⁸ Andrew W. LaVigne, American Seed Trade Association, Testimony before the U.S. House of Representatives Committee on Agriculture (July 12, 2017) 1, <https://www.betterseed.org/wp-content/uploads/Andrew-LaVigne-House-Ag-testimony-7-12-17.pdf>.

¹⁹ California Farmers Union et al., The Anticompetitive Impact of the Proposed Bayer-Monsanto Merger on Vegetable Seed Markets (August 2, 2017) 4–5 & n.44 (attached here as Exhibit 3).

²⁰ DOJ/FTC, Horizontal Merger Guidelines (2010) 19 (hereinafter “HMG”).

²¹ See Exhibit 3.

²² Clement E. Ward, *A Review of Causes for and Consequences of Economic Concentration in the U.S. Meatpacking Industry*, 3 *Current* 1 (2002).

²³ The four largest processors slaughter 83 percent of beef cattle, 66 percent of hogs, and half of all broiler chickens. See U.S. Dep’t of Agric., Packers and Stockyards Division: Annual Report 2018, *supra* note 5, at 9.

²⁴ See, e.g., *McKiver v. Murphy-Brown*, 980 F.3d 937, 946 (4th Cir. 2020) (“[Smithfield] imposes standard operating procedures for all of its contract growers. Specifically, [Smithfield] (1) directs grower management procedures; (2) mandates design and construction of operations; (3) can require the use of technological enhancements; (4) can require capital investments; (5) dictates how many of its hogs are to be placed at a given operation; and (6) controls hog waste management systems.”); Evan Anderson, *Note: Turning the Dirty Tide: The Farmer Fairness Act’s Attempt to Create Integrator Liability*, 46 *Iowa J. Corp. L.* 199, 200–02 (Fall, 2020); Kristy E. Boehler, *Comment: Poultry Growers in Arkansas: Agents or Independent Contractors?*, 63 *Ark. L. Rev.* 849, 851–54 (2010); Bruce Friedrich & Stefanie Wilson, *Coming Home to Roost: How the Chicken Industry Hurts Chickens, Humans, and the Environment*, 22 *Animal L.* 103, 129–31 (2015); FWW, *Abusive Poultry Contracts Require Government Action* (Feb. 2015), <https://foodandwaterwatch.org/wp-content/uploads/2021/03/Abusive-Poultry-Contracts-Feb-2015.pdf>.

The 2015 merger of pork packers JBS S.A. (“JBS”) and Cargill Pork (“Cargill”) illustrates the kind of harmful consolidation that is characteristic of the industry and which the Agencies have allowed to proliferate. JBS is the world’s largest protein company and became the second biggest pork packer in the United States following the JBS-Cargill deal. The move increased the pork industry’s HHI by over 200 points, presumptively creating a highly concentrated market with elevated market power.²⁵ It also had the immediate result of creating a considerably more vertically integrated JBS, through its acquisition of multiple pork slaughter and processing plants, feed mills, and hog production facilities.²⁶

Table 2. National Pork Packing Concentration

Company	Slaughter Capacity (head/day)				Market Share				Post-Merger Change	
	2012	2013	2014	Post-JBS-Cargill	2012	2013	2014	Post-JBS-Cargill	Δ	% Change
Smithfield	114,400	117,000	118,500	118,500	27.0%	27.2%	27.4%	27.4%		
Tyson Foods	76,775	76,925	76,925	76,925	18.1%	17.9%	17.8%	17.8%		
JBS-Swift	47,000	50,000	50,000	87,800	11.1%	11.6%	11.6%	20.3%	8.7%	75.6%
Cargill Pork	37,800	37,800	37,800		8.9%	8.8%	8.7%			
Hormel	37,300	37,300	36,800	36,800	8.8%	8.7%	8.5%	8.5%		
CR-4					65.2%	65.5%	65.5%	74.0%	8.5%	13.0%
HHI-4					1,261	1,272	1,277	1,552	275	21.5%
HHI-All					1,412	1,418	1,422	1,624	202	14.2%

Source: Analysis of National Pork Board data.

As explained in the attached detailed analysis of the anticompetitive effects of the JBS-Cargill merger,²⁷ the deal significantly increased the company’s monopsony power over farmers, both nationally and in the Midwest regions surrounding each packing/processing facility, enhancing JBS’s capacity to disadvantage farmers in price negotiations and contracts.²⁸ The merger also led to significant wholesale market concentration, reduced options for farmers selling hogs on the open market, and paved the way for consumer price increases.²⁹ That the Agencies allowed this merger, which should have been prohibited by the Clayton Act due to its clear likelihood to substantially lessen competition or create monopolies, illustrates the inadequacy of existing guidelines and agency practice.

²⁵ Based on an Analysis of Pork Board data, *see* FWW et. al., The Anticompetitive Effects of the Proposed JBS-Cargill Pork Packing Acquisition, 4 (July 2015) (attached here as Exhibit 4). *See also* HMG, *supra* note 20, at 19.

²⁶ Press Release, Cargill, JBS USA Pork Agrees To Purchase Cargill Pork Business (July 1, 2015), <https://www.prnewswire.com/news-releases/jbs-usa-pork-agrees-to-purchase-cargill-pork-business-300107828.html#:~:text=GREELEY%2C%20Colo.,to%20regulatory%20review%20and%20approval>.

²⁷ *See* Exhibit 4.

²⁸ *Id.* at 3–13.

²⁹ *Id.* at 14–22.

C. Retail Grocery Mergers Have Further Concentrated Market Power in the Food Industry

Further down the supply chain, extreme concentration in retail grocery markets has also contributed to a lessening of competition and a trend towards monopolies. Food & Water Watch recently published its *Grocery Cartels* report documenting the relentless trend towards retail grocery concentration and the resulting consequences, which we attach and incorporate by reference.³⁰ As explained in the report, retail grocery mergers and acquisitions have created a highly consolidated marketplace. Just four companies took in an estimated 69 percent of all grocery sales in 2019, up from a 23 percent combined market share in 1993.³¹ The sharp rise in consolidated supercenters and supermarket chains coincides with a steep decline in the actual number of grocery stores—a roughly 30 percent loss from 1994 to 2019.³²

This unchecked trend towards concentration and monopolies unequivocally harms consumers. With reduced grocery options comes reduced food access. According to the USDA, 17 percent of Americans live in low-income census tracts that lack adequate and accessible grocery store options.³³ And even when stores are accessible, consumers are met with fewer and poorer quality options once inside. Of 55 common grocery categories surveyed, over one third exceed the “highly concentrated” threshold identified in the merger guidelines, and more than 60 percent are tight oligopolies or monopolies.³⁴

Moreover, consolidated supermarket and warehouse chains exert significant influence further up the supply chain, negatively impacting upstream suppliers and the food retail industry at large. Grocery retailers charge manufacturing companies “slotting fees” for the privilege of stocking their products, making it more difficult for new brands to emerge or for local producers to bring their products to their communities.³⁵ Because companies willing to pay a premium can achieve more lucrative product placement, smaller brands unable to afford the fees are edged out. Consolidation can also lower manufacturing wages at firms that rely on chains as their sole purchaser, local wages, and even wages in the retail industry overall.³⁶ Again, the Agencies have appeared asleep at the wheel as this corporate transformation of our food system has unfolded.

II. The Agencies Should Establish a Stronger Presumption Against Future Agribusiness Mergers Reflective of Market Realities, Existing Concentration, and Anticompetitive Practices Endemic to the Industry

As the above examples demonstrate, food and agriculture markets have already trended towards a state of unacceptably high concentration, which has led to just a few large firms

³⁰ See Exhibit 1.

³¹ Fidel Ezeala-Harrison & John Baffoe-Bonnie, *Market Concentration in the Grocery Retail Industry: Application of the Basic Prisoners’ Dilemma Model*, 6 *Advances in Mgmt. & Applied Econ.* 47, 48 (2016); see Exhibit 1, at 18.

³² See Exhibit 1, at 3.

³³ U.S. Dep’t of Agric., Econ. Res. Serv., *Food Environment Atlas: Documentation* (updated May 24, 2021), <https://www.ers.usda.gov/data-products/food-access-research-atlas/documentation>.

³⁴ See Exhibit 1, at 1, 5.

³⁵ Ian M. Sheldon, *The Competitiveness of Agricultural Product and Input Markets: A Review and Synthesis of Recent Research*, 49 *J. of Agric. and Applied Econ.* 1, 25 (2017), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/BD569438D8B7ABC6358F7A510CA0BE9F/S1074070816000298a.pdf/the-competitiveness-of-agricultural-product-and-input-markets-a-review-and-synthesis-of-recent-research.pdf>.

³⁶ See Exhibit 1, at 3.

dominating vertically integrated supply chains, and squeezing farmers, producers, and consumers in the process. The Agencies' new guidelines must better recognize and prevent any more agribusiness mergers that result in anticompetitive effects. To that end, the Agencies should establish a strong presumption against any future agribusiness mergers or acquisitions that would increase concentration or any large firm's market power in any relevant market.

Under well-settled principles of administrative law, agencies have the power to establish evidentiary presumptions.³⁷ Courts will deem such presumptions valid so long as there is "some rational connection between the fact proved and the ultimate fact presumed and [] the inference of one fact from proof of another [is] not so unreasonable as to be a purely arbitrary mandate."³⁸ Regulatory presumptions are therefore entitled to substantial deference.³⁹ In the case of food and agriculture markets, there is ample evidence on which the Agencies can rely to establish a rebuttable presumption against future agribusiness mergers that further trend toward monopoly or increase the market power of a dominant firm. This includes the unique market structures that give rise to anticompetitive conduct, the extreme, existing market concentration, and widespread anticompetitive practices already pervasive throughout the industry.⁴⁰

A. The Current Market Dynamics of Meat, Poultry, and Dairy Production Predispose the Industry to Anticompetitive Outcomes and Support a Presumption Against Agribusiness Mergers

Livestock production is characterized by unique market dynamics that are critically important to how a merger or acquisition would likely affect competition in those markets, and appropriate market definitions are essential to identifying and analyzing these impacts. As explained above, excessive concentration and market power characterize these markets, with farmers stuck between up and downstream bottlenecks that allow dominant firms to engage in abusive and anticompetitive behavior as a core business strategy. Horizontally and vertically integrated firms exploit producers' vulnerable positions to suppress farmgate prices while simultaneously increasing consumer costs, decreasing producer and consumer welfare alike. These deeply asymmetrical relationships leave producers with little ability to negotiate fair prices or even determine how to operate their own livestock operations.⁴¹ As one leading advocate for

³⁷ See, e.g., *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979); *Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 177 F.3d 1, 6 (D.C. Cir. 1999); *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1284 (11th Cir. 2007); *Cole v. U.S. Dep't of Agric.*, 33 F.3d 1263, 1267 (11th Cir. 1994); *Holland Livestock Ranch v. United States*, 714 F.2d 90, 92 (9th Cir. 1983); *Chem. Mfrs. Ass'n v. Dep't of Transp.*, 105 F.3d 702, 705 (D.C. Cir. 1997).

³⁸ *Mobile, Jackson & Kansas City R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910).

³⁹ *NLRB v. Baptist Hospital*, 442 U.S. at 796 (J. Brennan, concurring); *NLRB v. L.A. New Hospital*, 640 F.2d 1017, 1020 (9th Cir. 1981); *N.Y. Foreign Freight Forwarders & Brokers Ass'n v. Fed. Mar. Comm'n*, 337 F.2d 289, 295 (2d Cir. 1964).

⁴⁰ *Nat'l Mining Ass'n v. Babbitt*, 172 F.3d 906, 912 (D.C. Cir. 1999) (finding evidentiary presumptions permissible "when proof of one fact renders the existence of another fact *so probable* that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it." (quoting *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1100–01 (D.C. Cir. 1998))).

⁴¹ For example, Craig Watts, a former contract poultry grower for Perdue Farms, has become an outspoken whistleblower exposing how large poultry firms control and abuse their producers through predatory contacts and other business practices. See Food Integrity Campaign, *Craig Watts: Whistleblower Profile*, <https://foodwhistleblower.org/profile/craig-watts/>.

independent ranchers observed, “[t]he relationship once based predominantly on competitive market forces is increasingly becoming marked by a corporate command-and-control regime.”⁴²

The Agencies should ensure that when defining the relevant market(s) in agribusiness merger reviews, they account for these realities and analyze the wholesale, post-merger market parameters that may limit farmers’ and ranchers’ options or enable price discrimination.⁴³ The Supreme Court has long recognized that the Clayton Act prohibits mergers that may substantially lessen competition, or that tend to create a monopoly “in any line of commerce in any section of the country.”⁴⁴ For livestock production, the wholesale markets that constrain farmers’ and ranchers’ ability to access processing and retail markets are of paramount importance to preserving overall competition. Market definitions sensitive to these realities will also more effectively account for potential harms that stem from longer-term, non-price factors such as loss of innovation, changes to product quality and variety, and market entry barriers. For example, during the Agencies’ recent listening session, Mike Solgero of Butcher Box explained that they are forced to source primarily from Australia because of the restrictive, anticompetitive market control exerted by the “Big Four” beef packers.⁴⁵ This is *exactly* the kind of situation Congress intended to avoid when enacting the Clayton Act, where a maverick newcomer is stifled under the weight of excessive corporate concentration, and lends considerable support to a presumption against any further concentration or aggregation of market power.⁴⁶

1. Meat and Poultry

Major processors of beef, chicken, and pork all share a common structure to their markets, characterized by a very small number of packers/processors that buy from a large number of producers and can sell to a large number of customers.⁴⁷ “This market structure lends itself to much mischief” by the firms occupying this highly concentrated link in the supply chain, where monopolistic, monopsonistic, and/or collusive conduct can be used to manipulate input and output markets.⁴⁸

In these situations, the relevant market is not simply where the finished products are sold or even where producers are located. Instead, the market most relevant to how a merger or acquisition will impact competition in the producer-processor relationship, including non-price impacts, must be defined by the spatial relationships between producers and reasonably available packers/processors. It can be prohibitively expensive for producers to transport their livestock over long distances to reach processing plants, and the Agencies have already recognized that the “[s]cope of geographic markets often depends on transportation costs.”⁴⁹ Indeed, some packer/processors outright refuse to work with growers who are located too far from their

⁴² Bill Bullard, *Under Siege: The U.S. Live Cattle Industry*, 58 S.D. L. Rev. 560, 567 (2013).

⁴³ See Peter C. Carstensen, *Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue*, 14 U. Pa. J. Bus. L. 775, 798–802 (Spring 2012).

⁴⁴ *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962) (must look to the “‘area of effective competition’” as determined by “a product market (the ‘line of commerce’) and a geographic market (the ‘section of the country’)”).

⁴⁵ See Food and Agriculture Listening Forum, *supra* note 2.

⁴⁶ See *H.J. Heinz, Co.*, 246 F.3d at 717 (“the anticompetitive effect of the merger is further enhanced by high barriers to market entry”).

⁴⁷ Tirza J. Angerhofer & Roger D. Blair, *Monopoly and Monosposy: Antitrust Standing, Injury, and Damages*, 89 U. Cin. L. Rev. 256, 256 (2021).

⁴⁸ *Id.*

⁴⁹ HMG, *supra* note 20, at 13.

facilities.⁵⁰ Thus, proximity to the remaining packer/processor facilities has enormous impacts on competition and in some cases can foreclose a farmer's or rancher's ability to viably access the market. This market power can be exceptional and warrants rigorous attention. If a proposed merger would create a local monopsony or would shift yet more market power to the firm(s) occupying this supply chain bottleneck, a Clayton Act violation is reasonably likely and the Agencies should prohibit the merger.

2. Dairy

Dairy markets are also prone to these kinds of competitive harms, although in somewhat different ways than in meat and poultry markets. Fluid milk markets are inherently local and regional due to the high cost of transport as well as the need to keep the product refrigerated before pasteurization and bottling or processing into more shelf stable dairy products. Dairy markets are typically characterized by local or regional cooperatives in which multiple dairy operations pool their production to gain negotiating power with processors.⁵¹ As an independent dairy producer from New York state explained to the Agencies at the recent listening session, when Dairy Farmers of America acquired a local bottling facility and subsequently terminated the relationship between the independent producers' coop and one of only three local bottlers, it significantly disrupted their ability to pool milk and access local markets.⁵² In addition to potential price increases for consumers, the loss of consumer choice and producers' ability to maintain their preferred cooperative structure are important nonprice considerations.

B. Highly Concentrated Market Conditions Further Support a Presumption Against Agribusiness Mergers

Existing market concentration should weigh heavily in the Agencies' merger review process. Indeed, the Supreme Court has warned that where "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is equally great."⁵³ In light of the extreme market concentration present in the food system, the Agencies should deem any agribusiness mergers that would increase concentration or any large firm's market power in any relevant market to be presumptively anticompetitive. To that end, the Agencies must strengthen their guidance on market concentration presumptions so that well-supported metrics can be effectively used to block illegal agribusiness mergers.

HHI-based presumptions of market concentration have proven inadequate to stop anticompetitive transactions in the food and agriculture sectors. As it currently stands, the Agencies' guidance relies on an HHI screen to identify mergers that presumptively enhance

⁵⁰ See, e.g., Tyson Foods, Inc., *Prospective Farmers*, <https://www.tysonfoods.com/who-we-are/our-partners/farmers/prospective-farmers> ("To be considered a Tyson Foods contract poultry farm, you must have existing chicken housing or property that could be used to build housing, within an approximate 30-to-50 mile radius of the feed mills that serve our poultry processing complexes. This is because of the efficiencies needed for delivering feed, chicks, and providing service.").

⁵¹ U.S. Dep't of Agric., CIR 1-16, *Cooperatives in the Dairy Industry* (rev. Sept. 2005), <https://www.rd.usda.gov/files/cir1-16.pdf>.

⁵² See Food and Agriculture Listening Forum, *supra* note 2.

⁵³ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 n.42 (1963).

market power.⁵⁴ However, the current guidelines do not consider these anticompetitive thresholds to be a “rigid screen to separate competitively benign mergers from anticompetitive ones,” and allow “persuasive evidence showing that the merger is unlikely to enhance market power” to rebut the anticompetitive presumption.⁵⁵ As a result, in practice problematic HHI increases have not swayed DOJ from approving agribusiness mega-mergers. As explained above in the Bayer-Monsanto and JBS-Cargill examples, agribusiness mergers have consistently triggered HHI thresholds for “highly concentrated markets,” and have even been known to spur HHI increases *four times* above the presumptive limit.⁵⁶ Nevertheless, these mergers time and again survive DOJ merger review.

This failure to use HHI increases as a presumptive screen amounts to a loophole in existing guidelines that the Agencies must close. The Clayton Act prohibits mergers and acquisitions that “may” substantially lessen competition or “tend” to create a monopoly.⁵⁷ This language shows that the Clayton Act is an incipency statute designed to stop corporate consolidation when there is a “reasonable probability” of substantially lessening competition or tending to create monopolies.⁵⁸ Thus, certainty that a merger will result in such effects is far from necessary; Congress wanted more proactive enforcement by the Agencies.⁵⁹ Clearly defined and amply supported metrics such as a large HHI increase should be a much stronger presumptive screen in the new guidelines only rebuttable by the strongest and most compelling evidence to the contrary. In the already concentrated and anticompetitive agricultural markets, such a screen should operate as a complete prohibition. This will empower enforcement and inform industry of the line it cannot cross. To faithfully implement antitrust protections, the Agencies must start reliably applying these kinds of anticompetitive presumptions.⁶⁰

The Agencies should also consider other metrics giving rise to presumptively anticompetitive mergers beyond HHI increases. For instance, an observed industry “trend toward concentration”⁶¹ should inform the market concentration analysis. So too should other metrics

⁵⁴ HMG, *supra* note 20, at Section 5.3. Per the guidelines, the Agencies calculate the HHI of market concentration by “summing the squares of the individual firms’ market shares,” which has the effect of giving “proportionately greater weight to the larger market shares.” *Id.* at 18. Mergers that involve an HHI increase of more than 200 points “will be presumed to be likely to enhance market power.” *Id.* at 19.

⁵⁵ HMG, *supra* note 20, at Section 5.3.

⁵⁶ See Exhibit 3 at 5 (noting the HHI increase for the Bayer-Monsanto merger was nearly four times greater than what the merger guidelines consider presumptively likely to enhance market power and create a highly concentrated market).

⁵⁷ 15 U.S.C. § 18.

⁵⁸ *Id.*; *Brown Shoe Co.*, 370 U.S. at 325, 355; *H.J. Heinz Co.*, 246 F.3d at 713; *Dairy Farmers of Am., Inc.*, 426 F.3d at 58; *United States v. Von’s Grocery Co.*, 384 U.S. 270, 284–286 (1966); S. Rep. No. 1775, 81st Cong., 2d Sess. 4–5 (1950) (“The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipency and well before they have attained such effects as would justify a Sherman Act proceeding.”).

⁵⁹ See *Von’s Grocery Co.*, 384 U.S. at 284–285 (noting the Clayton Act standard is “more stringent than a ‘mere possibility’ one the one hand and more lenient than that of a ‘certainty’ on the other”); Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 255 (1960).

⁶⁰ Stronger and more evenly applied presumptions will also alleviate the intense burden placed on parties and judges trying to referee these transactions. Current guidelines and Agency practice have led to “the extremely unsatisfactory state of our substantive merger law, ... [where v]irtually the entirety of the law boils down to the nearly unreviewable fact-finding of one person in each case (the trial judge), subject to the extravagant burden of proof created from more or less whole cloth” in *United States v. Baker Hughes*, 908 F.2d 981 (D.C. Cir. 1990). Chris Sagers, *No Fair Hearing for the DoJ in the AT&T-Time Warner Decision*, ProMarket (June 18, 2018), <https://www.promarket.org/2018/06/18/no-fair-hearing-doj-att-time-warner-decision/>.

⁶¹ See, e.g., *Brown Shoe Co.*, 370 U.S. at 316 (1962); *United States v. Baker Hughes*, 908 F.2d 981, 990 (D.C. Cir. 1990) (quoting *Philadelphia Nat’l Bank*, 374 U.S. at 363).

measuring current market conditions. Antitrust analysts often use the four-firm concentration ratio (CR4), which identifies the market share of the four largest firms, as an appropriate benchmark for market competition analyses.⁶² At least one federal circuit court has likewise looked to a CR4 analysis to uphold the Agencies' authority to block mergers.⁶³ Additionally, even when an HHI and CR4 analysis show relatively competitive conditions, it is still important to consider whether agribusiness firms enjoy near total monopolies for a specific segment of the market, whether it be for the production and sale of a specific product line, or within specific geographic markets. The Agencies should adopt a CR4 analysis and these other reliable metrics, in addition to its current HHI approach, to build a more accurate and comprehensive picture of market concentration that will facilitate enforcement. Setting clear and defensible metrics establishing a presumption that further concentration or accumulated market power is likely to lessen competition or trend toward monopoly will result in better enforcement, more certainty for industry, and better protection of competition.

C. Pervasive Collusive or Parallel Accommodating Conduct by Agribusiness Firms Supports a Presumption Against Agribusiness Mergers

Anticompetitive outcomes via coordinated or parallel accommodating conduct have become the norm in the highly concentrated agricultural markets, and the Agencies must strengthen their merger enforcement to ensure the problem does not get even worse. The Agencies' existing guidance acknowledges the risk of these collusive behaviors, and notes that market concentration can "strengthen such responses or enable multiple firms in the market to predict them more confidently, thereby affecting the competitive incentives of multiple firms in the market."⁶⁴ Yet, despite this guidance in place, the Agencies have failed to enforce the law against a slew of mergers and acquisitions that have led to persistent coordinated and parallel accommodating conduct among the firms now dominating these excessively concentrated markets. The Agencies' new guidelines should expressly include a pattern of anticompetitive conduct in a market or by a firm as establishing a presumption against any further consolidation or aggregation of market power, because such anticompetitive practice would only become easier and more likely by the post-merger firm(s).

One of the primary ways in which agribusiness firms have engaged in collusive conduct is through the use of wholesale and retail price statistics shared industry-wide through companies like Agri Stats. This privately held data and analytics firm facilitates the exchange of confidential, proprietary, and competitively sensitive data amongst meatpackers, allowing companies to see in nearly real-time counterparts' production numbers, what they pay producers, and what prices they intend to charge consumers.⁶⁵ Meat processing companies rely heavily on

⁶² See, e.g., Maurizio Naldi & Marta Flamini, *The CR4 Index and the Interval Estimation of the Herfindahl-Hirschman Index: An Empirical Comparison* (June 2014), https://www.researchgate.net/publication/272247507_The_CR4_Index_and_the_Interval_Estimation_of_the_Herfindahl-Hirschman_Index_An_Empirical_Comparison.

⁶³ *FTC v. University Health, Inc.*, 938 F.2d 1206, 1211 n.12 (11th Cir. 1991).

⁶⁴ HMG, *supra* note 20, at 25.

⁶⁵ Eli Hoff, *Is this legal? Why an Obscure Data Service Has Been Sued Nearly 100 Times for Facilitating Anti-Competitive Behavior*, Investigate Midwest (July 29, 2021), <https://investigatamidwest.org/2021/07/29/is-this-legal-why-an-obscure-data-service-has-been-sued-nearly-100-times-for-facilitating-anti-competitive-behavior/>; Leah Douglas & Christopher Leonard, *Is the U.S. Chicken Industry Cheating Its Farmers?*, Food & Env't Reporting Network (Aug. 2, 2019), <https://thefern.org/2019/08/is-the-u-s-chicken-industry-cheating-its-farmers/>.

Agri Stats data, and for that reason the data sharing tool has been at the center of over 100 lawsuits alleging price-fixing conspiracies.

The problem is made worse by agribusiness' drive to homogenize product lines, which facilitates output suppression and a coordinated rise in consumer prices.⁶⁶ In beef, pork, and poultry markets, homogenization is encouraged and often forced upon producers to serve the interests of the largest firms. Trade organizations representing the largest integrated firms celebrate homogenization,⁶⁷ and producers' own money is used to characterize entire markets as producing single, indistinguishable product lines that benefit large firms' interests and undermine independent producers.⁶⁸

The litany of ongoing litigation and DOJ investigations against the largest meat, poultry, and other agribusiness firms makes the problem, and the Agencies' failure to protect against excessive market concentration that allows such anticompetitive behavior, crystal clear. A few more recent examples include:

- The DOJ lawsuit against executives from Tyson Foods, Pilgrim's Pride, Koch Foods, Perdue, and others alleging price fixing and rigged bids in poultry markets.⁶⁹
- A class action brought against Smithfield Foods, Hormel Foods, Tyson Foods, Agri Stats, JBS USA, Seaboard Foods, and others for colluding to suppress output and fix prices.⁷⁰
- A lawsuit brought by grocery chains alleging a conspiracy to control the pork market and raise prices by JBS USA, Tyson Foods, Smithfield Foods, Hormel, Agri Stats, and others.⁷¹

⁶⁶ See HMG, *supra* note 20, at section 6.3; see also Eli Hoff, *Is this legal? Why an Obscure Data Service Has Been Sued Nearly 100 Times for Facilitating Anti-Competitive Behavior*, Investigate Midwest (July 29, 2021), <https://investigatamidwest.org/2021/07/29/is-this-legal-why-an-obscure-data-service-has-been-sued-nearly-100-times-for-facilitating-anti-competitive-behavior/>.

⁶⁷ E.g., National Chicken Council, *Vertical Integration* ("An important purpose of [integrators' preferred contracting systems] is to 'standardize production practices with the goal of producing a homogenous commodity.'"), <https://www.nationalchickencouncil.org/industry-issues/vertical-integration/>.

⁶⁸ For a detailed analysis of how independent producers' interests are undermined by the largest agribusiness firms using homogenization, see *Amici Curiae* of Food & Water Watch, Dakota Rural Action, Family Farm Action Alliance, Farm and Ranch Freedom Alliance, Institute for Agriculture and Trade Policy, Iowa Citizens for Community Improvement, Rural Advancement Foundation International USA, and Western Organization of Resource Councils, *R-CALF USA v. Vilsack*, No. 20-35453 (9th Cir. 2021), ECF No. 16 (*petition for certiorari filed* Dec. 17, 2021) (included here as Exhibit 5).

⁶⁹ Chloe Sorvino, *Pilgrim's Pride Ex-CEOs Face Felony Trial Over Alleged Price-Fixing in Chickens*, Forbes (Feb. 22, 2022), <https://www.forbes.com/sites/chloesorvino/2022/02/22/poultry-executives-facing-price-fixing-charges-kick-off-rare-criminal-trial/?sh=1fe380d92ec7>.

⁷⁰ Cathy Siegner, *Lawsuit Charges Smithfield, Hormel, Tyson and Others with Fixing Pork Prices*, FoodDive (June 29, 2018), <https://www.fooddive.com/news/lawsuit-charges-smithfield-hormel-tyson-and-others-with-fixing-pork-price/526828/>.

⁷¹ Julie Harker, *Grocers File Complaint Against Pork Processing Companies*, Brownfield (Jan. 5, 2022), <https://brownfieldagnews.com/news/grocers-file-complaint-against-pork-processing-companies/>.

- UniPro Foodservice, Inc.’s lawsuit alleging a conspiracy to control the pork market and raise prices by JBS USA, Tyson Foods, Smithfield Foods, Hormel, Agri Stats, and others.⁷²
- Lawsuits against the “Big Four” beef packers alleging a conspiracy to inflate beef prices.⁷³
- R-CALF’s lawsuit, representing independent ranchers, against the “Big Four” beef packers alleging a conspiracy to fix prices.⁷⁴
- The DOJ investigation into poultry companies for colluding to suppress worker wages.⁷⁵
- Several lawsuits alleging price gouging and price fixing by very large egg companies.⁷⁶

Several of the largest livestock firms have agreed to pay hundreds of millions to settle some of these allegations of price fixing and other anticompetitive conduct: Tyson Foods agreed to pay \$221.5 million to settle accusations of price fixing in early 2021;⁷⁷ JBS USA paid millions to settle pork price fixing allegations from food service and retail plaintiffs, direct purchasers, and consumers in 2021;⁷⁸ and JBS USA paid \$52.5 million to settle allegations of beef price fixing in 2021.⁷⁹

These examples make clear that the Agencies’ long-standing failure to prohibit harmful mergers and acquisitions has led to anticompetitive markets in which collusive or parallel accommodating conduct is widespread. The Agencies’ new guidance should reflect this

⁷² David Collins, *Antitrust Lawsuit Filed Against Pork Producers for Conspiracy to Inflate Prices*, Law Street (Dec. 9, 2021), <https://lawstreetmedia.com/news/agriculture/antitrust-lawsuit-filed-against-pork-producers-for-conspiracy-to-inflate-prices/>.

⁷³ Ryan McCarthy, *JBS USA Agrees to \$52.5 Million Settlement in Price-Fixing Lawsuit*, Meat+Poultry (Feb. 3, 2022), <https://www.meatpoultry.com/articles/26147-jbs-usa-agrees-to-525-million-settlement-in-price-fixing-lawsuit>.

⁷⁴ R-CALF USA, *Minnesota Federal Court Denies Packers’ Motion to Dismiss Cattle Antitrust Cases* (Sept. 14, 2021), <https://www.r-calfusa.com/minnesota-federal-court-denies-packers-motion-to-dismiss-cattle-antitrust-cases/>.

⁷⁵ Patrick Thomas & Brent Kendall, *Chicken Companies Were Asked about Sharing of Employment Practices*, Wall Street J. (Mar. 4, 2022), <https://www.wsj.com/articles/justice-department-investigates-chicken-companies-information-sharing-on-labor-11646397000>.

⁷⁶ Press Release, NY Attorney General, Attorney General James Sues One of the Nation’s Largest Egg Producers for Price Gouging During the Coronavirus Pandemic (Aug. 11, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-sues-one-nations-largest-egg-producers-price-gouging>; Christopher E. Ondeck et al., *Minnesota Files Price Gouging Suit Against Egg Producer*, Proskauer (Sept. 14, 2021), <https://www.mindingyourbusinesslitigation.com/2021/09/minnesota-files-price-gouging-suit-against-egg-producer/>; David Nayer, *Briefing Begins in Egg Price-Fixing Appeal*, Law Street (May 4, 2020), <https://lawstreetmedia.com/news/agriculture/briefing-begins-in-egg-price-fixing-appeal/>.

⁷⁷ Claire Kelloway, *Major Meat Corporations Pay Millions to Settle Price-Fixing Suits*, Civil Eats (Feb. 15, 2021), <https://civileats.com/2021/02/15/major-meat-corporations-pay-millions-to-settle-price-fixing-suits/>.

⁷⁸ Ryan McCarthy, *Judge Approves JBS Price-Fixing Pork Settlement*, Meat+Poultry (Jan. 19, 2021), <https://www.meatpoultry.com/articles/24407-judge-approves-jbs-price-fixing-pork-settlement>; Ryan McCarthy, *JBS USA Agrees to \$20M Settlement in Pork Price-Fixing Lawsuit*, Meat+Poultry (Mar. 30, 2021), <https://www.meatpoultry.com/articles/24751-jbs-usa-agrees-to-20m-settlement-in-pork-price-fixing-lawsuit>; Ryan McCarthy, *JBS USA Finalizes Settlement for Another Pork Price-Fixing Lawsuit*, Meat+Poultry (Nov. 22, 2021), <https://www.meatpoultry.com/articles/25825-jbs-usa-finalizes-settlement-for-another-pork-price-fixing-lawsuit>.

⁷⁹ Ryan McCarthy, *JBS USA Agrees to \$52.5 Million Settlement in Price-Fixing Lawsuit*, Meat+Poultry (Feb. 3, 2022), <https://www.meatpoultry.com/articles/26147-jbs-usa-agrees-to-525-million-settlement-in-price-fixing-lawsuit>.

unfortunate reality and establish presumptions against mergers or acquisitions that may exacerbate this ongoing anticompetitive conduct. This should include an analysis of anticompetitive behavior within defined markets as well as by specific firms, with a presumption that past anticompetitive conduct is likely to be encouraged and facilitated by any further concentration or acquisition of market power.

III. The Guidelines Should Account for the Full Range of Price and Non-Price Effects Likely to Result from Mergers in the Already Highly Concentrated Agribusiness Markets

As underscored by the above examples, highly concentrated food and agriculture markets result in unique price and non-price effects that harm consumers, farmers, and rural economies. The Agencies should update the merger guidelines to adequately account for these effects, and ensure they are considered in all future agribusiness merger reviews. These impacts include rising consumer prices once dominant firms have amassed exceptional market power, as well as non-price effects including reduced food access and choice, a growing lack of labeling transparency, increased monopsony power threatening farm incomes and livelihoods, and food insecurity.

A. Rising Consumer Prices

Consumers are especially vulnerable to the consolidated market power of food companies because food is a daily essential, and total consumer demand for food is therefore largely unresponsive to price or other market manipulations. Inelastic demand means that concentrated market power in the food sector can distort competition, raise prices, and erode equity more significantly than other sectors where consumers are price responsive.⁸⁰ Additionally, USDA has found that efficiency gains from consolidated food markets are generally not shared with consumers.⁸¹

B. Food Access and Choice

Consolidation also has substantial impacts on consumer food choices and access. Studies have shown that consolidated seed markets not only reduce biodiversity, but also favor processed food industries and degrade the quality of other inputs, limiting healthy choices for consumers.⁸² The same is true for consolidated meat production. For example, if a regional pork production market has multiple packers to which livestock facilities may sell their animals, one of which

⁸⁰ David A. Domina & C. Robert Taylor, Organization for Competitive Markets, *The Debilitating Effects of Concentration in Markets Affecting Agriculture* (Sept. 2009) 8, [https://www.dominalaw.com/documents/Domina-Taylor-Report-\(1\).pdf](https://www.dominalaw.com/documents/Domina-Taylor-Report-(1).pdf); see also Daniel Hosken et al., FTC Bureau of Econ., *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing*, Working Paper No. 313 (Dec. 2012) 29–30, <https://www.ftc.gov/sites/default/files/documents/reports/do-retail-mergers-affect-competition%C2%A0-evidence-grocery-retailing/wp313.pdf> (finding that consolidation in retail markets usually leads to a rise in food prices).

⁸¹ See, e.g., Nigel Key & William D. McBride, U.S. Dep't of Agric., Econ. Res. Serv., *ERR-52, The Changing Economics of U.S. Hog Production* (Dec. 2007) 24–26, <https://www.ers.usda.gov/publications/pub-details/?pubid=45938#>.

⁸² Gary Gereffi et al., *US-Based Food and Agricultural Value Chains and Their Relevance to Healthy Diets*, 4 *J. Hunger and Env't Nutrition* 357, 369–370 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3489136/>.

prefers conventional product while another serves smaller-scale, specialty production, the merger of these two firms is reasonably likely to eliminate or reduce market access for the specialty product lines. In this scenario, producers likely would be forced to modify their production practices to satisfy the remaining buyer or go out of business. Either way, consumer welfare is diminished through elimination of product variety and quality.⁸³

Concentrated retail grocery markets have likewise led to a decline in grocery store options and quality, resulting in reduced food access for many low-income Americans.⁸⁴ And as Food & Water Watch's *Grocery Cartel* report explains, consumers today are faced with a false sense of choice at the grocery store. While an array of brands occupies the shelves, the vast majority are owned by the same small number of very large firms. In addition to fostering an illusion of brand choice, highly concentrated retail markets have also made it harder for consumers to discern the origin and production methods of products. This is of significant and growing concern, in part because consumers are increasingly sensitive to what environmental, social, and governance practices they support with their dollars.⁸⁵

As raised by multiple commenters in the listening session, small producers driven out of conventional markets have sought to differentiate their products and meet consumer needs by highlighting certain product attributes like “product of the USA,” “humanely raised,” or “regenerative” in their marketing.⁸⁶ However, for these niche markets to properly function, transparency and truth in labeling and advertising is essential. Unfortunately, large firms have increasingly leveraged their extreme market power to appropriate these advertising claims for their own, even when they do not accurately describe their products or production practices.⁸⁷ When big brands flood the market with false and misleading claims touting the non-existent environmental, social, and health benefits of their products, they not only dupe consumers into making uninformed food choices, but also further undermine the ability of small producers or maverick newcomers to effectively compete.⁸⁸

⁸³ See generally Christine Abely, *E-Commerce Transactions and Country of Origin Marking for Imported Products: A Gap Between Statutory Purpose and Legal Requirements*, 59 Va. J. Int'l L. 1, 24 (Spring 2019) (“Consumers have also shown a willingness to pay higher prices for products from locations perceived as desirable”); Zak Franklin, *Giving Slaughterhouses Glass Walls: A New Direction in Food Labeling and Animal Welfare*, 21 Animal L. 285 (2015) (discussing consumer preferences for more “humane” meat and poultry products).

⁸⁴ See Exhibit 1, at 4.

⁸⁵ See, e.g., Caitlin M. Ajax & Diane Strauss, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere “Puffery”?*, 45 Ecology L. Quarterly 703, 704–05 (2019) (“research suggests that many consumers today are more socially conscious, demanding “greener” products and more transparency on corporate practices”).

⁸⁶ See Food and Agriculture Listening Forum, *supra* note 2.

⁸⁷ See, e.g., FWW et al., Complaint for Action to Stop False and Deceptive Advertising by Smithfield Foods, Inc. (Feb. 4, 2021) (documenting the false and misleading environmental and sustainability claims made by the world's largest pork producer), https://www.foodandwaterwatch.org/wp-content/uploads/2021/08/2021.02.03_Smithfield-FTC-complaint-filed.pdf; Complaint, *Animal Legal Defense Fund v. Hormel Foods Corp.*, 2016 CA 004744 B (D.C. Super. Ct., June 29, 2016) (documenting the ways in which the company's “natural” claims misled consumers); Complaint, *Food & Water Watch v. Tyson Foods, Inc.*, 2019 CA 004547 B (D.C. Super. Ct., July 7, 2019) (documenting false and misleading environmental and animal welfare claims).

⁸⁸ *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 n.9 (1999) (“That false or misleading advertising has an anticompetitive effect, as that term is customarily used, has been long established.” (citing *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 79–80 (1934))); Michael A. Carrier & Rebecca Tushnet, *Essay: An Antitrust Framework for False Advertising*, 106 Iowa L. Rev. 1841, 1864 (May 6, 2021) (“When companies engaging in false advertising have monopoly power, they possess the ability to harm not only an individual competitor but also the market as a whole. The consequences can be significant, especially for nascent competitors not able to enter the market, as the

C. Monopsony

Increased monopsony power is also a significant effect of agribusiness mergers that harms rural economies and farm incomes. Particularly prevalent in the meatpacking industry, rising concentration increases buyer power significantly and gives companies more leverage over producers. As one law professor put it, “[i]t is monoposy power that has enabled the big meat packers to turn farmers into serfs.”⁸⁹

This asymmetrical power dynamic allows packers/processors to exercise considerable control over farmers, lower the prices they pay for livestock, and more easily collude with other large firms, either tacitly or expressly. The decline in the number of buyers has left fewer selling options for producers, which puts them under increased pressure to take whatever price they can get. Moreover, the perishability of most agricultural products significantly exacerbates the impact of market concentration and gives buyers unique leverage over farmers,⁹⁰ often forcing producers to accept less favorable prices.⁹¹

The hyper-consolidation of local and regional markets (see Section II.A) has also led to a rise in exploitative production contracts, and artificially suppressed wages.⁹² This is particularly true in the poultry industry, where producers cannot effectively market for a supplier relationship given geographic market structure, cannot own their own animals or other inputs, and are “dependent on the whims of a single processor for continuing business to meet significant capital debt service requirements on their poultry facilities.”⁹³

D. Food Insecurity

Tightly consolidated food supply chains are also highly susceptible to shocks and disruptions, giving rise to food security concerns. The COVID-19 pandemic exposed many of these supply chain vulnerabilities, particularly in the protein sector.⁹⁴ For instance, a COVID-19 outbreak in a single Smithfield hog plant in South Dakota that failed to provide adequate workplace protections took 5 percent of the nation’s hog processing capacity offline, and essentially shut down the regional market. Without any viable, local or regional options, this processing bottleneck left many farmers with no choice but to euthanize their hogs.⁹⁵ Similarly,

deception of consumers deprives them of the opportunity to obtain lower prices, more options, or enhanced quality.”).

