Agricultural Marketing Service
U.S. DEPARTMENT OF AGRICULTURE

Interim Report: Competition and Fair Practices in Meat Merchandising

FAIR TRADE PRACTICES PROGRAM

October 2024

This report was compiled in conjunction with various people, organizations, etc. USDA works continuously to achieve its mission by setting goals and utilizing evidence, measurement, and learning to improve results of programs and the effectiveness and efficiency of agency operations in service to the American public.

The USDA Strategic Plan articulates the long-term goals and objectives USDA hopes to accomplish and what actions the agency will take to realize those goals. The plan provides the context for decisions about performance goals, priorities, and budget planning, and the framework for the detail provided in agency annual plans and reports.

The Annual Performance Plan and Report details USDA's progress and plans for progress toward achieving the strategic goals and objectives described in the USDA strategic plan, including plans on agency priority goals. As required by the *Evidence-Based Policy-making Act of 2018* (Public Law 115-435), USDA is committed to developing evidence-based policy and evaluation plans. The Agency Financial Report (AFR) is a report on the agency end-of-fiscal-year financial position that includes, but is not limited to, financial statements, notes to the financial statements, and a report of the independent auditors. The AFR also includes a performance summary.

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Introduction and Executive Summary

In July 2021, Executive Order (EO) No. 14036 on ‘‘Promoting Competition in the American Economy” (the Competition EO) directed the U.S. Department of Agriculture (USDA) to prepare a report “on the effect of retail concentration and retailers’ practices on the conditions of competition in the food industries.” The report’s purpose was “to improve farmers’ and smaller food processors’ access to retail markets…,” and its mandate included evaluating “practices that may violate the Federal Trade Commission Act (15 U.S.C. 41 et seq.) (FTC Act), the Robinson-Patman Act (RPA) (Public Law 74-692, 49 Stat. 1526, 15 U.S.C. 13 et seq.), or other relevant laws, and on grants, loans, and other support that may enhance access to retail markets by local and regional food enterprises.” Thus, the Competition EO directed the U.S. Government to reset its priorities in favor of competition and fair market practices.

This interim report summarizes findings from USDA research and investigations authorized by the Packers and Stockyards Act (P&S Act). It describes how retailers, distributors, and packers appear to be engaging in conduct that may violate the Act, such as through the use of unfair business practices and undue preference in pricing structures, fees, marketing decisions, and overall relationships that enhance dominance at the expense of competition on the merits. Conduct of concern also includes practices such as excessive marketing fees, accrual fees arrangements, and potentially anticompetitive preferential arrangements and price discrimination by certain food distributors, meat packers, and retailers. The aforementioned conduct may restrict competition, foreclose market access, and present unavoidable harms to market participants in the meat markets and ultimately harm American consumers. USDA’s goal in delving into concerning practices in the beef distribution and retail market is to understand what further efforts the Government should take to address potential concerns about competition in the food industry, including the application of available statutory authorities to regulate meat merchandising.

Food retail is a large, complex system. To accomplish the goals of this report as set out by the Competition EO, USDA focuses on linkages between food manufacturers (meatpackers), food distributors, and food retailers, with an emphasis on beef marketing among the other animal species in the meat supply chain. The meat supply chain has the longest history of comprehensive regulatory oversight under the P&S Act of 1921, as amended, (7 U.S.C. 181 et seq.) of any segment of the food industry, making it ripe for a focused investigation of marketing practices. Furthermore, the meat industry is economically significant: beef alone represents the single highest value element of U.S. food production—by largest share of total cash receipts—accounting for 17 percent of U.S. agricultural commodity revenue in 2023.[1] Meat and poultry plants also employed the largest share (about one third) of food and beverage workers.[2] Because of its economic, social, and dietary prominence, meatpacking has received considerable regulatory attention from a range of government agencies, including the USDA and the U.S. Department of Justice (DOJ).

Over the last 40 years, concentration in retail and distribution markets and among meatpackers has dramatically increased, and the number of livestock producers has declined. Producers, smaller processors, and independent retailers have increasingly complained that they are being shut out of markets across the meat supply chain. Following a multi-year effort to better understand these markets and the potential problems existing within them, this report concludes that current practices existing within the meat merchandising industry warrant a renewed focus on enforcement of existing laws.

Specifically, a few large packers, distributors, and retailers account for an increasingly large share of meat sales throughout the supply chain and, as a result, determine the terms of competition in retail meat markets.[3] According to USDA interviewees, these intermediaries may require the businesses and consumers dependent on them to pay a range of fees and other costs that may cut meaningfully into operating budgets, be too high for new businesses to enter, or are otherwise required in a manner that favors incumbency. Additionally, according to interviewees, these large intermediaries may offer better pricing and terms to certain intermediaries than others.

History indicates that these costs and competitive barriers are not preordained. From 1921 to the early 1980s, the Government more vigorously regulated the merchandising of meat from packing through to retail meat merchandising. The period was characterized, in general, for robust competition and market access for smaller producers, meat processors, and retailers alike. P&S Act regulation and enforcement reflected its connections to section 5 of the FTC Act as well as the Robinson-Patman Act (RPA), depending on the facts and circumstances.[4] The P&S Act regulated meat merchandising (i.e., distribution and sales) markets from packers processing meat to the distributor, retailer, and retail consumer to protect against unfair, deceptive, and unduly preferential practices, among other authorities. In practical terms this meant that USDA brought cases against price discrimination, false advertising, and other impermissible practices during this time.[5] As discussed in the paragraphs below, successful enforcement encouraged market participants to compete on price, innovation, and internal expansion; and to exercise caution when considering their deployment of potentially illegal conduct.

Beginning in the 1980s, however, policies prioritized efficiency and leveraging scale in the short term, even if in the longer run the change to a more consolidated market structure led to inefficiencies. DOJ and the FTC prioritized other areas of enforcement than meat, and abandoned enforcement of the Robinson-Patman Act almost entirely,[6] and USDA also reduced its P&S Act enforcement in meat merchandising. Thus, meat markets became more concentrated due to a series of mergers and potentially anticompetitive conduct rose during this period of time.

The prevailing view was largely that bigger firms would invariably lead to more efficiencies, which in turn would lower consumer prices. The values of resiliency, consumer-driven economics, rural economic and social vitality, and long-term sustainability of competition were a lower priority. Since 1974, the number of U.S. cattle, hog, and broiler farms declined by approximately 1.2 million or 59 percent.[7] As smaller producers, food processing, and retail businesses exited, the remaining food supply chain was more concentrated and vulnerable to shocks such as the COVID-19 pandemic. The concentrated supply chain was also less competitively nimble in quickly bringing down ensuing grocery price inflation once those initial supply constraints eased.[8]

For example, when the largest meat-processing plants shut or slowed down due to worker outbreaks of COVID-19, livestock prices collapsed while poultry and hog growers faced major economic costs from depopulation or reduced flock placements. Meat prices then quickly became the largest contributor to cost growth in food over the years 2020–2021, with the farm-to-wholesale spread[9] jumping from approximately 25 percent between 2010 and 2020 to well over 500 percent during the height of the pandemic.[10] Prior to COVID-19, multiple studies find above-competitive pricing in concentrated markets across food industries, including poultry processing, and in meat packing plants, sausages and other prepared meats, and poultry slaughtering and processing.[11]

The conclusions in this report are interim. Because USDA has largely not enforced competition regulations in meat merchandising for several decades, part of the purpose of this investigative study has been to gain familiarity with current practices. And while some parts of industry, including some large packers,

distributors, and retailers cooperated, several have resisted to date. Further investigation and analysis are needed. Accordingly, based on the information received to date, USDA intends to: (1) take immediate steps to further investigate concerns about fair competition in the food industries, including enforcing subpoenas where necessary; and (2) deepen our examination and public engagement regarding how to more vigorously and effectively regulate under the P&S Act so that market participants are protected from actions that violate the P&S Act and the antitrust laws.

Specifically, actions USDA expects to take include:

- Adjusting market surveillance and investigative actions as appropriate in response to changing practices in meat merchandising;
- Examining how to more vigorously enforce the P&S Act in the meat merchandising arena, including potential updates to P&S Act regulations and enforcement policies;
- Using USDA's subpoena authority under the P&S Act to gather more information from regulated entities to assess the extent of the problematic conduct uncovered in this report;
- Issuing an Advanced Notice of Proposed Rulemaking to invite further comment on appropriate regulatory limitations, and
- Responding to tips and complaints that may be filed with PSD and DOJ via email at PSDComplaints@usda.gov and ATR-USDA-PSAComplaints@usdoj.gov, or via calling toll free 1-833-DIAL-PSD (1-833-342-5773), including complaints related to meat merchandising activity that may violate the Act's provisions designed to promote fair and competitive markets.
- USDA will also enhance **cooperation between the USDA Food Safety Inspection Service and AMS's Packers and Stockyards Division** to enhance market monitoring, rulemaking, and enforcement. These efforts will complement FSIS's ongoing Animal Raising Claims Review and updates to relevant guidance.

While these are first steps, they represent USDA's intent to more vigorously address practices in the food markets that may harm fair, open, and competitive markets, undermine fair prices for producers and consumers, and otherwise burden economic opportunity for small businesses and rural economies.

Regulatory History

History tells us that dominant players in concentrated markets limit choices, for consumers and producers alike. Time and again, Government enforcers have needed to open those markets to restore fairness, a level playing field, and, ultimately, competitive economic opportunity.

In the early 1920s, after decades of Federal inquiry into abuses by the "Big Five" packing companies, multiple branches of Government acted aggressively to stamp out a continuing series of problems across the meat sector.[12] The FTC in a 1919 report found evidence that the Big Five meatpackers "control[led] all the facilities through which livestock is sold" from meat markets to stockyards to rail yards and that control allowed them to "hold a whip hand over the commission men;" "secure valuable information... of competitors;" and obtain preferential treatment from railroads, including through the use of "money rebates... special privileges and concessions;" and a wide range of unfair, discriminatory, and deceptive practices.[13] Signifying this power, the FTC reported that the Big Five accounted for 82 percent of cattle slaughter, 61 percent of hog slaughter, and 86 percent of sheep and lamb slaughter in 1916.[14]

Additionally, as the 1919 FTC report indicated, not only were the Big Five Packers dominate in meatpacking but the "five great packers have extended their operations to the production and distribution—and in some cases to the near control"[15] of other "nonrelated food lines" as well, including "more than half" of the poultry, cheese, eggs and butter markets; and also became important distributors in other markets including condensed milk, canned fruits, canned vegetables, and canned fish.[16] The FTC continued to report in 1919 that the big packers had entered the wholesale trade, and came to dominate market segments that had previously been "exclusively occupied by the independent provision jobber and wholesale grocer."[17] The FTC reported on a widespread "fear" of "manipulation of market conditions through the large buying power" which comes from large control of capital and credit, transportation services, and controlled wholesale sales outlets.[18] The FTC concluded, at the Big Five's rate of expansion, "There is virtually no limit to the possible expansion of their wholesale merchandising short of the complete monopolization of the primary distribution of the Nation's food."[19]

In 1920, on the eve of an indictment, the Department of Justice entered a consent decree with the packers. The Consent Decree separated the packers' ownership of meat packing from stockyards and branch houses that packers utilized to store and distribute meat, and eliminated their ability to exploit conflict of interests by self-preferencing Big-Five owned production or distribution over competitors.[20] In 1921, Congress passed the Packers and Stockyards Act (7 U.S.C. 181 et seq.), authorizing USDA with "complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith... the most comprehensive measure [that] extends farther than any previous law in the regulation of private business..."[21]

The P&S Act followed the Interstate Commerce Act (ICA) (49 U.S.C.) that regulates the railroads, the FTC Act, as well as the Sherman (15 U.S.C. secs 1, 2) and Clayton Acts (15 U.S.C. secs 12-27). The P&S Act directs USDA to address "unfair, unjustly discriminatory, or deceptive practices," "undue or unreasonable preference or advantage," and selling "for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly," among other provisions.[22] The P&S Act safeguards and protects livestock producers, poultry growers, and consumers; as well as businesses engaged in marketing, processing, and distributing livestock, meat, and poultry. In 1936, Congress passed the Robinson-Patman Act (RPA) to amend the Clayton Act of

1914 (15 U.S.C. 13 et seq.); the law prohibits sellers from discriminating in price, service, and facilities in ways that could injure competition. Congressional backers said the RPA would "keep open the door of opportunity for the small business... as well as the large," and "take away secret discounts, secret rebates, and secret advertising allowances…. the power to destroy the independent merchants and the independent and smaller wholesale concerns."[23] Further, Congress commented with respect to the RPA, "The chain-store octopuses, mainly controlled by Wall Street financiers, must be restricted from unfair and discriminatory practices."[24] And, "we are trying to keep open the door of opportunity for the small-business man as well as the large," and "the [RPA] is based upon the simple American ideals of equal opportunity and fair play."[25] Among the P&S authorities exercised by USDA were prohibitions on undue preferences, which reflect to some extent the influence of the ICA, and have some similarities to the prohibitions on economic discrimination under the RPA. The FTC exercises P&S Act jurisdiction over these practices at the retail level.[26]

Through the 1960s, USDA brought a range of meat merchandising enforcement actions, in particular seeking to limit predatory or preferential pricing practices and fees at the retail level of the supply chain.[27] The 1980s, however, saw the end of the Consent Decree over the packers, resulting in multiple mergers. Also, in the 1980s, USDA wound down its enforcement of meat merchandising practices under the P&S Act, with one of the last reported cases decided in 1985 and the dedicated Meat Merchandising Branch eventually eliminated in the late 1990s.[28] During that period and beyond, the FTC also stepped back its enforcement of economic discrimination, in light of reduced resources and other obligations, such as mandatory premerger review following the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

At the time, policymakers explained the change as tapping the power of the free market, in particular the benefits of scale and efficiency to bring down inflation. Even market power, especially buyer power, would work in the service of lowering prices.[29] Undergirding the change more broadly, however, was an intellectual movement that sought to undo New Deal Government involvement in the economy from antitrust to financial market regulation and beyond.[30] This new approach to economics masked a much deeper national debate around the value of concentrated economic power.[31]

In the decades since the late 1970s and early 1980s, the pendulum has swung in the direction of increasing concentration and permissive conduct. Even prior to the pandemic, dominant market power earned supra-normal returns—and thus lowered the real incomes of everyone else—though the focus then was on inequality and stagnant incomes.[32] Following the pandemic, industry consolidation contributed to sustained inflation once supply chains returned to normal.[33]

Describing the effects, the Biden-Harris Administration Executive Order on Promoting Competition in the American Economy states that:

> Consolidation in the agricultural industry is making it too hard for small family farms to survive. Farmers are squeezed between concentrated market power… in the channels for selling agricultural products. As a result, farmers' share of the value of their agricultural products has decreased, and poultry farmers, hog farmers, cattle ranchers, and other agricultural workers struggle to retain autonomy and to make sustainable returns.

The Executive Order directs USDA to assess the competitive conditions across agricultural markets, including meat retail—the focus of this interim report.

Areas of Analysis

Research Methods

To support USDA's efforts to understand practices and concerns in the food retail and distribution markets, USDA first facilitated academic research on the topic in 2022.[34] Also in 2022 USDA issued a Request for Information (RFI) titled "Competition in Food Retail and Distribution Markets and Access for Agricultural Producers and Small and Midsized Food Processors."[35] Over the course of 2023 and 2024, USDA also conducted further investigative research through its authorities under the Act that incorporate Section 6(b) of the FTC Act (15 U.S.C. 46(b)), including conducting interviews and requesting documents. USDA focused its inquiry on beef, which provided the basis for using the meat supply chain as the case study for this report, but also collected relevant information for the other livestock and poultry markets. As directed by the Executive Order and as part of strengthening its interagency partnership, USDA consulted with FTC staff to assess findings, particularly on market structure and conduct falling under similar statutory authorities.[36]