⁸⁹ Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. Mich. J.L. Reform 1, 103 (Fall 2015).

⁹⁰ David A. Domina & C. Robert Taylor, Organization for Competitive Markets, *The Debilitating Effects of Concentration in Markets Affecting Agriculture* (Sept. 2009) 8, [https://www.dominalaw.com/documents/Domina-Taylor-Report-\(1\).pdf](https://www.dominalaw.com/documents/Domina-Taylor-Report-(1).pdf).

⁹¹ See Exhibit 4 at 5.

⁹² See, e.g., *id.* at 9–13 (discussing the effects of monopsony power in pork markets); C. Robert Taylor, *The Many Faces of Power in the Food System*, presentation at the DOJ/FTC Workshop on Merger Enforcement (Feb. 17, 2004) 6–8, <https://www.justice.gov/atr/many-faces-power-food-system> (discussing monopsony power in poultry markets); C. Robert Taylor & David A. Domina, *Restoring Economic Health to Contract Poultry Production* (May 13, 2010) 1, <https://www.competitivemarkets.com/wp-content/uploads/2012/02/dominareportversion2.pdf> (same).

⁹³ C. Robert Taylor & David A. Domina, *Restoring Economic Health to Contract Poultry Production* (May 13, 2010) 1, <https://www.competitivemarkets.com/wp-content/uploads/2012/02/dominareportversion2.pdf>.

⁹⁴ National Sustainable Agriculture Coalition, *Meat and Poultry Supply Chain Complications and Covid-19* (May 21, 2020), <https://sustainableagriculture.net/blog/meat-and-poultry-supply-chain/>.

⁹⁵ Mary K. Hendrickson et al., *The Food System: Concentration and Its Impacts* (added May 6, 2021) 11–12, <https://farmaction.us/wp-content/uploads/2021/05/Hendrickson-et-al.-2020.-Concentration-and-Its->

farmers dumped huge quantities of fresh produce and dairy destined for then-shuttered schools, restaurants and businesses, because the centralized supply chain lacked the flexibility to pivot to new markets before food spoiled, despite spiking retail demand as people quarantined and ate at home.⁹⁶

IV. The Agencies Should Ensure that Efficiency Considerations Do Not Circumvent the Clayton Act

In keeping with both the letter and spirit of the Clayton Act, the Agencies should stop relying on supposed gains in market efficiency to justify the approval of otherwise unlawful mergers. The U.S. Supreme Court has made it abundantly clear that § 7 of the Clayton Act prohibits mergers that may substantially lessen competition, regardless of whether the merger may bring some degree of efficiency.⁹⁷ This express rejection of supposed benefits to justify an anticompetitive merger makes perfect sense given Congress’s intent in enacting the Clayton Act. Recognizing corporate concentration as a threat to consumers, businesses, and our democratic process, Congress specifically aimed to control unchecked consolidation in order to mitigate the kinds of harms caused by increased concentration, knowing that some tradeoffs were inevitable.⁹⁸

To this end, the Agencies must reject past guidance that embraced a cost-benefit analysis in which claimed efficiencies tipped the scales in favor of allowing anticompetitive mergers and acquisitions. Section 10 of the Horizontal Merger Guidelines treat claimed efficiencies in one part of the market as an offsetting factor capable of making a merger that violates the Clayton Act acceptable.⁹⁹ This has no basis in law, has proven to result in excessively concentrated and anticompetitive markets, and the Agencies must reject it. Congress has already made this cost-benefit choice in favor of controlling harmful consolidation, and the Agencies cannot rewrite the law.

Further, a claim of efficiency, for example in the form of reduced consumer prices, fails to account for impacts to competition upstream where producers may be severely harmed by increased concentration. Shifting market power to a small number of large firms at the expense of producers will likely have the effect of incurring nonprice harms such as reduced variety and quality.

[Impacts FINAL Addended.pdf](#); Press Release, Dep’t of Labor, Occupational Safety and Health Admin., U.S. Department of Labor Cites Smithfield Packaged Meats Corp. for Failing to Protect Employees from Coronavirus (Sept. 10, 2020), <https://www.dol.gov/newsroom/releases/osh/osh20200910>.

⁹⁶ David Yaffe-Bellany & Michael Corkery, *Dumped Milk, Smashed Eggs, Plowed Vegetables: Food Waste of the Pandemic*, N.Y. Times (updated Mar. 6, 2022), <https://www.nytimes.com/2020/04/11/business/coronavirus-destroying-food.html>.

⁹⁷ *Philadelphia Nat’l Bank*, 374 U.S. at 371 (“a merger the effect which ‘may be substantially to lessen competition’ is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial”).

⁹⁸ S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950) (“[t]he purpose of the proposed bill . . . is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions.”); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65, 135–39 (1982); Wesley A. Cann, Jr., *Section 7 of the Clayton Act and the Pursuit of Economic “Objectivity”: Is There Any Role for Social and Political Values in Merger Policy?*, 60 Notre Dame L. Rev. 273, 278 (1985).

⁹⁹ HMG, *supra* note 20, at 29–31.

Therefore, the Agencies should eliminate guidelines or practices like those described in section 10 of the Horizontal Merger Guidelines. The Clayton Act seeks to stop mergers that may substantially lessen competition in any line of commerce, and no degree of claimed efficiency can undo that congressionally-imposed prohibition. The Agencies' new guidelines must draw the line that Congress intended.

V. Conclusion

Based on the foregoing, Commenters request that the Agencies strengthen their merger enforcement guidelines so that the decades-long trend towards extremely concentrated and overtly anticompetitive agribusiness markets may be stopped. The new guidelines must include strong presumptions that the Agencies can reliably and confidently apply to block any additional mergers in agribusiness markets that would increase concentration or a dominant firms' market power in any market. Ample evidence is available to the Agencies to establish and enforce such a presumption.

Sincerely,



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Dakota Rural Action
Farm Aid
Farm and Ranch Freedom Alliance
Friends of the Earth
Institute for Agriculture and Trade Policy
Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA)
Western Organization of Resource Councils

EXHIBIT 1



The Economic Cost of Food Monopolies: The Grocery Cartels

While the COVID-19 pandemic dealt a blow to many parts of the economy, one sector saw record-breaking profits: the grocery industry. Many major supermarket chains reaped double-digit growth and surging stock values in 2020, as people locked down and ate more meals at home.¹

Americans, however, faced rising food costs and widespread shortages of some staples.² And while the cost of meat shot up, prices paid to farmers actually declined, spurring a federal investigation. Most atrociously, frontline workers who stocked grocery shelves or worked in meat processing plants sickened and died from COVID-19. Yet many corporations limited hazard pay and instead invested in stock buybacks.³ The COVID-19 pandemic pulled back the curtain on the idea that the current food system offers abundance, efficiency and resilience.

This first issue brief in our updated series on the *Economic Costs of Food Monopolies* examines the impacts of consolidation within the U.S. grocery industry. We found that:

- Just four companies took in an estimated two-thirds of all grocery sales in 2019, the year before the pandemic hit. Walmart alone gobbles up \$1 out of every \$3 spent at grocery retailers.
- The rise in supercenters and supermarket chains coincides with a steep decline in the actual number of grocery stores — a roughly 30 percent loss from 1994 to 2019. The trend is toward fewer but much larger stores, including a surge in those employing 100 or more employees.
- Food & Water Watch surveyed 55 grocery categories and found that just eight can be called highly competitive markets. In fact, over a third exceed the “highly concentrated” threshold used by the U.S. Department of Justice (DOJ) in merger reviews.

- Kraft-Heinz’s 2015 merger made the conglomerate a corporate powerhouse. It is among the top companies in one-fifth of all food categories we surveyed. General Mills, Conagra and Campbell Soup Company also topped multiple food categories.

This is not a broken system. It is functioning as it was designed: to funnel wealth from local communities into the hands of corporate shareholders and executives. Fortunately, alternative models exist that invest in their workers and the local economy, while increasing our food system’s resilience to shocks like the pandemic. A combination of antitrust law and enforcement and public incentives to help regional food hubs take root can help turn the tide.

Agribusiness merger-mania

The modern supermarket was born in the 1930s, forever changing the ways Americans shopped for food. Chains like King Kullen expanded their store sizes and shifted to self-service, while increasingly selling nationally advertised food brands. The post-war boom accelerated this growth, as did new technologies like UPC codes and electronic scanners. By the 1980s, Americans were spending three out of every four food dollars at supermarkets.⁴

Still, local and regional supermarket chains largely dominated the market, with some independent retailers managing to hang on. However, things were beginning to change.⁵ The combined market share of the four largest grocery retailers tripled from 23 percent in 1993 to 69 percent in 2019 (see Figure 1).⁶ Today, an ever-shrinking number of companies control what we grow and what we eat. How did we get here?

One significant factor has been the expanded influence of supercenters and warehouse clubs like Walmart and Costco. Walmart grew from opening its first supercenter selling groceries in 1988 to capturing \$1 out of every \$3 spent at grocery retailers^a today. Walmart’s strategy of race-to-the-bottom prices squeezed out many smaller grocers and other local retailers. Larger supermarket chains responded to Walmart’s threat by expanding their own market presence, primarily through purchasing regional chains while retaining the original store brand.⁷

Supermarket and warehouse chains, in turn, exert influence further up the supply chain.⁸ Some charge manufacturing companies “slotting fees” for the privilege of stocking their products, making it more difficult for new brands to emerge.⁹ Others have vertically integrated their supply chains: Kroger, Albertsons and Walmart own milk-bottling plants, and Costco is building

a Includes consumer expenditures at grocery stores, warehouse clubs and supercenters, and other food stores (excluding convenience stores).

FIG. 1: Market Power of the Four Largest Grocery Retailers

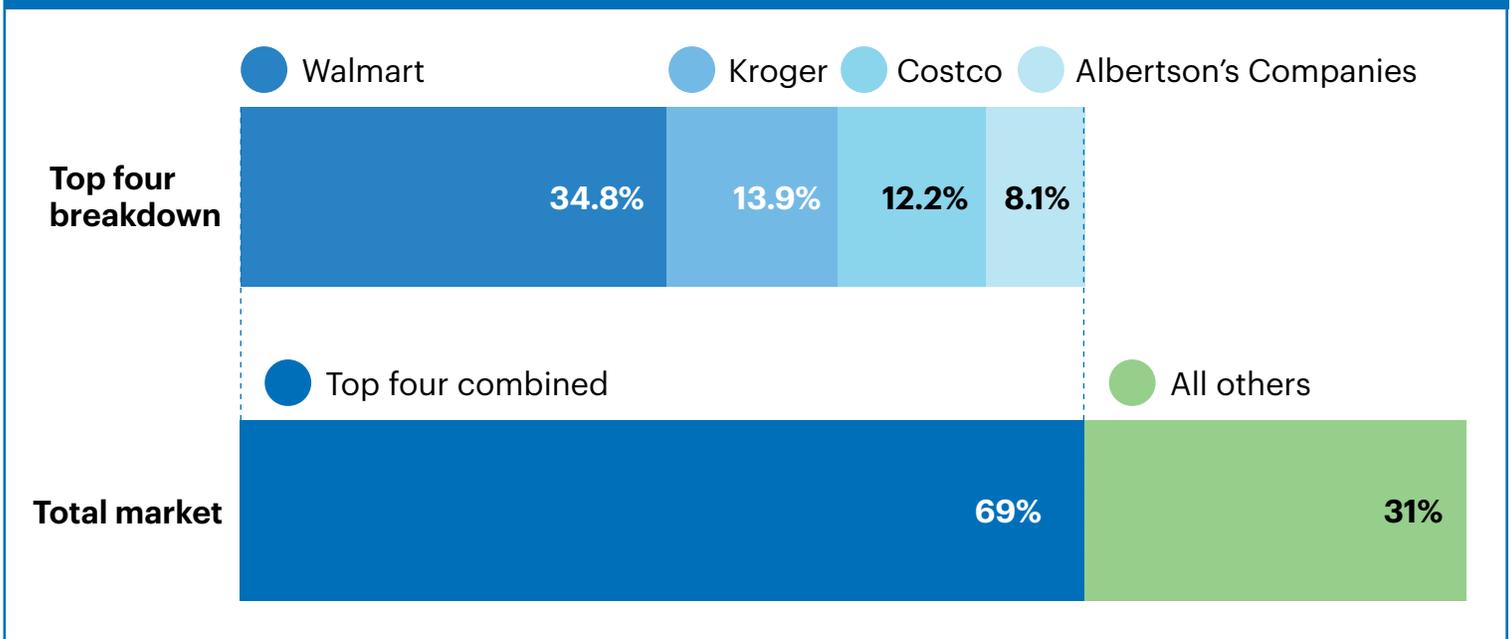
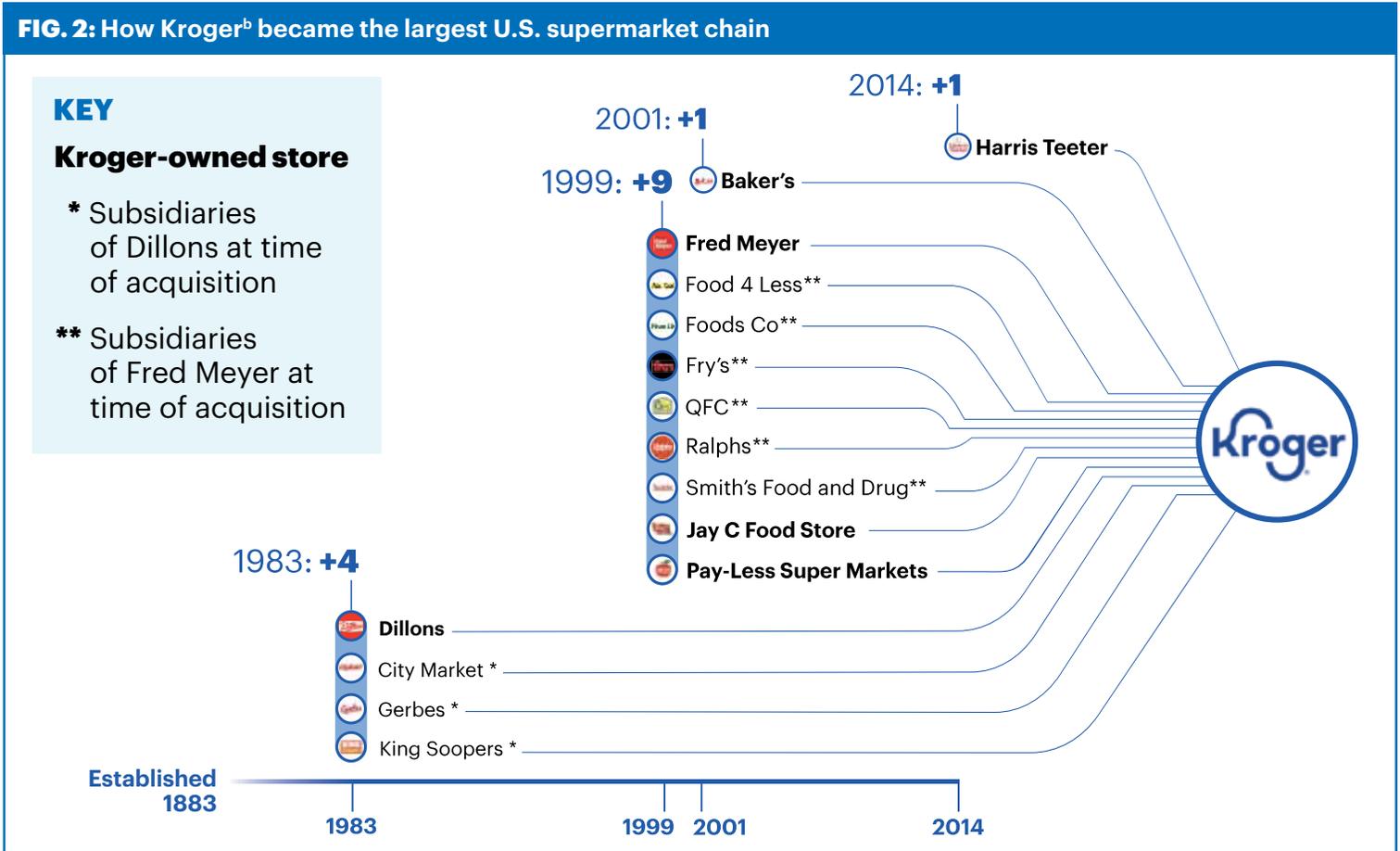


FIG. 2: How Kroger^b became the largest U.S. supermarket chain



chicken processing facilities.¹⁰ This frenzy of horizontal and vertical mergers hit virtually every sector of the food system in the 1990s and early 2000s (see Figure 2). Food industry mergers and acquisitions continue today, with over 300 in 2019 alone.¹¹

Experts predict that online shopping, which had explosive growth during the pandemic, will be the next big disruption to the grocery market.¹² Major players like Walmart and Instacart are cornering the delivery market by operating at razor-thin or negative margins — and off the backs of gig workers.¹³ Smaller chains and independent co-ops simply cannot compete.

Why should you care about market concentration?

A new supercenter or grocery chain store might bring seemingly greater selection and competitive prices. But these supposed perks conceal the bigger impacts that large grocery retailers have on regional economies.

First, a new big box chain can drive smaller grocers and other local retailers out of business. Walmart, for instance, uses cutthroat techniques — like squeezing costs from its supply chain and price-gouging — to gain an edge against competitors. These practices also prevent new stores from emerging.¹⁴ The growth of national supermarket chains and supercenters coincides with a significant drop in the overall number of U.S. grocery stores^c — down nearly 30 percent by 2019 compared to 1994.¹⁵

Smaller, independent businesses have a greater positive impact on local economies than chain retailers.¹⁶ Their loss in the face of big box competition has rippling social and economic effects within a community, and can even lower local wages, as well as those in the retail industry overall.¹⁷ Major big box chains also impact manufacturing wages at firms that rely on these chains as their sole purchaser.¹⁸

^b Kroger is second largest retailers of groceries (behind Walmart Supercenters and Sam's Clubs) and the largest supermarket chain.

^c Estimate includes convenience stores, which were not differentiated in the U.S. Census Bureau Economic Surveys until 1998. It does not include warehouse clubs and supercenters. See Methodology for details.

On top of this, many grocery retailers embraced self-checkout aisles and “demand-based” schedules to reduce labor costs (i.e., cutting weekly hours and reducing access to benefits).¹⁹ Wages remain so inadequate that even some full-time grocery workers rely on public assistance such as Medicaid and the Supplemental Nutrition Assistance Program (SNAP). In fact, a recent U.S. Government Accountability Office (GAO) report identified large grocery and general merchandise retailers as among the top industries employing workers enrolled in both programs. Walmart employs more working adults who rely on SNAP than any other company among the states included in the study — 1.5 times as many as the next employer, McDonald’s. Kroger chains also feature prominently in the ranking.²⁰

Second, at the local level, reduced grocery options can be more dire than national statistics reveal. Walmart, for instance, captures up to 95 percent of all grocery sales in some U.S. micropolitan regions.²¹ This means that many people today have fewer options for groceries near their homes — or none at all. According to the U.S. Department of Agriculture (USDA), 17 percent

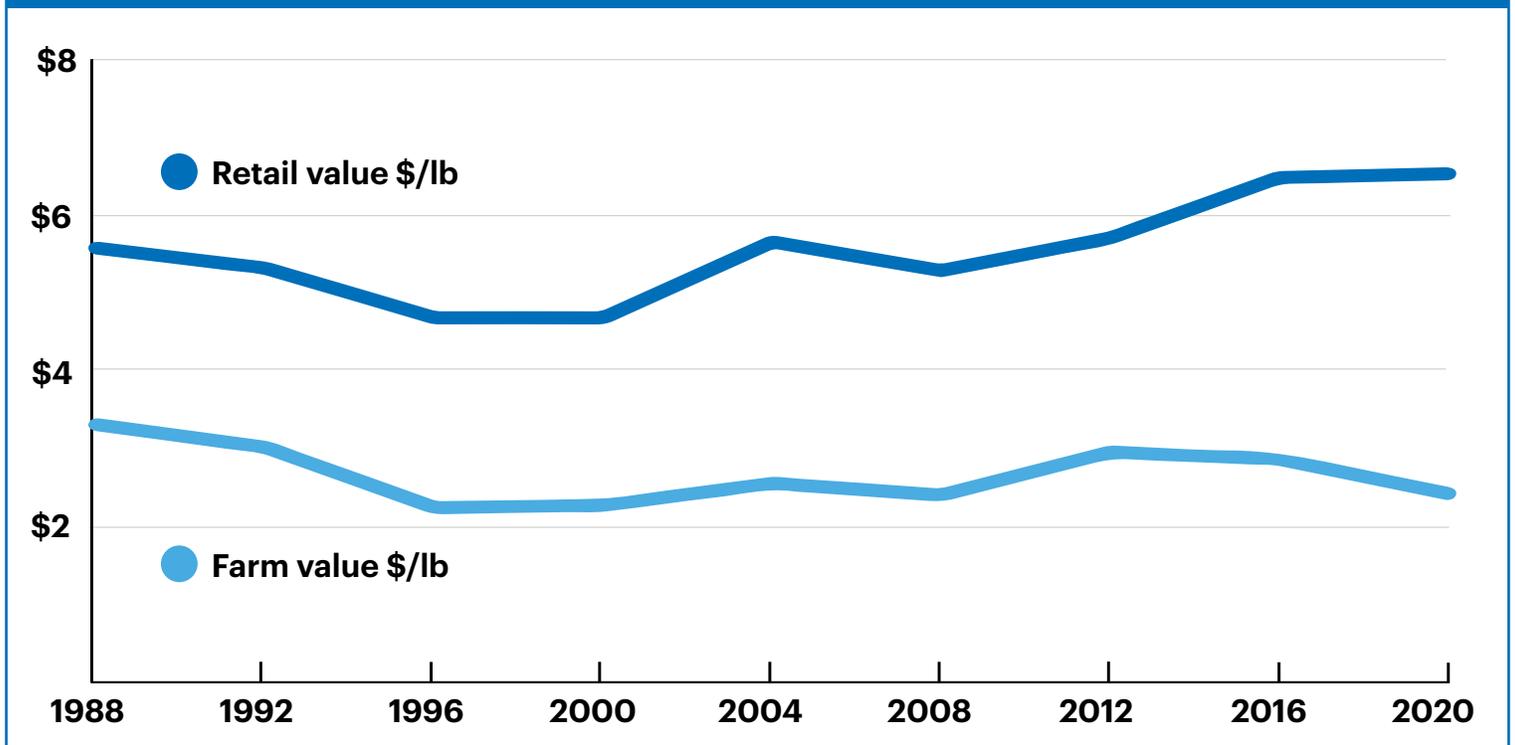
of Americans live in low-income census tracts with reduced food access. This includes urban neighborhoods with low vehicle ownership where residents must travel half a mile or more to the nearest store, and rural communities that travel 10 miles or more.²²

And what about those low, low prices? They do not necessarily stick around. Walmart has been known to raise food prices once it becomes the dominate grocery retailer in town.²³ Similar trends can occur in food manufacturing: for example, the real cost of beef rose after the meatpacking industry became more tightly consolidated, while the farmers’ share of the profits declined (see Figure 3).²⁴

The U.S. Federal Trade Commission (FTC) analyzed grocery mergers and found that growing market concentration usually leads to a rise in food prices.²⁵ Many academic studies also make this link.²⁶ Concentration in the broader agribusiness sector can also reduce efficiency and growth while increasing economic inequality.²⁷ Simply put, market power enables intermediaries like retailers and processors to capture an ever-growing share of food dollars,²⁸ at the expense of farmers, food chain workers and eaters.

FIG.3: Corporate concentration raises food prices and guts farm income

BEEF RETAIL VALUE VS. FARM VALUE IN DOLLARS PER POUND



All values adjusted to January 2020 dollars.

The illusion of choice

Inside supermarkets themselves, another battle is brewing: the fight to control the processing and marketing of food products.

Food & Water Watch examined the market share of the dominant companies across 55 grocery categories. (See Appendix for full list of grocery items, companies, brands and market shares.) We chose categories that represent the variety of products Americans commonly shop for, from fresh vegetable side dishes to milk and milk alternatives to convenience meals. We calculated the ratio of sales of the top four (or fewer) companies in each food category, compared to those of all other companies. This “CR4 index” is one yardstick for measuring industry concentration, with 0 indicating complete competition and 100 indicating complete monopoly. Markets where the top four companies account for more than 40 percent of sales are generally considered to have reduced competition; those exceeding 60 percent are tight oligopolies^d or monopolies.²⁹

More than 60 percent of grocery categories analyzed are tight oligopolies/monopolies. Only eight (15 percent) are considered highly competitive. Markets where just a few companies control a majority of sales can have reduced competition, higher costs for new companies to enter and higher prices for consumers. They also enable collusion and price fixing.³⁰ Supermarkets might present a façade of variety and choice, but chances are you are choosing between just a handful of companies for each supermarket item.

Take yogurt, a product with enough flavors and brands to fill an entire supermarket showcase. Yet just four companies make up three-quarters of all yogurt sales. These include Danone (maker of Activia and Oikos), General Mills (Yoplait and Mountain High) and Groupe Lactalis (Stonyfield Organic and siggi’s).

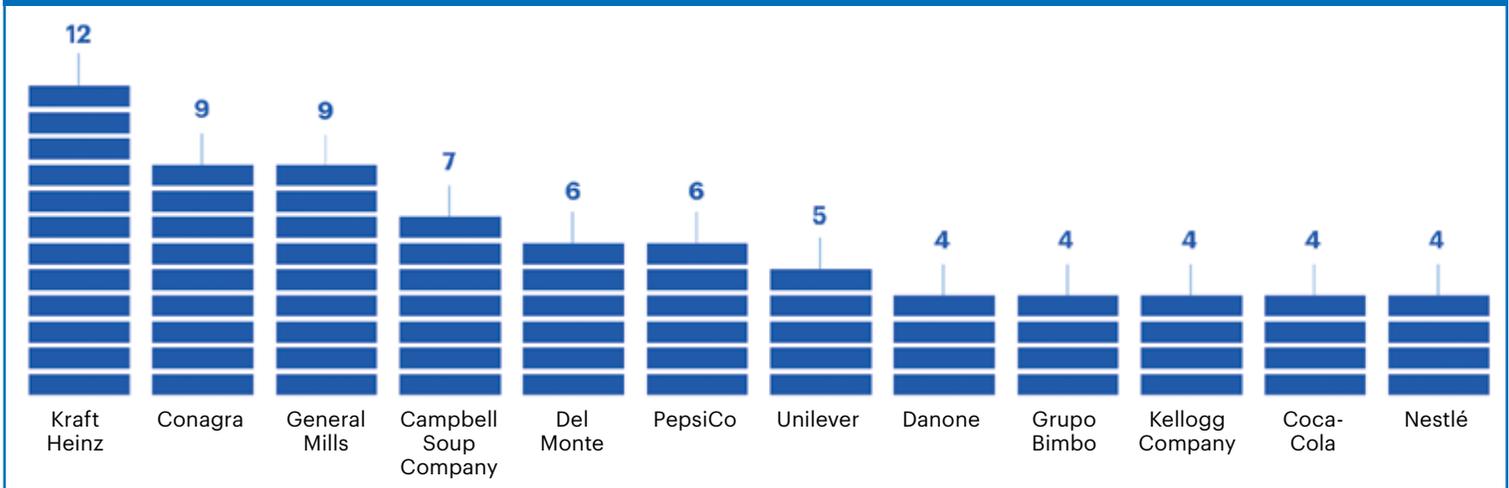
The baby formula market is another extreme oligopoly: just three companies capture 85 percent of all liquid formula sales and around 95 percent of powdered^e formula. Oligopolies enable these companies to engage in anticompetitive behaviors such as price fixing, which is long documented in the formula industry. Formula companies also use their power to aggressively promote their products to new mothers in their efforts to expand the market, especially in developing countries.³¹

We also found several monopolistic markets. PepsiCo alone captures 88 percent of all dip sales in the United States, largely through brands that do not carry its name (like Fritos, Lay’s and Tostitos). Danone dominates the refrigerated soy milk market with its Silk brand, accounting for 80 percent of all sales. The next leading brand takes in just over 1 percent. And Conagra has monopolies in more than one category, including single-serve prepared pasta dishes (64 percent of sales) and single-serve prepared sloppy joe sauce (92 percent of sales).



^d An oligopoly is a market dominated by a few firms, compared to monopolies where one firm dominates. See Robinson, William J. and Ashley M. Koley. “Antitrust enforcement against oligopolies.” *Antitrust Law Daily*. October 2019 at 1.

^e The 2017 *Market Share Reporter*, which we used in our analysis, only included data on U.S. sales of liquid formula. The estimate for powdered formula (which makes up the vast majority of formula sales) comes from a *New York Times* investigation and includes the same top three companies: Mead Johnson (acquired by Reckitt Benckiser in 2017), Abbott Laboratories and Nestlé. See Pomorski, Chris. “The baby-formula crime ring.” May 2, 2018. <https://www.meadjohnson.com/news/press-releases/mead-johnson-nutrition-merger-reckitt-benckiser-completed>.

FIG. 4: Number of times each company appears in the top four brands per food category

A handful of companies dominate the supermarket shelves (see Figure 4). General Mills and Conagra are among the top four companies in 9 out of the 55 categories we surveyed. Campbell Soup Company is in seven categories, and PepsiCo and Del Monte are both in six. Kraft-Heinz, however, blows them all out of the water at 12 categories (22 percent of the total). It is the lead company in five of those categories, including dry macaroni and cheese mixes and table sauces.

Kraft-Heinz is the result of a 2015 merger between two corporate giants in the food industry, Kraft and Heinz.³² The U.S. DOJ and the FTC are supposed to consider the impacts on market consolidation of proposed mergers. Using these agencies' very own measurement, over a third of grocery categories we surveyed exceed their "highly concentrated" market threshold.³³ Regardless, the agencies continue to greenlight mergers and acquisitions within these market categories.³⁴

Brand variety masks the problem of consolidation. Corporations usually keep the original brand name and marketing of popular items when they acquire competitors. You may be surprised to learn that Dave's Killer Bread is no longer owned by its namesake,³⁵ but by Flower Foods, a corporation that also produces Wonder Bread. And Caribou Coffee, Peet's Coffee and Gloria Jean's coffee beans are not from unique companies, but all belong to JAB Holding Company.

This is especially true in the organic and "natural" food market (see Figure 5 on page 7). Multinational

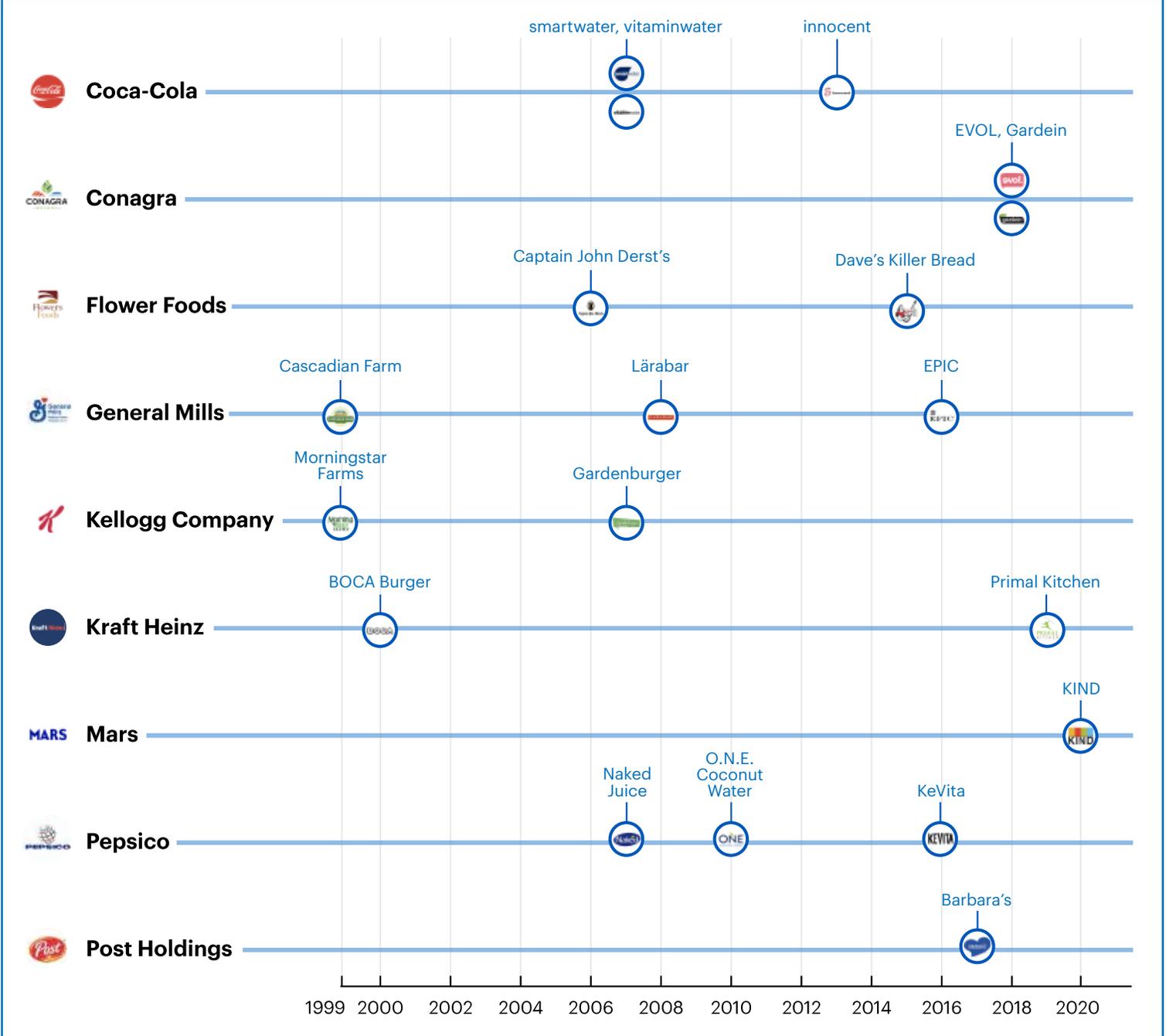
agribusinesses cornered the natural food market by acquiring well-known brands. General Mills owns Lärabar and Cascadian Farm, while Mars purchased the KIND Company. Kellogg Company dominates the frozen meat substitutes market by its acquisition of both Morningstar Farms and Gardenburger. Shoppers might think they are "voting with their dollars" by supporting brands and companies that share their values. In reality, their dollars are going to the same agribusinesses that also peddle sugary cereal and other junk food.

Supermarkets create additional hurdles that keep smaller, independent brands from breaking through these oligopolies. Some supermarkets charge slotting fees to processing companies in exchange for leasing shelf space or even stocking products. Companies willing to pay a premium can achieve more lucrative product placement, such as at eye-level or end-of-aisle displays. This effectively elbows out smaller brands unable to afford the fees. And while technically legal, details on the slotting fee system remain "shrouded in secrecy." In fact, witnesses from the manufacturing industry shielded their identities when testifying before Congress on the practice, donning black hoods and speaking behind smoked glass, presumably out of fear of retaliation by supermarket corporations.³⁶

Supermarkets are also expanding their private label lines in order to compete with both food processors and other retailers. These "store brand" products often cost less than name brand ones, and might

FIG. 5: Corporate takeover of the health food market

CORPORATE ACQUISITION OF HEALTH FOOD BRANDS BY YEAR



come from non-name brand manufacturers or even surpluses from brand name ones. Some supermarket chains even own manufacturing facilities that produce their own private label products.³⁷ Kroger's owns around three dozen manufacturing plants, including bakeries, dairies and meat processors, producing around 40 percent of its private label products. And some stores like Trader Joe's overwhelmingly sell private label products (accounting for approximately 80 percent of its sales).³⁸

In three grocery categories, private label products made up at least half of all sales. These include frozen fruit (66 percent of all sales), whole milk (56 percent) and eggs (54 percent). Private labels enable supermarkets to control more of the supply chain and compete with brand name products.³⁹ As shoppers, we have little way of knowing what companies or facilities are behind the private label products in our carts.



Market consolidation makes our food system vulnerable

The pandemic showed how our tightly consolidated, just-in-time grocery supply chain is highly susceptible to shocks and disruptions. A COVID-19 outbreak in a single Smithfield hog plant in South Dakota that failed to provide adequate workplace protections took 5 percent of the nation's hog processing capacity offline. Many farmers lacked local capacity for processing their hogs and were left with no choice but to kill their hogs.⁴⁰ Meanwhile, processing companies stoked fears of supermarket shortages in efforts to keep their plants open despite the deadly risks — while continuing to export record amounts of meat to foreign markets.⁴¹

Similarly, farmers dumped a gut-wrenching amount of fresh produce and dairy destined for then-shuttered schools, restaurants and businesses. This happened because the centralized supply chains lacked the flexibility to pivot to new markets before food spoiled.⁴² It also was a result of the loss of regional slaughterhouses, dairy plants and other processors that once supported nearby farms and boosted rural economies — until corporate consolidation wiped many of them out.⁴³

We must not use the pandemic recovery to prop up this inflexible and exploitive system. Instead, public resources must support the growth of regional food systems that support farmers, boost local economies and invest in workers.

The current, consolidated grocery system is not inevitable

The aggressive strategies we associate with today's agribusinesses — from vertical integration to waves of acquisitions to market manipulation — are nothing new, but part of the industry playbook dating back a hundred years.⁴⁴ What has changed is our federal regulators' oversight of growing corporate power and influence.

In the "trust-busting" era of the early 20th century, the U.S. government took action against anticompetitive practices of major meatpackers and other agribusiness giants. Many of our signature antitrust laws date back to this era, including the Packers and Stockyards Act, which prohibited discriminatory practices against farmers by meatpackers.⁴⁵ Antitrust oversight was fundamentally "anti-bigness" and prioritized protecting the interests of farmers, suppliers and small businesses. This interpretation continued into the middle of the century with additional legislation and action against powerful agribusinesses. Notably, the DOJ brought suits against major supermarket chains like A&P and Kroger due to their anticompetitive practices against suppliers and other retailers. Courts weighed such factors over any supposed cost savings that might be passed on to consumers.⁴⁶

But antitrust enforcement efforts were limited in their ability to stop new monopolies from forming — or to counter the growing political influence of agribusiness.⁴⁷ Additionally, by the latter part of the 20th century, antitrust oversight by courts and regulators shifted toward a single-minded focus on "economic efficiency" over concerns about market power or impacts on producers. The DOJ and FTC challenged more than a thousand mergers and acquisitions between 1950 and 1980, but this antitrust enforcement halted after Ronald Reagan was elected. This lenient attitude toward corporate concentration was similarly embraced by subsequent Democratic and Republican administrations alike.⁴⁸

Negligent regulators, asleep at the wheel, allowed a handful of agribusiness behemoths to amass market shares that dwarf those of the trust-busting era. Today — as the Packers & Stockyards Act turns 100 — the

beef packing industry is even more concentrated.⁴⁹ Walmart's share of grocery sales is more than twice as high as A&P's was when the DOJ forced its breakup.⁵⁰ And the DOJ continues to bless agribusiness mega-mergers, with some of the largest mergers in history occurring in the past decade.⁵¹

But there is hope for change. Congress is increasingly scrutinizing the tech industry for monopolistic behavior and anticompetitive practices. Now some lawmakers are turning their attention to agribusinesses.⁵² We must pressure our elected officials to strengthen our antitrust laws and enforce existing ones. Here are some key steps:

- **Stop consolidation in its tracks.** The COVID-19 pandemic has made pausing mergers all the more urgent, to prevent agribusinesses from purchasing struggling competitors and further entrenching their market power. Sample bills include the Food and Agribusiness Merger Moratorium and Antitrust Review Act.⁵³ This bill would enact an immediate moratorium on all large agribusiness mergers. It would also create a commission to evaluate the impacts of current consolidation levels on farmers and consumers and make recommendations to strengthen antitrust oversight.
- **Reinstate the Grain Inspection, Packers and Stockyards Administration (GIPSA).** In 2018, the Trump administration eliminated GIPSA, the independent office within the USDA that formally oversaw and enforced the Packers and Stockyards Act (P&SA). Enforcement moved to the Agricultural Marketing Service, an agency tasked with promoting agricultural products (as opposed to advocating for growers), thereby weakening P&SA oversight. The Biden administration must immediately reinstate GIPSA. It must also follow through with its promise of replacing the Trump administration's weak GIPSA rule with ones that make it easier for farmers to bring forth cases of abuses by powerful meat processing corporations.⁵⁴
- **Enforce existing antitrust legislation and break up monopolies/oligopolies.** Lax oversight and enforcement of anticompetitive practices helped create the mess we are in. We must elect leaders who are willing to stand against powerful

corporations and ensure that antitrust laws are appropriately interpreted and enforced. Federal courts must also broaden merger reviews beyond simplified "market efficiencies" to address potential impacts on the larger economy, including on farmers, workers and small businesses.⁵⁵

Antitrust enforcement is only part of the equation. We must also fundamentally reshape the ways in which we produce and market our food. This starts by boosting public funding for the expansion of local and regional food systems. Key infrastructure includes:

- **Grocery cooperatives.** Worker-owned cooperatives enable employees and communities to share profits and shape decisions. Cooperatives have a rich history in Black communities, and contemporary examples like Mandela Grocery in Oakland, California carry on the tradition. Mandela purchases legacy foods from local Black farmers, and it provides employees with the opportunity to share in profits by becoming "worker-owners." It is the first grocery store in its neighborhood in more than five decades, providing much-needed access to fresh, local produce.⁵⁶
- **Food hubs.** Larger institutions like restaurants and grocery stores often prefer to purchase from a single entity rather than from several small farms. A food hub can help bridge this divide. The Hmong American Farmers Association (HAFA) in West St. Paul, Minnesota assists small-scale farmers in marketing to local community supported agriculture (CSA) shares, schools, businesses, groceries and co-ops. The nonprofit also provides its members with additional marketing resources and training.⁵⁷
- **Local food processors.** These include the small-scale canning plants, slaughterhouses and grain mills that were all but wiped out by industrial agriculture. Nonprofits like the Common Grain Alliance are working to rebuild this infrastructure, by bringing together grain farmers, millers, bakers and brewers in the mid-Atlantic region. In fact, members saw a surge in demand for local flour at the onset of the pandemic, when flour disappeared from many supermarket shelves.⁵⁸

Public investment and incentives can help create similar food hubs across the country that are unique to each region’s geography and food culture. Congress should earmark additional funding in the next Farm Bill for existing USDA programs that support local food systems. State and local governments also play a vital role in providing additional resources and incentives. The impacts of regional food systems extend beyond farmers and food

producers, spurring local economic development and increasing food security.⁵⁹

Decentralized, diversified food systems are more resilient and capable of feeding people than the current corporate-controlled system. With political will and public investment, we can rebuild these local food economies — and reform food work from a system of exploitation to one of vocation.