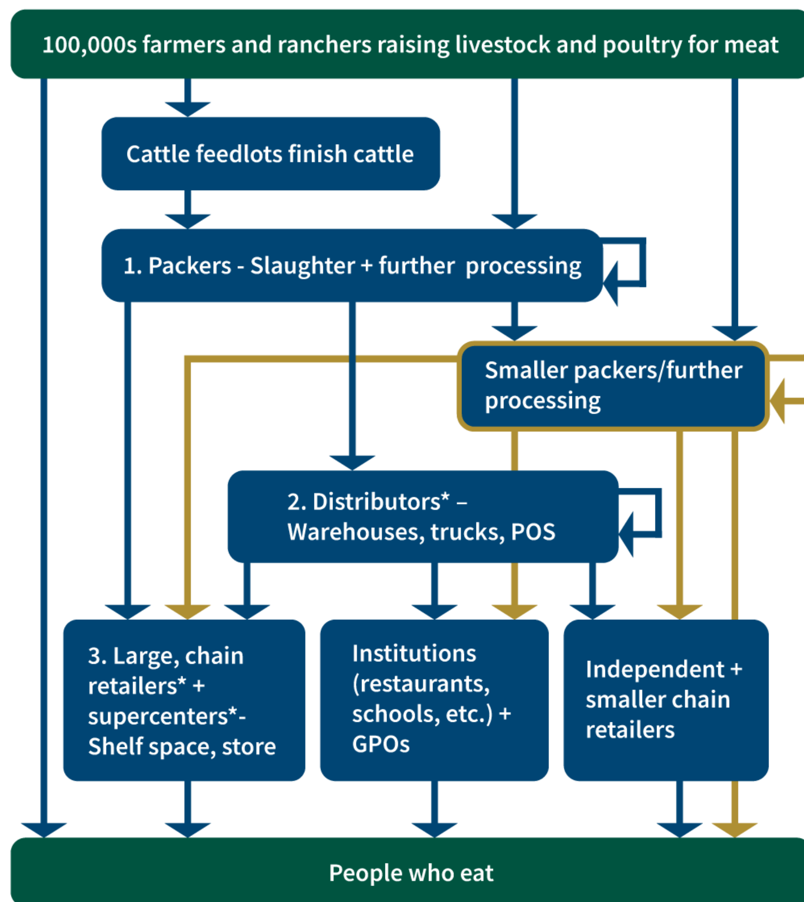
In March 2022, USDA initiated requests for information to document the concerns from the public on concentrated market power in the food retail, food service, and food distribution markets. Across all requests, USDA received over 280 comments in the public record and confidentially submitted comments. Additionally, USDA conducted over 30 interviews with a range of small, midsize, and large meatpackers, distributors, and retailers; as well as trade organizations, academics, and advocacy groups. Commenters and interviewees whose experiences and opinions are referenced in this report included advocacy, policy, research, and service organizations, industry trade associations, union groups, academic institutions, retail cooperatives, small independent retailers and meat packers, and consumer members of the general public.

In addition to conducting interviews, USDA issued document requests to nine companies across the meat merchandising supply chain to better understand their practices, especially in relation to their suppliers and buyers. Entities were chosen to reflect the diversity of the sector, but given that practices could vary greatly from one market participant to another, only preliminary conclusions can be drawn. USDA also examined publicly available data on the industry; reviewed historic accounts and academic research; and employed a mixed-methods research approach to systematically categorize and synthesize the collected data (comments, interviews, literature, and numerous quantitative data sources).

Market Structure and Concentration in the Food Industries

The structure of the meat and poultry industry has changed significantly over time. Today, market concentration and market power are major concerns in meat and poultry, as a few large companies control the process from live animal harvest, cold storage, transport, distribution, to grocery shelf space. Figure 1 depicts the meat retail chain from farmers and ranchers to people who eat and entities in between, with arrows representing the flow of livestock or meat product.[37]

Figure 1: Meat Retail Chain



*Often vertically integrated (retailers owning further processing, and distributors owning retail and further processing)

The foremost theme described by many commenters and interviewees concerned the power of some processors, distributors, and retailers. Commenters representing farmers and small and midsized entrepreneur (SME) suppliers, distributors, and retailers described the challenges in dealing with larger entities that control access to market channels, including strict delivery requirements, information asymmetries, and a pervasive fear of retaliation or being locked out of markets if they fail to meet the demands of these powerful actors.[38] Commenters and interviewees discussed worse terms for producers and consumers; for instance, some referenced the decreasing prices paid to farmers and increasing prices charged at retail for consumers. Commenters described other concerns, such as reduced product availability, market access, and resiliency, among others. Other commenters attributed these effects to the loss of fair, open, and honest competitive conditions and called on the Federal Government to increase enforcement of the relevant laws.[39]

Historical Overview

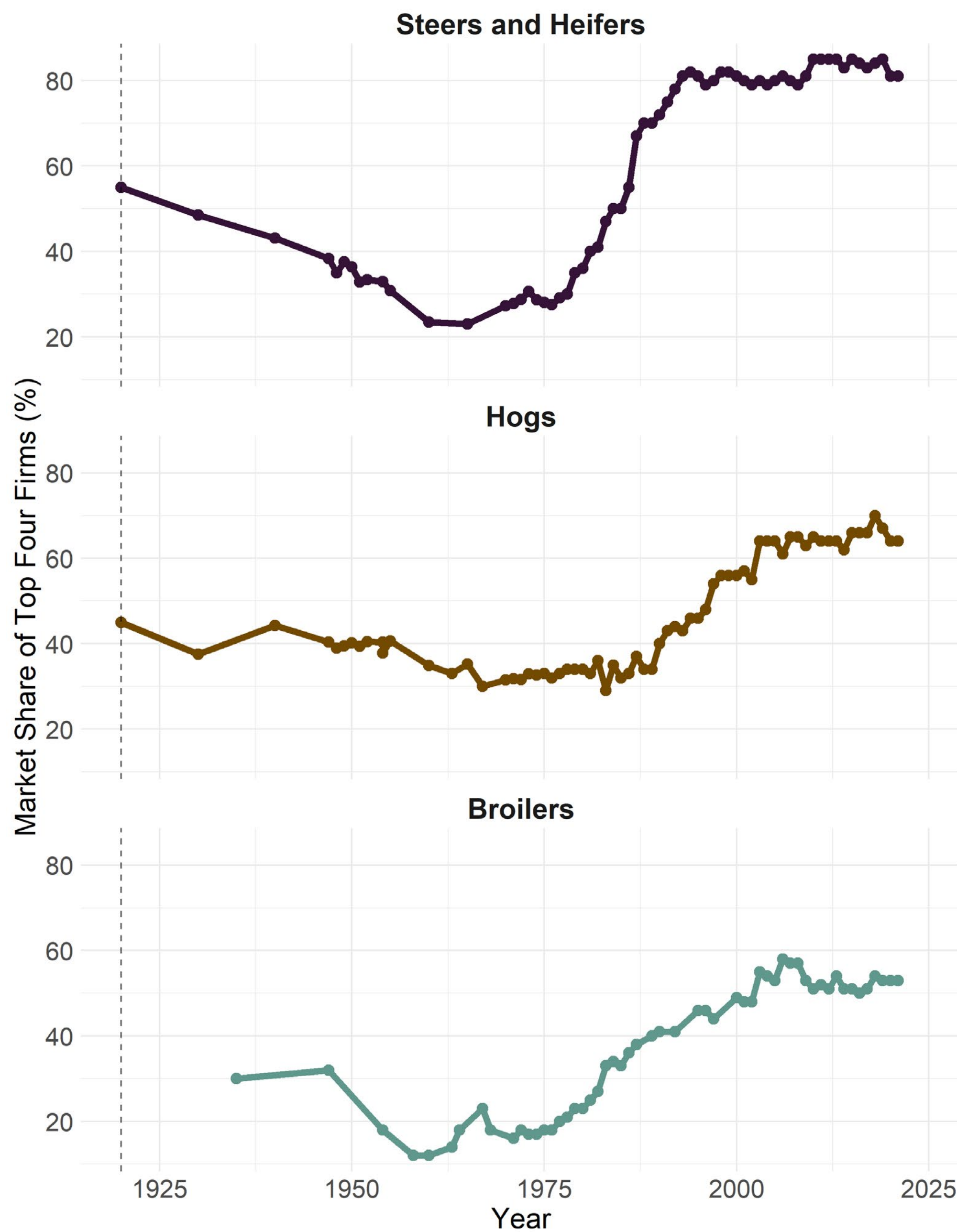
The P&S Act, the RPA, wartime support for the food industry, and the 1946 National School Lunch Program spurred a “hey day” of new business development in meat supply chains.[40] Describing the period following the separation of packers’ control of distribution, historians documented an increase in innovations in trucking and distribution; the improved economic position of producers and independent businesses; and the growth of nascent distribution and retail industries.[41] Some historians and researchers describe how, during the “hey day” of more competitive food systems, businesses chose to build new and improved stores, improve operational efficiencies and compete by offering across-the-board price discounts, high quality service, and a diverse array of products.[42] The number of plants and firms doubled from 1920 to 1956, with new plants able to enter and successfully operate in markets.[43] In response to ranchers’ concerns about the import of cheap meat products, Congress passed the Meat Import Act of 1964 (78 Stat. 594; Public Law 88-482) which imposed certain limits on meat imports. The USDA in 1974 issued Regulation 201.70a under the Packers and Stockyards Act to eliminate the conflict of interest between packer and feedlot ownership.[44] With these changes in place, in 1960, the top packers slaughtered 24 percent of the Nation’s total meat and poultry products, and in 1977, 21 to 22 percent—compared to the 1920, at the time of the Consent Decree, when the top five firms slaughtered 49 percent of the Nation’s meat and poultry.[45]

Meatpacking

Commenters and interviewees described their concerns with a few packers controlling most of the slaughter and further processing facilities. These individuals explained how the only way to slaughter and process an animal is to become a producer “captive” to one of the largest companies, or to travel hundreds of miles to slaughter and/or process animals with an independent processor.

Figure 2 shows the market share of the top four cattle, hog, and broiler meatpackers increasing and exceeding the share held by the Big Four meatpackers since the Consent Decree of 1920. In 2021, the four-firm concentration (CR4) measure was 81 percent for fed cattle processors (steers and heifers), 47 percent for hogs, and 65 percent for poultry (Figure 2).[46] In other words, four beef packers harvested 81 percent of the Nation’s beef in 2021, and only 19 percent of the beef market is open to many processors other than the top four. In the last three decades, DOJ blocked meatpacker mergers across multiple species that would have reduced the “Big 4” packers to the “Big 3.”[47]

Figure 2: Approximate Market Shares of Top Four Firms in Meatpacking and Poultry Processing, from the 1920 Consent Decree (vertical dotted line) to 2021[48]



Retail and Distribution

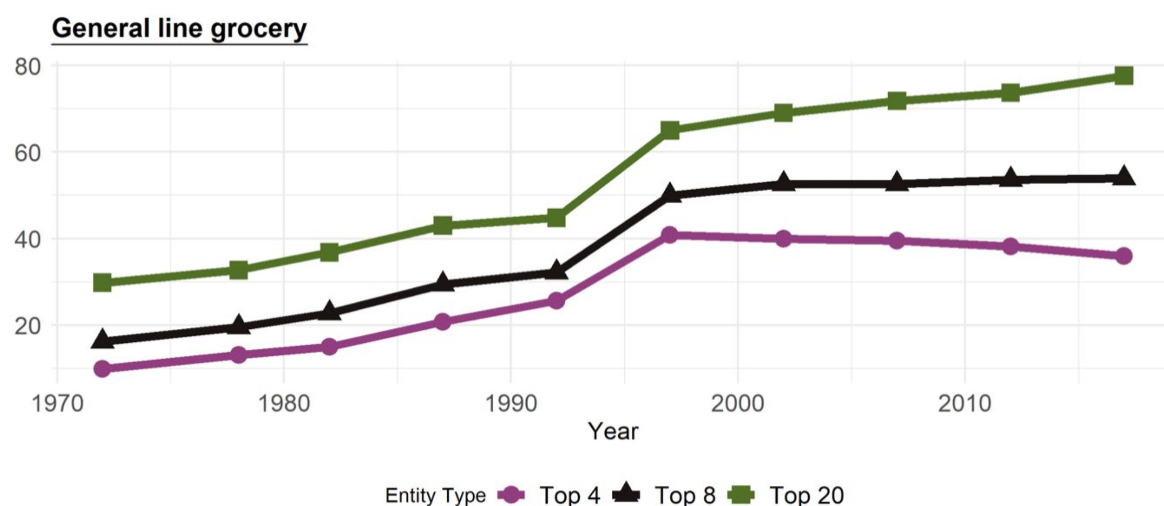
In grocery, the top four grocery retailers accounted for 34 percent of grocery sales in 2019, compared to just 19 percent in 1999.[49] National grocery concentration statistics can obscure higher levels of concentration in smaller geographic areas such as metropolitan areas and counties.[50] Measures of concentration at the State level are more than double that at the national level, and concentration at the county level is six times higher than at the national level.[51]

Through the 1980s, retailers participated in "merger mania." Additionally, numerous private equity groups acquired, sold, or closed grocery stores.[52] Between 1997 and 2000, the eight largest retailers' share of sales increased from 30 percent to 41 percent, due in large part to opting to grow through acquisitions of other retailers rather than investing in new stores.[53] Some commenters discussed that these acquisitions resulted in store closures and worker cutbacks. Acquiring retailers cited cost savings from reduced management expenses and lower procurement costs.[54]

Some interviewee accounts describe the losses of SME independent businesses, particularly in rural areas, as larger retail chains increased their market share. Beginning in the 1930s and accelerating in the 1970s, small local grocery stores and specialty stores, such as butchers and bakeries, declined while multistore chain supercenters spread to dominate the industry.[55] As supercenters emerged and retail chains expanded by acquiring smaller chains and independent stores, the number of smaller, often rural, independent retailers declined. One study found that when a large food retailer opened a store in a rural area, the event corresponded to increased market concentration and decreased number of independent retailers.[56] The study estimated an annual average exit rate for independent retailers at 6.6 percent from 1991 to 2015. In 1990, independent rural grocers accounted for 63 percent of food sales in rural counties, dropping to 25 percent by 2015.[57] Meanwhile, shares of regional chains and national food chains in rural counties nearly doubled and tripled, respectively.[58]

Food distribution, or wholesale, is also concentrated. A 2015 FTC merger enforcement action produced evidence that only two distributors controlled 75 percent of the national food service distribution market.[59] In the general-line grocery wholesale distribution market, four firms accounted for 36 percent of the market in 2017 (Figure 3). In "broadline food service distribution" (restaurants, hospitals, cafeterias), two firms accounted for 75 percent of the U.S. market in 2015, with the FTC finding that only these two operated at the national level.[60] According to a 2016 report, three firms accounted for 45 percent of North American food service.[61] Additionally, there are three large food service management companies (FSMC), or "catering companies."[62] In natural foods distribution, the largest firm is nearly three times larger than the only other nationwide distributor.[63]

Figure 3: Approximate Share of Sales for Top 4, 8, and 20 Firms in Food Wholesale (Census-classified General Line Grocery Wholesale) 1972 - 2017[64]

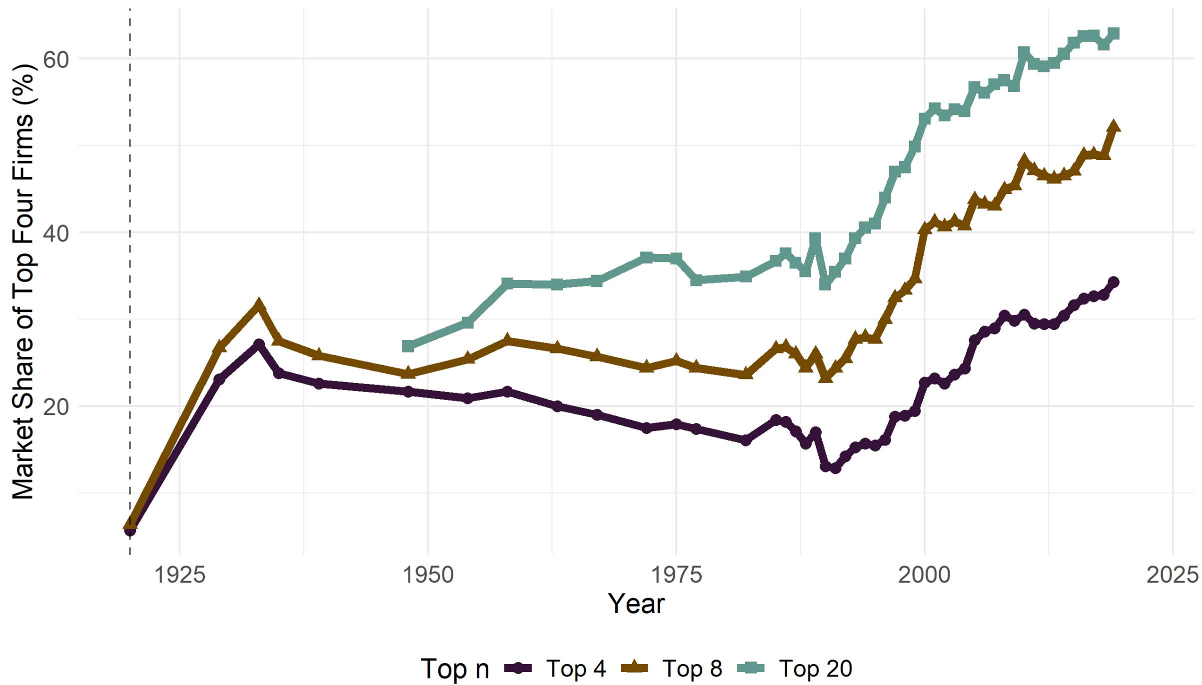


Concentration Impacts Today

Supply chain shocks that began with the onset of the COVID-19 pandemic in March 2020 left many grocery store shelves bare of meat and other products, forcing prices significantly upwards for many U.S. consumers. Bottlenecks in the supply chain and at distribution and retail, labor shortages, and higher processing costs were significant drivers of the immediate increase in consumer prices.[65] The pandemic highlighted the long-developing vulnerability of large-scale efficiencies coming up against growing concerns among many farmers and consumers of market diversity, resiliency, and competition more broadly. In response, the Biden-Harris Administration has sought to prioritize greater attention to competition, supply chain resiliency, and improving economic outcomes and livelihoods, including in rural America, as particularly highlighted by President Biden's Executive Order 14036 "Promoting Competition in the American Economy" and Executive Order 14016 "America's Supply Chains," each in 2021.