Appendix: Market Share of 55 Grocery Items

Grocery Type	Grocery Item (Data Year)	Parent Company	Market Share (%)	Leading Brands
BEVERAGES	Beer (2017)	Top Companies	78.6	
		Anheuser-Busch InBev	41.6	Bud Light, Shock Top, Michelob Ultra, LandShark, Devils Backbone, Goose Island
		Molson Coors	24.3	Coors Light, Blue Moon, Miller Lite, Leinenkugel's
		Constellation Brands	8.9	Modelo, Corona, Pacifico
		Heineken N.V.	3.8	Heineken, Red Stripe, Amstel
	Bottled Water (2019)	Top Companies	49.8	
		Nestlé	24.4	Nestlé Pure Life, Perrier, S.Pellegrino
		Coca-Cola	12.0	DASANI, smartwater
		PepsiCo	9.4	Aquafina, LIFEWTR
		Talking Rain Beverage Company	4.0	Sparkling Ice, Talking Rain
		Private Label/Store Brand	30.7	
	Carbonated Soft Drinks (2019)	Top Companies	92.9	
		Coca-Cola	42.4	Coca-Cola, Fanta, Barg's Root Beer
		PepsiCo	27.4	Pepsi, Sierra Mist, Mug Root Beer
		Keurig Dr. Pepper	23.1	Dr. Pepper, Canada Dry, 7UP, A&W, Crush
		Private Label/Store Brand	3.5	
	Coffee (2019)	Top Companies	68.3	
		The J.M. Smucker Company	25.4	Folgers, Dunkin’
		Starbucks Corporation	16.1	Starbucks, Seattle's Best Coffee
		JAB Holding Company	15.1	Caribou Coffee, Peet's Coffee, Gloria Jean's Coffees
		Kraft Heinz	11.7	Maxwell House
		Private Label/Store Brand	16.3	
Craft Beer (2017)	Top Companies	32.6		
	Molson Coors	13.1	Blue Moon, Leinenkugel Specialty	
	Boston Beer Company	7.9	Samuel Adams	
	Sierra Nevada	6.4	Sierra Nevada	
	Kirin Holdings Co.	5.2	New Belgium	

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Appendix continued

Grocery Type	Grocery Item (Data Year)	Parent Company	Market Share (%)	Leading Brands
BEVERAGES	Juice (2019)	Top Companies	46.7	
		Coca-Cola	17.6	Minute Maid, Simply Orange, innocent, vitaminwater
		PepsiCo	12.1	Tropicana, Naked, KeVita
		Kraft Heinz	10.1	Capri Sun, Crystal Light, Kool-Aid, Country Time
		Keurig Dr Pepper	6.9	Hawaiian Punch, Mott's, ReaLemon, Clamato
		Private Label/Store Brand	12.9	
	Refrigerated Almond Milk (2020)	Top Companies	80.8	
		Blue Diamond Growers	39.7	Almond Breeze
		Danone	33.5	Silk
		Califia Farms	6.4	Califa Farms
		Coca-Cola	1.2	Simply Almond
		Private Label/Store Brand	18.5	
	Refrigerated Soy Milk (2020)	Top Companies	81.2	
		Danone	79.5	Silk
		Stremicks Heritage Foods	1.3	8th Continent
		HP Hood	0.4	Booth Bros. Dairy
		Prairie Farms	0.1	Hiland
		Private Label/Store Brand	18.6	
	Tea - Bags/loose (2020)	Top Companies	57.5	
		Unilever	21.2	Lipton, TAZO
		Bigelow Tea Company	16.6	Bigelow, Charleston Tea
		Hain Celestial Group	11.4	Celestial Seasonings
		Associated British Foods	8.3	Twinings
	Private Label/Store Brand	7.6		
Wine Makers (2017)	Top Companies	68.9		
	E&J Gallo Winery	25.1	André, Apothic, Manischewitz, Simply Naked	
	The Wine Group	19.0	Cupcake, Fisheye, Franzia,	
	Constellation Brands	17.9	Cooper & Theif, The Dreaming Tree, Woodbridge	
	Trinchero Family Estates	6.9	Napa Cellars, Sutter Home, Ménage à Trois	
BREAD	Bagels/Bialys (2020)	Top Companies	77.2	
		Grupo Bimbo	64.2	Thomas', Sara Lee
		Flowers Foods	8.6	Nature's Own, Dave's Killer Bread, Captain John Derst's
		Franz Family Bakeries	2.8	Franz
		Campbell Soup Company	1.7	Pepperidge Farm
		Private Label/Store Brand	16.2	

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Appendix continued

Grocery Type	Grocery Item (Data Year)	Parent Company	Market Share (%)	Leading Brands
BREAD	Biscuits (Cookies & Crackers) (2019)	Top Companies	60.9	
		Mondelēz International	39.8	Ritz, Oreo, Chips Ahoy!, belVita, Honey Maid, Triscuit, Wheat Thins
		Kellogg Company	7.6	Cheez-It, Townhouse, Pringles, Austin
		Campbell Soup Company	6.9	Goldfish, Pepperidge Farm
		McKee Foods	6.6	Fieldstone Bakery
		Private Label/Store Brand	17.0	
	Fresh Bread (2020)	Top Companies	60.8	
		Grupo Bimbo	26.9	Sara Lee, Thomas'
		Flowers Foods	24.6	Wonder, Nature's Own, Dave's Killer Bread
		Campbell Soup Company	7.1	Pepperidge Farm
	Lewis Bakeries	2.1	Cinnabon, Bunny Bread	
	Private Label/Store Brand	17.0		
CONDIMENTS & SAUCES	Dip (2017)	Top Companies	90.7	
		PepsiCo	87.5	Tostitos, Lay's, Fritos
		Utz	1.6	Utz
		Kraft Heinz	0.9	Velveeta
		Campbell Soup Company	0.7	Pace
		Private Label/Store Brand	2.6	
	Mayonnaise (2017)	Top Companies	82.8	
		Unilever	50.7	Hellmann's
		Kraft Heinz	30.4	Miracle Whip
		McCormick & Company	1.7	McCormick
		Private Label/Store Brand	11.1	
	Single Serve Prepared Sloppy Sauce (2020)	Top Companies	93.9	
		Conagra	91.6	Manwich
		Del Monte	1.1	Del Monte
		Hormel Foods	0.8	Not-So-Sloppy-Joe
		Conagra	0.4	Red Fork
		Private Label/Store Brand	4.8	
Table Sauces (2019)	Top Companies	53.1		
	Kraft Heinz	25.4	A.1., Taco Bell, Athenos, Primal Kitchen	
	Unilever	11.1	Hellmann's, Knorr	
	Ken's Foods	8.3	Sweet Baby Ray's, Sticky Fingers Smokehouse, Ken's	
	Clorox	8.3	Hidden Valley, Soy Vay	
	Private Label/Store Brand	12.2		
DAIRY	Cheese (2019)	Top Companies	36.0	
		Kraft Heinz	25.1	Cracker Barrel, Philadelphia, Athenos, Classico
		Sargento Foods	5.8	Sargento
		Saputo Cheese USA	2.8	Frigo, Montchevre, Nikos
		BEL SA	2.3	The Laughing Cow, Babybel, boursin
		Private Label/Store Brand	39.1	

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Appendix continued

Grocery Type	Grocery Item (Data Year)	Parent Company	Market Share (%)	Leading Brands
DAIRY	Eggs (2017)	Top Companies	23.3	
		Cal-Maine	18.7	Eggland's Best, Farmhouse
		Pete & Gerry's	3.1	Pete & Gerry's, Nellie's
		Sauder's Eggs	0.7	Sauder's Eggs
		Dutch Farms	0.7	Dutch Farms
		Private Label/Store Brand	54.1	
	Processed/Imitation Cheese Slices (2020)	Top Companies	71.1	
		Kraft Heinz	64.9	Kraft Singles, Velveeta, Polly-O
		Dairy Farmers of America	3.7	Borden, Cache Valley
		Land O'Lakes	1.4	Land O'Lakes, Alpine Lace
		Boar's Head	1.2	Boar's Head
		Private Label/Store Brand	22.2	
	Refrigerated Whole Milk (2020)	Top Companies	22.5	
		Dairy Farmers of America	8.9	DairyPure, Lehigh Valley
		Danone	6.2	Horizon
		HP Hood	4.9	Hood, Lactaid, Simply Smart
		Capital Peak Partners	2.5	Borden
		Private Label/Store Brand	56.4	
	Single Serve Yogurt/ Yogurt Drinks (2020)	Top Companies	96.7	
		MOM Group	71.9	GoGo squeeZ
		Hain Celestial Group	22.0	Earth Best's Organic, The Greek Gods
		The Ricky Joy Company	1.7	Ricky Joy, Ricky Toy
		OKF Corporation	1.0	Aloe Yogos King
Sour Cream (2017)	Top Companies	63.9		
	Daisy	51.9	Daisy	
	Kraft Heinz	8.3	Breakstone's, Knudsen Hampshire	
	Dairy Farmers of America	2.9	Dean's, Mid-America Farms, Kemps	
	HP Hood	0.8	Hood	
	Private Label/Store Brand	24.9		
Yogurt (2019)	Top Companies	74.5		
	Danone	33.0	Activia, Oikos	
	Chobani Global Holdings	18.4	Chobani Greek Yogurt, Little Chobani Probiotic	
	General Mills	17.3	Yoplait, Annie's, Mountain High	
	Groupe Lactalis	5.8	Stonyfield Organic, siggi's, Green Mountain Creamery	
	Private Label/Store Brand	7.8		
FRUITS & VEGETABLES	Bottled Canned Green Beans (2017)	Top Companies	55.7	
		Del Monte	36.6	Del Monte, S&W
		Seneca Foods	8.3	Green Valley, Libby's
		B&G Foods	6.9	Green Giant, Le Sueur
		McCall Farms	3.8	Glory Foods, Margaret Holmes, Allens
		Private Label/Store Brand	35.2	

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Appendix continued

Grocery Type	Grocery Item (Data Year)	Parent Company	Market Share (%)	Leading Brands
FRUITS & VEGETABLES	Bottled/Canned Beans (No Green Beans) (2017)	Top Companies	50.7	
		Bush Brothers & Company	23.5	Bush's Best
		Goya Foods	13.9	Goya
		Vilore Foods Company	8.8	S&W, Luck's, Butter Kernel
		Conagra	4.5	Van Camp's, Ranch Style
		Private Label/Store Brand	28.5	
	Canned Corn (2017)	Top Companies	55.1	
		Del Monte	27.7	Del Monte, S&W
		B&G Foods	13.9	Green Giant, Le Sueur
		Seneca Foods	8.5	Green Valley, Libby's
		Juanita's Foods	5.0	Juanita's
		Private Label/Store Brand	35.0	
	Canned Pineapple (2017)	Top Companies	74.6	
		Itochu	62.5	Dole
		Del Monte	8.6	Del Monte
		NTC Marketing Inc.	2.7	Libby's
		Mitsui & Co.	0.7	Empress
		Private Label/Store Brand	24.2	
	Canned Potato/Sweet Potato (2017)	Top Companies	59.0	
		McCall Farms	46.8	Bruce's Yams, Allens, Glory
		Del Monte	12.2	Del Monte, S&W
		Private Label/Store Brand	20.5	
	Canned Tomato (2017)	Top Companies	57.5	
		Conagra	39.5	Hunt's
		Red Gold	8.1	Tuttorosso, Red Gold, Redpack
		Del Monte	6.3	Del Monte, Contadina
		Cento Fine Foods	3.6	Cento
		Private Label/Store Brand	28.2	
Fresh Cut Salad (2017)	Top Companies	54.2		
	Cultrale-Safra	21.7	Fresh Express, Gourmet Cafe	
	Itochu	14.0	Dole	
	Taylor Fresh Foods	11.2	Taylor Farms	
	Bonduelle	7.3	Ready Pac Foods, Bistro Bowl, Ready Snax	
	Private Label/Store Brand	35.8		
Frozen Fruit (2017)	Top Companies	21.5		
	Itochu	11.8	Dole	
	Wyman's	6.3	Wyman's	
	Matosantos Commercial Corporation	1.7	Campoverde	
	Goya Foods	1.6	Goya	
	Private Label/Store Brand	66.2		

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Appendix continued

Grocery Type	Grocery Item (Data Year)	Parent Company	Market Share (%)	Leading Brands
FRUITS & VEGETABLES	Single Serve Prepared Pasta Dishes (2020)	Top Companies	94.4	
		Conagra	63.7	Healthy Choice, Marie Callender's, EVOL
		Campbell Soup Company	26.2	SpaghettiOs, RavioliOs
		Barilla	3.1	Barilla Ready Pasta
		General Mills	1.4	Annie's
		Private Label/Store Brand	5.2	
	Single Serve Prepared Salads (2020)	Top Companies	68.1	
		Seneca Foods	33.0	READ
		The Fremont Company	16.1	Paisley Farm
		FCF Fishery Company	14.0	Bumble Bee, Clover Leaf
	Boscoli Foods	5.1	Boscoli	
	Private Label/Store Brand	19.4		
MEAT & FISH	Bacon (2017)	Top Companies	52.0	
		Kraft Heinz	18.8	Oscar Mayer
		WH Group	14.5	Smithfield, Farmland, Farmer John
		Hormel Foods	10.7	Hormel Black Label
		Tyson Foods	8.1	Wright
		Private Label/Store Brand	21.8	
	Canned Tuna (2017)	Top Companies	85.4	
		Dongwon Industries	45.6	StarKist
		FCF Fishery Company	26.4	Bumble Bee
		Thai Union	12.3	Chicken of the Sea, Genova
		Wild Planet	1.0	Wild Planet
		Private Label/Store Brand	11.9	
	Frozen Meat Substitute (2017)	Top Companies	76.1	
		Kellogg Company	54.0	Morningstar Farms, Gardenburger
		Maple Leaf Foods	8.1	Field Roast Grain Meat Co.
		Conagra	7.9	Gardein
		Kraft Heinz	6.1	BOCA Burger
		Private Label/Store Brand	2.1	
	Meat, Beef & Poultry Processing (2021)	Top Companies	48.8	
		JBS SA	18.7	Pilgrim's, Country Pride, Just Bare, thinkpure, Good Nature, Grass Run Farms
	Tyson Foods	15.4	Tyson, Hillshire Farm, Sara Lee, Nature Raised Farms	
	Cargill	9.0	Today's Kitchen, Meadowland Farms, Standard Pride	
	WH Group	5.7	Smithfield, Healthy Ones, Farmland, Nathan's Famous, Pure Farms	
Processed Meat (2019)	Top Companies	39.1		
	Tyson Foods	16.1	Ball Park, Hillshire Farm, Jimmy Dean, Sara Lee	
	Kraft Heinz	9.6	Oscar Mayer, Lunchables	
	Hormel Foods	6.7	Jeannie-O, Columbus Craft Meats, Spam	
	WH Group	6.7	Smithfield, John Morrell, Healthy Ones	
	Private Label/Store Brand	28.8		

Continued on next page

Appendix continued

Grocery Type	Grocery Item (Data Year)	Parent Company	Market Share (%)	Leading Brands
PREPARED MEALS/ MEAL KITS	Baby Food (2019)	Top Companies	81.7	
		Abbott Laboratories	31.4	PediaSure, Similac
		Reckitt Benckiser	26.3	Enfamil, Nutramigen
		Nestlé	24.0	Gerber, NaturNes
		Private Label/Store Brand	6.8	
	Dry Dinner Mixes with Meat (2020)	Top Companies	98.4	
		Conagra	59.3	Banquet
		General Mills	28.2	Helper
		Vigo Importing	9.4	Vigo, Alessi
		Brooklyn Bottling Co	1.5	Iberia
		Private Label/Store Brand	0.9	
	Dry Mac & Cheese Mixes (2020)	Top Companies	86.7	
		Kraft Heinz	72.6	Kraft, Velveeta
		General Mills	12.2	Annie's, Helper
		Otsuka Pharmaceutical	1.0	Daiya
		PepsiCo	0.8	Cheetos
		Private Label/Store Brand	12.4	
	Frozen Pizza (2017)	Top Companies	66.2	
		Nestlé	40.2	DiGiorno, Tombstone, California Pizza Kitchen
		CJ CheilJedang	18.4	Schwan's Company, Freschetta, Tony's Pizza
	General Mills	7.6	Totino's Party Pizza	
	Private Label/Store Brand	12.1		
Hard/soft tortillas/ taco kit (2017)	Top Companies	71.6		
	Gruma, S.A.B. de C.V.	48.1	Mission	
	General Mills	11.5	Old El Paso	
	Olé Mexican Foods	9.9	Olé	
	B&G Foods	2.1	Ortega	
	Private Label/Store Brand	8.4		
Prepared Soup (2019)	Top Companies	69.7		
	Campbell Soup Company	38.6	Campbell's, Pacific Foods	
	General Mills	14.4	Progresso, Annie's	
	Toyo Suisan Kaisha, Ltd.	11.0	Maruchan Ramen Noodle Soup	
	Unilever	5.7	Knorr	
	Private Label/Store Brand	10.2		
SNACKS	Popcorn, microwave (2017)	Top Companies	86.5	
		Conagra	43.6	Orville Redenbacher's, Angie's BOOM-CHICKAPOP
		Campbell Soup Company	27.0	Pop Secret
		Weaver Popcorn Company	10.0	Pop Weaver
		American Pop Corn Company	5.9	JOLLY TIME
	Private Label/Store Brand	9.9		

Continued on next page

Appendix continued

Grocery Type	Grocery Item (Data Year)	Parent Company	Market Share (%)	Leading Brands
SNACKS	Snack Bars (2019)	Top Companies	66.4	
		General Mills	26.7	Nature Valley, Lärabar, Cascadian Farm, EPIC
		Kellogg Company	17.2	Nutri-Grain, Special K
		Simply Good Foods	12.0	Atkins, Quest
		Mars	10.5	KIND
	Private Label/Store Brand	5.5		
STAPLES & OTHER	Baby Formula (Liquid concentrate) (2017)	Top Companies	84.6	
		Reckitt Benckiser	36.2	Enfamil Premium
		Abbott Laboratories	36.0	Similac Advance, Similac Isomil
		Nestlé	12.4	Gerber Good Start Gentle
	Breakfast Cereals (2019)	Top Companies	72.8	
		General Mills	27.9	Cheerios, Cascadian Farm, Fiber One, Total
		Kellogg Company	26.8	Special K, Froot Loops, Rice Krispies, Corn Flakes
		Post Holdings	18.1	Honey Bunches of Oats, Raisin Bran, Weet-abix, Malt-o-Meal, Barbara's,
		Private Label/Store Brand	8.8	
	Pasta (Dry Plain) (2019)	Top Companies	78.5	
		Barilla	33.2	Barilla, Tolerant Organic
		Ebro Foods	28.2	Ronzoni
		TreeHouse Foods	17.1	San Giorgio, Ronco, Creamette, Anthony's
		Private Label/Store Brand	6.4	
	Rice (2019)	Top Companies	52.2	
		Ebro Foods	22.6	Minute, Mahatma, Blue Ribbon,
		Mars	15.9	Ben's Original, Tasty Bite
		Unilever	7.9	Knorr
		PepsiCo	5.8	Rice-A-Roni, Near East
		Private Label/Store Brand	15.9	
	Sugar Processors (2017)	Top Companies	28.9	
	American Crystal Sugar Company	11.0	Crystal Sugar	
	Snake River Sugar Company	9.8	White Satin	
	Louis Dreyfus Company	4.5	Dixie Crystals, Imperial Sugar	
	Western Sugar Cooperative	3.6	GW	
SWEETS & CANDY	Chocolate Confectionary (2019)	Top Companies	80.3	
		Hershey Company	41.5	Kit Kat, Brookside, Cadbury, Skor
		Mars	27.4	M&M's, Dove, Milky Way
		Lindt & Spüngli AG	11.4	Lindt, Ghirardelli, Russell Stover
		Private Label/Store Brand	2.0	
	Doughnuts (2020)	Top Companies	61.5	
		Hostess Brands	20.6	Donettes
		Grupo Bimbo	18.1	Entenmann's, Sara Lee
	JAB Holding Company	11.6	Krispy Kreme	
	McKee Foods	11.2	Drake's, Little Debbie	
	Private Label/Store Brand	24.1		

Continued on next page

Appendix continued

Grocery Type	Grocery Item (Data Year)	Parent Company	Market Share (%)	Leading Brands
SWEETS & CANDY	Sweet Bakery (2019)	Top Companies	31.8	
		McKee Foods	13.5	Little Debbie, Drake's, Fieldstone Bakery
		Hostess Brands	8.3	Twinkies, Ding Dongs
		Conagra	5.0	Maire Callender's, Duncan Hines
		Grupo Bimbo	5.0	Sara Lee, Entenmann's
		Private Label/Store Brand	38.2	

Methodology

Food & Water Watch, in collaboration with The Guardian, analyzed the market share of top companies in 55 common grocery food and beverage categories, chosen to reflect a variety of food groups and products. We primarily relied on data compiled by the market research firm IRI. Data obtained directly from IRI cover the majority of 2020; we also used IRI data published by Mintel Group reports (covering 2019) and the Market Share Reporter (covering 2017). For the meat, beef and poultry processing category, we used IBISWorld’s estimate of total revenue in 2021.⁶⁰

For each category, we calculated the market share of the top four (or fewer) companies to determine the “four-firm concentration ratio” (CR4) index. The CR4 index is a common measurement for market consolidation; it is particularly useful when you do not have data on the market shares of all firms within an industry. Markets where the top four companies account for more than 40 percent of sales are generally considered to have reduced competition; those exceeding 60 percent are tight oligopolies or monopolies.⁶¹

In eight grocery categories, concentration is so high that the data sources only listed three companies. One category (canned potato / sweet potato) only listed two companies. Additionally, 48 of the 55 categories included shares for private label products (also called store brand). We excluded private label data from CR4 index measurements since these products can be sourced from multiple manufacturers, including surpluses from brand name companies. It is worth noting, however, that private label shares rivaled or exceeded top companies across several grocery categories.

Adjusting for parent companies/mergers. Some Market Share Reporter publications listed market share by brand (instead of by company); for these, we aggregated brand data by individual companies. For subsidiary companies, we used the names of the parent companies, aggregating data from multiple subsidiaries when necessary. We did the same for companies that have since merged or been acquired by another company. We did not, however, make these adjustments for proposed mergers/acquisitions that had not yet been finalized as of June 2021.

The Herfindahl-Hirschman Index (HHI). The DOJ and FTC now favor a different metric for measuring market concentration. The HHI squares the market share of each firm within a market and sums these totals, with higher scores indicating greater levels of concentration.⁶² In this report, we primarily use the CR4 index to measure market concentration, given that we do not have data on all firms operating within the included grocery categories. However, the DOJ and FTC acknowledge that firms with small market shares do not significantly impact HHI scores. As such, we calculated the HHI index using the top four (or fewer) companies within each grocery category. More than a third of categories still exceeded the DOJ / FTC threshold for “highly concentrated” markets.

Supermarket concentration. We used the USDA’s estimate of total U.S. food-at-home sales for 2019 from grocery stores, supercenters and warehouse clubs, and other food stores (excluding convenience).⁶³ We identified leading food retailers from both USDA and industry sources, and used U.S. Securities and Exchange Commission (SEC) 10-K filings for fiscal year 2019 to determine net food sales for each of these corporations.⁶⁴ For Walmart, we included food sales for both its supercenters and its Sam’s Club warehouses.

We used the U.S. Census Bureau’s County Business Patterns to estimate the loss of grocery retailers over the years (SIC 541 for 1994, and NAICS 4451 for 2019). NAICS 4451 includes supermarkets and other grocery retailers, as well as convenience stores, which were not differentiated in the County Business Patterns until 1998. NAICS 4451 does not include warehouse clubs and supercenters.

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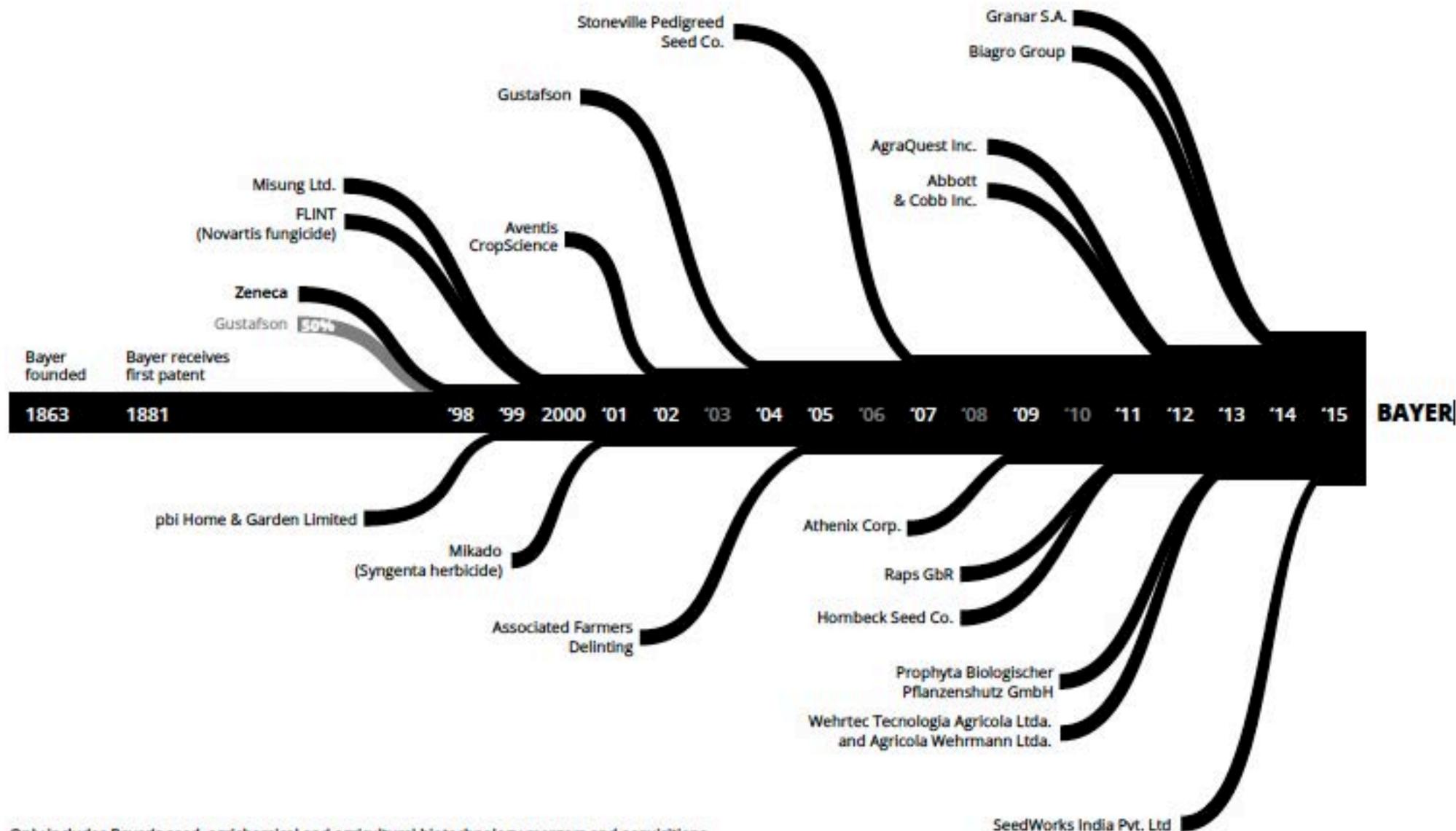
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EXHIBIT 2



Only includes Bayer's seed, agrichemical and agricultural biotechnology mergers and acquisitions.

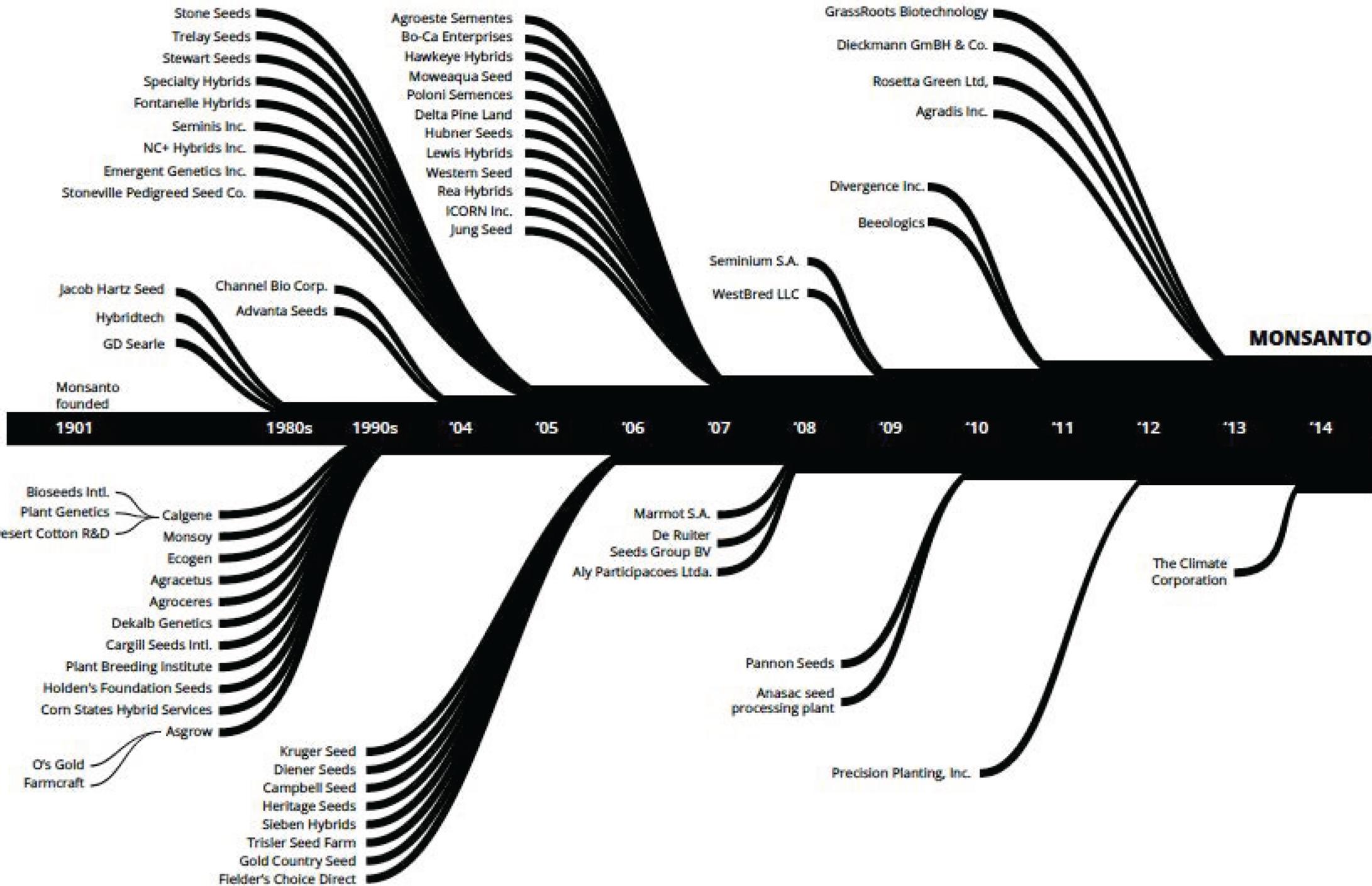


EXHIBIT 3

THE ANTICOMPETITIVE IMPACT OF THE PROPOSED BAYER-MONSANTO MERGER ON VEGETABLE SEED MARKETS

Andrew Finch
Acting Assistant Attorney General
U.S. Department of Justice Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

August 2, 2017

Re: The Proposed Bayer-Monsanto Merger and Vegetable Seeds

BY POST AND ELECTRONIC MAIL: antitrust.atr@usdoj.gov

Dear Acting Assistant Attorney General Finch:

The 24 undersigned advocacy organizations representing farmers, consumers and rural communities respectfully urge the U.S. Department of Justice to block the proposed merger between Bayer AG (Bayer) and the Monsanto Company (Monsanto).

The proposed \$66 billion Bayer-Monsanto deal would create the world's biggest agrochemical and seed company — eclipsing the Dow Chemical-DuPont and Syngenta-ChemChina deals completed over the past two years.¹ The completion of the three seed mega-mergers would make these top three seed and agribusiness firms three times larger than the rest of the top 10 global competitors combined.²

This deal has drawn most attention for the combination of agrochemicals and patented genetically modified (GM) commodity crop seeds, but the two companies are both significant players in vegetable seeds as well. Monsanto and Bayer are the first and fourth largest vegetable seed producers in the world, respectively.³

The vegetable seed industry is already highly consolidated. The proposed merger would strengthen the market power of the largest firm, disadvantage rival seed companies and increase the prices farmers pay for vegetable seeds while reducing their planting options — resulting in higher prices and reduced choices that are passed onto consumers at the supermarket.

Furthermore, the merger joins companies that dominate not only vegetable seeds but also the pesticides and herbicides that vegetable farmers use. Bayer and Monsanto were the second and fifth largest agrichemical suppliers in 2015 with combined pesticide and herbicide sales of \$14.3 billion.⁴

¹ Burger, Ludwig and Georgina Prodhan. “Bayer defies critics with \$62 billion Monsanto offer.” *Reuters*. May 23, 2016; “Bayer confirms \$66bn Monsanto takeover.” *British Broadcasting Corporation*. September 14, 2016.

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Commercial vegetable cultivation requires high cost seed and agrichemical inputs.⁵ The proposed merger augments the potential leverage Bayer-Monsanto could have over farmers who need to buy both seeds and agrichemicals from a diminishing number of firms, making them vulnerable to loyalty agreements and cross-marketing tie-ins.⁶

Allowing Bayer and Monsanto to merge would harm vegetable farmers and extract value from a substantial agricultural and food market. There are more than 72,000 U.S. vegetable farms with over \$16.8 billion in farmgate vegetable and melon sales in 2012.⁷ Consumers spent about \$123 billion in the supermarket for fresh, frozen and canned produce that year.⁸ The proposed combination would create a firm with the market power to unilaterally impose price increases on vegetable seeds, threatening the economic viability of farmers and raising the prices consumers pay for vegetables. The Department of Justice should enjoin the proposed Bayer-Monsanto merger.

I. The proposed merger exacerbates consolidation in vegetable seed industry

The proposed merger will only further consolidate an already significantly concentrated vegetable seed industry. During the past three decades, seed mergers have substantially consolidated the global vegetable seed industry.⁹ The biggest deals created vegetable seed companies that combined plant breeding, seed production and marketing.¹⁰ According to researchers from the University College London Laws, “concentration of the seed industry is remarkable even considering traditionally high food sector concentration.”¹¹

Monsanto has aggressively pursued a merger strategy that diversified both its seed portfolio and geographic markets.¹² From 1995 to 2015, Monsanto purchased 19 seed companies — about two-thirds of the company’s takeovers.¹³ This has included vegetable seed lines and brands. In 2005, Monsanto bought vegetable seed company Seminis for over \$1 billion.¹⁴ The Seminis deal gave Monsanto control of 39 percent of the U.S. vegetable seed market and 26 percent of the global market.¹⁵ In 2008, it added the \$800 million purchase of De Ruiter Seeds that specialized in greenhouse vegetable seeds.¹⁶

⁵ Dias, João Silva and Edward J. Ryder. “World Vegetable Industry: Production, Breeding, Trends.” *Horticultural Reviews*. Vol. 38. 2011 at 319.

⁶ Howard, Phillip. “Intellectual Property and Consolidation in the Seed Industry.” *Crop Science*. Volume 55. December 2015 at 5.

⁷ U.S. Department of Agriculture (USDA). National Agricultural Statistical Service (NASS). 2012 Census of Agriculture. May 2014 at Table 65 at 92.

⁸ “Produce’s fresh outlook.” *Grocery Headquarters*. April 1, 2013; Major, Meg and Jim Dudicek. “Swirling fortunes.” *Progressive Grocer*. April 2013 at 48; IBISWorld. [Press release]. “Canned Fruit and Vegetable Processing in the US industry market research report from IBISWorld has been updated.” April 19, 2014.

⁹ Liu, Zhen et al. “The sectoral innovation system of the Dutch vegetable breeding industry.” *Wageningen Journal of Life Sciences*. Vol. 74-75. 2015 at 27.

¹⁰ Moretti, Irene Musselli. United Nations Conference on Trade and Development. “Tracking the Trend Towards Market Concentration: The Case of the Agricultural Input Industry. UNCTAD/DITC/COM/2005/16. April 20, 2006 at 7.

¹¹ Lianos, Ioannis et al. University College London Laws. “The Global Seed Market, Competition Law and Intellectual Property Rights: Untying the Gordian Knot.” Research Paper 2-2016. February 2016 at 19.

¹² Fuglie, Keith O. et al. USDA. Economic Research Service (ERS). “Research Investment and Market Structure in the Food Processing, Agricultural Input and Biofuel Industries Worldwide.” ERR-No. 130. December 2011 at 34.

¹³ Lianos et al. (2016) at 15.

¹⁴ Pollack, Andrew. “Monsanto buying leader in fruit and vegetable seeds.” *New York Times*. January 25, 2005.

¹⁵ Howard, Philip H. “Visualizing consolidation in the global seed industry: 1996-2008.” *Sustainability*. December 8, 2009 at 1276.

¹⁶ Tomich, Jeffrey. “Seeds grow Monsanto’s business.” *St. Louis Post-Dispatch*. September 20, 2009.

Other vegetable seed companies have grown through mergers as well. Vilmorin, the second largest global vegetable seed company, purchased 13 vegetable seed companies between 2008 and 2016, including seven U.S. vegetable seed companies such as Shamrock Seeds.¹⁷ Syngenta bought the vegetable lines from Aventa in 2006 and two U.S. lettuce seed companies in 2009 (Synergene Seed and Pybas Vegetable Seed Co.).¹⁸

Monsanto's Seminis vegetable seeds includes the De Ruiter, Asgrow, Petoseed and Royal Sluis seed brands.¹⁹ Bayer essentially had no presence in the seed industry until its 2002 purchase of Aventis Crop Science which included the vegetable line Nunhems.²⁰ In 2015, Bayer had \$443 million in vegetable seed sales.²¹ In 2013, Monsanto's vegetable division generated \$821 million in sales.²² Even with lower crop prices, Monsanto had \$801 million in vegetable seed sales generating \$401 million in profits in 2016.²³

Today, the largest seed companies are vertically integrated firms that research and breed cultivar varieties, multiply and manufacture seeds and distribute and market seeds to farmers.²⁴ Only a few vegetable seed companies dominate the market for each commercial vegetable crop.²⁵ These companies are primarily interested in a relatively narrow set of high-value vegetables.²⁶ In 2016, the second largest vegetable seed firm, Vilmorin, stated that "the sector has become highly concentrated."²⁷

The high level of consolidation has disadvantaged rivals and the farmers that buy seeds. Consolidation can allow seed companies to "appropriate economic benefits" by using their market power to charge more for seeds.²⁸ Further, companies often shut down brands or seed lines after takeovers, limiting farmer choices.²⁹ Seed mergers have allowed large companies to direct networks of seed supplies through partnerships and cross licensing of seed cultivars and create potential bottlenecks that harm farmers and consumers.³⁰

The proposed deal would further increase consolidation in the seed industry and drive out smaller firms.³¹ It is harder for smaller firms and new entrants to compete against the consolidated vegetable seed industry. The research requirements to introduce new varieties require both substantial funding and a vast pool of genetic material with which to breed cultivars.³² Bigger companies can also impose loyalty discounts on distributors that carry fewer rival seed brands or other exclusive

¹⁷ Vilmorin & Cie (2016) at 10 to 11.