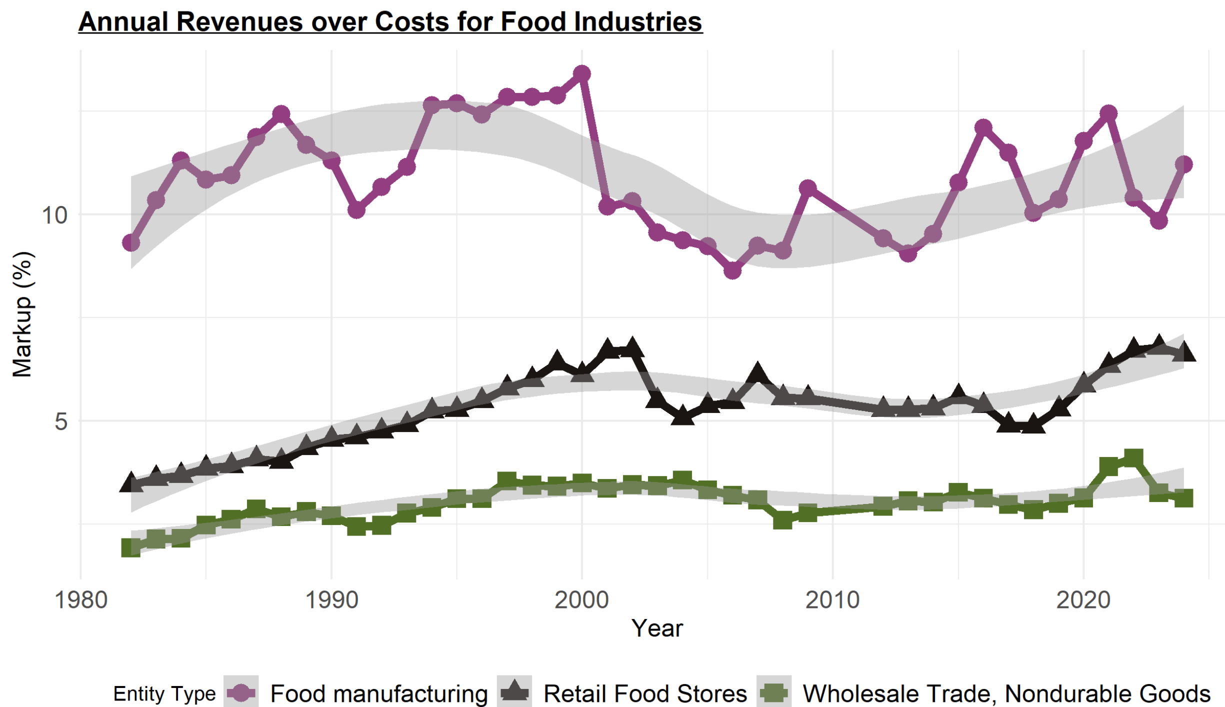
Higher meat prices may be caused, in part, by market concentration. As mentioned in the introduction, multiple studies find higher prices in concentrated markets across food industries, including poultry processing, in meat packing plants (sausages and other prepared meats), and in plants conducting both poultry slaughtering and processing.[66] Another study found that profit margins in plants acquired in merger transactions increased by 15 percent to 50 percent compared to nonacquired plants, but there was no statistically significant effect on productivity.[67] Finally, another study modeled county-level data and found that grocery store mergers in markets that are already highly concentrated led to higher consumer prices, while mergers in less concentrated markets led to price declines.[68] Other studies exist, however, in which quantitative evidence has thus far not definitively linked supply chain disruptions and consumer price increases observed during the height of the pandemic to market power abuses by the Nation's top meat packers or retailers.[69]

Figure 4: Approximate Share of Sales for Top 4, 8, and 20 Retail Firms, from the 1920 Consent Decree (dotted vertical line) to 2019[70]



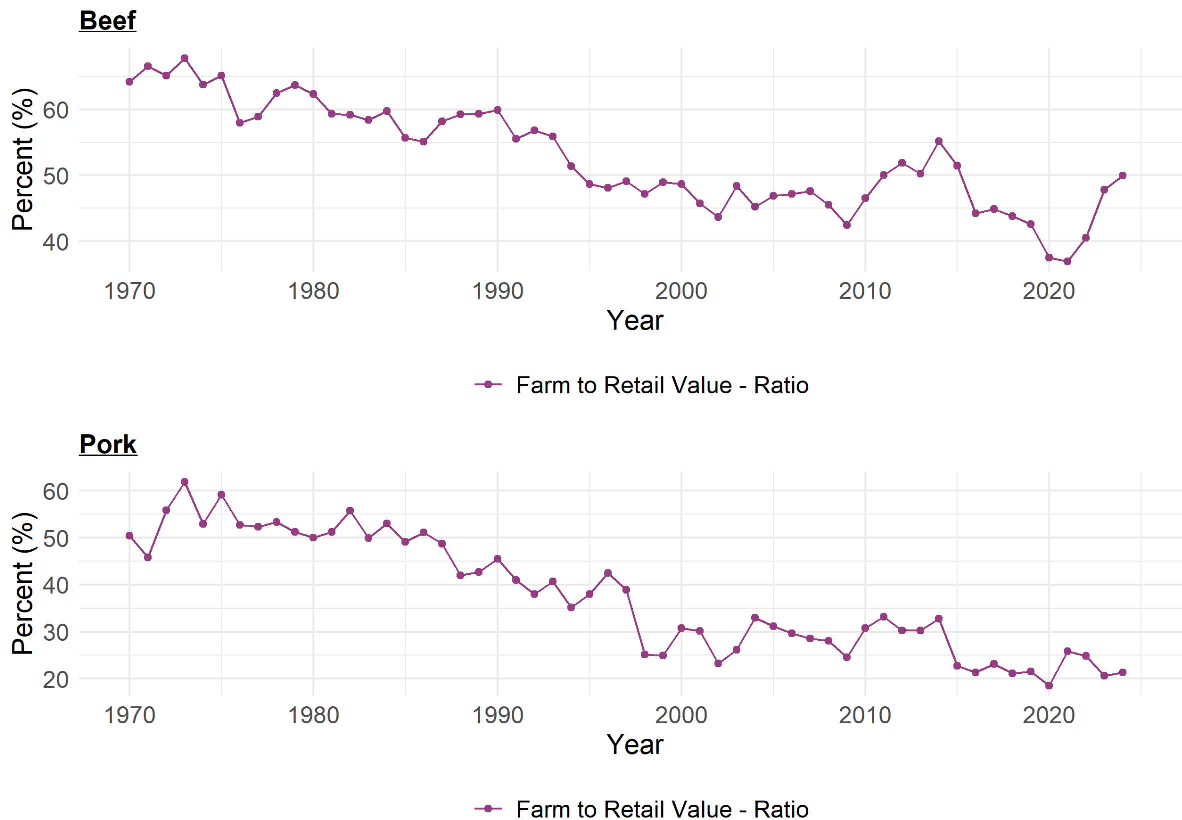
Although grocery price inflation has fallen since the end of the pandemic, higher food prices—and higher meat prices specifically—have persisted. Several researchers have assessed the effect of market power on supply chain disruptions and consumer price increases observed during the height of the pandemic. According to one study, 50 percent of 2021 inflation may be explained by increased margins, sharply higher than the decade leading up to COVID-19.[71] As the FTC recently explained, these higher prices have included higher profits for food and beverage retailers, with revenues for food and beverage retailers increasing from their recent peak of 5.6 above costs in 2015 to more than 6 percent above costs in 2021, and 7 percent above costs in the first three quarters of 2023.[72] The figure below shows the amount of money that companies across food industries made over and above their total costs from the 1980s to 2024, i.e.: markup.

Figure 5: Annual Revenues over Costs: US Food Industries, with increased markup percentages in recent years[73]



And while farm incomes have rebounded for those still in the market, including record returns to farmers in 2022 as a sector, farm profitability for many smaller family farms remains under pressure.[74] The figure below shows this trend: the farm to retail value ratio declined from above 60 percent in 1973 to a low of 36 and 19 percent in 2020; and has increased since to above 50 and 20 percent for cattle and hog farmers, respectively. While the decreasing ratio could be due to increasing market power by retailers and packers, other factors could also increase the marketing margin such as increased preparation of meat after it leaves the farm as in prepared hamburger patties and premarinated roasts. Producers who have lost or may lose their farms struggle with heavy stress and mental health issues; in recent years, many studies have noted a marked increase in farmer suicides and have attributed these increases in part to farm loss.[75]

Figure 6: Historic Farm to Retail Price Value Ratios for Beef and Pork[76]



Tackling food price inflation and improving fair and competitive market conditions for farmers have each been top priorities of the Biden-Harris Administration. As part of that effort, on July 9, 2021, the Competition EO directed the Secretary of Agriculture to "address the unfair treatment of farmers and improve conditions of competition in the markets for their products."[77] A year later, the Administration committed $1 billion toward expanding independent meat processing and packing in a "fairer, more competitive, and more resilient meat and poultry supply chain." USDA also commenced a series of rulemakings to modernize its approach to transparency, competition, and fair market enforcement, along with a series of other initiatives.[78] Since 2023, USDA AMS has finalized two rules, Transparency in Poultry Grower Contracting and Tournaments, and Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, and published two proposed rules, Poultry Grower Payment Systems and Capital Improvement Systems, and Fair and Competitive Livestock and Poultry Markets.

These actions are important steps to ensure that all farmers may benefit from and compete in meat markets. But more is needed to combat the unfair and anticompetitive factors in the markets that may reduce profits and market access for smaller producers and increase prices and reduce choices for consumers.

USDA Authorities and Meat Merchandising

To assess the legality of practices in meat retail, the USDA can reference other authorities that prohibit proportionally unequal treatment of like market participants, e.g.: the Robinson-Patman Act enforced by the FTC. The Robinson Patman Act (RPA) was designed to prevent large buyers from gaining discriminatory and

preferential treatment over smaller ones, where the effect may be to injure, destroy, or prevent competition between such favored and disfavored buyers. Among other things, the Act prohibits sellers from charging disfavored customers higher prices than those charged to favored customers for commodities of like grade and quality; however, the law does allow for price discrimination in certain situations, such as when the difference reflects different costs of dealing with different buyers or is the result of a seller's attempts to meet a competitor's offering, among other examples.[79] Buyers are likewise prohibited from knowingly accepting or inducing discriminatory prices.

The RPA also prohibits offering services or facilities on a proportionally unequal basis, paying anything of value to a seller on a proportionally unequal basis, and paying kickbacks more generally.[80] These proscriptions are absolute, meaning the affirmative defenses that Congress made available for price discriminations charges are unavailable to sellers.[81] And where slotting fees, marketing fees, rebates, and the like are not proportionally equal or available to all retailers or other buyers, these provisions of the RPA may be implicated.

The Impact of Fees, Rebates and Other Agreements in the Meat Industry

Information received by USDA identified multiple types of fees, rebates, and other agreements in the meat merchandising space. Many industry participants expressed concerns about the use and potential misuse of such agreements. Interviewees raised concerns that the use of these agreements—outside of the per unit price agreement—may reduce choice, increase prices, and exclude SMEs from the marketplace.

According to researchers, RFI commenters, and investigative interviewees conducted in the course of USDA's investigative study, fees may be referred to in the market as "marketing fees," "slotting fees,"[82] "free-fills,"[83] on-time-and-in-full (OTIF) fees, "trade spend," "pay-to-stay" fees, or "accruals." There are also implicit fees requested by larger retailers and distributors where—a "fee" or a "cost" is assessed for nonparticipation, as in the case of "rebates"[84] or "kickbacks."[85] Midsized packers explained that retailers charge a lot of fees, such as late fees, or fees for broken pallets or storage fees to a large distributor. Although public information about the scale and scope of some of these fees is available, the USDA Packers and Stockyards Division (PSD) is only able at this time to present qualitative information about these fees. Further investigation remains underway.

Marketing and Slotting Fees

Investigative interviewees spoke of "marketing fees," "promotional fees," "slotting fees," and "trade spend" interchangeably. Overall, "slotting fees and allowances" are known as a "family of marketing practices that involve payments and other incentives (e.g., free products or services) given by manufacturers to persuade downstream channel members to stock, display, and support their products."[86] Fees may be a one-time payment or an ongoing, reoccurring fee. Fees might be "in kind," such as "free fills," which occur when a supplier provides a free product to the retailer in exchange for retail space.[87] An investigative reporter wrote that "placement fees matter because they determine the selection of products available to consumers and how they are presented to them, influencing which foods and beverages consumers buy and eat."[88]

According to interviewees, retailers and distributors often charge packers fees in consumer-packaged goods (CPG) markets and in meat markets in particular. Retailers or food service wholesalers often request suppliers to enter into fee contracts. “A slotting fee, sometimes called a slotting allowance or shelving fee, is a fee that retailers charge for your products to be on their shelves.”[89] These fees may also be charged in exchange for preferential placement on the grocers’ shelf, or in a distributors’ supply chain. Some sources define slotting allowances as lump-sum, up-front payments from suppliers to retailers to have a new product carried by the retailer and placed on its shelves, while payments to retailers to keep existing products on the shelves may be referred to as “pay-to-stay” fees.[90] However, not all retailers and distributors rely upon fees, rebates and other agreements. In general, according to one nonprofit think tank, some retailers that rely on private label sales and limited assortment do not rely on fees.[91]

Distributors also reportedly charge these fees to their customers, including small, independent grocers, smaller retail chains and food service management companies (FSMCs). FSMCs are often hired by institutions such as universities to prepare and deliver dining services. In turn, FSMCs, small, independent grocers, and smaller retail chains may pass on these fees to their customers, in the form of higher prices for the end consumer.

Many interviewees—large and small suppliers—expressed dissatisfaction with feeling pressured to pay fees. According to large suppliers, marketing fees are requested of suppliers by retailers to help promote product at retail or food service; however, suppliers often don’t know exactly what the fee is used for, perhaps to promote suppliers’ product, or the suppliers’ general retail category. A food consultant reported that a midsized packer found that its required trade spend to a national chain grocer of $120 million was double that of other chains and decided it couldn’t afford to stay on the shelves of the “more expensive” retailer. A large packer called a “marketing fee” a “random fee,” and reported that it is “not a level playing field.” Another midsized supplier noted that it can mark up its price when a marketing fee is requested, but it doesn’t always receive the price premium needed to cover the fee. This supplier felt compelled to pay the fee and didn’t know what the fee was used for at retail or in food service. One midsized grocery chain commented that it does not participate in slotting fees, rebates, or kickbacks. One of its employees commented that it doesn’t care “to play those games.” This midsized retailer reported that it does not hold any contracts with packers, it negotiates trades weekly over the phone or sometimes via email, and prices are negotiated weekly, and no pricing formulas are utilized.

However, this “family” of fee arrangements has some industry support. Slotting fees that were once reported as being a tax on new products, are now reportedly “loved because it lets you lock up space.”[92] Some industry insiders maintain that slotting fees, for example, allow for the efficient distribution of product because they provide a screening mechanism to single out high quality products, which therefore can help predict successful sales and thus reduces risk when retailers introduce new products.[93] Supporters of slotting allowances for new products contend they facilitate new entry by compensating retailers for the costs and risks of introducing new and unproven products, many of which fail within a short period. Some believe that if a manufacturer or supplier is willing to pay a slotting fee, it can signal to the buyer that the manufacturer is confident of its product’s success, and willing to share the risk. However, pay-to-stay fees have been viewed as more problematic because they are charged for established products.[94]

RFI commenters noted that these fees have been increasing over time and comprise an “integral revenue stream, or source of savings” for some retailers and all the largest food service distributors.[95] Reportedly, fee ranges vary widely. According to a food systems researcher, to launch new products in several stores can cost anywhere from $10,000 to well over $100,000, depending on the retailer and region.[96] In 2001, a national

rollout for one item was estimated at $4.2 million and $16.8 million for a small product line, equating to 30 to 50 percent of the total cost of launching new products.[97] Slotting fees for refrigerated shelf space are generally higher.[98] Nielsen IQ (NIQ) reported that the initial slotting fee for a new product is around $250–$1,000 per item, or stock-keeping unit (SKU) per store, which can translate to about $25,000 to $250,000 per item depending on the characteristics of the market.[99]

According to researchers and industry participants, fee arrangements in effect preference the largest vendors and essentially exclude smaller suppliers."[100] In an interview, a midsized supplier commented that the marketing fees and incentives make it very difficult for new packers to establish meat sales and be successful. A researcher detailed that these fees could prevent new brands from competing and achieving scale absent significant financial backing.[101] The researcher added that reportedly exclusionary arrangements leave only one-quarter of a food category available for new entrants and smaller incumbent competitors.[102] Another researcher commented that "you have to pay to play" with large retailers and distributors.[103]

In an interview, a university researcher focused on local food systems noted that fewer services are currently offered by the large wholesale distributors to independent small grocers and fees have increased. Reportedly, distributors that once used to help independent retailers with payroll and store design are raising their fees and reducing services to offset the high prices they face from meatpackers because the independent retailers are nonpreferred customers. The researcher went on to explain that this occurs because the largest retailers coerce low prices out of the large meatpackers, and then the meatpackers recoup their losses by charging other retailers and distributors higher prices. Distributors may then recoup their own losses by passing on higher prices as fees to their customers, such as independent grocers. This is why, the researcher explained, prices are lower at a large national chain store 15 miles away compared to an independent grocer.