¹⁸ Syngenta International AG (Syngenta). "Our Industry 2016." 2016 at 91; Fuglie et al. (2011) at 35.

¹⁹ Pollack (2005); Monsanto Corporation. U.S. Securities and Exchange Commission (SEC). Form 10-K Fiscal Year Ending August 31, 2016 at 4.

²⁰ Fuglie et al. (2011) at 34; Bayer AG. "Annual Report 2016 Augmented Version." 2016 at 46.

²¹ Vilmorin & Cie (2016) at 36.; 2015 Euros converted to U.S. dollars with U.S. Federal Reserve Board. "Foreign Exchange Rates—G.5A Annual." January 4, 2017.

²² Paynter, Ben. "Monsanto is going organic in a quest for the perfect veggie." *Wired*. January 14, 2014.

²³ Zhang (2017) at 14; Monsanto Corporation (2016) at 156.

²⁴ Lianos et al. (2016) at 3.

²⁵ Dias, João Carlos de Silva. "Guiding strategies for breeding vegetable cultivars." *Agricultural Sciences*. Vol. 5, No. 1. 2014 at 9.

²⁶ Dias and Ryder (2011) at 330.

²⁷ Vilmorin & Cie (2016) at 15.

²⁸ Fuglie et al. (2011) at 14.

²⁹ Schafer, Sara. "Players offer more choices from fewer brands." *Farm Journal*. July 27, 2012.

³⁰ Lianos et al. (2016) at 4; Liu et al. (2015) at 28.

³¹ Court, Emma. "How a Bayer-Monsanto merger will wind up costing you at the grocery store." *MarketWatch*. September 15, 2016.

³² Dias and Ryder (2011) at 301.

marketing deals.³³ According to the U.S. Department of Agriculture, the substantial consolidation in agricultural input industries like seeds through the mid-2000’s led to many firms exiting as the remaining firms got bigger through mergers and takeovers.³⁴

II. Proposed merger raises concentration level in vegetable seeds

The proposed merger will significantly increase concentration in the vegetable seed industry, giving Bayer-Monsanto the ability to unilaterally raise prices on vegetable seeds. The appropriate market for review is the national market for vegetable seeds as well as the national market for specific vegetable seeds. Available evidence suggests that the vegetable seed market is already considerably concentrated and that the proposed merger will substantially increase concentration.

Precise levels of vegetable seed concentration are difficult to assess.³⁵ There is considerably less data on vegetable seed sales than commodity crops, largely because vegetables are grown on a much smaller area than corn, soybeans, wheat and other row crops. In 2012, vegetable production comprised only about 1 percent of harvested cropland in the United States.³⁶ Further, this small area of cultivation is divided between dozens of different vegetable types, meaning that concentration is likely to be considerably higher in specific markets such as processing tomatoes.

The proposed merger joins the largest global vegetable seed company (Monsanto) with the fourth largest (Bayer).³⁷ In 2015, the four largest companies (Monsanto, Vilmorin, Syngenta and Bayer) controlled 71 percent of global vegetable seed sales (see Table 1) and Monsanto alone controlled 22 percent of the global market.³⁸ This high level of market concentration has held steady for about a decade. The top four firms controlled about 70 percent of the global vegetable seed market in 2007 and in 2013.³⁹ The high and steady level of global concentration warrants substantial scrutiny under the Department of Justice-Federal Trade Commission merger guidelines that “give more weight to market concentration when market shares have been stable over time.”⁴⁰

	Global Sales (\$M)	Market Share	Est. U.S. Sales (\$M)	Est. U.S. Market Share
Monsanto	\$816	22%	\$204	24%
Syngenta	\$616	17%	\$154	18%
Vilmorin	\$765	21%	\$191	22%
Bayer	\$443	12%	\$111	13%
Rijk Zwaan	\$431	12%	\$108	13%
Global CR-4		71%	Est. U.S. CR-4	77%
			Current HHI	1,543
			Post-Merger HHI	2,310

The level of concentration in the vegetable seed

³³ Lianos et al. (2016) at 28.

³⁴ Fuglie et al. (2011) at 2.

³⁵ Mammana, Ivan. “Concentration of Market Power in the EU Seed Market.” Commission by The Greens/EFA Group in the European Parliament. January 2014 at 27.

³⁶ NASS (2014) at Table 9 at 17 and Table 38 at 33.

³⁷ Vilmorin & Cie (2016) at 21.

³⁸ Analysis of global vegetable seed sales and market shares based on corporate data. Monsanto Corporation. “2016 Annual Report: A Limitless Perspective.” 2016 at 24; Vilmorin & Cie (2016) at 21 for Vilmorin and Bayer; Syngenta (2016) at 87; “Rijk Zwaan sales up 14% in FY2016.” *AgroNews*. November 27, 2016; 2015 Euros converted to U.S. dollars with Federal Reserve Board (2017); global commercial vegetable seed market estimated at \$3.7 billion based on Monsanto’s assessment that it controls 22 percent of the global sales; Thompson, Tad. “Monsanto vegetable chief describes his world.” *The Produce News*. April 4, 2017.

³⁹ Fuglie et al. (2011) at 35; Liu et al. (2015) at Table 2 at 30.

⁴⁰ U.S. Department of Justice/Federal Trade Commission (DOJ/FTC). “Horizontal Merger Guidelines.” August 19, 2010 at 18.

market is likely to be considerably higher in developed national markets, like the United States and Europe, and even higher for specific vegetables. For example, the top five firms controlled 95 percent of the European vegetable seed market in 2014.⁴¹ Vilmorin estimated that the top three firms controlled 75 percent of the U.S. market for vegetable seeds in 2015.⁴²

In 2015, the U.S. vegetable seed market was \$860 million.⁴³ The top four firms controlled at least 77 percent of the U.S. vegetable seed market in 2015 (see Table 1) and the proposed merger would substantially increase concentration.⁴⁴ This is likely to considerably underestimate the level of concentration. For example, it estimates Monsanto controls 24 percent of the U.S. market, which is considerably lower than its 39 percent market share when it purchased Seminis.⁴⁵

Even with conservative assessments of vegetable seed concentration, the proposed merger warrants considerable scrutiny by the Department of Justice. This conservative estimate finds that the current market is moderately concentrated with a Herfindahl-Hirschman Index (HHI) of over 1,500 and that the proposed merger would increase the HHI to 2,300 — an HHI increase of nearly 800. The Department of Justice merger guidelines suggest that mergers that result in moderately concentrated markets with HHI increases over 100 points “potentially raise significant competitive concerns and often warrant scrutiny.”⁴⁶

It is almost certain that the level of national vegetable seed concentration is higher and that the proposed merger would result in a highly-concentrated market with an HHI over 200 (even the estimate finds an HHI increase much greater than 200) and the merger guidelines state that these mergers “will be presumed to be likely to enhance market power.”⁴⁷

A. Proposed merger substantially increases processing tomato seed concentration

The proposed merger would likely substantially raise concentration levels considerably higher for specific vegetable crops. Both companies offer a broad range of overlapping vegetable varieties. Monsanto sells over 2,000 varieties of seeds covering 22 kinds of vegetables (green beans, broccoli, cabbage, carrots, cauliflower, sweet corn, cucumbers, eggplant, lettuce, melons, onions, peppers, pumpkins, spinach, squash, tomatoes and more).⁴⁸ Bayer launched a horticulture division in 2013 to push its produce business and sells seeds for 25 types of vegetables.⁴⁹ Bayer’s Nunhems brand sells seeds for carrots, cauliflower, cucumbers, leeks, melons, peppers, squash, tomatoes and

⁴¹ Mammana (2014) at 27.

⁴² Vilmorin & Cie (2016) at 36.

⁴³ LaVigne, Andrew W. American Seed Trade Association. Testimony before the Committee on Agriculture. U.S. House of Representatives. July 12, 2017 at 1.

⁴⁴ Analysis of U.S. vegetable seed sales and market shares based on 25 percent of corporate global vegetable seed sales data. Monsanto Corporation. 2016 Annual Report at 24; Vilmorin & Cie (2016) at 21 for Vilmorin and Bayer; Syngenta (2016) at 87; *AgroNews* (2016); 2015 Euros converted to U.S. dollars with Federal Reserve Board (2017); U.S. vegetable seed sales are about 25 percent of global sales. IndustryARC. “Fruit and Vegetable Seed Market by Type, Others & Geography—Forecast (2016-2021).” September 3, 2016; total U.S. sales. LaVigne (2017) at 1.

⁴⁵ Howard (2009) at 1276.

⁴⁶ DOJ/FTC (2010) at 19.

⁴⁷ *Ibid.*

⁴⁸ Ohlemeier, Doug. “Industry evaluates Bayer’s Monsanto purchase.” *The Packer*. September 16, 2016.

⁴⁹ Monsanto Corporation. 2016 Annual Report at 8 and 32; Ohlemeier (2016).

watermelons.⁵⁰ Despite clear overlaps in vegetable seed production, Bayer downplayed the merger contending that the vegetable seed lines were complements not competitors.⁵¹

Tomatoes are the most valuable vegetable crop and California produces over one-third of the world’s processing tomatoes (destined for canning, juice, ketchup, sauces, etc.).⁵² The market for processing tomato seeds is already significantly concentrated. The proposed merger would substantially raise the levels of concentration, giving Bayer-Monsanto the ability and incentive to raise prices and reduce choices for farmers.

In 2015, Bayer and Monsanto were the second and third largest seller of all processing tomato seeds with 23.7 and 14.1 percent of the total market, respectively.⁵³ The total market for processing tomato seeds in California is already moderately concentrated (with an HHI of 2,200 points) and the proposed merger would increase the HHI by nearly 700 points making it highly-concentrated (with an HHI of nearly 2,900). The proposed merger’s increase in concentration would “be presumed to be likely to enhance market power.”⁵⁴

All Processing Tomato Seeds				Sold Processing Tomato Seeds			
Company	Loads	Market Share	Rank	Company	Loads	Market Share	Rank
Heinz	193,208	34.8%	1	Bayer (Nunhems)	131,725	39.3%	1
Bayer (Nunhems)	131,725	23.7%	2	Monsanto (Seminis)	78,363	23.4%	2
Monsanto (Seminis)	78,363	14.1%	3	Vilmorin (Harris Moran)	78,225	23.4%	3
Vilmorin (Harris Moran)	78,225	14.1%	4	Woodbridge	16,731	5.0%	4
United Genetics	27,781	5.0%	5	BHN	10,326	3.1%	5
Woodbridge	16,731	3.0%	6	Orsetti	2,405	0.7%	6
BHN	10,326	1.9%	7	Syngenta	196	0.1%	7
Orsetti	2,405	0.4%	8	All Other	16,911	5.0%	8
Syngenta	196	0.0%	9				
All Other	16,911	3.0%	10				
	Current CR-4		86.6%		Current CR-4		91.1%
	Post-Merger CR-4		91.6%		Post-Merger CR-4		94.2%
	Current HHI		2,204		Current HHI		2,675
	Post-Merger HHI		2,872		Post-Merger HHI		4,516
	Δ HHI		668		Δ HHI		1,841

Post-merger, Bayer-Monsanto would have the top market position for all processing tomato seeds with 37.8 percent and would be nearly three times larger than the number three firm (Vilmorin’s Harris Moran Seeds) and seven times larger than the number four firm (United Genetics). The

⁵⁰ Gaspar, Kathleen Thomas. “Nunhems adopts new business approach for North America.” *The Produce News*. February 12, 2009.

⁵¹ “Monsanto and Bayer complementary re vegetable seeds.” *Fresh Plaza*. September 19, 2016.

⁵² Dias and Ryder (2011) at 316.

⁵³ Analysis of AgSeeds Unlimited. “2016 South Sacramento Valley Processing Tomato Production Meeting.” January 7, 2016. Includes early, mid-season, extended field storage, F3 and pear varieties. Concentration is considerably higher in these subsets of processing tomato seeds.

⁵⁴ DOJ/FTC (2010) at 19.

substantial gap between the proposed merged Bayer-Monsanto and the number three and smaller firms suggests the merger will undermine competition, as the merger guidelines note that these smaller rivals “may not be able readily to replace competition between the merging firms that is lost through the merger.”⁵⁵

A more appropriate processing tomato seed market would be solely for seeds that are *sold* to farmers. The functional market for processing tomato seeds would exclude the tomato seeds provided under production contracts by processing companies, as independent farmers are unable to purchase these varieties. Heinz processing tomato seeds are provided to contract growers and largely not sold to independent farmers.⁵⁶ Kagome’s United Genetics processing tomato seeds produce fruit for the Kagome’s vertically integrated tomato processing business.⁵⁷

The California market for processing tomato varieties that are not contracted by vertically integrated companies is already highly-concentrated, with an HHI of 2,675 points, and the proposed merger would substantially increase concentration, raising the HHI by more than 1,800 points to over 4,500. In 2015, Bayer and Monsanto were the number one and number two sellers of processing tomato seeds with 39.3 and 23.4 percent of the market, respectively. The proposed merger would give Bayer-Monsanto 62.7 percent of the processing tomato seed market, nearly three times larger than the number two firm (Vilmorin) and more than twelve times larger than the number three firm (Woodbridge). The proposed merger’s increase in concentration would “be presumed to be likely to enhance market power.”⁵⁸ Such an estimate, however, is still conservative as it fails to reflect even greater consolidation in seasonally adapted tomato markets.⁵⁹

B. Concentration in vegetable seed varieties suggests comparable concerns in other vegetable seeds

The hyper-consolidated processing tomato seed could likely exist in markets for seeds of other types of vegetables. There is little available data on the specific geographic and product markets for individual vegetable crops, but there is evidence that the top companies hold considerable control over the available vegetable varieties.

It is likely that the market concentration is considerably higher than the concentration in cultivars. For example, in the European Union, the four largest vegetable seed companies (Monsanto, Syngenta, Vilmorin and Rijk Zwaan) market 40.2 percent of the tomato cultivars and the proposed merger would raise the four-firm cultivar concentration to 43.9 percent.⁶⁰ The market concentration of seeds is likely to be considerably higher — cultivation is not equally distributed among cultivars. For example, Bayer’s Nunhems represented 16 percent of the cultivars but 24 percent of the delivered loads for processing tomatoes. The top four companies controlled 73 percent of cultivars but 87 percent of delivered loads of processing tomatoes, suggesting that modest increases in market

⁵⁵ *Ibid.* at 18.

⁵⁶ Gereffi, Gary et al. Prepared for Healthy Eating Research Program of Robert Wood Johnson Foundation. “The Governance Structures of U.S.-Based Food and Agriculture Value Chains and their Relevance to Healthy Diets.” June 17, 2008 at 46 and 51.

⁵⁷ Sampson, Alex. “Kagome’s claim to be the world’s best tomato processor is no idle boast.” *Melbourne (Australia) Weekly Times*. March 23, 2016; Kagome Co., Ltd. [Press release]. “United Genetics Holding LLC to become consolidated subsidiary of Kagome Co., Ltd.” September 30, 2013.

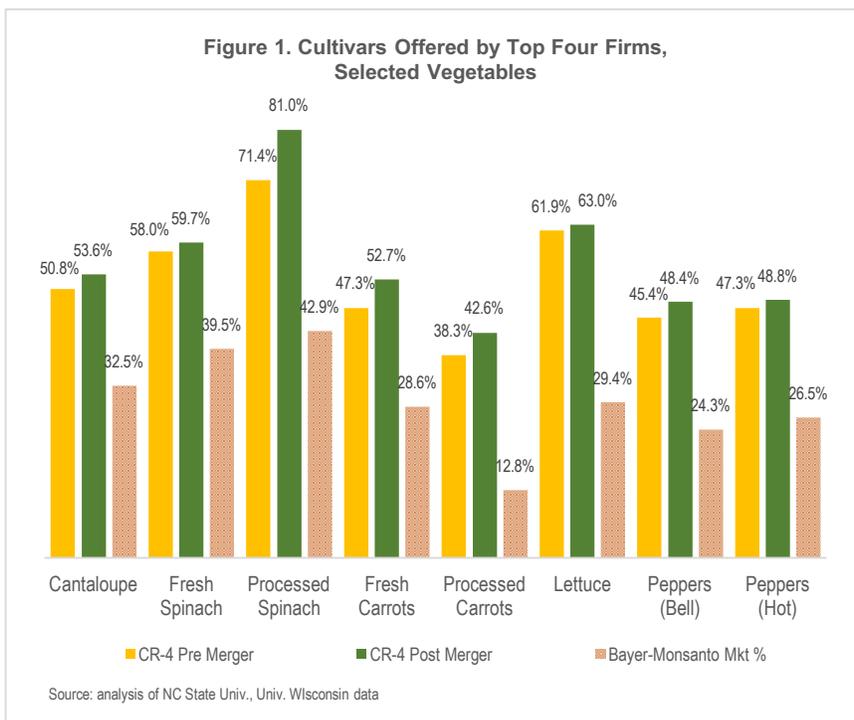
⁵⁸ DOJ/FTC (2010) at 19.

⁵⁹ Analysis of AgSeeds Unlimited (2016). Includes early, mid-season, extended field storage, F3 and pear varieties. Concentration is considerably higher in these subsets of processing tomato seeds.

⁶⁰ Mammana (2014) at 27.

share of specific cultivars is likely to translate into substantial increases in market concentration. These cultivars are almost exclusively for commercial production as the processing tomato market doesn't include a large number of garden varieties that likely are present, but unused, by commercial producers in other vegetable markets.⁶¹

In many types of vegetables, the proposed merger would increase the control a few firms have on the majority of vegetable cultivars and cement Bayer-Monsanto's dominant position (see Figure 1).⁶² Bayer-Monsanto would rank first in all examined vegetable types (cantaloupe, fresh carrot, processing carrot, lettuce, fresh spinach and processing spinach) and would control at least one-third of the market for cantaloupe, fresh spinach and processing spinach.



The concentration of cultivars considerably constrains farmer choices. The proposed Bayer-Monsanto merger would give the top four firms control of more than half the cultivars

for cantaloupe, fresh carrots, lettuce, fresh spinach and processed spinach. Not only are fewer firms controlling a larger portion of cultivars, making it harder for farmers to select varieties outside the seeds produced by the dominant firms, but commonplace arrangements between seed companies and seed dealers can further curtail available choices for farmers.

III. Proposed merger will not foster innovation but strengthens patent control over farmers

Although Bayer and Monsanto have contended that the proposed merger will drive more research and innovation, there is little evidence that seed mergers enhance research into improved seed varieties. Bayer officials stated that the proposed merger would benefit farmers through improved innovation even as the number of seed and agrichemical companies declines dramatically after the

⁶¹ Pittenger, Dennis R. et al. "Growing tomatoes in the Home Garden." *University of California Division of Agriculture and Natural Resources*. Publication 8159. 2005 at 1.

⁶² Analysis of percent of available cultivars based on Wehner, Todd C. (Ed.). North Carolina State University. "Vegetable Cultivar Descriptions of North America." Available at <http://cucurbitbreeding.com/todd-wehner/publications/vegetable-cultivar-descriptions-for-north-america/>. Accessed July 2017; carrot cultivars from Luby, Claire H. and Irwin L. Goldman. "Improving freedom to operate in carrot breeding through the development of eight open source composite populations of carrot." *Sustainability*. Vol. 8. No. 479. May 14, 2016 at 7 to 9.

Dow-DuPont and Syngenta-ChemChina deals.⁶³ The proposed merger is unlikely to enhance innovation, as it allows the firm to flex its market power rather than compete for farmer customers through innovative product competition.

The biggest vegetable seed companies including Monsanto and Bayer are integrated seed companies that research, breed, manufacture and sell vegetable seeds.⁶⁴ The seed companies have strengthened research largely through mergers that have increased market share and captured the target companies' vegetable cultivar portfolio.⁶⁵ These seed companies dominate vegetable seed research and have marginalized public sector breeding and innovation.⁶⁶ In 2014, Bayer and Monsanto combined submitted 36 percent of all European Union Community Plant Variety Protection applications for new vegetable varieties.⁶⁷

The majority of commercial vegetable seed companies have proprietary control over their seed lines through hybridized techniques that reduce or eliminate the reproducibility of the seed cultivar to prevent the seed traits from being used by competitors or small-scale breeders.⁶⁸ These companies also aggressively enforce their proprietary rights on seed and genetic traits through highly restrictive intellectual property protections (such as utility patents and licensing agreements). For example, Monsanto prohibits vegetable farmers from saving and replanting its seeds.⁶⁹ Its seed contracts also set exclusive conditions that ensure farmers can only sell produce that meets specific standards of sweetness, firmness or scent, which Monsanto enforces through rigorous quality assurance testing.⁷⁰ Unlike open, non-hybrid cultivars, these hybrids cannot be successfully replanted in successive generations of saved seeds.⁷¹ Even if farmers wished to replant hybrids to accept lower yields or lower quality crops, quality testing effectively prevents this. Vegetable hybrids are about a century old — sweet corn hybrids were first offered in the 1920s and hybrid onions in the 1940s.⁷²

The use of patented vegetable seeds has been increasing even in advanced markets like the United States.⁷³ By 2006, private companies, using proprietary seeds supplied two-thirds of global crop seeds.⁷⁴ Companies are increasingly focusing on these patented hybrid seeds.⁷⁵ Since 1984, the number of non-hybrid vegetable cultivars available in the United States declined by two-thirds.⁷⁶

Patents are designed to give innovators a safe harbor to develop their products and markets, but seed patents – especially when many traits are held by a small number of firms – can freeze new entrants out of the marketplace.⁷⁷ The combination of patented seed varieties and hybrid seeds

⁶³ Gullickson, Gil. “What Bayer is saying about the Bayer-Monsanto merger.” *Successful Farming*. March 2, 2017.

⁶⁴ Fuglie et al. (2011) at 32.

⁶⁵ Dias (2014) at 9.

⁶⁶ *Ibid.*

⁶⁷ Community Plant Variety Office. “Annual Report 2014.” Luxembourg: Publications office of the European Union. 2015 at 35.

⁶⁸ Chiarolla, Claudio and Hope Shand. Utviklingsfondet and Berne Declaration. “An Assessment of Private *Ex Situ* Seed Collections.” 2013 at 24 and note 81 at 24.

⁶⁹ Szokan, Nancy. “Monsanto develops new veggies without GMO’s Frankenfood factor.” *Washington Post*. February 14, 2014.

⁷⁰ Paynter (2014).

⁷¹ Moretti (2006) at 15.

⁷² Dias and Ryder (2011) at 300.

⁷³ Vilmorin & Cie (2016) at 14.

⁷⁴ Fuglie et al. (2011) at 11 and 12.

⁷⁵ Dias (2014) at 20.

⁷⁶ *Ibid.* at 21.

⁷⁷ Harl, Neil E. Charles F. Curtiss Distinguished Professor of Agriculture and Professor of Economics, Iowa State University. “The Structural Transformation of Agriculture.” Presentation at 2003 Master Farmer Ceremony, West Des Moines, Iowa. March 20, 2003 at 10.

enable seed companies to exert more leverage over farmers who cannot save and replant seeds and are forced to purchase new seed input supplies for every planting season.⁷⁸

The main breeding and research goals of major seed companies focus on a few high-value vegetables and center around post-harvest marketability (durability for transport, long shelf-life and cosmetic appearance) rather than nutrition or yield.⁷⁹ Very few seed companies are developing vegetable seeds adapted to local environments.⁸⁰ Global companies have lower incentives to be responsive to local demands.

The proposed merger will likely reduce rather than inspire vegetable seed innovation and strengthen the grip Bayer-Monsanto has over vegetable farmers. Historically, seed mergers have not improved seed innovation. USDA found that the significant increase in global seed concentration from 1994 to 2009 was not associated with a permanent rise in research investments.⁸¹ A recent analysis found that the mergers that drove rapid consolidation have not contributed to increased introduction of new biotech seed traits.⁸²

IV. Proposed merger raises seed prices for farmers and increases vulnerability to vertical coordination between seed companies, distributors and retailers

The proposed merger will likely further increase the prices farmers pay for vegetable seeds. The tiny number of seed sellers can exert significant oligopoly seller power over farmers. In the United States, farmers spent \$860 million on vegetable seeds in 2015.⁸³ Between 2008 and 2015, seeds and plants made up nearly 9 percent of fruit and vegetable farmers' expenses.⁸⁴ Some seeds can be incredibly expensive. Syngenta reports that "seeds for some high value tomato varieties can be more than double the cost of the equivalent weight in gold."⁸⁵

Even modest increases in seed prices and agrichemical inputs could have substantial economic impact on vegetable farmers. Oligopolistic seed companies do not need to compete on either price or innovation, and the few dominant companies can use their market power to maintain sales revenues knowing that their rivals can tacitly collude on price to maintain their own sales.⁸⁶ A five percent increase in seed and agrichemical input prices for farmers would reduce vegetable farmers' net farm income by an average of 3 percent.⁸⁷

Vegetable seed prices have risen rapidly over the past decade and appear to correspond with the rise in mergers by the largest seed companies (see Figure 2). From 1992 to 2001, the annual change in vegetable seed prices remained fairly steady (declined by 0.6% on average), but prices grew an

⁷⁸ Howard (2009) at 1268.

⁷⁹ Dias (2014) at 18 and 21.

⁸⁰ Dias and Ryder (2011) at 332.

⁸¹ Fuglie et al. (2011) at 14 to 15.

⁸² See American Antitrust Institute, Food & Water Watch and National Farmers Union. Letter to Acting Assistant Attorney General Andrew Finch. In Re. The Proposed Merger of Monsanto and Bayer. JULY 26, 2017 at 3 and 4.

⁸³ LaVigne (2017) at 1.

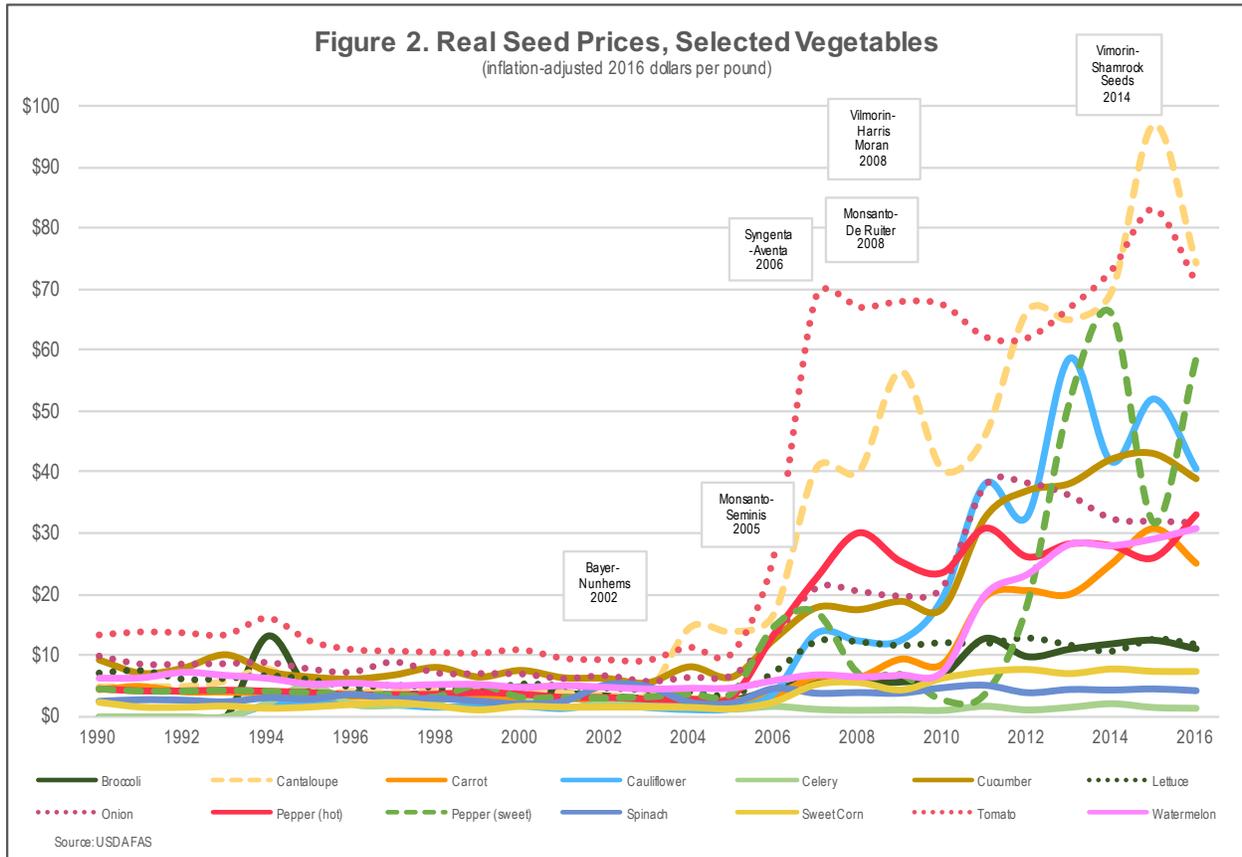
⁸⁴ U.S. Department of Agriculture. Economic Research Service. ARMS Farm Financial and Crop Production Practices survey data. Available at <https://www.ers.usda.gov/data-products/arms-farm-financial-and-crop-production-practices/>. Accessed July 2017.

⁸⁵ Syngenta (2016) at 59.

⁸⁶ Howard (2009) at 1270.

⁸⁷ Analysis of USDA ERS ARMS Farm Financial and Crop Production Practices survey data.

average of 21.4 percent annually from 2002 to 2016.⁸⁸ For high value vegetables like tomatoes and sweet peppers, seed prices were substantially higher from 2012 to 2016 than the five years prior to the Monsanto-Seminis deal (8 times higher for sweet peppers and 5 times higher for tomatoes). Increased prices have not necessarily meant improved yields. For example, cantaloupe yields only increased 1.1 percent annually from 1998 to 2016, but cantaloupe seed prices increased more than 8-fold over the same period.⁸⁹



A. Vegetable seed company vertical alliances disadvantage farmers

Vegetable seed companies are increasingly partnering with processors, retailers and distributors that exert pressure on growers to raise specific varieties.⁹⁰ Half of seed companies have alliances with grocery retailers that have helped drive the development of new vegetable cultivars and some seed companies have exclusive contracts with grocery chains to market specific vegetable varieties.⁹¹ These corporate alliances favor the largest vegetable farms and have contributed to the decline in farm numbers as companies “de-list” farmers that cannot deliver considerable volumes.⁹²

⁸⁸ Analysis of USDA. Foreign Agricultural Statistics. Global Agricultural Trade Service database (FAS GATS). USDA does not keep seed prices for vegetable seeds, but export prices reflect the prices for vegetable seeds. Export volumes and values for broccoli, cantaloupe, carrot, cauliflower, celery, cucumber, lettuce, onion, hot pepper, bell pepper, radish, spinach, sweet corn, tomato and watermelon.

⁸⁹ Analysis of USDA NASS Quick Stats database. Cantaloupe yield (CWT/acre) 1998 to 2016; USDA FAS GATS database.

⁹⁰ Linden, Tim. “Retailers starting to exert influence at seed variety level.” *The Produce News*. April 17, 2012; Ashcroft, Philip W. Verdant Partners. “The Vegetable Seed Industry — Where is it Heading?” *Strategic Insights*. November 6, 2009 at 1.

⁹¹ Liu et al. (2015) at 31 to 32.

⁹² Dias (2014) at 13

Vegetables are typically delivered to retailers or processing plants by a wholesaler known as a shipper. Shippers have gotten larger, especially through marketing alliances, in order to sell into a more consolidated retail marketplace and meet the volume and service requirements of the national retail chains.⁹³ This consolidation means that farmers have fewer buyers and that there is significant vertical integration and coordination between seed companies, manufacturers, grower-shippers and farmers.

Shippers also negotiate and arrange fruit and vegetable delivery contracts with farmers. Contracting has been used to secure supplies of processing vegetables since the 1950s and contracts covered 39 percent of vegetable production by 2008.⁹⁴ The processing industry is extremely vertically integrated, with virtually all processed vegetables raised under some kind of contract.⁹⁵ Some contracts can be quite explicit and constrain farmers' options for seed choice. The majority of processing contracts set the inputs farmers can use and set payment schemes that award bonuses and impose penalties based on quality.⁹⁶

The biggest vegetable trade association players celebrated both Bayer's and Monsanto's existing cooperative partnerships with the vegetable industry when the merger was announced.⁹⁷ The two companies already partner with agribusinesses and retailers to provide custom vegetable seeds. Monsanto has worked with Dole Foods to develop broccoli, cauliflower and lettuce varieties.⁹⁸ It also has been working with "retailers that want solutions to problems," according to the head of Monsanto's vegetable seeds division.⁹⁹

Bayer's Nunhems began working directly with the grower-shippers that buy vegetables from farmers — a shift away from the seed dealers that sell to farmers to the distributors, manufacturers and retailers that buy from farmers.¹⁰⁰ Bayer spent two years collaborating with Walmart to develop an all-season cantaloupe that was 40 percent sweeter — a fruit Walmart is hoping will drive sales.¹⁰¹

The purpose of these vertical alliances between seed companies, agribusinesses and retailers is to produce "product identification that the consumer will pay for, that will create brand identity and that they can charge more for," according to an agribusiness investment banking advisor.¹⁰² As a Monsanto vegetable executive noted, "the goal is to get the products recognized by the consumer,

⁹³ Hoy, Carmen F., Roberta Cook and Richard J. Sexton. "Chapter 4: Marketing California's Agricultural Production." In Siebert, Jerry (Ed.). (2003). *California Agriculture: Dimensions and Issues*. Berkeley, CA: University of California Giannini Foundation of Agricultural Economics: Division of Agriculture and Natural Resources at 94; Cook, Roberta L. Professor, Department of Agricultural and Resource Economics, University of California Davis. "Supermarket Challenges and Opportunities for Fresh Fruit and Vegetable Producers and Shippers: Lessons from the U.S. Experience." Presented at the Conference on Supermarkets and Agricultural Development in China—Opportunities and Challenges. Shanghai, China. May 24, 2004 at 3.

⁹⁴ Hueth, Brent et al. Iowa State University, Department of Agricultural and Resource Economics. "Incentive Instruments in Fruit and Vegetable Contracts: Input Control, Monitoring, Measuring, and Price Risk." March 20, 1999 at 1; MacDonald, James M. and Penni Korb. USDA ERS. "Agricultural Contracting Update: Contracts in 2008." EIB-72. February 2011 at 13.

⁹⁵ Macdonald and Korb (2011) at 5 and 13.

⁹⁶ Hueth et al. (1999) at 16.

⁹⁷ Ohlemeier (2016).

⁹⁸ Tomich (2009).

⁹⁹ Thompson (2017).

¹⁰⁰ Gaspar (2009).

¹⁰¹ Bhattarai, Abha. "Walmart's answer to Aldi and Amazon: 'designer cantaloupe.'" *Washington Post*. June 13, 2017.

¹⁰² Tomich (2009).

trusted, and purchased.”¹⁰³ In some cases, the price premium for these designer vegetables can exceed the prices typically achieved by certified organic products.¹⁰⁴

The proposed merger will strengthen these vertical alliances to the disadvantage of farmers, especially small- and medium-sized farmers who may be less able to deliver larger volumes. Farmers will find it more difficult to not only choose seed but also to have multiple competitive marketing channels for vegetable crops, which ultimately reduces the price farmers receive for their crops.

V. Proposed merger reduces sustainable farming options and consumer choice

The proposed merger will have significant impacts on the food system, food supply and consumers. Seeds are vital to supplying food products — a “disruption in seeds supply may cause a systemic food shock.”¹⁰⁵ Increasing consolidation of the global vegetable seed supply leaves all farmers and consumers dependent on only a few seed suppliers.¹⁰⁶

The biggest seed companies are increasingly committed to “high-tech derived products” that are becoming “an ever-larger part of the vegetable seed portfolio,” according to agricultural analysts at Verdant Partners.¹⁰⁷ In the United States, vegetable production makes up one percent of cultivated land but 14 percent of pesticide applications.¹⁰⁸ Both Bayer and Monsanto’s focus on patented seed traits tied to agrochemical use could spread more aggressively to its vegetable seed products.¹⁰⁹

The consolidation has diminished the genetic diversity of vegetable seeds that can make crops more vulnerable to diseases, pests or weather stresses and can contribute to food insecurity.¹¹⁰ The proposed merger is likely to generally decrease vegetable seed research, including a decline in research into more varieties and types of vegetables. Monsanto vegetable seed research has included traditional breeding as well as more advanced genetic mapping techniques designed to produce more specific qualities.¹¹¹ Bayer has also invested in vegetable seed research and, according to a Bayer vegetable executive, “one of our main objectives has been strengthening ourselves in high-tech vegetables, and investments in this have been increasing for years. This [Monsanto] take-over fits that.”¹¹²

Most of Monsanto’s vegetable research has had a decidedly industrial orientation, for example, grape tomatoes that are 50 percent sweeter than other grape tomatoes with a long “shelf life” gene designed to be shipped thousands of miles from farm to supermarket.¹¹³ Monsanto’s research has aimed to make a host of produce sweeter (and with a higher sugar content), including cantaloupes, watermelon and tomatoes.¹¹⁴

¹⁰³ Paynter (2014).

¹⁰⁴ Dias (2014) at 17.

¹⁰⁵ Lianos et al. (2016) at 3.

¹⁰⁶ Dias (2014) at 9.

¹⁰⁷ Ashcroft (2009) at 2.

¹⁰⁸ Dias (2014) at 14.

¹⁰⁹ Court (2016).

¹¹⁰ Dias (2014) at 9 and 22.

¹¹¹ Monsanto Company. [Press release]. “Monsanto completes vegetable research site expansion.” August 19, 2013; Paynter (2014).

¹¹² *Fresh Plaza* (2016).

¹¹³ Tomich (2009).

¹¹⁴ Paynter (2014).

While the seed market has more than doubled in value in the past 20 years, the market for conventional (non-GM) seeds has diminished.¹¹⁵ Farmers have had difficulty accessing a wide variety of seed options. At the 2010 Department of Justice-USDA workshop on Competition in Agriculture Markets, farmers noted the lack of availability of non-GM seeds.¹¹⁶ The seed supply for organic production also remains insufficient.¹¹⁷ In July of 2017, an organic farmer testified before the Senate Agriculture Committee that he had difficulty finding appropriate tomato seed varieties for his organic operation.¹¹⁸

Monsanto has long been interested in GM vegetables. In the 1990s, it purchased Calgene, the inventor of the commercially unsuccessful GM Flavr Savr tomatoes that could be shipped ripe.¹¹⁹ Monsanto's purchase of the conventional vegetable seed company Seminis posed potential risks of delivering the rigid patent and technology applications of biotechnology to vegetable seeds.¹²⁰ When Monsanto bought Seminis, its chief executive stated that "in the long term, there may be opportunities in biotech [vegetables]."¹²¹ Seminis currently markets the GM virus-resistant squash and Monsanto canceled its GM beetle-resistant potato after fast food companies refused to use them for French fries.¹²² In 2012, Monsanto's GM sweet corn was commercialized, cultivated and marketed to supermarkets.¹²³

The consolidation of the vegetable seed industry has substantial impacts on consumers' food choices and prices. Vegetables are an important category of food. Consuming the micronutrients, vitamins and antioxidants in fruits and vegetables can reduce the incidence of cardiovascular disease and certain cancers and that insufficient produce consumption has been attributed to nearly 3 million worldwide deaths annually.¹²⁴ Although vegetables are a vital part of a nutritious and healthful diet, more than 80 percent of U.S. consumers still eat fewer vegetables than are recommended.¹²⁵

Consolidation of inputs favors processed food industries and degrades the quality of other inputs, limiting healthy choices for consumers.¹²⁶ The proposed deal may make it harder for consumers to find healthy diversity in vegetables or those grown with fewer or less risky pesticides.¹²⁷ The proposed merger would give Bayer-Monsanto more leverage to raise seed prices for farmers, reduce the choice of the crops they can produce and, ultimately, these higher costs would be passed onto

¹¹⁵ Vilmorin & Cie (2016) at 14.

¹¹⁶ USDA and DOJ. "Competition and Agriculture." Washington, D.C. December 8, 2010 at 137 and 148; USDA and DOJ. "Competition and Agriculture." Ankeny, Iowa. March 12, 2010 at 126.

¹¹⁷ See Hubbard, Kristina and Jared Zystro. Organic Seed Alliance. "State of Organic Seed, 2016." June 2016.

¹¹⁸ Cristantes, Theogary Jr. President, Operation Wholesome Harvest. Opportunities in Global and Local Markets, Specialty Crops, and Organics: Perspectives for the 2018 Farm Bill. Committee on Agriculture, Nutrition & Forestry. U.S. Senate. July 13, 2017. Responses to questions by Senators Debbie Stabenow and Kirsten Gillibrand. Available at www.agriculture.senate.gov/hearings/opportunities-in-global-and-local-markets-specialty-crops-and-organics_perspectives-for-the-2018-farm-bill at 1:16 and 1:30.

¹¹⁹ Paynter (2014).