Accrual Arrangements

USDA also identified the existence of another, implicit fee in the industry, through the use of accrual agreements in the meat merchandising trade. In an accrual arrangement, the retailer or distributor (the customer) pays the packer for product but adds an additional sum to the payment which the packer then holds in an accrual account. This sum is then returned to the customer at a later date—often months later--at the customer's request, to purportedly fund consumer promotional activities.

Two suppliers reported that in an accrual arrangement the retailer or wholesaler "overpays" initially and gets a rebate (or discounted price) at a later date. According to large suppliers and wholesalers, in an accrual arrangement, suppliers are paid an extra $0.03 per pound on beef, for example, and the supplier holds the accrual amount and will rebate it back to retailers or wholesalers on a monthly or quarterly basis. In other accounts, two large meat companies added that the accrual sum used to be about a ½ penny to 1 penny per pound but has increased to 5 to 10 cents per pound in some cases.

In effect, in an accrual arrangement the customer (retailer or distributor) prepays the packer towards a future purchase. A large distributor explained that their accrual funds—held by packers—are used to help "fund down" future advertising pricing on various fresh meat products, and drive future price promotions. Buyers may use accrual fees to adjust prices seasonally, presumably because this way they can direct their pricing policy in line with fluctuations in demand. During the fall holiday season, a distributor reported that it spends $800,000 to $900,000 to "fund down" meat prices to boost sales.

These accrual arrangements raised concerns among RFI commenters and investigative interviewees because they appear like an unnecessary transaction imposed upon suppliers by distributors and retailers, and required additional accounting costs, without a clear understanding of its purpose. Both a large meat packer and a wholesaler said they didn't know why retailers require accrual payments, and that the payments have been going on "forever." A meat packer added: "I don't care, we'll hold your money." In contrast, another large meat packer reported that it has protested against accrual arrangements, but to no avail.

An additional concern regarding accruals is that interviewees expressed concern around how these fees affect the spot market price used as benchmarks in contracts and during negotiations with their sales customers.

On Time and In Full (OTIF) Fees

Another fee type identified are on time and in full fees (OTIF). Interviewees explained that OTIF fees are charged to packers by retailers and distributors for product that is not delivered on time and in full. A large retailer reported that it has strict "OTIF" clauses in its contracts that it can use at times to leverage supplies. An FTC study found that some large retailers and wholesalers used OTIF to "pressure their suppliers to favor them over rivals."[104] The FTC reported that some of the largest retailers and wholesalers used strict delivery requirements and steep penalties for noncompliance on upstream suppliers to secure scarce product during the pandemic supply disruptions.[105]

Meatpacker interviewees reported paying OTIF fees to retailers or wholesalers, with varying judgments. A large supplier said these fees were "irrational" and "did not make sense," but saw it as the cost of doing business. Another large packer said the practice is "onerous." One supplier conceded that OTIF is "painful" but not completely unreasonable. A large packer explained further that "in full" can be subjective, and questioned how the retailer enforced its OTIF policy. Another supplier explained that OTIF charges occur, but they can be built back into freight charges, so it is not a big issue. One midsized retailer commented that when a large retailer increased its OTIF fees during COVID, wholesale distributors noticed shortages.

The threat of these fees can be significant. PSD received multiple complaints from producers during COVID that appear to be connected to how packers may have prioritized livestock acquisition and processing so as to avoid these fees and otherwise maintain priority relationships with retailers.

Rebates, Kickbacks, and Preferred Vendors

Information received by USDA identified what interviewees called rebates and kickbacks. As will be described, a researcher that responded to the RFI commented that when suppliers or customers tie larger payments (such as rebates and kickbacks) in exchange for a larger share of sales or shelf space, "they significantly limit competitors' market access, and their practices constitute effective exclusive dealing."[106] Commenters and interviewees asserted that this incentive system impedes market entry for small suppliers, including regional producers and producers of color.[107]

Sometimes packers use rebates that can function as implied fees for not purchasing additional product, resulting in a higher net price paid. For example, a large packer may offer a rebate to a large distributor or retailer for purchasing increasing volumes of its product. The award maybe a flat rate, or tiered, with higher level awards rewarded for reaching specified increased purchase targets. If the retailer or distributor does not

participate then it foregoes a sizeable income or revenue stream. Interviewees said that the contracting parties might pass on the benefits to consumers in the form of lower prices; but generally tended to express skepticism of a lower resulting price. One consultant shared how a supplier gives a discount (a rebate) to distributors, but the discount to the distributors is not passed onto the retailer.

On the sales side, a large distributor may offer rebates or payments (some call these “kickbacks”) to smaller retailers or institutions, such as a university cafeteria through a food service management company (FSMC), for choosing its products. These entities reportedly develop programs that incentivize purchasing their own branded product over others, which disincentivizes purchasing from smaller local and regional competitors that do not have sufficient funds to provide rebates.

By some accounts, the industry has grown to rely upon these rebates and kickbacks because they are substantial, with many industry insiders noting that these rebates and kickbacks are major profit centers for retailers and distributors.[108] One source suggests these sums contribute up to half of net profits for some companies.[109] In another example, a source that requested to remain anonymous suggested that rebates account for 40 to 50 percent of the profits of the largest FSMC’s net profits. Interviewees reported that a school cafeteria, for example, may contract with a food service wholesaler only to find that the food service distributors likely receive rebates from its preferred meat packer suppliers. These rebates can be 30 to 40 cents on the dollar, which can amount to significant revenue streams that are not passed back to the school. One food consultant reported that these revenue streams are often undetected because they are “off invoice.”

Likely due to the potential added revenue, food service wholesalers reportedly preference suppliers that offer rebates.[110] According to a commenter, the use of rebates to reward customers for hitting certain volume thresholds is uneven but used more routinely in distribution. According to a midsized beef packer, beef is a primary driver of margins for distributors and thus beef sales receive the top priority in how distributors manage relationships with their suppliers and customers. The suppliers that offer such rebates are coined “on-contract,”[111] “pre-approved,”[112] or “preferred” vendors. Multiple sources reported that food service companies receive rebates from their pre-approved meatpacker vendors based on meeting targeted purchase levels.[113] Buyers working for large food service wholesalers reportedly receive bonuses for hitting target earnings from rebates. One buyer for a large distributor compared the need to comply with pre-approved vendors and rebate quotas to “handcuffs.”[114] In one example, a midsized packer lost a customer because the restaurant switched suppliers to a large wholesaler because it offered up to $20,000 per month of other products for free if the restaurant would buy all of its product from the large supplier. In another example, an interviewee described how a large distributor might give a restaurant chef a paid cruise in exchange for purchasing its product.

According to interviewees, smaller retailers can face challenges in purchasing from local/regional suppliers. The largest grocery chains have increasingly sourced directly from meat packers, relying less on wholesalers. In turn, wholesaler and distributor markets have grown increasingly concentrated, which has then meant smaller grocery chains and independents have fewer wholesalers from which to source product.[115] A food systems researcher described how a food service wholesaler may require a small independent grocery to purchase a certain percentage of its purchases from the food service wholesaler.[116] A rural food systems advocacy group described the case of an industry member they interviewed, saying that one distributor the industry member worked with required the member’s firm to exclusively source 68 percent of its cost of goods from them. The industry member went on to explain, “when your distributor wants you to buy 68 percent from them, you can't viably source from local producers, there isn't any margin left.”[117]

Similarly, one small supplier stated that food services at institutions such as universities, prisons, and grade schools had once been a promising market for smaller scale producers and processors, but they report increasingly being squeezed out by the large wholesale foodservice companies and the limits on purchases outside of the contractually preferred vendors. According to a report from a FSMC that purchases product from larger distributors, most FSMCs required their customers—such as university cafeterias—to purchase 80 percent or more of their products from pre-approved suppliers. A small supplier stated that the barriers for small local suppliers to qualify as a vendor through the FSMC were too high, thereby excluding these suppliers from this segment of the market. In some cases, contractual restrictions on purchase outside of the contract, such as for local and regional food, were reported to be by dollar limits, which make it difficult for higher value products such as beef to fit within any permissible cap.