¹²⁰ Moretti (2006) at 11.

¹²¹ Pollack (2005).

¹²² Tomich (2009).

¹²³ Berry, Ian. "Monsanto digs deeper in vegetable seeds." *Wall Street Journal*. June 26, 2012.

¹²⁴ Lock, Karen et al. "The global burden of disease attributable to low consumption of fruit and vegetables: Implications for the global strategy on diet." *Bulletin of the World Health Organization*. Vol. 83, No. 2. February 2005.

¹²⁵ U.S. Department of Health and Human Services and U.S. Department of Agriculture. 2015–2020 Dietary Guidelines for Americans. 8th Edition. December 2015 at 39.

¹²⁶ Gerefi, Gary, Joonkoo Lee and Michelle Christian. "US-based food and agricultural value chains and their relevance to healthy diets." *Journal of Hunger and Environmental Nutrition*. Volume 4. 2009 at 369-370.

¹²⁷ Court (2016).

consumers at the supermarket.¹²⁸ That could mean fewer sustainable or affordable options for consumers and reduced vegetable consumption.

* * *

The proposed Bayer-Monsanto merger would substantially reduce competition in the vegetable seed sector, diminish research into vegetable varieties, erode farmer seed choice, raise input prices and undermine consumers' choices for more sustainable and healthy vegetables. The scale and scope of the deal — including agrochemicals, conventional and GM commodity crops as well as the vegetable seeds discussed here — cannot be remedied through behavioral remedies. The Department of Justice should enjoin the Bayer-Monsanto merger. Absent blocking the proposed deal in its entirety, it is essential that the Department of Justice require the divestiture of the Seminis vegetable seed lines and brands to ensure that sufficient competition remains in the market for vegetable seeds, traits and research.

Sincerely,

California Farmers Union
Community Alliance for Global Justice
Connecticut Northeast Organic Farming Association
Dakota Rural Action
Farm and Ranch Freedom Alliance
Federation of Southern Cooperatives/Land Assistance Fund
Food & Water Watch
Food for Maine's Future
Sustainable Iowa Land Trust
National Family Farm Coalition
National Farmers Union
National Hmong American Farmers
National Organic Coalition
National Sustainable Agriculture Coalition
National Young Farmers Coalition
New England Farmers Union
Northeast Organic Farming Association Massachusetts
Northeast Organic Farming Association of New Jersey
Northeast Organic Farming Association of New York
Northeast Organic Farming Association of Rhode Island
Northeast Organic Farming Association of Vermont
Organic Seed Alliance
Rural Advancement Foundation International–USA
Wisconsin Farmers Union

cc. Kathleen O'Neill, Chief, Transportation, Energy, and Agriculture Section, Antitrust Division, U.S. Department of Justice; Mark B. Tobey, Special Counsel for State Relations and Agriculture, Antitrust Division, U.S. Department of Justice.

¹²⁸ *Ibid.*

EXHIBIT 4

The Anticompetitive Effects of the Proposed JBS-Cargill Pork Packing Acquisition

July 2015



I. Introduction

The proposed acquisition of Cargill Pork (Cargill) by JBS S.A. (JBS) would significantly reduce competition in the hog processing and slaughter industry, disadvantaging hog producers, wholesale pork buyers and, ultimately, consumers. The scale and scope of the proposed acquisition warrant substantial scrutiny by the U.S. Department of Justice.

JBS and Cargill are already two of the largest meatpackers in the United States and globally. In the United States, the combined firms sold \$59 billion worth of meat products in 2014 making them the second and third largest meat processing firms behind Tyson Foods.¹ Brazil-based JBS is the world's largest meat company and the second largest beef packer, second largest poultry processor and third largest pork packer in the United States.² Cargill is the largest privately held company in the United States and the third largest meat processor in the United States.³ The proposed acquisition also would mean that the top two pork packing firms — Smithfield and JBS — are controlled by foreign companies.⁴

The proposed \$1.45 billion acquisition would join the third and fourth largest pork packing companies and the post-acquisition

JBS would surpass Tyson Foods to become the second largest hog processor in the country behind Smithfield.⁵ It also would create a considerably more vertically integrated JBS. The deal includes Cargill's two pork slaughter and processing plants (located in Ottumwa, Iowa and Beardstown, Illinois), five feed mills (located in Missouri, Arkansas, Iowa, and Texas), along with four hog production facilities (located in Arkansas, Oklahoma, and Texas).⁶ Cargill's hog production facilities were the eighth largest in the country in 2014, with 161,000 sows.⁷

The merger extends JBS' long-term effort to become the dominant protein company in each market. The company has grown into the largest meat processor in the world primarily through large acquisitions. JBS has "a very aggressive growth strategy" and growth through acquisitions is "in [the company's] DNA."⁸ The proposed Cargill acquisition represents "a strategic investment in the long-term growth of [JBS'] domestic and global pork business and demonstrates [the company's] commitment to the U.S. livestock sector."⁹

The proposed merger would enable JBS to grow to become a more dominant and more vertically integrated meat manufacturer and violates the Clayton Act's prohibition against mergers that may "substantially to

¹ "National Provisioner's Top 100." *National Provisioner*. May 2015 at 30.

² "JBS to purchase U.S. Cargill pork assets for \$1.45 billion." *Reuters*. July 1, 2015; Magalhaes, Luciana. "With Cargill purchase, Brazil's JBS poised to become No. 2 pork producer in U.S." *Wall Street Journal*. July 2, 2015; "2014 top poultry companies." *Watt Poultry USA*. March 2014 at 18.

³ Murphy, Andrea. "Top 20 largest private companies of 2014." *Forbes*. November 5, 2014; Clyma, Kimberlie. "Leaders of the pack." *Meat and Poultry*. March 2015 at 16, 22.

⁴ In 2013, Smithfield was purchased by Shuanghui International Holdings Ltd. (now WH Group) for \$4.7 billion. Tadena, Nathalie. "Smithfield Shareholders approve Shuanghui deal." *Wall Street Journal*. September 24, 2013.

⁵ JBS USA. [Press release]. "JBS USA Pork agrees to purchase Cargill pork business." July 1, 2015; Magalhaes (2015); National Pork Board. "Pork Stats 2014." 2014 at 22.

⁶ JBS USA (2015).

⁷ "Top 25 Pork Powerhouses." *Successful Farming*. 2015.

⁸ Runyon, Luke. "Inside the world's largest food company you've never heard of." *KUNC Community Radio for Northern Colorado*. June 26, 2015; Blankfield, Keren. "JBS: the story behind the world's biggest meat producer." *Forbes*. April 21, 2011.

⁹ Gylan, Georgi. "JBS to make further acquisition with Cargill pork business." *Global Meat News*. July 2, 2015.

lessen competition, or tend to create a monopoly.”¹⁰ The proposed merger runs afoul of the U.S. Department of Justice’s merger guidance stating “[m]ergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise.”¹¹

Rapid consolidation in the food and agriculture sectors has been of rising concern to farmers, consumers and federal regulators. Since the economy began to recover from the recession, the pace of mergers has accelerated and threatens to increase concentration in the already over-consolidated food and agriculture sectors. In 2014, there were more than more than 300 food and beverage mergers and acquisitions valued over \$120 billion.¹² The proposed acquisition contributes to the growing size and market power of the top meat and poultry processors that has had tremendous ripple effects across the food chain. Mergers and acquisitions in one portion of the food chain are used to justify reverberating mergers up and down the agribusiness, food manufacturing and retailing sectors.

Only robust antitrust enforcement can protect consumers and farmers from anticompetitive combinations and practices. A May 2012 Department of Justice report “stressed the importance of vigorous antitrust enforcement” and detailed the ways that anticompetitive mergers and conduct can harm farmers, consumers and others.¹³

¹⁰ 15 U.S.C. §18.

¹¹ U.S. Department of Justice/Federal Trade Commission (DoJ/FTC). “Horizontal Merger Guidelines.” August 19, 2010 at 2.

¹² Harris Williams & Co. “Food and Beverage Industry Update.” January 2015 at 11; de la Merced, Michael. “Deal makers notched nearly \$3.5 trillion worth in ’14, best in 7 years.” *New York Times*. January 1, 2015.

¹³ U.S. Department of Justice. “Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy.” May 2012 at 2.

As President Barack Obama observed in his 2013 Inaugural Address “a free market only thrives when there are rules to ensure competition and fair play.”¹⁴

The proposed acquisition creates a substantially more concentrated hog slaughter market and would give JBS-Cargill the capacity and incentive to profitably exert this market power over its rivals, farmers and consumers. It would significantly increase the company’s buyer power over farmers, both nationally and in the Midwest regions surrounding each facility (Section II). It would increase the anticompetitive vertical integration in the industry, reducing options for farmers selling hogs on the open market, delivering hogs under contract or raising hogs under production contracts (Section III). It would also further concentrate the market for wholesale pork products, raising prices for retailers, further processing companies and foodservice outlets (Section IV). Ultimately these price increases would be passed onto consumers at the grocery store (Section V). The combined increase in monopsony market power over hog producers and the increase in monopoly market power over consumers acts as a transfer of economic welfare from both farmers and eaters to what would become the second largest pork packer in the United States.

The Department of Justice must oppose the early termination of the antitrust review and issue a second request under the Hart-Scott-Rodino Act to fully examine the anticompetitive and anti-consumer impacts of the proposed acquisition.¹⁵ We believe the Department of Justice should ultimately enjoin this merger.

¹⁴ President Barack Obama. 2013 Inaugural Address. January 21, 2013.

¹⁵ 15 U.S.C. §18(e).

II. Proposed Acquisition Would Exacerbate Buyer Power Over Hog Farmers

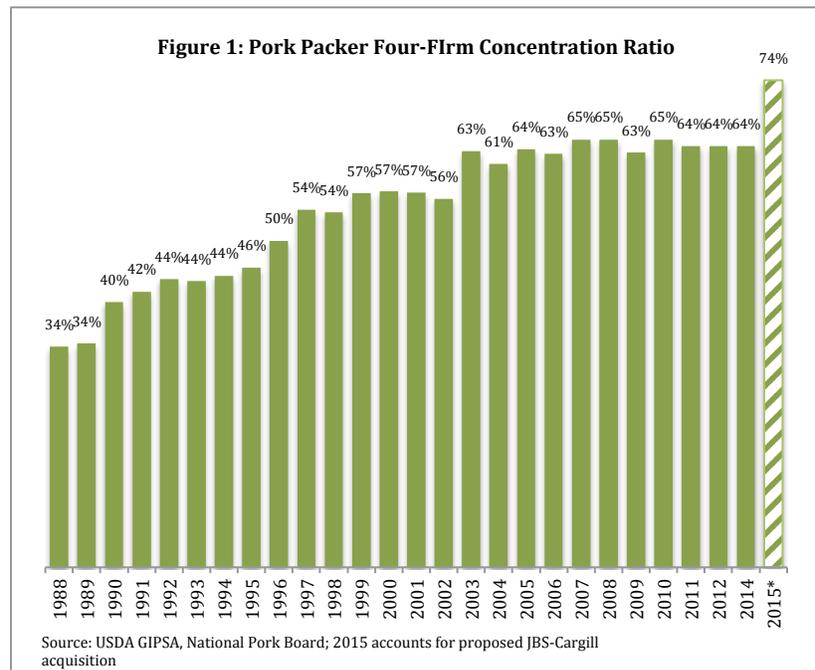
The proposed acquisition would increase the buyer power concentration over hog farmers in an already consolidated hog slaughter and processing sector. Over the past few decades, the U.S. pork packing and processing industry has gained a dominant position over hog farmers through mergers, acquisitions and the emergence of contractual relationships between packers and producers. The appropriate market to measure pork packer buyer power is live slaughter hogs (gilts and barrows) within the appropriate regional markets encompassing captive draw areas (*see below for analyses of several regions of concern*).

Competition among processors is critical for the thousands of farmers trying to earn a living selling their hogs. In 2013, 111 million hogs were purchased at a cost of over \$20 billion.¹⁶ In 2014, commercial hog slaughter was 106.9 million head.¹⁷ 28.6 million of them were in Iowa alone.

The hog production sector is horizontally concentrated (only a few companies buy, slaughter and process the majority of hogs) and vertically integrated (pork packers have tight contractual relationships with hog producers throughout all stages of production). Meatpacking “concentration levels are among the highest of any industry in the United

States, and well above levels generally considered to elicit non-competitive behavior and result in adverse economic performance,” according to Oklahoma State University professor Clement Ward.¹⁸ This horizontal consolidation and vertical integration in the pork packing industry has contributed significantly to the decline in the number of hog farms. The United States has lost 150,000 hog operations — about 70 percent — between 1993 and 2012.¹⁹

National concentration in the hog slaughter industry has nearly doubled over the past three decades as mergers significantly reduced the number of competitors and increased market concentration.²⁰ In 1982, the four largest firms slaughtered one out of three hogs (35.8 percent) nationally. By



¹⁶ National Pork Producers Council. “The importance of trade to U.S. agriculture.” Testimony before the Agriculture Committee. United States House of Representatives. March 18, 2015 at 2.

¹⁷ U.S. Department of Agriculture (USDA). National Agricultural Statistical Service (NASS). “Livestock Slaughter 2014 Summary.” April 2015 at 6, 45.

¹⁸ Ward, Clement E. “A review of causes for and consequences of economic concentration in the U.S. meatpacking industry.” *Current*. No. 3. 2002 at 1.

¹⁹ USDA NASS. “Hogs—Operations with Inventory.” Available at quickstats.nass.usda.gov, accessed July 2014.

²⁰ Ward (2002) at 5.

Company	Slaughter Capacity (head/day)				Market Share				Post-Merger Change	
	2012	2013	2014	Post-JBS-Cargill	2012	2013	2014	Post-JBS-Cargill	Δ	% Change
Smithfield	114,400	117,000	118,500	118,500	27.0%	27.2%	27.4%	27.4%		
Tyson Foods	76,775	76,925	76,925	76,925	18.1%	17.9%	17.8%	17.8%		
JBS-Swift	47,000	50,000	50,000	87,800	11.1%	11.6%	11.6%	20.3%	8.7%	75.6%
Cargill Pork	37,800	37,800	37,800		8.9%	8.8%	8.7%			
Hormel	37,300	37,300	36,800	36,800	8.8%	8.7%	8.5%	8.5%		
CR-4					65.2%	65.5%	65.5%	74.0%	8.5%	13.0%
HHI-4					1,261	1,272	1,277	1,552	275	21.5%
HHI-All					1,412	1,418	1,422	1,624	202	14.2%

Source: Analysis of National Pork Board data.

2014 that figure nearly doubled, as the four biggest companies slaughtered two out of three hogs (65.5 percent) (*see* Figure 1).²¹ Since the 1990s, Smithfield Foods, the nation's largest pork processor, absorbed competitors including John Morrell, Premium Standard Farms and Farmland, which had facilities and operations throughout the Midwest.²² In 2001, Tyson Foods bought IBP, which had four hog packing plants in Iowa.²³

The proposed acquisition would significantly increase the national concentration in pork packing. If the proposed acquisition were approved, the top four pork packers would slaughter three out of four hogs (74.0 percent), a 13.0 percent increase (*see* Table 1). The proposed acquisition would represent the largest increase in pork packer concentration in the

past 25 years, significantly larger than when Smithfield purchased Farmland in 2003.²⁴

The proposed acquisition would create a moderately concentrated national hog packer market, with a Herfindahl-Hirschman Index (HHI) increase over 200 with a national HHI of over 1,600 that “potentially raise[s] significant competitive concerns [that] often warrant scrutiny.”²⁵ The proposed acquisition would make the three largest pork packers much closer in size and considerably larger than the next largest packers. Prior to the proposed deal, JBS and Cargill were only slightly larger than the next largest rival, Hormel (with 11.6, 8.7 and 8.5 percent of the national slaughter capacity, respectively). After the proposed deal, JBS-Cargill would be twice as large as Hormel and about four times larger than the fifth and sixth largest firms (Triumph and Seaboard, each with under 5 percent of the national slaughter capacity).

²¹ USDA. Grain Inspection, Packers and Stockyards Administration. “Packers and Stockyards Statistical Report: 1997 Reporting Year.” GIPSA SR-99-1. June 1999 at Table 31; USDA GIPSA. “2013 Annual Report Packers and Stockyards Program.” March 2014 at Table 14 at 31; National Pork Board (2014) at 22.

²² Smithfield Foods. SEC Form 10-K. August 2, 1999 at 2; Smithfield Foods. Annual Report 2004. 2004 at 6; National Pork Board (2009–2012) at 96.

²³ Tyson Foods. 2001 Annual Report. 2001 at 22; National Pork Board. “Pork Quick Facts.” 2012 at 96.

²⁴ The proposed acquisition increases the four-firm concentration ratio by 10 percentage points, a nearly 16 percent relative increase. The 2003 Smithfield-Farmland merger was associated with a 7 percentage point increase in the four-firm concentration ratio, a relative increase of 13 percent. John Morrell. [Press release]. “John Morrell president urges Senators to clear Smithfield-Farmland Foods transaction.” July 23, 2003.

²⁵ DoJ/FTC (2010) at 19.

A. Buyer power extracts value from farmers

The proposed acquisition would substantially strengthen monopsony buyer power and enable JBS-Cargill to exercise unilateral and coordinated market power to depress hog prices paid to producers and farmers. The rising concentration in the pork packing industry increases buyer power significantly and gives firms more leverage over farmer suppliers. This power dynamic allows processors to exercise considerable control over farmers, lower the prices they pay for hogs and more easily collude with other packers, either tacitly or expressly.

Pork packers and processors are the gatekeepers of the hog and pork sector. These firms can source hogs from thousands of different farmers but the farmers sell most of their hogs to only a handful of firms. Farmers generally sell all their marketable hogs to one buyer, which gives pork packers tremendous bargaining power over farmers.²⁶ The decline in the number of hog buyers has left fewer selling options for hog producers, which puts them under increased pressure to take whatever price they can get, even if it does not cover their costs.

Consolidation has made it easier for pork packers to tacitly collude to drive down prices. All pork packers benefit when the prices they pay to producers are low, so there is little incentive to compete by bidding up prices and every incentive to exercise tacit coordinated market power. Buyers can withhold or lower their offers for hogs with little fear of competitors trying to pay more for the product.²⁷ In some cases, there is only one buyer at hog auctions as a

result of market consolidation. Consolidation also gives the pork packers a significant informational advantage over farmers because they regularly purchase large volumes of hogs and are more knowledgeable about prevailing market conditions.²⁸ In 1990, when pork packer concentration levels were only half what they are today, a study found that the hog packing sector exhibited market buyer power that was “not statistically different from a collusive oligopsony.”²⁹

The perishability of most agricultural products significantly exacerbates the impact of market concentration and gives buyers unique leverage over farmers.³⁰ Buyers can impose lower prices or unfavorable terms on farmers who must sell perishable products.³¹ Finished livestock are only at their ideal slaughter weight for a few weeks.³² Market hogs are slaughtered at an ideal weight of 265 pounds.³³ If farmers cannot find decent prices for their hogs when they reach market weight, they must choose between bearing the cost of overfeeding their hogs while they search for alternate buyers and/or receiving less favorable prices.

²⁶ Carstensen, Peter C. University of Wisconsin Law School. Statement Prepared for the Workshop on Merger Enforcement. February 17, 2004 at 13.

²⁷ *Ibid.* at 4.

²⁸ Schroeder, Ted C. and James Mintert. “Market Hog Price Discovery: Barriers and Opportunities.” Paper presented at the National Pork Producers Council’s National Pork Summit. Kansas City, Missouri. December 10, 1999 at 3.

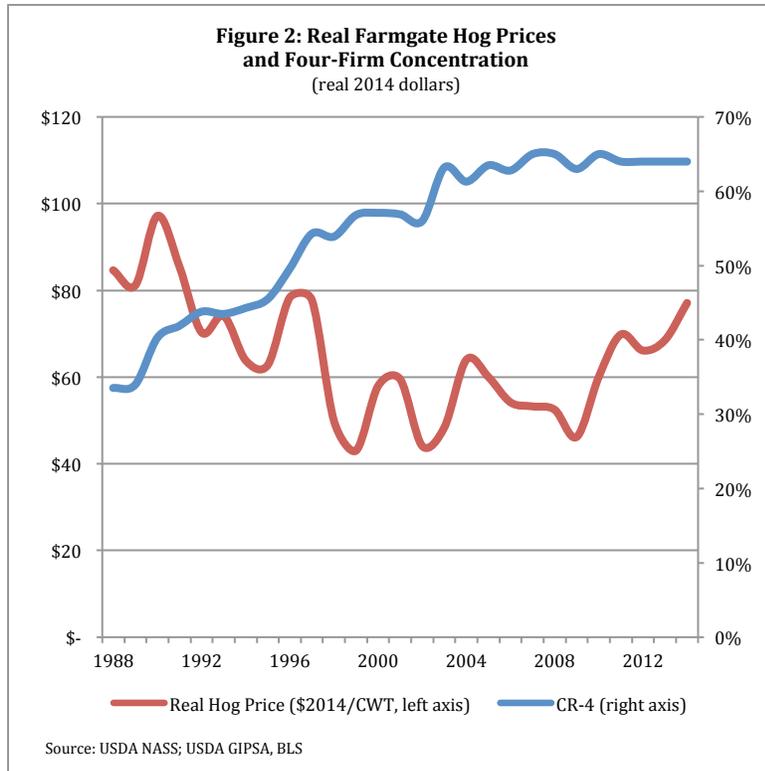
²⁹ Azzam, A.M. and E. Pagoulatos. “Testing oligopolistic and oligopsonistic behavior: An application to the U.S. meat-packing industry.” *Journal of Agricultural Economics*. Vol. 41, Iss. 3. 1990 at 368.

³⁰ Domina, David and C. Robert Taylor. Organization for Competitive Markets. “The Debilitating Effects of Concentration in Markets Affecting Agriculture.” September 2009 at 8.

³¹ Carstensen (2004) at 22.

³² Taylor, C. Robert. Auburn University. “The Many Faces of Power in the Food System.” Presentation at the DoJ/FTC Workshop on Merger Enforcement. February 17, 2004 at 3.

³³ USDA Agricultural Marketing Service. “2012 Annual Meat Trade Review.” 2012 at 3.



Buyer power is similar to seller power, but the power dynamics between pork packers buying hogs is different from the monopolistic power exerted by food companies on retail consumers. Buyers have different market incentives and operate in different marketplaces, and the limitations on buyer-side competition can be different than for sellers.³⁴ Consolidated buyer markets and large single-firm buyer market shares can be more distorting and anticompetitive than seller markets.

Buyers can exert more market power over their suppliers with a smaller share of the purchasing market than sellers can exercise. Buyers can potentially exert unilateral dominance over suppliers with control of less than ten percent of the purchasing market.³⁵ JBS and Cargill held about 10

³⁴ Carstensen (2004) at 3.

³⁵ Foer, Albert A. American Antitrust Institute. "Mr. Magoo Visits Wal-Mart: Finding the Right Lens for Antitrust." Working Paper No. 06-07. November 30, 2006 at 5.

percent of the national hog market before the proposed merger (11.6 and 8.7 percent, respectively), but the proposed acquisition would give JBS-Cargill more than one-fifth of the national hog market (20.3 percent), giving the post-merger firm considerably more leverage over hog farmers and capacity to disadvantage farmers in price negotiations and contracts.

Mergers and acquisitions have made the remaining pork packers significantly larger and helped to drive medium-sized firms out of business. Since 2003, six hog slaughter plants closed in the Midwest, reducing the total daily market for hogs by 22,500 head — the equivalent of eliminating Triumph Foods.³⁶ This

consolidation has reduced options and prices for farmers. A 1999 economic model by Purdue University estimated that a marketplace with 20 equally sized pork packers (akin to the national market in the late 1980s) would pay about 5 percent less than a perfectly competitive marketplace; a marketplace with eight firms would pay 18 percent less; and if there were only four firms, they would pay 28 percent less than a perfectly competitive market.³⁷ The authors concluded, "We have shown that greater consolidation in the meat packing and processing industry creates a markdown effect on the prices farmers receive for live animals."³⁸

³⁶ National Pork Board. "Pork Facts." 2013 at 101.

³⁷ Paarlberg, Philip et al. Department of Agricultural Economics, Purdue University. "Structural Change and Market Performance in Agriculture: Critical Issues and Concerns About Concentration in the Pork Industry." Staff Paper 99-14. October 1999 at 6 to 7.

³⁸ *Ibid.* at 8.

As market concentration has increased, the real price farmers receive for their hogs has declined (*see* Figure 2). Between 1988 and 2012, the market share of the top four pork packers nearly doubled from 34 percent to 64 percent.³⁹ Over the same period, real farmgate hog prices fell by about one-fifth (18 percent), from \$84 per hundredweight in the period 1988 to 1992 to \$68 per hundredweight between 2010 and 2014 (measured in inflation adjusted 2014 dollars).⁴⁰ The proposed acquisition would only worsen this trend by strengthening JBS-Cargill's overall leverage over hog farmers and strengthening its unilateral and coordinated market power to push down on hog prices. Even if the proposed acquisition contributed to small but significant reductions in the price farmers receive for hogs, it could have a significant impact on whether hog producers are economically viable or are forced to exit farming.⁴¹

Farmers would be largely unable to avoid these price cuts. The livelihood of hog farmers depends on their ability to sell their hogs to buyers offering the best prices that enable them to pay for all of the costs that they incur, including production and transportation.⁴² Hog farming requires significant investment, infrastructure, and time considerations that are unique to those animals. Hog farmers cannot easily switch

to another animal type or a commodity crop in order to avoid a small farmgate price decrease.

Nor would it be likely that new pork packers would enter the market to capitalize on JBS-Cargill's exercise of market power by paying slightly more for hogs or charging slightly less for pork. New entry into pork processing is costly and time consuming. Construction of a large-scale slaughter facility would take hundreds of millions of dollars and the additional planning, design and permitting costs are substantial. A recent expansion of Cargill's Ottumwa facility alone cost the company \$25 million.⁴³ Building a facility from scratch would likely be considerably more, and if a firm wanted to enter the market through purchasing an already completed facility, this current acquisition shows how much that can potentially cost. As the Department of Justice noted in its complaint against the Cargill-Continental grain merger, these factors make it unlikely that the "exercise of market power will be prevented by new entry [...] or by any other countervailing competitive force."⁴⁴

B. Midwestern hog-buying geographic market

National concentration measurements can conceal much higher market concentration that farmers face at the regional or local level.⁴⁵ Mergers can increase market power in regional markets where the merged firm can extract even minor price concessions

³⁹ USDA GIPSA. "Packers and Stockyards Statistical Report: 1996 Reporting Year." SR-98-0. October 1998 at 48; USDA GIPSA. "Packers and Stockyards Statistical Report: 1995 Reporting Year." SR-97-1. 1997 at Table 31; USDA GIPSA. "Packers and Stockyards Annual Report 2010." 2010 at 45; USDA GIPSA. "Statistical Report 2002." 2002 at Table 30; USDA GIPSA. "Packers and Stockyards Annual Report 2013." 2013 at 31.

⁴⁰ USDA NASS. Quickstats. "Hogs—Price Received, Measured in \$/CWT." Available at quickstats.nass.usda.gov, accessed July 2015; Real dollar deflator calculated with U.S. Department of Labor, Bureau of Labor Statistics. CPI Inflation Calculator. Available at bls.gov/data/inflation_calculator.htm, accessed July 2015.

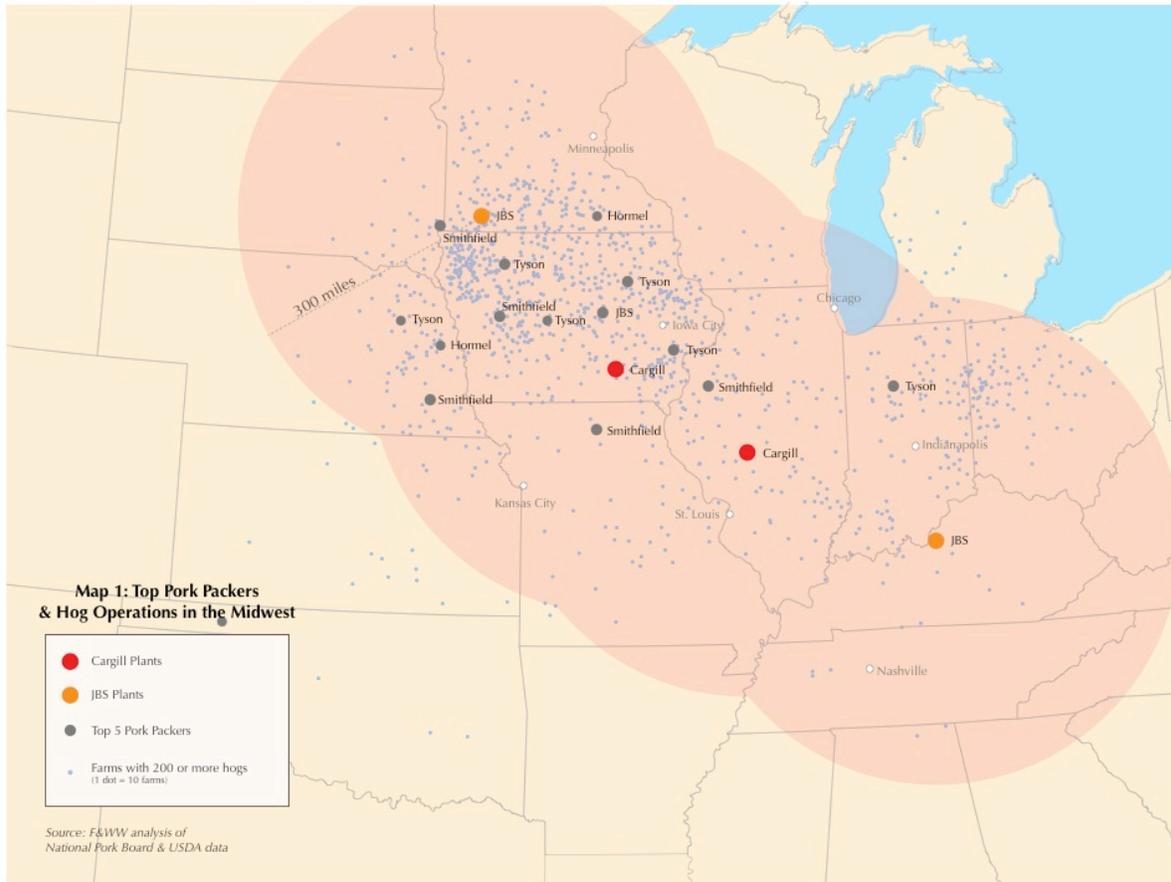
⁴¹ Ward (2002) at 2 and 19.

⁴² *See* Complaint at 6. U.S. v. Cargill, Inc. and Continental Grain Co. (D.D.C. 1999) (No. 99-1875).

⁴³ Cargill. [Press release]. "Cargill \$29 million Hedrick, Iowa, pork business feed mill dedication set for May 12." May 4, 2012.

⁴⁴ *See* Complaint at 12. U.S. v. Cargill, Inc. and Continental Grain Co. (D.D.C. 1999) (No. 99-1875).

⁴⁵ MacDonald, James M. and William D. McBride. USDA Economic Research Service (ERS). "The Transformation of U.S. Livestock Agriculture: Scale, Efficiency, and Risks." EIB-43. January 2009 at 25.



that sellers cannot avoid.⁴⁶ Pork packing plants are generally located near hog production areas to reduce livestock transportation costs from the farm to the slaughterhouse.⁴⁷ The majority of U.S. hogs are produced in the Midwestern corn belt, where transportation costs and access to corn and soymeal feed ingredients is the lowest.⁴⁸

The proposed JBS-Cargill acquisition includes five pork packing plants, a JBS plant and a Cargill plant in Iowa, a JBS plant

in Minnesota, a Cargill plant in Illinois and a JBS plant in Kentucky, spanning the hog producing region from Indiana to Minnesota, Nebraska and Missouri (*see* Map 1).⁴⁹ The transportation cost and hog weight “shrinkage” limit the distance that hogs can be transported in order to reach a potential competing buyer’s processing facility.⁵⁰ Hogs are shipped on average 113 miles from farm to slaughterhouse, with a standard deviation of 96 miles.⁵¹ Almost all hogs would be shipped within two standard deviations of the average, or about 300

⁴⁶ U.S. v. Cargill (2000) at 19.

⁴⁷ Muth, Mary K. et al. RTI International. “Pork Slaughter and Processing Sector Facility-Level Model.” Prepared for USDA, Food Safety and Inspection Service. Contract No. 53-3A94-02-12. June 2007 at 2–2.

⁴⁸ RTI International. Prepared for USDA GIPSA. “GIPSA Livestock and Meat Marketing Study: Volume 1: Executive Summary and Overview – Final Report.” January 2007 at 1–4.

⁴⁹ National Pork Board (2013) at 100; USDA NASS. 2012 Census of Agriculture Atlas Maps. “Number of Farms with 200 or More Hogs and Pigs: 2012.” 2014 at Map 12-M150.

⁵⁰ See Complaint at 7. U.S. v. JBS. S.A. and National Beef Packing Co., LLC. (N.D. Ill. 2008) (No. 08-CV-05992).

⁵¹ RTI International (2007) at 2–48.

Table 2: Midwestern Hog Belt—Farms and Hog Sales

State	Hog Farms	State Farm Rank	% of Farms	Hog Sales (head)	State Sales Rank	% of Sales
Iowa	6,616	1	11.8%	49,355,848	1	24.8%
Minnesota	3,420	3	6.1%	22,154,443	3	11.1%
Illinois	2,019	4	3.6%	13,121,384	4	6.6%
Nebraska	1,552	5	2.8%	10,620,451	5	5.3%
Indiana	2,823	6	5.1%	10,551,241	6	5.3%
Missouri	1,852	7	3.3%	9,727,491	7	4.9%
Ohio	3,372	9	6.0%	6,693,226	9	3.4%
South Dakota	678	12	1.2%	3,914,312	12	2.0%
Michigan	2,150	13	3.8%	3,598,475	13	1.8%
Wisconsin	2,210	19	4.0%	934,000	19	0.5%
Kentucky	866	20	1.5%	933,620	20	0.5%
Midwestern Total	27,558		49.2%	131,604,491		66.2%

Source: USDA NASS 2012 Census of Agriculture.

miles.⁵² The appropriate geographic markets to evaluate the proposed JBS-Cargill acquisition are the markets delineated by the overlapping draw areas of the JBS and Cargill pork packing plants.

In the overlapping 300-mile “draw areas” for the JBS and Cargill facilities, these facilities are two of a small number of competing pork processing plants. By acquiring Cargill’s facilities in these captive draw areas, JBS would be in a position to unilaterally, or in coordination with the few remaining competitors, depress prices paid to hog farmers because transportation costs would preclude producers from selling to more distant buyers outside the captive draw

⁵² A 300-mile draw is also in line with the typical transportation distance to market beef cattle. *See* Sexton, Richard J. Department of Agricultural and Resource Economics, University of California Davis.

“Industrialization and Consolidation in the U.S. Food Sector: Implications for Competition and Welfare.” Waugh Lecture, Agricultural & Applied Economics Association Annual Meeting, Tampa, Florida. August 2, 2000 at 21.

areas in sufficient quantities to prevent the price decrease.⁵³

The JBS and Cargill plants compete to source hogs with other large slaughter plants within this 300-mile draw. This area includes the major pork packers in Illinois, Indiana, Iowa, Minnesota, Missouri, Nebraska and South Dakota. This Midwestern region encompasses the buyer market for hogs for the proposed acquisition based on locations of the suppliers (hog farmers), transportation limitations and competitive landscape for hog purchases.⁵⁴

There are essentially two broad draw areas within this Midwestern hog and corn belt, the western draw of Iowa and surrounding states and the eastern draw of Illinois and Indiana and the surrounding states. These states represent half of the hog farms (49.2 percent) and two-thirds of the hog sales (66.2 percent) in the United States (*see* Table 2).⁵⁵ The proposed acquisition reduces the options for the nearly 28,000 hog producers in both regions, substantially increases horizontal concentration and increases the monopsony buyer power of pork packers, giving them more market power to depress the prices farmers receive for their hogs. In this analysis, we examine the Iowa pork packing market, the Iowa and surrounding states market and the Illinois-Indiana and surrounding states market. These are imprecise but reasonable proxies for the changes to the hog slaughter markets that hog farmers would face under the proposed JBS-Cargill acquisition.

⁵³ *See* Complaint at 8 and 12. *U.S. v. Cargill, Inc. and Continental Grain Co.* (D.D.C. 1999) (No. 99-1875).

⁵⁴ DoJ/FTC (2010) at 13 to 14.

⁵⁵ USDA NASS. 2012 Census of Agriculture data.

Table 3: Pork Packing Concentration in Iowa

Company	Slaughter Capacity (head/day)				Market Share				Post Merger Change	
	2012	2013	2014	Post JBS-Cargill	2012	2013	2014	Post JBS-Cargill	Δ	% Change
Tyson Foods	53,600	53,700	53,700	53,700	48.9%	48.1%	48.1%	48.1%		
JBS-Swift	18,500	20,000	20,000	38,400	16.9%	17.9%	17.9%	34.4%	16.5%	92.0%
Cargill Pork	18,400	18,400	18,400		16.8%	16.5%	16.5%			
Smithfield	9,400	9,400	9,400	9,400	8.6%	8.4%	8.4%	8.4%		
Sioux-Preme Packing	4,500	4,500	4,500	4,500	4.1%	4.0%	4.0%	4.0%		
CR-4					91.1%	90.9%	90.9%	94.9%	4.0%	4.4%
HHI-4					3,032	2,974	2,974	3,267	293	9.9%
HHI-All					3,057	3,000	3,000	3,278	277	9.2%

Source: Analysis of National Pork Board data.

1) Iowa hog buying market

The Iowa pork packing market is already tremendously concentrated. Although 8 pork packing companies operate 11 plants in Iowa, the top four Iowa companies have slaughtered more than 9 out of 10 hogs for the past several years (*see* Table 3). This level of market concentration and the market shares of the top four firms have been fairly stable for almost a decade, suggesting that the market may already lack competition.⁵⁶ Most of the changes in the concentration levels have related to market exits and, more rarely, entrants,⁵⁷ not the vibrancy of competition between the major packers. Iowa ranks number one in hog farms and sales, accounting for one-eighth of the nation's hog operations and one-quarter of hog sales.⁵⁸ For hog farmers in the central part of the Iowa, they are most likely to sell or deliver their hogs to Iowa-based pork packing plants.

The proposed acquisition significantly increases concentration. Iowa's pork packing is already highly concentrated, with

an HHI of 3,000. The combination of JBS and Cargill would essentially double the capacity of JBS' pork packing operations and make it 4 times larger than the third largest firm (Smithfield), more than 8 times larger than the fourth largest firm (Sioux-Preme Packing), 12 times larger than the fifth largest firm, 25 times larger than the sixth and 32 times larger than the smallest firm. The proposed acquisition would increase the HHI by 277 to 3,278. The Department of Justice Horizontal Merger Guidelines state that mergers resulting in highly concentrated markets with HHI increases over 200 points are "presumed to be likely to enhance market power."⁵⁹

2) Iowa and surrounding states hog buying market

The pork packing market for Iowa and surrounding states (Illinois, Minnesota, Missouri, Nebraska and South Dakota) is moderately concentrated with 15 firms and 26 plants, but the top four firms slaughtered three out of four hogs over the past several years. The smallest 9 firms (each with only one plant) slaughtered only 6.7 percent of the hogs in 2014. In 2014, the pork packing

⁵⁶ DoJ/FTC (2010) at 18.

⁵⁷ National Pork Board (2013) at 101.

⁵⁸ USDA NASS. 2012 Census of Agriculture data.

⁵⁹ DoJ/FTC (2010) at 19.

concentration for Iowa and surrounding states had an HHI of 1,648, making it moderately concentrated (*see* Table 4).

The proposed acquisition would substantially increase concentration in the region, increasing the HHI by more than 400 points to an HHI of 2,066, making the pork packing industry 25 percent more concentrated. The Horizontal Merger Guidelines suggest that mergers resulting in moderately concentrated markets that increase HHI by more than 100 points “potentially raise significant competitive concerns and often warrant scrutiny.”⁶⁰

The proposed acquisition would double the slaughter capacity of JBS, making it the largest pork packer in the five-state region, slaughtering more than one-quarter of the hogs (28.9 percent) and JBS-Cargill would be substantially larger than almost other firms in the region. In Iowa and surrounding states, the post-acquisition JBS-Cargill would be more than 25 percent larger than both Tyson and Smithfield, the top two pork packers nationally, but it would also dwarf all other competitors (*see* Table 5). It would be 3 times larger than Hormel, the fourth

largest firm nationally and regionally after the proposed acquisition, and 4 times larger than Triumph Foods, the fifth largest firm. It would be 16 times larger than the sixth largest, 17 times larger than the seventh largest and more than 50 times larger than the six smallest firms.

The significant size of the gap between the post-acquisition JBS-Cargill and most of the rest of the marketplace suggests that the remaining market participants will be unable to provide sufficient competition.⁶¹ The post-acquisition JBS-Cargill and the top two national firms would dominate the market and all would be many-fold larger than even the other largest national rivals operating in Iowa and surrounding states. This would make it easier for these three buyers to exercise coordinated market power that would disadvantage hog producers. Auction buyers would likely tacitly collude on prices through strategies including sharing buying agents, avoiding competitive bidding and withholding spot market purchases when prices are high. For example, since hog marketing contracts are often tied to the prevailing mid-morning upper Midwest market price, it is easier for a smaller

Table 4: Pork Packing Concentration in Iowa and Surrounding States

Company	Slaughter Capacity (head/day)				Market Share				Post Merger Change	
	2012	2013	2014	Post JBS-Cargill	2012	2013	2014	Post JBS-Cargill	Δ	% Change
Tyson Foods	61,475	61,625	61,625	61,625	23.4%	22.9%	22.9%	22.9%		
Smithfield	59,600	62,000	61,000	61,000	22.7%	23.1%	22.7%	22.7%		
JBS-Swift	37,000	40,000	40,000	77,800	14.1%	14.9%	14.9%	28.9%	14.1%	94.5%
Cargill Pork	37,800	37,800	37,800		14.4%	14.1%	14.1%			
Hormel	29,500	29,500	29,500	29,500	11.2%	11.0%	11.0%	11.0%		
CR-4					74.7%	74.9%	74.5%	85.5%	11.0%	14.7%
HHI-4					1,473	1,475	1,458	1,997	538	36.9%
HHI-All					1,665	1,659	1,648	2,066	418	25.4%

Source: Analysis of National Pork Board data.

⁶⁰ DoJ/FTC (2010) at 19.

⁶¹ *Ibid.* at 18.

Post-Merger Firm Rank	Firm	JBS-Cargill Compared to Rivals
#2	Tyson Foods	+26%
#3	Smithfield	+28%
#4	Hormel	3 x
#5	Triumph Foods	4 x
#6	Rantoul Foods	16 x
#7	Sioux-Preme Packing	17 x
#8	Premium Iowa Pork	26 x
#9	Spectrum Meat	49 x
#10	Dakota Pork	52 x

Source: Analysis of National Pork Board data.

number of pork packers to tacitly collude to withhold their purchases until the afternoon to drive down prices.⁶² Afternoon bidding prices on this key reference market are more aggressive and hog prices tended to be higher, suggesting that pork packers are taking advantage of their coordinated market power to delay participating in the spot market to hold down prices paid under marketing and production contracts.⁶³

3) Illinois-Indiana and surrounding states hog buying market

The pork packing market in Illinois, Indiana, and the surrounding states (Kentucky, Ohio, Michigan, Wisconsin, Missouri, and Iowa) has 18 firms and 26 plants, but the top four firms control almost three-quarters of the market, whereas the smallest 10 firms only slaughtered 10 percent of the hogs in the area in 2014. The HHI for the Illinois-Indiana region is 1687, making it moderately concentrated (*see* Table 6).

Post-acquisition, concentration in the Illinois-Indiana market would go up

significantly. The HHI in the region would rise by almost 500 points to 2,122, increasing concentration by 25 percent, significantly above the 100-point increase that would warrant close scrutiny under the Horizontal Merger Guidelines. In central Indiana, Illinois, eastern Ohio, the proposed acquisition would reduce the number of major packers from four to three (*see* Map 1), leaving farmers with even fewer options than producers in the Iowa market.

C. Proposed acquisition raises anticompetitive concerns similar to mergers in which DOJ intervened

The proposed JBS-Cargill acquisition would increase anticompetitive monopsony buyer power sufficiently for the post-acquisition firm to exercise unilateral or coordinated market power over hog producers throughout the Midwest. The above regional analysis of Iowa and surrounding states and Illinois-Indiana and surrounding states understates the effects of concentration that farmers would face after the proposed acquisition. These multistate regions are imprecise and the appropriate measurement for farmers is 300 miles from their farm and each of these regions has multiple overlapping captive draw areas.

For example, hog producers in western Illinois-southeastern Iowa-northeastern Missouri would lose an important potential competitive buyer. Instead of two Smithfield plants and two Cargill plants, three Tyson plants, and one JBS plant, there would be three Tyson plants, three JBS-Cargill plants and two Smithfield plants. For producers in southeastern Illinois and central Indiana, farmers would go from three major competitors to two. The analysis of the Iowa state market likely comes closest to reflecting the impact of the proposed acquisition on farmers, with the proposed

⁶² American Antitrust Institute's Transition Report on Competition Policy: Chapter 8 Food. 2008 at 294.

⁶³ Schroeder and Mintert (1999) at 14.

acquisition causing a substantial increase in concentration and creating a highly-concentrated hog buying market.

The proposed acquisition’s expected result in highly-concentrated hog markets is comparable to several Department of Justice interventions to block mergers that increased buyer power over agricultural markets and farmers. In JBS’s attempt to acquire National Beef, the market for the purchase of fed cattle in the High Plains region would have had an HHI increase of over 500 points to 2,600.⁶⁴ Additionally, in the wholesale boxed beef market, the acquisition would have also increased the HHI 500 points. In Tyson Foods’ acquisition of Hillshire, the HHI for the purchase of sows from farmers would have increased by more than 500 points to 2,100. The changes in HHI and concentration in the Cargill-Continental merger also triggered scrutiny. In the Texas Gulf port market for wheat, the post-merger Cargill would have accounted for 34 percent of all wheat purchases in the region and lead to an HHI increase of 451 for a total HHI of 2,611. The Ardent flour milling joint venture for hard wheat in the Los Angeles market

would have increased the HHI by more than 200 points to over 2,500.⁶⁵ These precedents warrant close scrutiny of the proposed acquisition and suggest that the Justice Department should enjoin the JBS-Cargill pork-packing merger.

Table 6: Pork Packing Concentration Illinois, Indiana and Surrounding States

Company	Slaughter Capacity (head/day)				Market Share				Post Merger Change	
	2012	2013	2014	Post JBS-Cargill	2012	2013	2014	Post JBS-Cargill	Δ	% Change
Tyson Foods	68,900	69,000	69,000	69,000	30.6%	30.2%	30.2%	30.2%		
Cargill Pork	37,800	37,800	37,800	67,800	16.8%	16.5%	16.5%	29.7%	13.1%	79.4%
Smithfield	30,200	31,100	30,100	30,100	13.4%	13.6%	13.2%	13.2%		
JBS-Swift	28,500	30,000	30,000		12.7%	13.1%	13.1%			
Triumph Foods	20,000	20,000	21,000	21,000	8.9%	8.8%	9.2%	9.2%		
CR-4					73.6%	73.5%	73.1%	82.3%	9.2%	12.6%
HHI-4					1,563	1,544	1,532	2,052	519	33.9%
HHI-All					1,713	1,691	1,687	2,122	435	25.8%

Source: Analysis of National Pork Board data.

⁶⁴ Complaint at 12. U.S. v. JBS. S.A. and National Beef Packing Co., LLC. (N.D. Ill. 2008) (No. 08-CV-05992).

⁶⁵ Complaint at 8. U.S. v. ConAgra Foods, Inc. et al. (D.D.C. 2014) (No. 14-CV-00823).

III. Proposed acquisition accelerates vertical integration, shift to production contracts at JBS

The proposed acquisition will intensify vertical integration and the use of production contracts in the hog sector, disadvantaging farmers. Mergers and acquisitions tend to lead to more vertical integration, which increases market power and disadvantages farmers. Vertical integration by meat processors represents a growing share of the supply chain and tightly manages all aspects of meat and poultry production “from genetics to grocery.”⁶⁶

Pork packers often secure livestock through contract marketing arrangements or production contracts with farmers. These contracts give farmers a guaranteed market for their hogs, but large contract buyers can extract lower prices and distort and conceal prices. Marketing and production contracts undermine the cash market and enable packers to manipulate the spot market, which is used as the reference price for most contracts, creating a long-term downward pressure on the value of hogs — either the prices farmers receive at auction, the prices they receive for marketing contracts or the fees they receive for production contracts.

Vertically integrated hog processing companies use marketing or production contracts to secure the hogs they slaughter. In marketing contracts, farmers agree to deliver a certain number of hogs at a future date. In another type of contract arrangement, known as a production contract, pork packers own the hogs and hire farmers to raise them. Production contracts essentially convert independent farmers that own their livestock into contract employees that perform services for the pork-packing

industry. The significant reduction in autonomy and independence from often-exploitative contracts has been compared to serfdom or sharecropping and has been widely criticized in the broiler chicken industry.

Pork packers can use marketing contracts to secure livestock without having to bid against other packers to buy hogs at auction.⁶⁷ Contracts have been commonplace in some agricultural sectors, such as poultry, for decades but have been a relatively new phenomenon in the hog sector. Between 1991 and 1993, there were too few hog contracts for the USDA to count; by 2008, two-thirds of hogs were delivered under contract.⁶⁸ By 2013, less than 10 percent of hogs were sold on the spot market, which further reduces competition and depresses the prices independent farmers receive for their hogs.⁶⁹

Contracting can further depress hog prices. Contracts short-circuit the price discovery functions of the marketplace by securing supplies outside of the public auctions or spot markets for hogs.⁷⁰ The price for contract hogs is typically tied to the spot or futures market prices, so meatpackers benefit when futures and spot prices decline. As the cash market is replaced by marketing and production contracts, the cash market becomes so limited that the remaining cash prices that are the basis for contracts become increasingly suspect and unrepresentative.⁷¹

⁶⁶ Barkema, Lan, Mark Drabentstott and Nancy Novack. Federal Reserve Bank of Kansas City. “The new U.S. meat industry.” *Economic Review*. Second Quarter 2001 at 36.

⁶⁷ Carstensen (2004) at 6.

⁶⁸ MacDonald, James M. and Penni Korb. USDA ERS. “Agricultural Contracting Update: Contracts in 2008.” EIB-72. February 2011 at 13.

⁶⁹ USDA GIPSA (2013) at Table 17 at 30 to 31.

⁷⁰ Barkema, Drabentstott and Novack (2001) at 36.

⁷¹ Schroeder and Mintert (1999) at 2.

The combination of pork packer concentration and increased vertical integration means that smaller farms face fewer options to market their hogs and can become the suppliers of last resort when large packers need extra hogs for their slaughter facilities.⁷² The hogs sold by independent farmers effectively are sold on spot markets that have “the characteristics of a salvage market,” as economists from Purdue University noted.⁷³

Fewer public transactions leave the markets susceptible to volatility, distortion and manipulation, since even a few sales can have a significant impact on the prices farmers receive. The rise of hog contracting can contribute to the long-term downward pressure on price and increase price volatility.⁷⁴ This creates the potential for pork packers and processors to manipulate hog prices across the industry.

JBS is one of the few pork packers that primarily relies on purchasing auction hogs and entering marketing arrangements with farmers. Conversely, Cargill obtains all of its hogs through production contracts. The proposed acquisition would not only magnify JBS’s buyer power but would make JBS a considerably more vertically integrated pork packer. JBS’s takeover of Cargill’s pork operations includes not only Cargill’s two pork packing plants but also five feed mills and two industrial farrowing operations, with more than 160,000 sows.⁷⁵ This acquisition would immediately make JBS a vertically integrated hog firm, owning

feed mills, hog production facilities and inheriting production hog contract growers. This would limit the choices for all hog producers — either where to sell or market their hogs as well as the options to raise hogs under production contracts, which confirms and reinforces “the potentially harmful effects of increased concentration.”⁷⁶

The proposed acquisition accelerates and cements vertical integration and the use of production contracts in the hog sector. JBS would likely shift from largely sourcing all of its hogs from auctions and marketing contracts to using production contracts to raise the hogs produced by Cargill’s farrowing production facilities. This could have a significant impact on hog farming in the upper and eastern Midwest, where production contracts are considerably less common.

⁷² Barkema, Allen and Mark Drabenstott. Federal Reserve Bank of Kansas City. “Consolidation and change in Heartland agriculture.” In Federal Reserve Bank of Kansas City. (1996) Federal Reserve Bank of Kansas City: Kansas City, MO. *Economic Forces Shaping the Rural Heartland* at 65.

⁷³ Paarlberg et al. (1999) at 3.

⁷⁴ *Ibid.* at 8.

⁷⁵ JBS USA (2015); “Top 25 Pork Powerhouses.” *Successful Farming*. 2015.

⁷⁶ DoJ/FTC (2010) at 19.

IV. Proposed acquisition would create anticompetitive conditions in the wholesale pork market

The proposed JBS-Cargill acquisition would exacerbate horizontal monopoly power in the wholesale pork market. JBS and Cargill are two of the largest manufacturers of unbranded wholesale pork. Cargill Pork's primary product is fresh, wholesale pork that is boxed and shipped to retailers, foodservice firms and further processors.⁷⁷ JBS has just begun to move into branded meat products and primarily sells only the meat commodities of wholesale pork and beef.⁷⁸ The other major pork packers — Smithfield, Tyson and Hormel — sell a greater volume of branded and processed meat products, making Cargill and JBS essential to the wholesale pork market. The proposed acquisition would create the largest marketer of wholesale pork and eliminate a rivalry by eliminating a top competitor.

The appropriate product market is the national market for unbranded wholesale pork, a homogenous set of pork cuts sold to retailers, foodservice and further processors.⁷⁹ Many pork packers also sell branded fresh meats and processed meat products, which is excluded from the wholesale market.⁸⁰ Retail pork and beef (wholesale meat) represent one of the largest categories of unbranded groceries.⁸¹

The level of packer concentration creates leverage over the retail and other wholesale pork buyers.⁸² The consolidation in the meatpacking sector allows pork packers to exert market influence over the prices buyers pay for wholesale pork.⁸³ A 2001 study found that packers used their market power to keep wholesale pork prices high even when farmgate hog prices fell.⁸⁴ Another study found that more than a third of the farm-retail price spreads were caused by the combined exercise of monopsony and monopoly market power by the concentrated pork packing industry.⁸⁵

There have been similar studies in the beef industry demonstrating that packers used their market power to capture value in the meat supply chain and raise supermarket prices. A 2014 study found that beef packers (often the same firms as the top pork packers) have an advantage over livestock producers and “their gross margin will tend to remain the same when there is an increase in the price of the primary commodity, and it will tend to expand when there is a decrease in that price.”⁸⁶ A 1980 Congressionally commissioned study found that beef packer concentration had “a significant effect on the prices for fresh beef.”⁸⁷

⁷⁷ Cargill Pork. “Products and brands.” Available at <http://www.cargill.com/company/businesses/cargill-pork/products-brands/index.jsp>. Accessed July 2015.

⁷⁸ “JBS sets sights on branded packaged goods.” *MeatingPlace*. June 24, 2015; Runyon (2015).

⁷⁹ Azzam and Pagoulatos (1990) at 363.

⁸⁰ Value Ag, LLC. “Wholesale Pork Price Reporting Analysis.” Commissioned by USDA Agricultural Marketing Service. November 2009 at 9.

⁸¹ Marsh, John M. and Gary W. Brewster. “Wholesale-retail marketing margin behavior in the beef and pork sectors.” *Journal of Agricultural and Resource Economics*. Vol. 29, No. 1. April 2004 at 48.

⁸² Emmanouilides, Chrostos J. and Panos Fousekis. “Vertical price dependence structures: Copula-based evidence from the beef supply chain in the U.S.” *European Review of Agricultural Economics*. May 2014 at 17.

⁸³ Ward (2002) at 4.

⁸⁴ Miller, Douglas J. and Marvin L. Hayenga. “Price cycles and asymmetric price transmission in the U.S. pork market.” *American Journal of Agricultural Economics*. Vol. 83, No. 3. August 2001 at 561.

⁸⁵ Ward (2002) at 14.

⁸⁶ Emmanouilides and Fousekis (2014) at 16.

⁸⁷ Helmuth, John W. and John R. Multop. “Relationship Between Structure and Performance in the Steer and Heifer Slaughtering Industry.” House of Representatives. Committee on Small Business. September 1980 at 40.

This market concentration is compounded by the lack of price transparency in the market for wholesale pork. Pork packers can more easily tacitly coordinate pricing when they have more market information

than downstream buyers, which gives suppliers more market power and leverage over buyers.⁸⁸ Marketing arrangements (forward and formula contracts) are also common in the wholesale pork market, further thinning the cash market and making the price for wholesale pork opaque.⁸⁹ The USDA includes a “perilously low percentage volume of trade” in the public wholesale pork reports.⁹⁰ Wholesale pork price discovery is compromised because the prices for the most commonly purchased wholesale pork products are rarely reported.⁹¹ As a result, wholesale pork buyers can pay a wide range of prices for the same shipment of wholesale pork. For example, the price ranges for the two most common pork loin cuts varied by 45 to 76 percent.⁹²

Today, the top four pork packers control more than two-thirds (67.9 percent) of the

⁸⁸ Sunshine, Steven C. Deputy Assistant Attorney General. Antitrust Division. U.S. Department of Justice. “Vertical Merger Enforcement Policy.” Speech before the American Bar Association Section of Antitrust Law Spring Meeting. April 5, 1995 at 12.

⁸⁹ Schroeder and Mintert (1999) at 7.

⁹⁰ Value Ag, LLC. (2009) at 4.

⁹¹ *Ibid.* at 35, 36 and 40.

⁹² USDA AMS. “National Weekly Pork Report FOB Plant — Negotiated Sales. July 20, 2015.

Company	2014 Slaughter Capacity (head/day)	Est. % Wholesale	2014 Wholesale Capacity (head/day)	2014 Wholesale Market Share	Post JBS-Cargill Wholesale Market Share	Δ	% Change
Tyson Foods	76,925	84%	64,848	23.9%	23.9%		
JBS-Swift	50,000	100%	50,000	18.4%	28.4%	10.0%	54.1%
Triumph/Seaboard	40,800	94%	38,515	14.2%	14.2%		
Smithfield	118,500	26%	30,810	11.4%	11.4%		
Cargill Pork	37,800	72%	27,027	10.0%			
CR-4				67.9%	77.8%	10.0%	14.7%
HHI-4				1,240	1,707	466	37.6%
HHI-All				1,394	1,761	367	26.3%

Source: Analysis of National Pork Board data.

national wholesale pork market (see Table 7).⁹³ The HHI is estimated to be 1,394, making the national wholesale pork market at the high end of unconcentrated. The proposed acquisition would make JBS-Cargill the nation’s largest producer of wholesale pork with nearly one-third of the U.S. market (28.4 percent). The top four

⁹³ The share of wholesale pork for each of the top packers was estimated based on reported non-intersegment, non-branded sales. JBS is assumed to sell only wholesale pork; Cargill sells approximately 72 percent of its pork on the wholesale, unbranded market (Mintel. “Packaged Red Meat—U.S.” February 2015); Tyson Foods reports that \$1.0 billion of its 2014 \$6.3 billion in pork sales went to intersegment sales, making wholesale sales account for approximately 84 percent of slaughter (Tyson Foods, Inc. Securities and Exchange Commission Form 10-K. Fiscal Year ending September 27, 2014 at 83); Smithfield’s private label unbranded products account for 26 percent of total sales (Smithfield. “BMO Capital Markets 2013: Farm to Market Conference.” May 14, 2013 at 10); Hormel transfers all its pork cuts from its slaughter operations to its food processing divisions, meaning effectively none of its slaughter capacity enters the wholesale market (Hormel Foods. 2013 Annual Report. “Delicious Growth.” 2013 at 14); Triumph/Seaboard produces 98 million pounds of branded bacon and 50 to 60 million pounds of branded hams, amounting to about 6 percent of its annual slaughter production (see <http://www.dailysmeats.com/about-factsfigures/Index.htm>. Accessed July 2015); this analysis assumes that Hatfield Quality Meats, which sells a wide range of branded pork products, sells the industry average private label wholesale meat of 25 percent (Smithfield. May 24, 2013 at 10); and all pork packers with capacity under 5,000 hogs per day were assumed to sell all their pork on the wholesale market.

firms would sell more than three-quarters (77.8 percent) of the wholesale pork market. The proposed acquisition would increase the HHI by nearly 400 points to 1,761, increasing the concentration level substantially to moderately concentrated. That should raise “significant competitive concerns” and “warrant scrutiny.”⁹⁴

The proposed acquisition would raise concentration in the wholesale pork market and give JBS-Cargill sufficient market power to unilaterally raise wholesale prices or more effectively coordinate with other packers to disadvantage wholesale buyers. Because the market lacks transparency and price discovery, the proposed acquisition makes it even harder for wholesale pork buyers to shop for better deals. The impact of concentrated wholesale pork market power is especially acute for restaurants, cafeterias and other foodservice institutions that are more disaggregated than the retail, manufacturing or food distribution sectors. Ultimately, these higher prices would be passed onto consumers in the form of higher retail pork prices in grocery stores, foodservice establishments or restaurants.

⁹⁴ DoJ/FTC (2010) at 19.

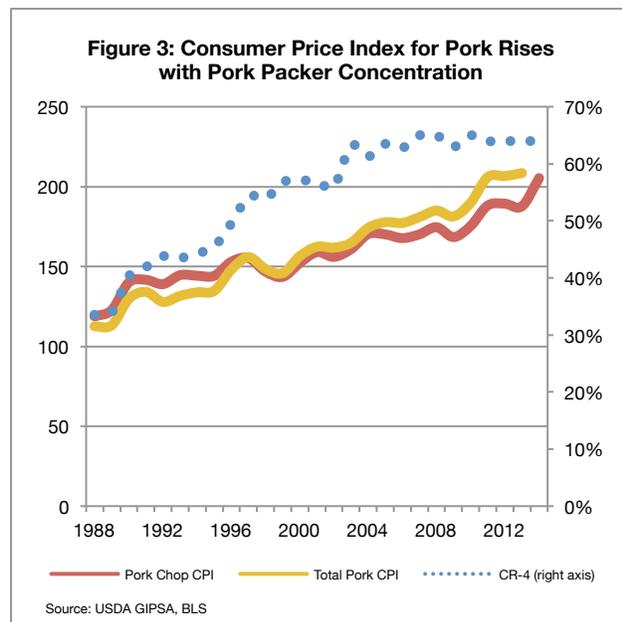
V. Proposed Merger Would Increase Pork Prices, Erode Consumer Welfare

The horizontal and vertical elements of the proposed merger would enable or facilitate JBS-Cargill's ability to unilaterally impose pork price increases and erode consumer welfare. Monopoly power allows sellers to keep prices higher than they would be under more competitive situations.⁹⁵ The size and scope of the proposed merger is likely to increase pork prices and especially disadvantage lower-income consumers during a period of economic stagnation combined with already rising food prices.

Consumers are especially vulnerable to the consolidated market power of food companies since food is essential and total consumer demand for food is largely unresponsive to price. This inelastic demand also means that concentrated market power in the food sector can distort competition, raise prices and erode equity more significantly than sectors where consumers

are more responsive to prices.⁹⁶ According to the American Antitrust Institute, the concentration in buyers, processing and retailing has “undoubtedly contributed to the increased cost of food.”⁹⁷ Even small increases in pork prices constitute a considerable welfare loss to all consumers and can “result in a substantial transfer [to pork packers and retailers] when aggregated across all consumers.”⁹⁸

Shoppers have certainly faced high and rising grocery prices over recent years. The industry trade magazine *Progressive Grocer* reported in 2013 that, “Prices for grocery items remain high” and “have risen every month over the past two-and-a-half years.”⁹⁹ Since the Great Recession started, grocery food prices rose more quickly than inflation and wages, and over the three years between 2010 and 2012 grocery food prices rose twice as quickly as average wages.¹⁰⁰



The rising concentration in the pork packing industry has been accompanied by a significant rise in the consumer retail price for pork products. Over the past 20 years, the market share of the top four pork packers rose by 41 percent from 46 percent in 1995 to 64 percent in 2014.¹⁰¹ Total pork prices rose by 67 percent over the same period and

⁹⁶ Domina and Taylor (2009) at 8.

⁹⁷ American Antitrust Institute (2008) at 281.

⁹⁸ Miller and Hayenga (2001) at 561.

⁹⁹ *Progressive Grocer*. April 2013 at 50.

¹⁰⁰ U.S. Department of Labor. Bureau of Labor Statistics (BLS). Monthly average consumer price index for food at home (CUSR0000SAF11), all items total inflation (CUSR0000SA0) and average hourly earnings of private sector production workers and non-supervisory employees (CES0500000008).

¹⁰¹ USDA GIPSA. “Packers and Stockyards Statistical Report: 1995 Reporting Year.” SR-97-1. 1997 at Table 31; USDA GIPSA. “Packers and Stockyards Annual Report 2013.” 2013 at Table 17 at 30 to 31.

⁹⁵ *United States v. Cargill, Incorporated and Continental Grain Company*. United States District Court for the District of Columbia. Civil Action No. 99-1875 (GK). “United States Response to Public Comments.” February 11, 2000 at 18.

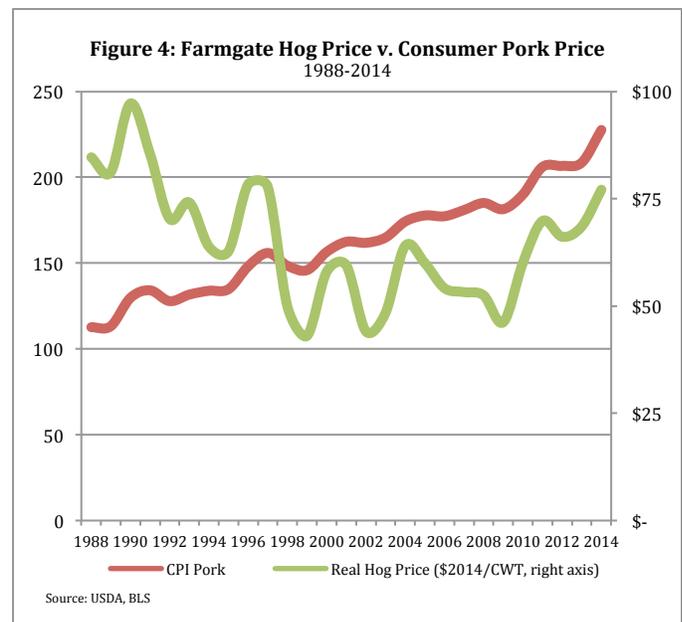
pork chop prices rose by 42 percent (*see* Figure 3).¹⁰²

Pork packer consolidation has pushed down the real prices that farmers receive for their hogs (*see* Section I), but few of these savings are passed on to consumers — the packers and retailers are pocketing the difference. The USDA found that the efficiency gains in the pork sector have not been shared with consumers, suggesting that any efficiency gains that may possibly occur from the proposed merger would be unlikely to be shared with consumers. According to USDA, consumer prices for retail pork “increased substantially” between 1992 and 2004 despite the cost savings for pork packers from changes in the hog production sector and increases in processor efficiency.¹⁰³

Although the price of hogs has been trending downward, the consumer price of pork products has been less responsive to the declining hog prices. Some studies have found that increases in farmgate prices are passed on to consumers completely and immediately, but when farmgate prices fall, the grocery store prices do not fall as rapidly or completely.¹⁰⁴ This phenomenon of sticky pricing (or asymmetric pricing) is common in many markets.¹⁰⁵ High levels of concentration in meatpacking and retailing allow these sectors to exercise their market

power to keep consumer prices high even when the input prices for live hogs declines because there is insufficient competitive pressure that could capitalize on lower input prices to capture new consumers, demonstrating an oligopolistic coordinated market.¹⁰⁶ But concentration in the hog industry may amplify the asymmetric pricing tendencies that tend to ratchet up consumer prices even when input prices fall dramatically. Over the past several decades, the real price farmers receive for hogs has trended downwards and been increasingly volatile while retail prices have steadily increased (*see* Figure 4).

Many studies have documented sticky pork pricing. Retail prices are “significantly asymmetric” for slower but significant changes in hog prices.¹⁰⁷ Some economists attribute the increased spreads between hog farm prices and retail pork prices as well as



¹⁰² BLS. Consumer Price Index series. Monthly average price index for total pork (CUSR0000SEFD), pork chops (CUSR0000SEFD03) and bacon and breakfast sausage (CUSR0000SEFD01). Available at www.bls.gov/data/, accessed July 2014.

¹⁰³ Key, Nigel and William McBride. USDA ERS. “The Changing Economics of U.S. Hog Production.” Economic Research Report 52. December 2007 at 24-26.

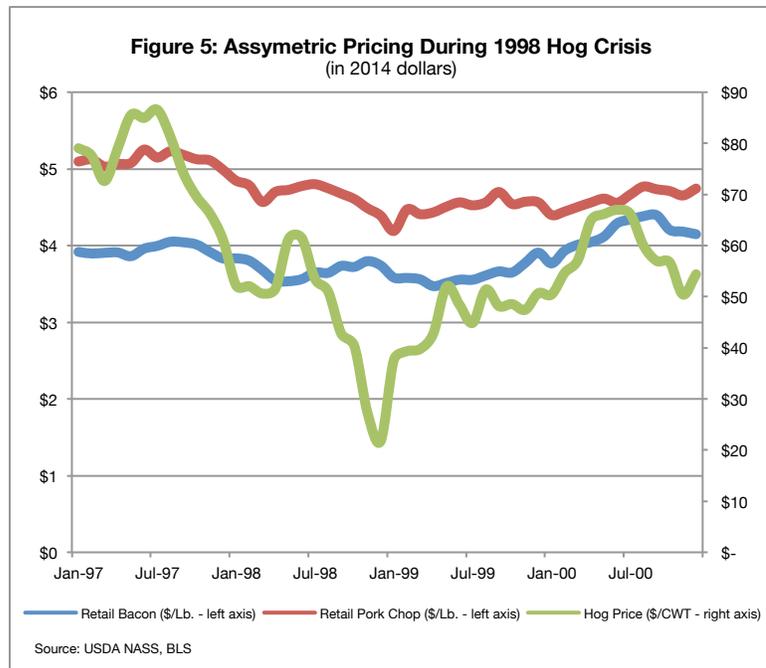
¹⁰⁴ Dimitri, Carolyn, Abeyayehu Tegene and Phil R. Kaufman. USDA ERS. “U.S. Fresh Produce Markets: Marketing Channels, Trade Practices, and Retail Pricing Behavior.” Agricultural Economic Report No. 825. September 2003 at 15.

¹⁰⁵ Peltzman, Sam. “Prices rise faster than they fall.” *Journal of Political Economy*. Vol. 108, No. 3. 2000 at 493.

¹⁰⁶ Zheng, Shi, Douglas J. Miller, Zhigang Wang and Satoshi Kai. “Meta-evidence of asymmetric price transmission in U.S. agricultural markets.” *Journal of the Faculty of Agriculture* (Kyushu University). Vol. 53, No. 1. 2008 at 350.

¹⁰⁷ Miller and Hayenga (2001) at 561.

the asymmetric price response when input prices fall due to the exercise of market power by the pork packers.¹⁰⁸ A USDA economist reported that “pork has evidence of asymmetric adjustment between wholesale and retail prices” and that this could be “evidence of a non-competitive price of pork to consumers.”¹⁰⁹ Unlike other agricultural markets, retail pork prices may not eventually reach an equilibrium following a hog price decline, instead “lower costs may not be passed onto consumers, questioning the efficiency of price transmission in the U.S. hog/pork supply chain.”¹¹⁰



Consumers and farmers faced a stark example of this phenomenon during the 1998 hog crisis. When the prices farmers received for hogs plummeted, the supermarket prices that consumers paid for pork products did not decline very much.¹¹¹ Real hog prices dropped by about two-thirds between June and December of 1998, but real pork chop prices fell by only 8 percent and bacon prices actually rose by 5 percent (see Figure 5).¹¹²

Some have suggested that asymmetric pricing trends may not be related to market power but to consumer search costs or to cost adjustments by manufacturers.¹¹³ However, these explanations work poorly for retail food price asymmetry because consumers are largely captive to their preferred grocery retailer. Each supermarket effectively acts as a local, one-stop-shopping

¹⁰⁸ Kulper, W. Erno and Alfons G.J.M. Oude Lansink. “Asymmetric price transmission in food supply chains: Impulse response analysis by local projections applied to U.S. broiler and pork prices.” *Agribusiness*. Vol. 29, No. 3. 2013 at 342.

¹⁰⁹ Hahn, William F. USDA ERS. “Dynamic and Asymmetric Adjustment in Beef and Pork Prices.” Paper presented at the Agricultural & Applied Economics Association 2010 Annual Meeting, Denver, Colo. July 25-27, 2010 at 14.

¹¹⁰ Gervais, Jean-Philippe. “Disentangling nonlinearities in the long- and short-run price relationships: An application to the US hog/pork supply chain.” *Applied Economics*. Vol. 43. 2011 at 1509.

¹¹¹ Lazarus, William F. et al. University of Minnesota, Department of Applied Economics. “Generic Environmental Impact Statement on Animal Agriculture in Minnesota.” Submitted to the Minnesota Environmental Quality Board. June 29, 2001 at 181.

¹¹² Analysis of average consumer price data from BLS, Consumer Price Index—Average Price Data, U.S. City

Average. Series ID: APU0000704111 Bacon and APU0000704211 Center Cut Bone-in Pork Chops. Farmgate prices from USDA NASS, Agricultural Prices Annual Summary, 1990–2011.

¹¹³ See Remer, Marc. U.S. Department of Justice. Economic Analysis Group. “An Empirical Investigation of the Determinants of Asymmetric Pricing.” EAG No. 12-10. November 2012. This paper discounts market power of asymmetric pricing in retail gasoline prices by determining market concentration based on brand (but not franchise) density of establishments, not of sales. See also, Kimmel, Sheldon. U.S. Department of Justice. Economic Analysis Group. “Why Prices Rise Faster than they Fall.” EAG No. 09-4. July 2009. This paper argues that manufacturers would have to increase capital or labor expenditures to take advantage of lower prices, which slows the response to declining input costs. This is less true in pork slaughter and fabrication, which rarely operates at full capacity and can easily accommodate increased supplies without making capital investments.

monopoly.¹¹⁴ Consumers are unlikely and unwilling to switch to different stores based on small price increases.¹¹⁵ Search costs do not explain the price asymmetry in the retail pork market, which is a slower cycle change than some high-frequency search cost examples (such as gasoline).¹¹⁶ Indeed, studies that discount market power explanations admit that “the price of products whose consumers are less likely to shop for the lowest price are slower to adjust downwards during a negative cost shock, but increase at the same rate following a cost increase.”¹¹⁷

Beyond price, increased concentration reduces consumer choice and can lower the quality of goods, as fewer participants compete to capture consumers based on value. According to the USDA, high levels of market concentration allow the largest participants to extract more of the economic value from food transactions, but “consumers typically bear the burden, paying higher prices for goods of lower quality.”¹¹⁸ For example, according to USDA, the low-cost pork produced from large-scale hog operations, where the animals are bred to gain weight quickly, “may not have the flavor or texture some buyers seek.”¹¹⁹

The proposed merger would strengthen JBS-Cargill’s market power over wholesale pork and enable the post-acquisition firm to profitably increase wholesale prices,

ultimately hitting consumers at the supermarket checkout. As the Department of Justice has noted, “A firm with a large market share may not feel pressure to reduce price even if a smaller rival does.”¹²⁰

¹¹⁴ Connor, John M. “Evolving research on price competition in the grocery retailing industry: An appraisal.” *Agricultural and Resource Economics Review*. October 1999 at 122.

¹¹⁵ Balto, David A. “Supermarket Merger Enforcement.” *Journal of Public Policy & Marketing*, Vol. 20, Iss.1. Spring 2001 at 43.

¹¹⁶ Miller and Hayenga (2001) at 561.

¹¹⁷ Remer (2012) at 1.

¹¹⁸ King, John L. USDA ERS. “Concentration and Technology in Agricultural Input Industries.” AIB-763. March 2001 at 2.

¹¹⁹ MacDonald and McBride (2009) at 22.

¹²⁰ DoJ/FTC (2010) at 15.

VI. Conclusion and Recommendations

The proposed JBS-Cargill acquisition significantly increases concentration in the pork packing industry and would undermine competition, reduce the price farmers receive for their hogs, accelerate anticompetitive vertical integration and raise consumer prices. The merger is one of the largest pork-packing mergers in recent years. The size and impact of the proposed acquisition deserves close examination. The U.S. Department of Justice should issue a second request to fully investigate the potential adverse, anticompetitive impacts the proposed acquisition can have on the marketplace, consumers and farmers.

The Department of Justice should pay special attention to several factors which could further exacerbate the anticompetitive effects of the proposed acquisition:

JBS-Cargill's Midwestern captive draw areas: The proposed acquisition substantially increases pork packer concentration on the national level but has an especially negative impact on hog farmers in the eastern and upper Midwest. The proposed acquisition would make JBS-Cargill the second largest national pork packer, the second largest in Iowa, the largest in Iowa and surrounding states and essentially the same size as the largest packer in Illinois-Indiana and surrounding states. JBS-Cargill could exercise unilateral and/or coordinated market power to depress the price they pay for hogs. For farmers operating in the midst of the captive draw areas of JBS and Cargill, the proposed acquisition would limit their hog marketing options, reduce the price they receive for hogs and erode their economic viability. These impacts harm not only the farmers themselves but also the economic stability of surrounding rural communities.

The impact of Cargill's vertical integration on JBS and the hog sector: The proposed acquisition will likely accelerate the vertical integration of the hog sector in the upper and eastern Midwest by joining Cargill-owned farrowing facilities and feed mills with the larger post-acquisition pork slaughter operations. Vertical integration reduces farmer independence and autonomy and subverts price discovery by excluding larger volumes of hogs from the open market. The proposed acquisition would allow JBS-Cargill to exercise unilateral and coordinated market power to manipulate the thin auction hog market that is the price basis for most production and marketing contracts.

The impact on the wholesale pork market and consumers: The proposed acquisition creates the largest wholesale pork producer in the United States controlling nearly one-third of wholesale pork sales. This would give the post-acquisition firm unilateral and coordinated market power to impose price increases on wholesale pork buyers that have fewer alternative sources. The largely opaque wholesale pork market, where common wholesale pork cuts are sold at a wide range of price points magnifies this effect. This disadvantages foodservice and retail establishments and ultimately JBS-Cargill would be able to impose price hikes on retail and foodservice consumers. Even small increases in consumer pork prices can constitute a significant welfare transfer from consumers to pork packers.

There are more than sufficient anticompetitive concerns for the Department of Justice to block the early termination of the merger review, issue a second request and extend the investigation into the JBS-Cargill acquisition. The Department of

Justice should not approve the largest pork-packing merger in years that would erode competition in hog slaughter and wholesale

pork that would disadvantage farmers and consumers. The Department of Justice should enjoin this proposed acquisition.

EXHIBIT 5

Case No. 20-35453

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED
STOCKGROWERS OF AMERICA,
Plaintiff-Appellant,

v.

SONNY PERDUE, in his official capacity as Secretary of Agriculture, and THE
UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendants-Appellees,

MONTANA BEEF COUNCIL; NEBRASKA BEEF COUNCIL;
PENNSYLVANIA BEEF COUNCIL; TEXAS BEEF COUNCIL; LEE
CORNWELL; GENE CURRY; WALTER J. TAYLOR, Jr.,
Intervenors-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Montana

**BRIEF OF *AMICI CURIAE* FOOD & WATER WATCH; DAKOTA RURAL
ACTION; FAMILY FARM ACTION ALLIANCE; FARM AND RANCH
FREEDOM ALLIANCE; INSTITUTE FOR AGRICULTURE AND TRADE
POLICY; IOWA CITIZENS FOR COMMUNITY IMPROVEMENT;
RURAL ADVANCEMENT FOUNDATION INTERNATIONAL USA; AND
WESTERN ORGANIZATION OF RESOURCE COUNCILS IN SUPPORT
OF PLAINTIFF-APPELLANT, SUPPORTING REVERSE AND REMAND
OF DECISION BELOW**

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RULE 29 STATEMENTS

Pursuant to Fed. R. App. P. 29(a)(2), *amici* certify that all parties in this proceeding have consented to the filing of this brief.

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no party or party's counsel authored this brief in whole or in part, and that no other person besides *amici* or their counsel contributed money that was intended to fund preparing or submitting this brief.

Sept. 08, 2020

/s/Tyler Lobdell
Tyler Lobdell

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, all *amici* are nonprofit corporations, and have no parent corporations and no publicly held corporation owns 10% or more of any of their stock.

Sept. 08, 2020

/s/Tyler Lobdell

Tyler Lobdell

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William D. McBride & Nigel Key, USDA, Econ. Res. Serv., Rep. No. 158, U.S. Hog Production from 1992 to 2009: Technology, Restructuring, and Productivity Growth (Oct. 2013).....7

IDENTITY AND INTERESTS OF AMICI

Amici are nonprofit organizations focused on grassroots organizing and policy advocacy, and who advocate for policies that benefit independent family farmers and ranchers, rather than agribusiness corporations. *Amici*'s memberships include ranchers harmed by the Beef Checkoff and its funding of advertising by private entities promoting all beef as of equal quality. *Amici* file this brief pursuant to Fed. R. App. P. 29(a)(2).

Food & Water Watch ("FWW") is a national, nonprofit membership organization that mobilizes regular people to build political power to move bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW has a long history of advocating for agricultural market reforms, including to checkoff programs, that will keep farmers on the land and limit corporate consolidation.

Dakota Rural Action is a South Dakota-based grassroots organization that works to protect environmental resources, advocate for resilient agricultural systems, and empower people to create policy change that strengthens their communities and cultures.

Family Farm Action Alliance is a national organization working to build a sustainable, inclusive economy, including through advancing checkoff reforms and other policies to dismantle the consolidated food and agriculture system.

Farm and Ranch Freedom Alliance (“FARFA”) is a nonprofit organization that supports independent family farmers and protects a healthy and productive food supply for American consumers. FARFA’s members include livestock producers who sell beef that is grass-fed, antibiotic-free, hormone-free, humanely raised, and otherwise distinct from commodity beef.

The Institute for Agriculture and Trade Policy works locally and globally to ensure fair and sustainable food, farm, and trade systems, including advocating for differentiated markets that better inform consumers, help ranchers stay on the land, and support rural communities through more locally-based businesses.

Iowa Citizens for Community Improvement is a grassroots organization that organizes family farmers, independent livestock producers, and other grassroots Iowans to take on issues of corporate concentration in livestock production as well as other social, environmental, and economic justice issues.

Rural Advancement Foundation International USA is a national organization that works to cultivate markets, policies, and communities that support thriving, socially just, and environmentally sound family farms, including by providing resources to farmers exploited by one-sided agreements with meat companies.

Western Organization of Resource Councils works to advance its vision of a democratic, sustainable, and just society through community action. WORC is committed to building sustainable environmental and economic communities that

balance economic growth with the health of people and stewardship of their land, water, and air resources.

SUMMARY OF ARGUMENT

Federal commodity promotion programs like the Beef Checkoff, which compel farmers and ranchers to pay for advertising for their products, have been the subject of significant opposition. Independent farmers increasingly struggling with the harmful economic impacts of corporate consolidation have repeatedly questioned whether the mandatory assessments paid into checkoff programs ultimately help or harm their bottom line, and whether they unconstitutionally compel producers to fund speech they disagree with. The Beef Checkoff is no exception. As beef has become the most consolidated livestock sector in the U.S, independent beef producers have faced growing challenges making a living and gaining fair access to markets.

At the same time, millions of dollars in Beef Checkoff funds are spent on generic advertising by unaccountable private parties. These private entities advocate for policies that foster the corporate consolidation harming independent producers. They use producers' Checkoff dollars to serve the same end, generating advertising that tells consumers "beef is beef," preventing independent, domestic, and specialty producers from being able to distinguish their products from industrially produced, imported, and other lower-value beef products. This advertising should be overseen and approved by the federal government, enabling producers to hold the United States Department of Agriculture ("USDA")

accountable for harmful Checkoff impacts through democratic action, but in reality these ads evade even minimal USDA scrutiny when funding is first passed through Qualified State Beef Councils. Through this “shell game,” USDA continues to unconstitutionally compel farmers and ranchers to fund private speech antithetical to their interests, causing significant harm to their industry and their livelihood.

Amici urge the Court to reverse and remand.

ARGUMENT

I. **Livestock Checkoffs Have Correlated with Agricultural Consolidation and a Decline in Independent Farms and Ranches**

The Beef Checkoff was established, in part, in response to a loss in beef's market share to chicken and other meats. Mike Callicrate, *The Beef Checkoff: A Broken and Failed Program*, Org. for Competitive Markets (Dec. 11, 2015).¹ Along with other federal checkoff programs, it was created to generally “expand markets for agricultural commodities.” Steven A. Neff & Gerald E. Plato, USDA, Econ. Res. Serv., Rep. No. 707, *Federal Marketing Orders and Federal Research and Promotion Programs: Background for 1995 Farm Legislation* 7 (1995). *See also* 7 U.S.C. § 7401(b)(3) (“The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor.”); *id.* § 2901(b) (intending Beef Checkoff assessments to fund “a coordinated program of promotion and research designed to strengthen the beef industry’s position in the marketplace”). To this end, these programs have invested many millions of dollars into generic advertising campaigns, giving rise to such well-known promotional slogans as “Beef. It’s What’s for Dinner.,” “Got Milk?,” and “Pork, the Other

¹ <https://competitivemarkets.com/the-beef-checkoff-a-broken-and-failed-program/>.

White Meat.” Jennifer William Zwagerman, *Checking Out the Checkoff: An Overview and Where We Are Now That the Legal Battles have Quieted*, 14 Drake J. Agric. L. 149, 150 (2009).

While these programs may have benefited the corporations processing these commodities, they have rarely benefited independent farmers and ranchers. Since Congress established these livestock checkoff programs, every U.S. livestock sector has become significantly more consolidated. USDA statistics show that, between 1987 and 2012, the average number of animals per operation has skyrocketed: the number of cows on fed cattle operations has increased by 119%, number of broiler chickens has increased by 127%, number of milk cows by 1,025 percent, and number of hogs by 3,233%. James MacDonald et al., USDA, Econ. Res. Serv., EIB No. 189, *Three Decades of Consolidation in U.S. Agriculture* 36 (Mar. 2018). This extreme growth has corresponded with a dramatic loss of small and mid-sized independent farms in every sector. For example, while the hog industry was “[o]nce dominated by many small operations that practiced both crop and hog farming[,]” that dramatically changed as “[t]he number of hog farms fell by more than 70 percent from 1992 to 2009 while the hog inventory remained stable.” William D. McBride & Nigel Key, USDA, Econ. Res. Serv., Rep. No. 158, *U.S. Hog Production from 1992 to 2009: Technology, Restructuring, and Productivity Growth* iii, 1 (Oct. 2013). Similarly, “licensed U.S. dairy herds fell by

more than half between 2002 and 2019, with an accelerating rate of decline in 2018 and 2019, even as milk production continued to grow. As a result, production has been shifting to much larger but fewer farms.” James M. MacDonald et al., USDA, Econ. Res. Serv., Rep. No. 274, Consolidation in U.S. Dairy Farming i (July 2020).

The persistent trend for cattle feedlots, where most cattle are sent to be “finished” on feed prior to being slaughtered, is also towards fewer, larger operations. USDA, Econ. Res. Serv., *Cattle & Beef: Sector At a Glance* (last updated Aug. 4, 2020) (“The industry continues to shift toward a small number of very large specialized feedlots . . .”).² In the 1980’s alone, “the number of cattle-feeding operations in the largest 13 cattle states dropped by 40 percent.” Claire Kelloway & Sarah Miller, Open Markets Inst., *Food and Power: Addressing Monopolization in America’s Food System* 3 (Mar. 2019).³ Similarly, the total number of farmers raising cattle has continued to decline, with an average of nearly 17,000 cattle ranchers going out of business every year since 1980, despite total sales increasing in more recent years. *Id.*; USDA, Nat’l Agric. Stat. Serv., ACH 12-20, 2012 Census of Agriculture: Highlights (Feb. 2015) (finding a 5.2% decrease in the number of farms and a 24.8% increase in sales from just 2007 to 2012).⁴

² <https://www.ers.usda.gov/topics/animal-products/cattle-beef/sector-at-a-glance/>.

³ https://www.openmarketsinstitute.org/s/190322_MonopolyFoodReport-v7.pdf.

⁴ https://www.nass.usda.gov/Publications/Highlights/2015/Cattle_Highlights.pdf.

This trend towards fewer, larger cattle operations and other livestock farms has been driven by an even more extreme concentration of market control by a handful of powerful corporations. The meatpacking and poultry industries have become extremely consolidated (i.e. horizontally integrated), with the four largest firms processing about 85% of the cattle, about 64% of the hogs, and more than half the chickens. Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, 81 Fed. Reg. 92,703, 92,711 (Dec. 20, 2016).

Economic research indicates that “when four firms control more than forty percent of a market” that market becomes oligopolistic and is not competitive. Mary Hendrickson et al., Power, Food and Agriculture: Implications for Farmers, Consumers and Communities 14 (Nov. 1, 2017).⁵

These companies consequently wield vast market power, and can exercise this power over livestock and poultry producers through “increased use of contracts and forward contracting, with a transparently negotiated cash market all but disappearing.” *Id.* at 27. In other words, producers have lost their bargaining power. Meatpackers are increasingly able to control the terms of livestock purchasing through non-transparent contracts and other schemes that prevent producers from fairly negotiating prices based on market conditions. *Id.* at 27–28. At the same time, increased vertical integration by meat and poultry processors

⁵ <https://ssrn.com/abstract=3066005>.

means that these companies control a growing share of the supply chain and tightly manage all aspects of meat and poultry production, “from genetics to grocery.”

Alan Barkema et al., Federal Reserve Bank of Kansas City, *The New U.S. Meat Industry* 36 (2001).⁶

In the beef sector, where four multinational companies slaughter four out of every five cattle, these meatpackers have tremendous leverage over independent cattle producers who have vanishingly few potential buyers to slaughter and market their cattle. Kelloway & Miller, *supra*, at 3. Adding to this market pressure, cattle producers increasingly must also compete directly with meatpacker-owned cattle. USDA, Grain Inspection, Packers and Stockyards Admin., *Packers & Stockyards Annual Report 2013* 30–31 (Mar. 2014) (by 2011, more than 1 in 20 cattle slaughtered were meatpacker-owned). Meatpackers who own cattle can operate as both buyers and sellers, allowing them to distort or manipulate prices, such as by slaughtering their own cattle when prices are high, or buying at auction when prices are low, which can drive down prices for independent producers. C. Robert Taylor, *The Many Faces of Power in the Food System* 3–5 (Feb. 17, 2004).⁷

Extreme industry consolidation has hurt farmers’ share of retail profits in recent decades. Across sectors, farmers’ share of food dollars has steadily declined,

⁶ <https://www.kansascityfed.org/publicat/econrev/PDF/2q01bark.pdf>.

⁷ <https://www.justice.gov/sites/default/files/atr/legacy/2007/08/30/202608.pdf>.

with the farm share of every dollar spent on domestically produced food falling from 18.4 cents in 1993 to 15.5 cents in 2011. Patrick Canning, *ERS Food Dollar Series Allows an Indepth Look at Farm Level Components of the U.S. Food Dollar*, USDA (July 1, 2013).⁸ Of this small amount, less than *seven cents* stay with the farmer. *Id.* Beef producers have not escaped this trend; in the beef sector, the most consolidated of livestock sectors, researchers have found that “[o]ne result of this [meatpacker] consolidation is that the price ranchers receive continues to fall, even though the price consumers pay for beef is rising and beef packers are making record margins.” Kelloway & Miller, *supra*, at 3 (citations omitted).

Congress’ establishment of various checkoff programs clearly has not strengthened America’s independent farmers. Quite the opposite; faced with increased corporate ownership and control of livestock and meat processing, fewer options to sell livestock and access markets, and a steadily decreasing share of the retail food dollar, beef producers and other farmers have questioned whether the generic advertising these programs fund benefits them financially, or instead serves to hasten the very consolidation and anti-competitive practices that have steadily harmed their bottom line. As a result of these market trends and questions about unfairness and corruption in the administration of checkoff programs, several

⁸ <https://www.ers.usda.gov/amber-waves/2013/july/ers-food-dollar-series-allows-an-indepth-look-at-farm-level-components-of-the-us-food-dollar/>.

programs have been the subject of litigation and “most have been the subject of some controversy,” with beef producers and other farmers rebelling against a system they conclude is rigged against them. *See Zwagerman, supra*, at 150; Ken Anderson, *Another Flare-Up in the Feud Between NCBA and OCM*, Brownfield Ag News (Oct. 1, 2019).⁹

II. The Beef Checkoff Primarily Benefits Large Corporate Interests, At the Expense of Independent Producers

As a result of Qualified State Beef Councils’ transferring producers’ Checkoff assessments to private third parties, many millions of Checkoff dollars are used to generate generic advertising without any USDA oversight. These third parties are allied with the largest multinational meatpackers and actively promote policies antithetical to independent ranchers’ interests. In line with these policies, their generic marketing serves to treat all beef as equal regardless of important and material differences in how many ranchers raise their cattle, harming producers who are raising higher quality beef but cannot differentiate their products to the public.

⁹ <https://brownfieldagnews.com/news/another-flare-up-in-the-feud-between-ncba-and-ocm/>.

A. Beef Checkoff Funds Are Funneled to Private Third Parties to Generate Private Speech

As the lower court acknowledged, the movement of Beef Checkoff funds amounts to a “shell game” in which producers’ money is moved from one account to another, then another, where it is used at the discretion of unaccountable private parties. *See R-CALF v. Perdue*, 2020 U.S. Dist. LEXIS 54015, at *26 (D. Mont. Mar. 27, 2020); Excerpts of Record (“E.R.”) 25. When a producer pays their \$1 assessment per head of cattle sold, 7 C.F.R. § 1260.172(a), a Qualified State Beef Council typically retains 50 cents and sends the remaining 50 cents to the federal Cattlemen’s Beef Board. E.R. 79 (“undisputed that QSBCs typically retain up to 50 cents of each assessment”). The Cattlemen’s Beef Board then allocates its share of the money through a contracting process administered by the Beef Promotion Operating Committee, which invariably doles out the vast majority of this money to the National Cattlemen’s Beef Association (“NCBA”) and NCBA’s subcontractor, the U.S. Meat Export Federation (“USMEF”)—non-governmental, privately incorporated entities, E.R. 87–88. *See Beef Checkoff, Operating Committee Approves FY19 Plan of Work* (Sept. 14, 2018) (awarding 2019 contracts to NCBA worth \$27.4 million and to USMEF worth \$8.3 million, 88% of the total \$40.5 million budget)¹⁰; Drovers News Source, *Beef Promotion Operating*

¹⁰ <https://www.beefboard.org/2018/09/14/operating-committee-approves-fy19-plan-of-work/>.

Committee Approves 2020 Checkoff Plan (Sept. 16, 2019) (awarding 2020 contracts to NCBA worth \$27.3 million and to USMEF worth nearly \$8.3 million, 87% of the total \$40.9 million budget).¹¹ Several Qualified State Beef Councils entered into Memoranda of Understanding (“MOUs”) in response to this litigation that marginally govern their relationship with USDA. E.R. 91, 247–286. As a result, the beef promotion funded through these federal contracts and MOUs is subject to some, albeit limited, government oversight.

The Qualified State Beef Councils, many of which are entirely private entities, may expend the money they retain themselves, but they often pass funds to other private third parties. Primary recipients of these Qualified State Beef Councils’ Checkoff funds are, once again, the NCBA (but through its Federation Division¹²) and the USMEF, which receive millions more Checkoff dollars through this pathway. E.R. 98–102; *see* Federation of State Beef Councils, 2019 Investor Report (listing millions of dollars transferred from Qualified State Beef Councils to

¹¹ <https://www.drovers.com/article/beef-promotion-operating-committee-approves-2020-checkoff-plan>.

¹² The NCBA describes its Federation Division, which coordinates with State Beef Councils, as “a critical voice” to “influence and give direction to the Beef Checkoff Program,” and “a leading advocate for and defender of the ‘one vision, one plan, one voice’ approach to beef market development.” Federation Charter of Principles (amended July 29, 2020), https://www.ncba.org/CMDocs/BeefUSA/Federation/Federation_Charter_Amended_7-29-20.pdf.

the Federation and USMEF).¹³ Unlike the direct contract funding to NCBA discussed above, the promotion generated by this pass-through funding is not subject to *any* meaningful USDA oversight or content review; by first passing producers' money through Qualified State Beef Councils, the NCBA Federation and USMEF avoid even the minimal oversight afforded by the Beef Promotion Operating Committee contracting process and the MOUs. These private, unaccountable third parties are free to use these millions of assessment dollars to generate speech to promote beef according to their particular objectives for the beef industry.

B. Private Entities Like the NCBA Have Specific Policy Goals That Are Antithetical to Independent Producers' Interests

NCBA sees itself as “the definitive voice of the beef industry,” and as “an advocate for the cattle industry’s policy positions and economic interests.” NCBA, *About*.¹⁴ USMEF’s mission is to increase industry profitability through exports, and to increase exports so that they account for “at least 16%” of total beef value in the U.S. USMEF, Strategic Plan 2016-2020 1, 13.¹⁵

NCBA’s and USMEF’s self-declared representation of and advocacy for “the beef industry” is not inclusive of all producers. Instead, these private

¹³<https://www.ncba.org/CMDocs/BeefUSA/Federation/Federation%20Annual%20Report%202019%20Update.pdf>.

¹⁴ <https://www.ncba.org/about.aspx>.

¹⁵ https://www.usmef.org/downloads/USMEF-Strategic-Plan_Final-Jan-2017.pdf.

organizations serve the interests of corporate consolidation and profit maximization for the largest market participants, particularly multinational meatpackers. *See* E.R. 64; Bill Bullard, *Under Siege: The U.S. Live Cattle Industry*, 58 S.D. L. Rev. 560, 569 (2013) (explaining that the NCBA was formed from a former meatpacker trade association, has consistently had meatpackers on its governing board, and has consistently sided with meatpackers on critical issues and opposed pro-competition initiatives). NCBA advocates specific policy positions that run directly counter to the interests of many cattle producers, including R-CALF's and *amici*'s memberships.¹⁶ The two most relevant examples are NCBA's opposition to country-of-origin labeling ("COOL") and cattle producer protections under the Grain Inspection, Packers and Stockyards Administration ("GIPSA").¹⁷

NCBA has spent many years at odds with producers on COOL, which would require retailers to inform consumers of a beef product's country of origin, thereby enabling domestic ranchers to effectively communicate to consumers that their

¹⁶ USMEF is also aware that its advocacy does not serve all producers equally. *See* USMEF, Strategic Plan 2016-2020, *supra*, at 9 (recognizing one of its "[w]eaknesses" to be "aligning the interests of all sectors represented by USMEF given the differences in roles, priorities, capabilities, and expectations of its members").

¹⁷ USDA eliminated GIPSA as a stand-alone agency in 2018, transferring the former GIPSA delegations to the Agricultural Marketing Service. Revision of Delegations of Authority, 83 Fed. Reg. 61,309, 61,310 (Nov. 29, 2018).

beef was U.S. born and raised. Wendy J. Umberger et al., *Country-of-Origin Labeling of Beef Products: U.S. Consumers' Perceptions*, 34(3) J. Food Distribution Res. 103, 103 (2003); see NCBA, 2020 Policy Book, at 86.¹⁸

Unsurprisingly, “those mainly representing U.S. producers (and therefore mostly U.S. cattle) favored mandatory COOL, while those representing U.S. processors and packers (and therefore meat from multiple countries) sought a voluntary requirement.” Peter Chang, *Country of Origin Labeling: History and Public Choice Theory*, 64(4) Food Drug L. J. 693, 701 (2009). Despite initially supporting COOL in the late 1990s because a full body vote came out in its favor, NCBA’s leadership later capitulated to the interest of meatpackers and retailers to scuttle mandatory labeling. *Id.* at 700–02 (explaining that “NCBA and others reversed course” and joined meat industry groups as well as Wal-Mart, ConAgra, Grocery Manufacturers of America, and others “to halt the mandatory labeling program”). NCBA’s position on COOL shows who’s interests it truly supports: corporate meatpackers.

Congress ultimately repealed COOL, in part because of NCBA and its corporate, pro-consolidation allies, allowing beef produced from cattle that were raised in foreign countries but processed in the U.S. (which can mean as little as a

¹⁸[https://www.ncba.org/CMDocs/BeefUSA/Media/2020%20NCBA%20Policy%20Book%20-MASTER%20COPY%20\(1\).pdf](https://www.ncba.org/CMDocs/BeefUSA/Media/2020%20NCBA%20Policy%20Book%20-MASTER%20COPY%20(1).pdf).

larger piece of meat being cut into smaller ones) to be marketed as “Product of U.S.A.,” leaving domestic cattle ranchers unable to capitalize on consumer demand for truly domestic beef products. Consolidated Appropriations Act, 2016 § 759, PL 114-113; Deena Shanker, *Most Grass-Fed Beef Labeled ‘Produce of U.S.A.’ Is Imported*, Bloomberg (May 23, 2019).¹⁹ This allows meatpackers and other multinational corporate interests to take advantage of consumer preference for domestic beef, while actually sourcing from cheaper, overseas cattle producers—especially grass-fed cattle—and suppress prices so that domestic ranchers can hardly compete. See Ben Lilliston, *Stop Meat Companies from Rigging the Grass-Fed Market*, Inst. for Agric. & Trade Pol’y (Aug. 2, 2018) (explaining that large meatpackers like JBS and Cargill source cattle internationally, that an estimated 70-80% of grass-fed beef on U.S. market is imported, and that this is hurting U.S. ranchers);²⁰ Dan Charles, *Why Lots of Grass-Fed Beef Sold in U.S. Comes from Down Under*, NPR (Oct. 3, 2013) (explaining that grass-fed cattle from other countries is cheaper, cutting U.S. ranchers out of the market).²¹

NCBA also fought against GIPSA rules that would allow independent cattle ranchers to protect themselves from anti-competitive practices used by the large

¹⁹ <https://www.bloomberg.com/news/articles/2019-05-23/most-grass-fed-beef-labeled-product-of-u-s-a-is-imported>.

²⁰ <https://www.iatp.org/blog/stop-companies-rigging-grass-fed-market>.

²¹ <https://www.npr.org/sections/thesalt/2013/10/04/228659915/why-most-grass-fed-beef-sold-in-u-s-comes-from-down-under>.

meatpackers. Large meatpackers can take advantage of smaller cattle producers in many ways, for example by inaccurately weighing a rancher's cattle and thereby underpaying him or her.²² Stronger GIPSA rules were designed to make it easier for producers who were subject to anti-competitive behavior to protect their interests in court. *See* Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92,566 (Dec. 20, 2016). NCBA and its meatpacker allies opposed these rules. *See* NCBA, *Proposed GIPSA Rule*.²³ R-CALF and *amici* have long advocated for strong GIPSA rules to protect their members. *E.g.*, R-CALF, *GIPSA Rule*;²⁴ Rural Advancement Found. Int'l USA, *2014 Farm Bill Analysis: GIPSA* (Feb. 14, 2014);²⁵ Petition for Rule-making on Captive Supply Procurement Practices under the Packers and Stockyards Act, submitted by Western Organization of Resource Councils (Oct. 8, 1996).²⁶

²² This practice is well documented, and harms smaller producers who “are required to sell their cattle on carcass weight, forcing them to carry all the risk . . . and then unreasonably having to trust that [the packer] weights and grades the animal correctly. Larger producers are given the opportunity to sell on live weight at the point of sale, skirting these risks.” Org. for Competitive Markets, *New JBS Violations Highlight Weak Enforcement of Packers & Stockyards Act* (Dec. 12, 2018), <https://competitivemarkets.com/new-jbs-violations-highlight-weak-enforcement-of-packers-stockyards-act/> (describing USDA's lax enforcement against JBS's proven bilking of small, independent producers).

²³ <https://www.ncba.org/CMDocs/BeefUSA/Issues/NCBA-GIPSA-Rule.pdf>.

²⁴ <https://www.r-calfusa.com/gipsa-rule/>.

²⁵ <https://www.rafiusa.org/blog/2014-farm-bill-gipsa/>.

²⁶ https://www.gipsa.usda.gov/psp/publication/worc_petition/petition.pdf.

NCBA's policy positions make clear that its mission and work align with large, multinational corporate interests, and not with independent, domestic cattle ranchers. It strains credulity to suggest that these overt policy positions and alliances do not shape the way NCBA and its Federation Division use Beef Checkoff funds to craft generic beef promotion.

C. Generic Beef Promotion Under the Beef Checkoff Primarily Benefits Large Corporate Interests and Hurts Specialty Cattle Producers

Congress created the Beef Checkoff to maintain or increase overall demand for beef, but not to “maintain or expand the share of [the beef] market[] held by any individual producer or processor.” 7 U.S.C. § 7401(b)(3), (7). In practice though, the Beef Checkoff fails to achieve this egalitarian ideal. The program's generic beef promotion lumps all beef products together and attempts to convince consumers that all beef is of a uniform high quality, no matter how or where the cattle were raised. Over 25% of the Checkoff funds contracted out by the Beef Promotion Operating Committee are expended on expressly generic beef advertising, with another 20% going to foreign promotion. Dr. Harry M. Kaiser, *An Economic Analysis of the Cattlemen's Beef Promotion and Research Board Demand-Enhancing Programs* 5 (2018).²⁷ This primarily serves the interests of the

²⁷ <https://www.beefboard.org/wp-content/uploads/2019/07/Full-ROI-Report.pdf>.

largest multinational corporate interests, and harms independent, domestic cattle producers.

1. Many U.S. Ranchers Raise High Quality Cattle with Unique and Valuable Attributes That Consumers Seek Out

While NCBA uses Beef Checkoff funds to tell consumers that “beef is beef,” with no differentiation, there is important variety in how U.S. ranchers raise cattle. Cattle are raised for many different specialty attributes that consumers are increasingly looking for, such as 100% grass-fed, raised without antibiotics, treated with superior animal care, or raised with more environmentally sustainable practices. *See, e.g.,* Lauren Gwin et al., *Understanding Markets for Grass-Fed Beef*, 43(2) J. Food Dist. Res. 91, 93 (2012) (citing studies finding that “providing production information increases [willingness to pay more] for grass-fed beef relative to grain-fed beef”); Trisha Calvo & Rachel Meltzer-Warren, *What ‘No Antibiotics’ Claims Really Mean*, Consumer Reports (Nov. 30, 2018) (“Nearly 6 in 10 people . . . would pay more for a ‘no antibiotics’ burger.”);²⁸ Megan Pellegrini, *2019 Consumer Trend Report: Making Connections*, Nat’l Provisioner (Nov. 7, 2018) (“we are finding upward trends in purchasing for mindful and humanely raised beef” and “consumers are willing to pay more for trending attributes” such

²⁸ <https://www.consumerreports.org/overuse-of-antibiotics/what-no-antibiotic-claims-really-mean/>.

as no added hormones).²⁹ These higher quality cattle should command higher prices compared with conventional beef, and often must for their production to be financially viable. *See* Stone Barns Ctr. for Food & Agric., *Back to Grass: The Market Potential for U.S. Grassfed Beef* 21 (Apr. 2017) (charting retail price premium for certain product claims).³⁰

Beef from cattle born and raised by a U.S. rancher is also high-value because consumers show “a strong desire to support U.S. producers.” Umberger et al., *supra*, at 113 (finding a “majority of consumers (73%) were willing to pay an 11% and 24% premium for COOL of steak and hamburger, respectively”); Consumer Reports, *Food Labels Survey 3* (Apr. 6, 2016) (finding that an “overwhelming majority of consumers want labels on meat . . . to reflect country of origin (87%)”).³¹ But consumers must be able to distinguish this attribute before U.S. ranchers can benefit from this demand.

Another significant category of specialty producer is those that employ organic production methods; however, unlike other specialty producers, they are exempt from paying Beef Checkoff assessments. *See* 7 U.S.C. § 7401(e) (first

²⁹ <https://www.provisioneronline.com/articles/107036-consumer-trends-report-making-connections>.

³⁰ https://www.stonebarnscenter.org/wp-content/uploads/2017/10/Grassfed_Full_v2.pdf.

³¹ https://www.ftc.gov/system/files/documents/public_events/975753/cr_intro_and_2016_food_survey.pdf.

exempting organic producers in 2002 (Farm Security and Rural Investment Act of 2002, PL 107-171), strengthened to include more organic producers in 2014); Press Release, Organic Trade Ass'n, Organic Trade Ass'n Claims Hard-Won Victory in Check-Off Exemption for Organic (Dec. 16, 2014) (highlighting organic producers' "unique demands for research and promotion").³² Non-organic, specialty beef producers similarly need to differentiate their products and have unique promotion needs, but are nevertheless forced to pay into the Checkoff, where their funds can be used to portray their beef as no higher quality than any other beef, undermining their position in the market.

2. Generic Marketing Yields Reduced Benefits For, and Can Actually Harm, High Quality and Specialty Producers in Concentrated Industries Like the Beef Industry

The NCBA's and others' generic promotion of beef as a homogenous commodity, paired with the oligopolistic structure of the beef industry, results in inequitable distribution of benefits and entrenches the largest processors. *See* Ronald W. Ward, *Commodity Checkoff Programs and Generic Advertising*, 21(2) Choices 55, 59 (2006) ("the level of concentration and the competitive structure within a commodity sector are major factors determining the usefulness of generic advertising").³³ Under these conditions, the multinational meatpackers reap

³² <https://ota.com/news/press-releases/17768>.

³³ <https://www.choicesmagazine.org/2006-2/checkoff/2006-2-02.pdf>.

enormous benefits in the form of increased retail sales, while producers' benefits shrink. Mingxia Zhang & Richard J. Sexton, *Optimal Commodity Promotion in Imperfectly Competitive Markets*, 84 Am. J. Agric. Econ., at 25 (2000) (“Producers’ benefits from advertising are reduced by 31% [compared to a] regime of perfect competition, and packers capture 55% of the benefits generated . . .”).

Reduced differentiation among origin and production methods means that consumers cannot distinguish among producers, instead believing that “beef is beef” and one producer’s cattle are substantially the same as any others’. See generally, Amitav Chakravarti & Chris Janiszewski, *The Influence of Generic Advertising on Brand Preferences*, 30 J. Consumer Res. 487, 487 (2004) (finding generic ads have a tendency “to change the relative importance of the attributes used to evaluate brands”).³⁴ This can harm higher-quality market participants while benefiting lower-quality ones. John M. Crespi, *Generic Advertising and Product Differentiation Revisited*, 5 J. Agric. & Food Indus. Org. (2007), at 14–15 & n.9 (citing studies finding correlation between generic advertising and decrease in product differentiation, and recognizing this can be “detrimental to high-quality firms while being profitable to firms producing lower qualities”).

³⁴https://pdfs.semanticscholar.org/dcbc/7bac4b86ff5182f48b49142fe02f44b8b466.pdf?_ga=2.191708074.1436600646.1599365271-1716414366.1599365271.

3. The Beef Checkoff's Generic Beef Promotion Reduces Differentiation at the Expense of Producers

The harms of generic marketing are not merely theoretical; the specific Checkoff-funded messaging disseminated by NCBA and other private entities in fact harms independent, domestic cattle ranchers. NCBA uses millions of Checkoff dollars each year to generically “[p]lac[e] positive stories about how beef is raised, beef safety, quality, nutrition, [and] sustainability,” including assertions that all beef provides higher quality attributes. Beef Checkoff, *Consumer Information*,³⁵ Kaiser, *supra*, at 7 (noting an increase in spending on disseminating “industry information” regarding issues such as animal care and production technology). NCBA tells the public that all beef from a U.S. meatpacker is from cows raised by U.S. ranchers treating their animals with exceptional care. *See* 2017 Cattlemen’s Stewardship Review at 3, 9, 13 (representing that the “beef community” “rais[es] cattle in a safe, humane, and sustainable way,” with dozens of references to U.S. producers and virtually no acknowledgment of imports).³⁶ Apparently, all beef is “the most sustainable.” Beef Checkoff, *Beef Sustainability: Environmental, Social & Economic Impacts* (“[t]he beef production system works in harmony to produce

³⁵ <https://www.beefboard.org/checkoff/beef-checkoff-programs/consumer-information-program/>.

³⁶ <https://www.beefitswhatsfordinner.com/Media/BIWFD/Docs/beef-csr-report-2017-final.pdf>.

the most sustainable product”).³⁷ And the unqualified use of phrases like “from pasture to plate” paint all beef as pasture raised, without regard for the producers who invest the extra time and resources required to produce truly pasture-raised cattle. *E.g.*, Texas Beef Council, *Texas Chefs Experience Beef Industry from Pasture to Plate* (July 27, 2018).³⁸ This communicates to consumers that they have no reason to seek out certain producers or product attributes.

The Checkoff funds that Qualified State Beef Councils pass through to USMEF similarly homogenize beef to benefit multinational meatpackers, only internationally. *See* E.R. 107 (undisputed that USMEF’s promotions described below were funded by intervenor Qualified State Beef Councils). For example, USMEF hosted a “barbecue seminar” in Japan where “U.S. packers and Japanese trade representatives” were able to mingle and discuss the U.S. beef industry. Plaintiff’s Statement of Undisputed Facts Exhibit 37, ECF Doc. 91-1, at 780 (attached hereto as Exhibit A). In South Korea, USMEF held “lunch box events” intended to “demonstrate the versatility of U.S. beef.” *Id.* And in Ghana, USMEF brought together “U.S. exporters” and buyers from several African countries “to educate those buyers about the advantages of U.S. beef.” *Id.* at 781. This export promotion generically promoted any beef coming out of a U.S. processor, whether

³⁷ <https://www.beefitswhatsfordinner.com/raising-beef/beef-sustainability>.

³⁸ <https://www.texasbeefcheckoff.com/checkoff-news/texas-chefs-experience-beef-industry-from-pasture-to-plate/>.

or not the source cattle were U.S. raised or were of a certain quality or offered any specialty attributes.

Thus, Checkoff-funded marketing seeks to convince consumers that whether beef comes from an independent rancher in Montana raising 100% pasture-based, grass-fed, raised without antibiotics cattle, or a producer in another country who regularly feeds antibiotics to his grain-fed cattle on a dirt and manure-covered feedlot, is of no importance. In this world, *all* beef is homogenous, humanely raised, and is “the most sustainable product.” This allows large meatpackers to source cheaply, drive down costs, and still benefit from marketing that describe their beef as “produced” in the U.S. and having sought after, high quality attributes. Domestic ranchers producing high quality cattle, on the other hand, are substantially disadvantaged by this generic “beef is beef” promotion. *See, e.g., R-CALF v. USDA*, No. 2:17-cv-223-RMP, 2018 U.S. Dist. LEXIS 94527, at *9–*10 (E.D. Wash. June 5, 2018) (finding that R-CALF’s members suffered harm because failure to inform consumers of beef’s true country of origin “diminishes the[ir] income”). U.S. cattle ranchers, and particularly specialty producers, rightfully disagree with being lumped in with lower quality or foreign competitors in this way. *See* E.R. 64 (stating that R-CALF considers “advertising that treats all beef as equal” “contrary to [its] mission”).

In sum, while the Qualified State Beef Councils and NCBA spend money assessed from all beef producers, the benefits do not accrue equitably across the beef industry. Instead, the program favors the largest corporate interests in the highly concentrated U.S. beef industry, while harming domestic, sustainable, and specialty producers. Forcing these ranchers to pay for marketing that makes it harder for them to distinguish their higher-quality products from all other beef on the market, with no democratic recourse available, harms their ability to succeed in an ever more challenging industry.³⁹

III. The Beef Checkoff Has a History of Corruption and Misuse of Funds

In addition to spending cattle producers' money on inherently inequitable and harmful generic beef promotion, the private entities spending Beef Checkoff funds have a history of cronyism and misuse of these funds. Such a history further highlights the need to close the loophole allowing such promotion to take place without even nominal government oversight.

In 2010, the Cattlemen's Beef Board conducted an audit of the NCBA, and the results were alarming. *See* Cattlemen's Beef Board, Executive Summary of Report of Agreed-Upon Procedures for the National Cattlemen's Beef Association

³⁹ *Amici* do not suggest that Checkoff funds must be used in ways that distinguish between types of beef to benefit specialty producers. However, more equitable beef promotion that distinguishes between types of beef would be permissible. *See* 7 C.F.R. § 1260.169(d) (allowing promotion of "a brand or trade name of any beef product" if approved).

Contract Compliance FY 2008, FY 2009, and the Five Months Ending February 28, 2010.⁴⁰ Among the Cattlemen’s Beef Board’s findings was that NCBA was spending Checkoff funds for improper purposes that appeared to advance the private organization’s policy positions and not beef promotion activities as intended and legally required. *Id.* at 1–4. The audit also uncovered a woefully uncompetitive bidding process for NCBA’s subcontracts, indicating that the funds were used to prop up an “old boys’ network” as opposed to truly advancing the interests of beef producers. *Id.* at 4; Anna McConnell, *A Constant Battle for Beef Checkoff Transparency*, *Successful Farming* (Mar. 21, 2017).⁴¹

Producers have decried the NCBA’s culture of cronyism for years. For example, when an insider asked how many members of the Beef Promotion Operating Committee, which chooses what organizations get contracts funded under the Checkoff, were also NCBA members, “nearly all of them” raised their hands. McConnell, *supra*. With such overlap, it is no surprise that NCBA is consistently awarded the lion’s share of beef promotion funds allocated by the Beef Promotion Operating Committee or Qualified State Beef Councils in any given year. *See supra* Part II.A. NCBA has little reason to worry about serving the

⁴⁰ https://www.agripulse.com/ext/resources/pdfs/c/b/b/r/t/CBB_NCBA_Report.pdf.

⁴¹ <https://www.agriculture.com/livestock/cattle/a-constant-battle-for-beef-checkoff-transparency>.

vast majority of independent producers that fund the Checkoff, and thus NCBA's operations, because the private contractors asking for Checkoff funds are the same people who make allocation decisions. NCBA can rest assured that it will get tens of millions of dollars each year whether or not it has the support of the majority of independent producers who fund the program.

State Beef Councils have equally concerning records, and have engaged in several instances of Checkoff fund mismanagement. For example, from 2009 through 2016, the Oklahoma Beef Council fraudulently misused more than \$2.6 million of producers' money to open a clothing boutique. U.S. News, *Former Oklahoma Beef Council Accountant Charged with Fraud* (May 10, 2017, 5:12pm).⁴² A past Washington State Beef Commission manager has similarly been charged with misusing producers' assessments. One News Page, *Ex-Washington State Beef Commission Office Manager Charged with Theft for Misusing State Credit Card* (June 17, 2020).⁴³

In 2018, the Ohio Beef Council was accused of illegally using Checkoff funds to prop up the Ohio Cattlemen's Association and to engage in prohibited political activity. Org. for Competitive Markets, *Farm Tax Dollars Used Illegally*

⁴² <https://www.usnews.com/news/best-states/oklahoma/articles/2017-05-10/former-oklahoma-beef-council-accountant-charged-with-fraud>.

⁴³ <https://www.onenewspage.com/n/Business/1zlsbu52xi/Ex-Washington-State-Beef-Commission-office-manager-charged.htm>.

to Influence Ohio's Governor Race (Apr. 17, 2018) (noting that “[t]his latest incident only builds upon a list of concerns about the activities of the State and Federal Beef checkoff programs”).⁴⁴

The full scope of State Beef Council mismanagement is unclear. When the USDA Office of Inspector General reassessed the Beef Checkoff in 2014, it found that State Beef Councils also had “internal control deficienc[ies]” in that they were approving contracts with private third parties without reviewing the details of how the Checkoff money would be spent. USDA, Office of Inspector General, 01099-0001-21, Agricultural Marketing Service Oversight of the Beef Promotion and Research Board’s Activities 6, 11 (Jan. 2014).⁴⁵ However, it is clear that the private State Beef Councils are not responsible stewards of producers’ Checkoff funds, wasting and mismanaging them instead of serving producers’ interests by fairly promoting their beef products.

⁴⁴ <https://competitivemarkets.com/farm-tax-dollars-used-illegally-to-influence-ohios-governor-race/>.

⁴⁵ <https://www.r-calfusa.com/wp-content/uploads/checkoff/140131OIGCorrectedAuditReport.pdf>.

CONCLUSION

USDA’s administration of the Beef Checkoff has created an unconstitutional “shell game” by allowing Qualified State Beef Councils to pass funding to private third parties whose advertising evades even cursory USDA review. This compelled speech harms independent ranchers’ ability to compete in the corporate-controlled market, and leaves them with no democratic recourse. For these reasons, *amici* urge the Court to reverse and remand the District Court’s decision.

Respectfully Submitted,

/s/Tyler Lobdell_____

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September 08, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that his brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 6,125 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 16.40 in 14-point Times New Roman font.

September 08, 2020

/s/Tyler Lobdell
Tyler Lobdell

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system, which will send notice of such filing to all counsel who are CM/ECF registered users.

September 08, 2020

/s/Tyler Lobdell
Tyler Lobdell

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FOR THE NINTH CIRCUIT

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EXHIBIT A

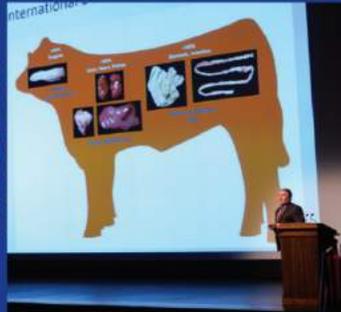
Exhibit 37

U.S. MEAT EXPORT FEDERATION

ANNUAL REPORT 2015



Putting U.S. Meat on the World's Table



From the President and CEO



2015 Filled with Challenges, but Also Opportunities for Future Growth

For those of us focused on exporting U.S. beef, pork and lamb – or as we like to say at the U.S. Meat Export Federation, “putting U.S. meat on the world’s table” – 2015 was a year of imposing challenges. The year began with a transportation crisis on the West Coast, with severe port congestion making it difficult to serve our Asian markets in a timely and reliable manner. While the labor impasse that prompted this situation was eventually resolved, we found ourselves in the unfortunate position of trying to win back customers who had turned to other suppliers.

Unusually large production by our two primary competitors – Australia on the beef side and the European Union for pork – also created a major headwind for U.S. exports, especially in the first half of 2015. Australia remained in a drought-induced herd liquidation longer than expected, resulting in record-large production and export volumes, as well as low prices. This situation was exacerbated in Japan by significant reductions in the import duties assessed on Australian beef as a result of the Japan-Australia Economic Partnership Agreement.

EU pork production surged by 4 percent in the first half of 2015, with large volumes going to key Asian markets. This added further momentum to a trend that first took hold in Asia when Russia suspended imports of EU pork in early 2014, forcing European suppliers to find alternative markets.

Exchange rates were also a key factor in our export markets this year, as the currencies of both export destinations and our largest competitors weakened substantially versus the U.S. dollar. Finally, the industry continued to be frustrated by our lack of beef access to China, which is the fastest-growing beef market in the world. Pork access to China is also limited, though our opportunities to serve this market should improve in 2016 as a result of recent plant relistings.

I don’t want to give the impression, however, that 2015 was simply a year of doom and gloom. Successful completion of the Trans-Pacific Partnership (TPP) negotiations offers a significant opportunity to improve market access for U.S. meat in Japan and Vietnam, with other key markets potentially joining TPP in the future.

Another noteworthy bright spot in 2015 has been our industry’s outstanding commitment to U.S. meat exports, which has remained steadfast even in a time of difficult economic conditions. This is tremendously gratifying, showing a deep understanding of the benefits red meat exports deliver for all of U.S. agriculture. I also had the privilege of working with an outstanding officer team and Executive Committee in 2015, who not only provided excellent leadership over the past year but also launched a strategic planning process aimed at ensuring a successful future for USMEF.

We speak often of market development at USMEF, and this is definitely a key component of our success in the international marketplace. But I strongly believe that to be effective in expanding our exports, we need a “3D” strategy:

- Develop new business at the importer/distributor level, then expand customer outreach as products gain traction and exposure.
- Displace competitors by emphasizing the quality and consistency of U.S. meat, and showing processors, retailers and foodservice providers how U.S. products can help them grow their business.
- Defend our hard-fought market share by providing superior customer service and closely monitoring demand trends and economic conditions in each and every market.

By employing these strategies with a staff of seasoned professionals and outstanding support from the U.S. industry, I firmly believe that U.S. meat exports will continue to achieve great success across the world. I thank you again for your support and commitment, and look forward to 2016 – the 40th anniversary of the founding of USMEF!

Sincerely,

A handwritten signature in black ink, appearing to read "Philip M. Seng".

Philip M. Seng
USMEF President and CEO

ABOUT USMEF

The U.S. Meat Export Federation (**USMEF**) is a nonprofit trade association working to create new opportunities and develop existing international markets for U.S. beef, pork, lamb and veal.



Headquartered in Denver, Colorado, **USMEF** has offices in Beijing, Brussels, Hong Kong, Mexico City, Monterrey, Moscow, Seoul, Shanghai, Singapore, St. Petersburg, Taipei and Tokyo. USMEF also has special market representatives covering the Caribbean, China, Central and South America and the Middle East.

99 employees and representatives in more than a dozen offices worldwide

USMEF has forged a series of partnerships which have enabled U.S. companies and U.S. products to become integral parts of international red meat markets. An extensive international presence enables USMEF to have a finger on the pulse of vital markets around the world.



277 USMEF member organizations



USMEF shares its local intelligence and more than three decades of experience with U.S. exporters, traders and buyers in addition to end users and processors in each market. As high-quality U.S. beef and pork have taken a lead position in international markets, exports play a more prominent role in industry growth and prosperity.

80 countries in which USMEF carries out market development activities

USMEF receives funding and support from USDA; the beef, pork, lamb, corn and soybean checkoff programs, as well as its members representing nine industry sectors: beef/veal producing and feeding, pork producing and feeding, lamb producing and feeding, packing and processing, purveying and trading, oilseeds producing, feedgrains producing, farm organizations and supply and service organizations.

9 sectors representing U.S. production, processing and distribution fall under USMEF global efforts



USMEF LEADERSHIP



Roel Andriessen

Chair, USMEF Board of Directors, Dakota Dunes, South Dakota

Roel Andriessen has more than 35 years of meat industry experience. Andriessen started in his family's international meat and poultry business in the Netherlands, and later continued the business in Kansas. In 1978, he moved to IBP which was subsequently acquired by Tyson. Roel is a senior vice president of Tyson, responsible for the International Sales Group of Tyson Fresh Meats.



Bruce Schmall

Chair-Elect, USMEF Board of Directors, Claremont, Minnesota

Bruce Schmall is a soybean and corn producer in southeast Minnesota who has served on the USMEF Executive Committee representing the Oilseeds Producing sector. He is a past president of the Minnesota Soybean Growers Association. He also is a member of the Dodge County Corn and Soybean Board, the Minnesota Corn Growers Association, the Farm Bureau and the Southeast Ag Alliance.



Dennis Stiffler

Vice Chair, USMEF Board of Directors, Bronx, New York

Dennis Stiffler, Ph.D., is chief executive officer of Mountain States Rosen, a fully integrated, livestock producer-owned, fabricator, processor and distributor supplying quality lamb and veal products. The company operates facilities in Greeley, Colorado, and Bronx, New York. Stiffler joined Mountain States Rosen in October 2008, bringing 30 years of livestock, meat industry and international marketing experience to the company.



Conley Nelson

Secretary/Treasurer, USMEF Board of Directors, Algona, Iowa

Conley Nelson is general manager of Smithfield Foods' hog production division in the company's five-state Midwest region. He was president of the National Pork Board in 2012-13. He is also a pork producer, operating a farm that has been in his family for more than 120 years.



Leann Saunders

Past Chair, USMEF Board of Directors, Castle Rock, Colorado

Leann Saunders served as USMEF chair during the 2015 fiscal year, completing her 12-month term in November 2015. She is president of Where Food Comes From, a leading agricultural and food verification and certification company. Saunders is chair of the Traceability Working Group. She also sits on the board of directors for the International Stockmen's Education Foundation. An alumna of Colorado State University, she graduated magna cum laude with a B.S. in Agriculture Business and a Masters in Beef Industry Leadership.



Philip M. Seng

USMEF President and CEO, Denver, Colorado

Philip M. Seng oversees USMEF operations worldwide, providing direction for USMEF strategies and priorities in international programs, research, technical services, industry relations and global communications. He also serves as the primary spokesman for USMEF and other exporting interests to government and private entities regarding international trade policy and foreign market development issues related to U.S. red meat products.

USMEF INTERNATIONAL PRESENCE

PUTTING U.S. MEAT ON THE WORLD'S TABLE

USMEF carries out market development activities in more than 80 countries in a dozen regions. These activities include marketing, trade servicing and maintaining market access for U.S. beef, pork and lamb.

MISSION STATEMENT

The mission of USMEF is “to increase the value and profitability of the U.S. beef, pork and lamb industries by enhancing demand for their products in export markets through a dynamic partnership of all stakeholders.” Simply put, USMEF is “Putting U.S. Meat on the World’s Table.”



Contact USMEF Around the Globe

Office	Phone	Email	Website
● ASEAN / Singapore	011-65-6733-4255	singapore@usmef.org	www.usmef.org
● Caribbean	830-997-6319	wunderlc@hctc.net	www.usmef.org
● China / Beijing	011-86-10-8441-8455	beijing@usmef.org	www.usmef.org
● China / Hong Kong	011-852-2890-7408	hongkong@usmef.org	www.usmef.org
● China / Shanghai	011-86-21-6249-4640	shanghai@usmef.org	www.usmef.org
● China / South China	011-86-20-3223-8668	canton@usmef.org	www.usmef.org
● Europe / Brussels	011-32-2-514-1506	eu@usmef.org	www.usmef.org
● Japan / Tokyo	011-813-3501-6328	tokyo@usmef.org	www.americanmeat.jp
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● Mexico / Monterrey	011-52-81-8989-2323	monterrey@usmef.org	www.usmef.org.mx
● Middle East / Cairo	011-20-2-22-90-70-75	a.abdelgljel@agrmarketingint.com	www.agrmarketingint.com
● Middle East / Lebanon	011-961-1-740378	amfime@cyberia.net.lb	www.usmef.org
● Russia / Moscow	011-7-495-544-9387	moscow@usmef.org	www.usmef.org
● Russia / St. Petersburg	011-7-812-309-1101	stpete@usmef.org	www.usmef.org
● South America / Lima	011-51-9877-37692	jjulca@usmef.org	www.usmef.org
● Taiwan / Taipei	011-886-2-2736-1200	taiwan@usmef.org	www.usmef.org.tw

6 U.S. RED MEAT EXPORTS 2015

After Record Breaking 2014, U.S. Exports Step Back in 2015

Export value for both U.S. beef and pork reached new heights in 2014, posting double-digit gains over the previous year's totals. Beef export value was \$7.13 billion – an increase of nearly \$1 billion over the previous record set in 2013. Export volume was just under 1.2 million metric tons (mt) – which was short of the 2011 record, but up 2 percent year-over-year. Pork export value in 2014 totaled \$6.67 billion, an increase of 10 percent year-over-year, breaking the 2012 record by 6 percent. Pork export volume increased 2 percent to 2.18 million mt. The volume record is 2.62 million mt, set in 2012.

2015 proved to be significantly more difficult for U.S. exports, due to a number of factors. Through October, pork exports were down 4 percent year-over-year in volume (1.76 million mt) and were 17 percent lower in value (\$4.65 billion). Muscle cut exports gained momentum in the second half of the year, but overall results were held back by weak demand for pork variety meat.

Mexico continued to be a bright spot for U.S. pork, with exports poised to set a new volume record for the fourth year in a row. Through October, exports to Mexico were up 5 percent in volume to 589,564 mt. Export value fell 20 percent to \$1.04 billion, reflecting lower prices for hams and other popular items. Although demand in South Korea cooled in the second half of the year, exports were still up 30 percent in volume (140,249 mt) through October and increased 16 percent in value.

Hampered by limited access to China, exports to the China/Hong Kong region were down 5 percent from a year ago in volume (271,903 mt) and 13 percent lower in value (\$567.2 million). But a number of U.S. processing facilities regained eligibility to export to China near the end of October, presenting a strong opportunity for growth in 2016. Pork demand remains sluggish in leading value market Japan, with exports through October falling 13 percent below last year's pace in volume (344,609 mt) and down 19 percent in value (\$1.34 billion).

After record-large imports in 2014, Japan's volume from all suppliers was down 7 percent through October. Its large frozen inventories have recently declined, however, which could stimulate future demand.

January-October exports accounted for 24 percent of total pork production and 21 percent for muscle cuts only, down from 27 percent and 22 percent, respectively, during the same period in 2014. Export value per head slaughtered averaged \$48.84, down 23 percent year-over-year.

South Korea and Taiwan were top performers for U.S. beef exports in 2015. Through October, exports to Korea were up 7 percent in volume to 102,919 mt and reached \$671.7 million in value, which was steady with last year's pace. In Taiwan, exports were up 3 percent in volume to 29,490 mt and value remained on a record pace at \$265.3 million, up 9 percent.

Chilled beef excelled in both markets, with U.S. chilled exports to Korea up more than 40 percent. U.S. share of the chilled beef market in Taiwan reached 63 percent – the highest of any Asian destination.

As with pork, U.S. beef exports to Japan struggled in 2015. Though Japan remains the largest value destination for U.S. beef, January-October exports were down 15 percent to 176,236 mt, with export value falling 18 percent to \$1.1 billion. Japan's total beef imports from all suppliers are down about 6 percent, but it is noteworthy that both Australia and Mexico have made gains in 2015. Both countries enjoy lower tariffs in Japan through their respective economic partnership agreements, an advantage reflected in the year-to-date results. U.S. beef exports to Hong Kong were also well below year-ago levels through October, falling 25 percent in volume (92,389 mt) and 29 percent in value (\$641.1 million).

January-October beef exports accounted for 13 percent of total production and 10 percent for muscle cuts only – each down one percentage point from the same period last year. Export value per head of fed slaughter averaged \$278.06, down 5 percent.

Lamb exports through October were down 15 percent in volume to 7,585 mt and fell 33 percent in value to \$15.8 million. Growth markets in 2015 include Saudi Arabia, Hong Kong, Costa Rica and Honduras, but these gains were offset by lower exports to Mexico and Canada.

A 10-YEAR LOOK AT U.S. RED MEAT EXPORTS

1,196,752

METRIC TONS

Volume of U.S. beef exports in 2014

2,178,472

METRIC TONS

Volume of U.S. pork exports in 2014

10,407

METRIC TONS

Volume of U.S. lamb exports in 2014

472,668

METRIC TONS

Volume of U.S. beef exports in 2005

1,157,689

METRIC TONS

Volume of U.S. pork exports in 2005

8,956

METRIC TONS

Volume of U.S. lamb exports in 2005

MEAT TRADE: A GLOBAL OVERVIEW

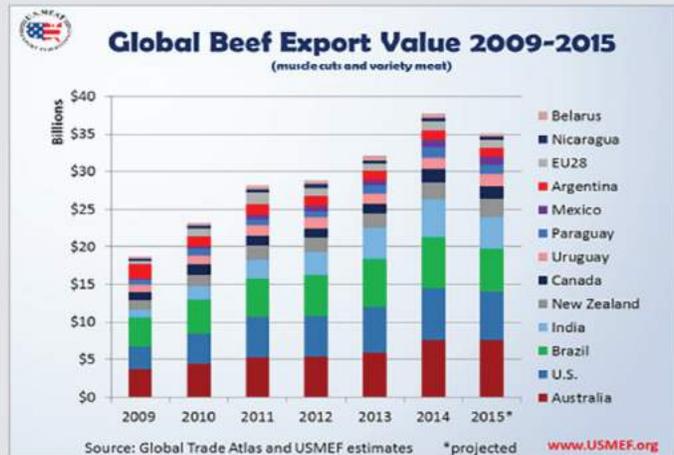
Global Beef Export Value Drops for First Time Since 2009

For the world's top 11 beef/beef variety meat exporters, combined 2015 export volume (through September) was 5 percent below the 2014 pace at 5.57 million metric tons (mt). While Australia's exports slowed in the second half of the year, volume was still up 4 percent to 1.12 million mt.

New Zealand (396,748 mt, +9 percent) was the other major supplier to post a significant year-over-year gain, while exports were slightly higher for Canada, Uruguay and Argentina. These increases were more than offset by smaller volumes from Brazil (940,587 mt, -14 percent), India (918,231 mt, -14 percent) and the United States (832,857 mt, -12 percent).

Exports were also lower for the European Union and Paraguay. A common thread among exporters posting smaller volumes in 2015 is lack of direct access to China (Brazil regained access mid-year) while overall volumes increased for those with access to China.

Among major import markets, the Greater China region actually took less product in 2015 as smaller imports for Hong Kong offset gains in China. Imports were also lower for Japan, Russia, the European Union, Mexico and Chile, while volumes increased for the United States, Egypt, South Korea and Canada.



From 2009 through 2014, the annual value of global beef exports more than doubled to \$38 billion. This remarkable run will end in 2015, as export value is projected to decline 7 percent to about \$35 billion. On a per-unit basis, however, values held up fairly well compared to other proteins – indicating relatively solid demand and tight supplies.

Global Pork Export Volume Edges Higher, but at Lower Prices

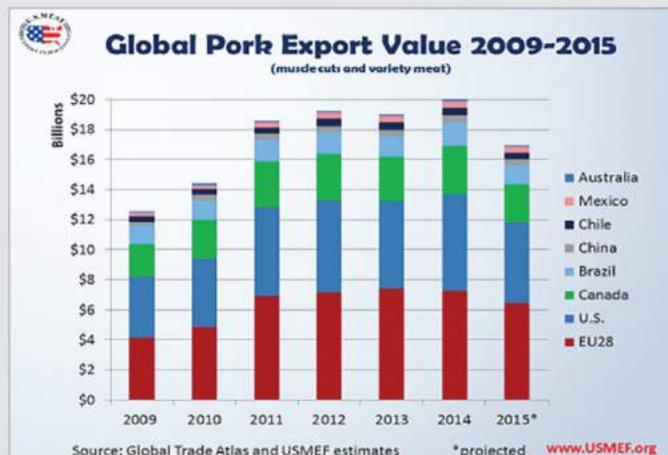
Pork/pork variety meat exports from the world's top eight suppliers were running 2 percent ahead of last year's pace through September at 5.14 million metric tons (mt), with growth from the European Union (2.14 million mt, +8 percent), Brazil (379,662 mt, +6 percent), and Chile (130,608 mt, +12 percent) partially offset by decreases from the United States (1.58 million mt, -4 percent) and Canada (758,735 mt, -4 percent).

With domestic production in many major markets rebounding from porcine epidemic diarrhea virus (PEDV) in 2015, softer demand for imported pork meant lower prices for exporters.

Per-unit export value for chilled/frozen pork declined significantly for all major suppliers, including (in U.S. dollars) the EU (-20 percent), U.S. (-18 percent), Canada (-23 percent), Brazil (-24 percent), Chile (-18 percent) and Mexico (-14 percent).

China was a major exception to the trend toward larger production, but its higher prices and correspondingly larger imports (mainly from the EU) were not enough to boost global prices.

For the world's main exporters, global export value for pork/pork variety meat is projected to finish the year near



\$17 billion, down 15 percent from a year ago. Export volume will be roughly 6.9 million mt, up 3 percent from 2014 and the largest since the record total posted in 2012.

On the import side, volumes trended higher in 2015 for China/Hong Kong, Mexico, South Korea, the United States, Canada, Australia and Taiwan, but lower for Japan, Russia and the Philippines.

8 | REVIEW OF INTERNATIONAL MARKETS 2015

The U.S. red meat industry has achieved outstanding export growth in recent years, enhancing profitability for all members of the supply chain. In 2014, both beef exports (\$7.13 billion) and pork exports (\$6.67 billion) shattered previous records for export value, but exports trended lower in 2015. Following is a glance at recent trends and developments in each USMEF region.

AFRICA

USMEF organized a first-of-its-kind buyers seminar and showcase in Sub-Saharan Africa, which drew a strong turnout of exporters and buyers to Accra, Ghana. This event was part of an ongoing effort to increase U.S. exports to this rapidly developing region. USMEF continues to monitor ongoing market access discussions between U.S. trade officials and the government of South Africa, which is currently closed to U.S. beef and pork. As USMEF explores opportunities for U.S. beef and pork in western and central Africa, regaining access to South Africa would help advance this effort.

ASEAN

In early 2015, Singapore's Agri-Veterinary Authority (AVA) announced that it had agreed to extend the range of eligible U.S. beef products to include boneless and bone-in beef from cattle of all ages. Previously, Singapore had only allowed boneless cuts from cattle less than 30 months of age. Singapore and Vietnam were strong growth markets for U.S. beef in 2015, while pork exports also increased to Vietnam. The Philippines is the largest destination for U.S. beef and pork in the Association of Southeast Asian Nations (ASEAN), but exports to the Philippines trended lower this year.

CARIBBEAN

Export verification (EV) requirements no longer apply in St. Lucia, making all federally inspected establishments eligible to export boneless and bone-in beef to this popular Caribbean vacation spot. With this positive development in mind, several importers – including four key importers who helped get the beef restrictions lifted – were invited to a USMEF-organized showcase featuring bone-in products. The Dominican Republic was a star performer for both beef and pork in 2015, with exports posting double-digit growth.

CHINA/HONG KONG

The U.S. beef industry continues to be frustrated by lack of access to China – the world's fastest-growing beef import market. Australia, Uruguay, New Zealand and Argentina already have strong footholds in China, with Brazilian and Canadian beef also gaining traction. Market access for pork has also been limited due to China's ractopamine policy and other restrictions, but several U.S. plants and cold storage facilities regained eligibility to export to China shortly after the 2015 fiscal year ended.

CENTRAL/SOUTH AMERICA

The fifth edition of the USMEF Latin American Product Showcase in San Jose, Costa Rica, was the largest and most productive to date, as USMEF member companies exhibited red meat products to nearly 100 buyers from 16 countries. U.S. exports to this region benefit from preferential duties through CAFTA-DR, as well as free trade agreements with Chile, Peru, Colombia and Panama. Colombia is the region's largest destination for U.S. pork, though exports to Colombia trended lower in 2015. The main beef markets are Chile, Peru and Guatemala.

EUROPE

Imports of U.S. beef under the European Union's duty-free, high-quality beef quota were challenged this year by a weak euro and increasing pressure on the quota's capacity due to larger imports of Australian and Uruguayan beef. The EU is also a very challenging environment for U.S. pork, given the supply and exchange rate situation. Negotiations continue between the EU and U.S. on the Transatlantic Trade and Investment Partnership (TTIP), but progress must accelerate if the agreement is to be completed by the end of 2016.

JAPAN

Japan continues to be the top value market for U.S. pork and beef, with pork exports reaching \$1.93 billion in 2014 and beef exports of nearly \$1.6 billion. But Japan was a more challenging market in 2015, due to a weaker yen and softening demand. Australia's exports were bolstered by the implementation of the Japan-Australia Economic Partnership Agreement, which lowered import duties on frozen Australian beef to 28 percent and to 31 percent for chilled, while U.S. beef is still subject to a 38.5 percent duty. The United States is seeking to eliminate this tariff gap and improve access for U.S. pork in Japan through the Trans-Pacific Partnership (TPP).

MEXICO

As the No. 1 volume market for both U.S. beef and pork, maintaining a positive trading relationship with Mexico is particularly important to the U.S. meat industry. Despite a very weak peso, pork exports to Mexico are poised to set a new volume record for the fourth consecutive year in 2015 despite growing competition from Canadian pork. Beef exports to Mexico trended lower in 2015, but it remains a critical destination for underutilized muscle cuts and beef variety meat. The U.S. is Mexico's dominant beef supplier, but maintaining beef consumption is a challenge given the price and exchange rate situation.

MIDDLE EAST

Efforts to restore access for U.S. beef in Saudi Arabia – once a \$30 million per year market – continued in 2015, but its BSE-related import ban has been in place for more than three years. Other markets in the region continue to show promise, especially the United Arab Emirates (UAE) and Kuwait, while Egypt remains a reliable market for livers and other variety meat. Opportunities for U.S. pork in the region are very limited, but the first-ever USMEF pork workshops held in the UAE were well-received by importers and hospitality industry representatives.

RUSSIA

Just three years ago, Russia was a brand new WTO member and a nearly \$600 million market for U.S. red meat. But U.S. beef was locked out of the market due to ractopamine restrictions in early 2013, and access for U.S. pork was also very limited. U.S. products now face additional obstacles due to an import embargo imposed by Russia in August 2014, as well as a weak ruble and declining consumer purchasing power. USMEF's promotional efforts in the region are currently focused on opportunities in adjacent countries such as Georgia, Ukraine, Uzbekistan and Azerbaijan.

SOUTH KOREA

Korea was a strong performer for U.S. beef and pork in 2015, with chilled beef gaining traction in the retail and foodservice sectors and U.S. pork expanding beyond the processing sector to find increasing success at retail. Korea's economy took a major hit in the early summer due to an outbreak of Middle East respiratory syndrome (MERS), which greatly impacted restaurant traffic, tourism and other consumer activities. But the market rebounded quickly and showed no lasting effects from the MERS outbreak.

TAIWAN

U.S. exports to Taiwan performed exceptionally well in 2015, with U.S. beef capturing 63 percent of the chilled market – its highest market share in any Asian destination. Beef exports to Taiwan will likely set a new value record in 2015, with shipments through October exceeding \$265 million. Pork exports to Taiwan are regaining momentum after hitting a seven-year low in 2014. Negative publicity related to ractopamine use has caused Taiwan's meat processors to take a conservative approach to U.S. pork, but USMEF conducted workshops aimed at easing processors' concerns and highlighting U.S. pork's advantages as raw material for further processing.

USMEF AT WORK 2015

JAPAN

Southwest Barbecue Team Delivers Flavor to Japanese Foodservice Industry, Consumers

USMEF led a team of U.S. producers and a Texan pitmaster to Tokyo to present a barbecue seminar, meet Japanese food importers and participate in events designed to personally connect Japanese consumers to American farmers and ranchers. The barbecue seminar was held at the Tokyo Prince Hotel Garden Island restaurant, where approximately 100 hotel chefs, restaurant owners, buyers and distributors – along with U.S. packers and Japanese trade representatives – gathered to not only learn about barbecue, but also gain insight into the U.S. beef industry.



EUROPE

Importers, Chefs, Journalists Get Taste of U.S. Beef at Amsterdam Event



Dutch chefs, restaurateurs, food bloggers and journalists joined meat importers from across Europe at a U.S. beef workshop and tasting organized by USMEF in Amsterdam. The goal was to educate foodservice professionals about the quality and versatility of U.S. beef and provide the region's media with information about the product. John Brook, USMEF regional director for the European Union, presented an overview of the U.S. beef industry and highlighted the advantages of including U.S. beef on restaurant menus. Brook said that a large number of attendees were meat importers in the region. USMEF also invited customers of the top importers.

SOUTH KOREA

U.S. Beef Featured in Korean Lunch Box Promotion

USMEF launched a new promotion in South Korea to demonstrate the versatility of U.S. beef and encourage consumers – especially young professionals – to incorporate beef into their daily diets. U.S. meat lunch box events take advantage of Korea's growing interest in social media to attract consumers and maintain a connection with them. Participants in USMEF lunch box events use Facebook to enter contests that award U.S. beef lunch boxes to the winner and up to 20 colleagues. Lunch boxes with U.S. beef chuck flap tail steak and U.S. chuck eye roll, salad and other dishes were delivered to workplaces.



TAIWAN

USMEF Introduces New U.S. Beef Cuts as Part of 'Beef Bowl Month' in Taiwan

More than 160 Taiwanese restaurants participated in USMEF's beef bowl promotion. The event capped a campaign in which foodservice companies were invited to promote a "beef bowl culture" and learn more about using U.S. beef rib cap plate and plate fingers in the dish. As a tie-in to the beef bowl promotion, USMEF teamed with the Taiwan Junior Chef Association (TJCA) to hold seminars to formally introduce rib cap plate and plate fingers to the Taiwan market. The 2015 New U.S. Beef Cut Seminar series, attended by 179 importers and foodservices operators, featured cooking demonstrations and product tastings. USMEF specifically targeted office workers who seek fast and convenient meals.



BEEF ACTIVITY HIGHLIGHTS

Funded through support from the Beef Checkoff Program, the USDA Market Access Program (MAP) and checkoff support from the corn and soybean industries.

WEST AFRICA

Inaugural Event in Sub-Saharan Africa Reveals Great Interest in U.S. Beef

A high level of interest in U.S. beef was evident during the inaugural USMEF Meat Buyers Showcase and Seminar in Sub-Saharan Africa. The event, which was held in Accra, Ghana, featured educational sessions and face-to-face business meetings, attracted several U.S. export companies and more than two dozen buyers from Ghana, Benin, Nigeria and other developing countries in the region. Monty Brown, USMEF representative for the African Region, said that participating U.S. exporters appreciated the opportunity to discuss current and future business opportunities with buyers during the product showcase. Meanwhile, USMEF's effort to educate those buyers about the advantages of U.S. beef and pork and the procedures for importing these products was a major focus of the seminar.



ASEAN

U.S. Beef Promoted to Fast-Growing Hospitality Market at Food & Hotel Vietnam



USMEF promoted U.S. beef to one of the fastest growing hospitality sectors in Asia during Food & Hotel Vietnam 2015. The record-setting show in Ho Chi Minh City featured 470 exhibitors from 36 countries and nearly 11,000 attendees. During the three-day event, USMEF staff distributed U.S. beef cut charts and informational brochures and answered questions from several existing and potential trade contacts. Staff coordinated meetings between USMEF members and local importers and organized the "Hot Cooking-U.S. Beef" category of the Vietnam Culinary Challenge. Sabrina Yin, USMEF-ASEAN director, noted, "Vietnam is one of the fastest growing economies in Asia. Many local restaurant chains continue to expand and more western food concepts are being introduced."

MIDDLE EAST

First U.S. Beef Culinary Initiative Conducted for Chefs in Jordan

Recognizing opportunities in the Jordanian hotel, restaurant and institutional (HRI) sector, USMEF organized the first "U.S. Beef Culinary Initiative for Chefs" at the Four Seasons Hotel in Amman. More than 65 executive chefs, general managers, food directors and purchasing managers participated, along with a number of food bloggers and media representatives. In a classroom-style setting, participants learned more about U.S. beef production practices and acquired hands-on experience and practical exposure to various grades and types of U.S. beef – with a special focus on alternative cuts.



RUSSIA AND SURROUNDING REGION

U.S. Beef Workshop in Georgia Demonstrates Product Quality



To provide chefs and foodservice professionals with information regarding the quality of U.S. beef and tips on handling, cutting and cooking the product, USMEF held a U.S. beef workshop in Batumi, Georgia, a well-known resort city on the Black Sea Coast. Among the goals of the workshop was to provide the chefs with essential background information about the U.S. beef industry – cattle breeds, genetics, major segments in the production chain from farm to plate, food safety, grading and aging. Workshop participants also were shown examples of high-quality chilled beef cuts, including lip-on ribeye, cube roll, tenderloin and striploin.

USMEF AT WORK 2015

WORLDWIDE

USMEF Global Processing Seminar Attracts Companies from Several Regions



Food companies from Mexico, Central America, South America, the Caribbean, South Korea and Southeast Asia gathered at the University of Wisconsin to participate in the inaugural USMEF Global Further Processing Seminar – an event focused on promoting and enhancing utilization of U.S. raw materials. The seminar’s objective was to provide further processing companies with ideas and knowledge on how to improve the quality of their products, while also helping them gain a better understanding of U.S. beef and pork raw materials. In all, 26 companies were represented at the event, which was held over two days at the UW Meat Laboratory in Madison, Wisconsin.

MEXICO

Student Chef Training in Mexico Promotes Quality, Versatility of U.S. Pork

USMEF continued its effort to promote U.S. pork with chefs and other foodservice professionals by holding a series of student trainings across 26 campuses of the Universidad del Valle de Mexico (UVM). The training program, first developed in 2014 as a pilot program, is designed to educate future chefs, food service managers and menu planners about the quality, value and versatility of U.S. red meat. In the most recent training session, students were given an overview of the industry, lessons on handling meat, guidance on muscle cuts and a number of educational sessions on preparing and presenting pork dishes.



JAPAN

U.S. Meat Trade Seminar, Blogger Event Promote U.S. Pork in Japan



A delegation of agricultural leaders from Midwestern states wrapped up a USMEF-led trade mission to Japan by participating in a U.S. meat trade seminar and a food blogger event that educated Japanese consumers and foodservice professionals about the quality and availability of U.S. pork. The trade seminar featured updates and overviews of U.S. pork, along with beef, corn and soybean markets. More than 70 Japanese food bloggers interviewed members of the U.S. team during a subsequent blogging event. For U.S. producers, it was a great opportunity to tell their stories.

CHINA

Swine Industry Symposium Brings U.S. and China Pork Interests Together

Stakeholders from the world’s two largest pork-producing nations came together in September for the fourth U.S.-China Swine Industry Symposium, a collaborative event co-sponsored by USMEF and agricultural organizations from both countries. Held in Beijing, this year’s symposium focused on changes and challenges faced by pork producers, processors and other members of the supply chain. For the U.S. delegation, the symposium was part of an extensive trade mission organized by USMEF to build relationships between producers, importers and processing companies in order to improve trade.



PORK ACTIVITY HIGHLIGHTS

Funded through support from the Pork Checkoff, the USDA Market Access Program (MAP) and checkoff support from the corn and soybean industries.

SOUTH KOREA

U.S. Meat Culinary Camp Educates Korean Chefs on American Barbecue

To capitalize on growing interest in Asian countries, USMEF-Korea organized its 2015 U.S. Meat Culinary Camp with a focus on American barbecue. Seminars were held in the Texas cities of San Antonio and Austin and included chefs, foodservice professionals and food processing companies from South Korea. “Recently, American barbecue is gaining popularity in Korea and American barbecue restaurants are appearing in trendy areas as more and more people are enjoying the dish,” said Jihae Yang, USMEF director in Korea. “The Korean chefs enjoyed U.S. meat in a variety of ways, and they were very impressed with the quality and product line of U.S. pork.”



ASEAN

Seminars in Philippines Showcase Quality Attributes, Processing Capabilities of U.S. Pork



USMEF held a series of seminars in Manila, the Philippines, to promote the quality and safety of U.S. pork, and to educate importers about underutilized cuts. Also highlighted were the attributes of U.S. pork as raw materials for further processing. Hog producers from across the Philippines attended the workshop, which also featured representatives from meat-producing companies and the Philippines’ National Meat Inspection Service (NMIS). USMEF explained the U.S. food safety system and hog production, but the seminar also included a presentation on methods to improve cold chain management.

LATIN AMERICA

Largest-ever USMEF Latin American Product Showcase Promoted U.S. Pork in Costa Rica



The fifth edition of the USMEF Latin American Product Showcase, held in Costa Rica, was the largest and most productive to date, as 44 USMEF member companies exhibited red meat products for more than 90 buyers from 16 countries in the region. Nebraska pork producer Brian Zimmerman, who chairs the National Pork Board’s International Trade Committee, said the 2015 event offers the U.S. pork industry an excellent venue for pursuing export growth opportunities in Central and South America, as well as the Caribbean.

U.S. Pork Highlighted for Honduran Meat Processors and Their Customers

USMEF promoted U.S. pork to foodservice distributors, restaurants, hotels and retailers at the Honduras Meat Processors Association (AHPROEM) trade show in San Pedro Sula, Honduras. Gerardo Rodriguez, USMEF director for trade development in the region, said that AHPROEM represents nearly all pork processors in Honduras, a country of 8.7 million people. “USMEF is continuing its effort to develop new business opportunities for further processed products in Honduras, and having discussions at this trade show provided valuable progress toward that goal,” said Rodriguez.

Port Training in Colombia Provides Guidance for Importing U.S. Pork

In an effort to clarify import inspection procedures at key ports in Colombia, USMEF teamed with the USA Poultry and Egg Export Council (USAPEEC) and the USDA Foreign Agricultural Service (FAS) to hold a series of workshops on food safety and customs inspections of U.S. meat products. The workshop offered sessions on a number of topics, including getting product from the plant to the port, U.S. beef quality and yield grading programs and frozen product attributes. The team also answered questions from inspectors.



USMEF GOALS

Strategic Priorities

Total Carcass Utilization

Maximize returns at each link in the marketing chain by building export demand for value-added products and the complete range of red-meat items, especially those that are underutilized in the U.S. market.

Market Access

Secure meaningful, sustained access to new and existing export markets using all available means.

Trade Support

Gather and disseminate market intelligence and facilitate contact between U.S. exporters and targeted buyers in export markets.

Buyer Education and Loyalty

Educate targeted buyers in export markets on the attributes of U.S. red meat and red-meat products and build buyer loyalty to products exported from the United States.

Market Presence

Increase the presence of U.S. red meat and red-meat products in the HRI and retail sectors in targeted export markets.

Product Image

Establish positive images for U.S. beef, pork and lamb with consumers in targeted export markets.

Seeking Broader Market Access for U.S. Lamb

Due to scrapie-related restrictions imposed after the first U.S. BSE case in December 2003, U.S. lamb still lacks access to several key Asian markets. Because of these restrictions, U.S. exports are currently limited to Western Hemisphere markets, the Middle East and Hong Kong.

USMEF continues to work with U.S. trade and agricultural officials to resolve lamb market access issues, especially in the high-value target markets of Taiwan and Japan. While neither market opened to U.S. lamb in 2015, progress was made in both countries' regulatory proceedings.

"We're very excited about the prospect of getting U.S. lamb into Taiwan," said Dennis Stiffler, Ph.D., USMEF vice chair and CEO of Mountain States Rosen. "With its diversity of culture and the types of high-



quality products consumers desire in Taiwan, there's a real opportunity for lamb."

Stiffler noted that Japan was a strong market for U.S. lamb prior to its closure, and the industry is anxious to win back Japanese customers.

"Getting back into Japan is extremely important to the lamb industry's export initiative," he said. "There's a great consumer base in Japan that enjoys grain-fed red meat, and this presents a great opportunity for U.S. lamb."

USMEF MEMBER SERVICES

USMEF membership brings with it access to the talents, research, contacts and expertise of an organization that has provided guidance and help to U.S. meat exporters since 1976. USMEF's worldwide staff help members break into or expand sales in markets and navigate complex import laws and regulations by offering advice and assistance.

Technical Services

Whether U.S. exporters are looking to break into a new international destination or expand their businesses in established markets, USMEF provides tools to assist them. Trade barriers are often technical or regulatory in nature, and removing these obstacles is the specialty of the USMEF Technical Services Department, where staff members help exporters navigate the import requirements of individual countries and keep them apprised on any changes in U.S. export requirements. Daily bulletins inform exporters of new regulatory changes, as well as any breaking news regarding transportation difficulties, customs clearance concerns and other potential roadblocks. Guidance documents on complex issues requiring exporters' ongoing attention are developed and posted online. The Technical Services department also carefully monitors regulatory proceedings that impact U.S. exports and, when necessary, files comments in these proceedings. In conjunction with USMEF's international staff, the Technical Services Department also conducts educational seminars for buyers and importers, highlighting the positive attributes of U.S. red meat.



Economic Analysis

USMEF provides its members with valuable information regarding global meat production, consumption and trade, including critical market intelligence gathered by its international staff members. Exporters and member organizations often turn to USMEF for key insights on global economic trends and other important factors that impact international marketing decisions.

Producer Education

Producer leaders from USMEF member organizations have opportunities throughout the year to gain firsthand knowledge about international marketing efforts for U.S. red meat and to learn more about how their checkoff investments are utilized. The USMEF Market Expo, held every spring, is just one example. In March 2015, producers traveled to China and Japan to meet with importers, distributors, retailers and U.S. Embassy staff, gathering valuable information about these key markets. The USMEF delegation also spent a full day at Foodex – one of the world's largest food exhibitions held annually in Tokyo.



USMEF FINANCIALS 2015

Revenue
\$40.3
million

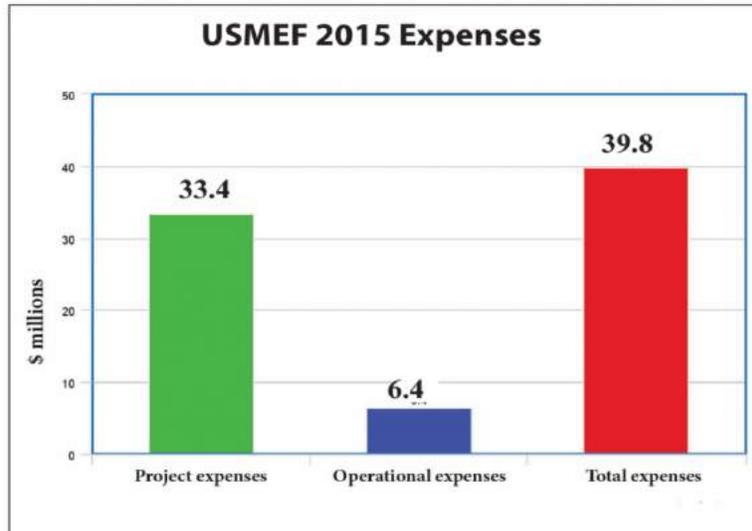
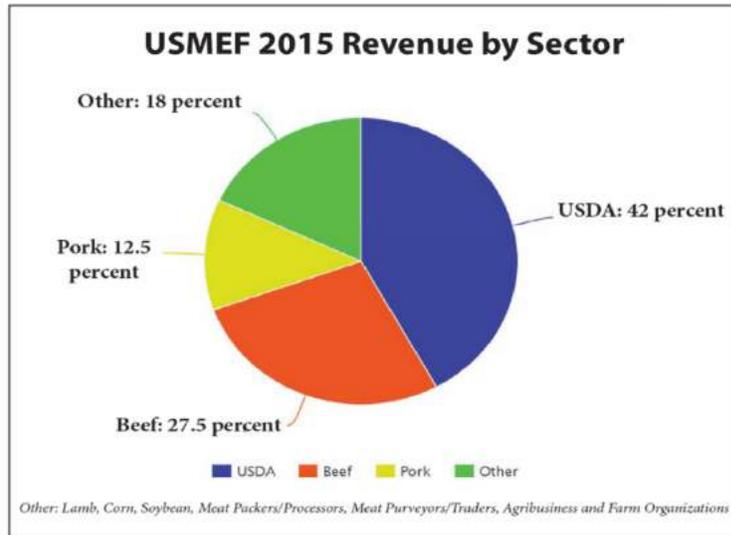
Includes project revenue (\$33.4 million), implementation revenue (\$4.6 million) and USMEF membership dues (\$1.4 million)

Expenses
\$39.8
million

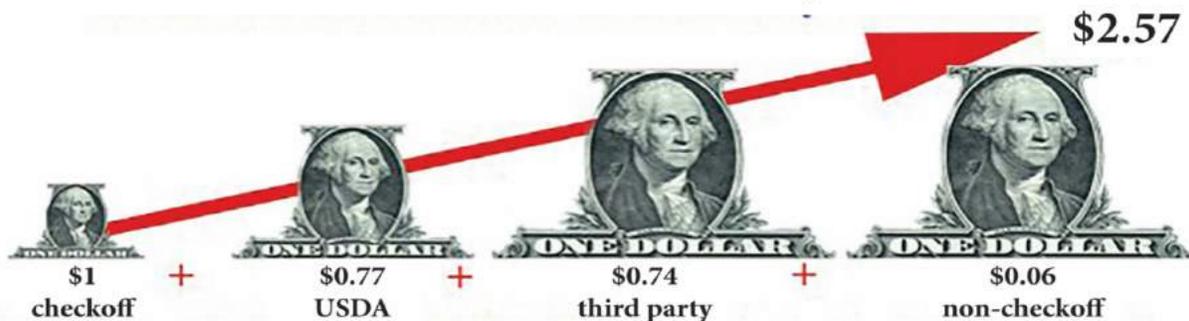
Includes project expenses (\$33.4 million) and operations expenses (\$6.4 million)

Checkoff Funding
\$21.8
million

Total includes beef, pork, soybean, corn and state association funding



USMEF adds \$1.57 to the value of every checkoff dollar



The checkoff dollar grows with USDA, non-checkoff and third party funding.



U.S. Meat Export Federation

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