Grocery Category Management

Another business practice observed in the industry that can present a barrier similar to fees is an arrangement whereby each category within the grocery store—such as cereal or soft drinks—is managed as if "it were a free-standing business."[118] According to interviewees and researchers, these individual "businesses" are managed by "captains," which are typically the large suppliers due to the costs required to serve as a "captain."[119] Serving as category captain may require the payment of a fee, or it might include providing free services.[120] Free services may include market research and category management, which includes advising retailers on product placement.[121]

When a retailer asks a large supplier to manage a category, the nature of this relationship is theoretically open to self-preferencing whereby the supplier preferences its products in the category at the expense of competing brands or by recommending favorable shelf space and product assortment, for example.[122] A potential conflict of interest can similarly arise whereby the captain could theoretically use its role to "disadvantage" competitors, including new or incumbent smaller processors who may be unable to sustain their foothold in the market under those conditions.[123] The extent to which these behaviors are present in the meat market is the subject of continuing investigation as part of this report.

Potentially Unfair or Anticompetitive Pricing Practices in the Food Industries

In addition to the concerns around market structure and the use of fees, rebates, and other agreements in meat merchandising, USDA's research investigation for this report revealed concerns about certain pricing behavior in today's retail and wholesale markets and how these pricing behaviors may exclude SME businesses from food marketing channels. PSD examined the impact of seller-driven predatory pricing, buyer-driven price discrimination, deceptive pricing and labeling, algorithmic collusion, and most favored nation clauses on competitive conditions with respect to firms and consumers. Some industry stakeholders suggested that these pricing practices may lead to higher overall prices, especially to the extent that they inhibit competitors in the market. Other industry stakeholders disagreed and argued that the same practices were useful in maintaining lower prices.

Price discrimination usually comes in one of three forms: (1) primary line cases involve conduct that harms competition with the seller's competitors (e.g., predatory, below cost pricing in a specific geographic market to injure competitors in the same market);[124] (2) secondary line cases involve price discrimination that injures competition among the seller's customers;[125] and (3) tertiary line cases involve harm to competition at the level of purchaser's customers.[126] However, the law does allow for price discrimination in certain situations, such as when disparate prices reflect different costs of dealing with different buyers or is the result of a seller's attempts to meet a competitor's offering, among other possible scenarios.[127]

The three forms of price discrimination and examples from interviewees and commenters in the meat and poultry markets are described in turn below.[128]

Primary-Line Price Discrimination

The first form of potential price discrimination may occur when a seller sells a product at different prices to different buyers and the harmed party is a competitor of the seller. A commonly described practice involves the use, primarily by large suppliers or retailers, of selective low or discounted prices to push competitors out of the marketplace.[129] This form of price discrimination occurs when the offending seller charges predatory, below-cost prices in one market and higher prices in another market and causes injury to the seller's competitors. For example, were a large packer to offer a large retailer in one geographic market preferential pricing (while offering lower prices to a large retailer in another geographic market), that could make it harder for a smaller meat packer to compete in that market. A small independent meat packer (and echoed by a representative for an industry trade association)[130] claimed in an interview that "price point is always a way to ice someone out," referencing how a large meat packer can enter smaller local markets and charge significantly lower prices to push its small competitor out of the market. Once competitors are removed, according to a national research and advocacy group, after a time, the newly dominant business will enjoy the ability to charge higher prices without competition. Likewise, USDA received comments and heard from interviewees that some dominant manufacturers lower their prices in a select geographic region to price a smaller, competing manufacturer out of the market, then raise prices to "recoup" the lost profits from the period of discount pricing. This practice has been referred to as a "two-stage strategy for securing monopoly profits" and it matches the pattern of what may be illegal predatory pricing.[131] Some RFI commenters believe in particular that "big retailers…[have] predatorily priced competitors out of business..."[132]

Secondary-Line Price Discrimination

In secondary-line price discrimination, an upstream seller, such as a meatpacker, treats its downstream customers—wholesalers and retailers—differently. The harmed party is a buyer or potential buyer of the price-discriminating seller. This occurs when the offending supplier or manufacturer sells goods to one retailer for less than the goods are sold to a competing retailer—at the same functioning level of the market—and causes injury to the disfavored retailer in the form of higher prices.[133] Sellers offering one price to a (favored) retailer and a different price to a (disfavored) wholesaler is usually not a violation, those higher prices would also likely be passed onto the disfavored wholesaler's customers. Interviewees described an example where a packer sells meat to a large retailer, and to a large wholesaler, who in turn supplies smaller independent retailers. Interviewees explained that this wholesaler may be disfavored, is put at a disadvantage because it has to pass on higher costs to its customers. One interviewee gave an example: A bottle of laundry detergent

that sells for $14 on a popular large national supermarket chain's shelf is sold for $21 at wholesale to a smaller independent retailer.[134] Commenters suggested that potential harm arises when price-discriminating sellers charge lower prices to "power buyers" than other customers—lest they lose big buyers that account for a significant percentage of their sales—and offset these discounts by charging disfavored wholesalers and retailers higher prices. As one interviewee said, this difference in prices charged by the price-discriminating seller occurs because dominant retailers can use their buyer power to "muscle" suppliers into providing them staple products in high demand or offering them more favorable prices.

This exercising of market power can be very effective, allowing power wholesale and retail buyers to sell products at lower prices than their smaller competitors and thereby drawing in additional customers at their competitors' expense. Along these lines, an independent grocers' association representative explained how "power buyers that are able to offer lower prices in turn benefit from another advantage: amassing a larger customer base, since today's customers are reportedly more bargain-oriented." Price is a major consideration for many consumers when deciding where to shop; and meat prices in particular have increased substantially in the last 3 years, leading consumers to place relatively more weight on price than other considerations such as product quality or nutrition when deciding what meat products to buy.[135] One commenter wrote that "the change in relative prices skews the terms of competition and, if the discount is large enough, can lead to monopoly [of favored retailers] as it drives those who can't get the discounts out of the market,"[136] disfavored retail stores. Thus, in today's consumer landscape, the ability to offer lower prices than competitors can be a particularly powerful marketing strategy.

Tertiary-Line Price Discrimination

Tertiary-line price discrimination involves injury to competition at the level of the retail or wholesale buyer's customers, or consumers, leading to increased prices for the buyer's customers, and hence, resulting potential market exit for the customers.[137] For example, customers of "favored" dominant retailers may get bargains on a range of food and household items, while other customers, shopping at other, nondominant disfavored stores, may pay higher prices than they otherwise would if the customers of the dominant retailers were not benefitting from buyer power-driven discounting from price-discriminating sellers. The nondominant retailers may be forced to raise retail prices, as "inflated costs [from suppliers] ultimately get passed down to their customers."[138] To the extent that the small number of dominant favored retailers pull out of smaller communities, the options consumers are left with can be highly unattractive.[139]

As mentioned, while some consumers may benefit, at least in the short term, from discounting driven by buyer power of favored retailers, other consumers may bear the cost, as retailers without buyer power are charged higher prices by suppliers, which they may pass on to their own customers, depending on competitive conditions.[140] One economist describes this behavior as the "waterbed effect": lower prices for retailers on one side of the waterbed could then lead to higher prices for retailers on the other side, putting them at an even greater competitive disadvantage,[141] and in turn further affecting their customers and consumers.

Price Transparency and Algorithmic Pricing

Related to the issues of price discrimination, commenters and interviewees brought up concerns about price transparency and the use of algorithmic pricing in the food industry.

Some commenters and interviewees asserted that predatory pricing or manipulation may be facilitated by the manner in which meat is traded, specifically the robustness of certain cash markets and the use of reported markets as benchmarks—a reference price used as a basis for pricing a large volume and wide range of contracts—in detailing payment terms in contracts with suppliers. Although a few commenters stated that they found the markets underlying these benchmarks to be satisfactory and “there is very little opportunity for any participants to manipulate the market,” many commenters and interviewees shared opposing views.

The potential concern here is how some large market participants may seek to manipulate the market underlying the benchmark.[142] There may be an inherent conflict of interest when entities such as packers have sufficient market clout to influence the boxed beef benchmark by short-term trading in the market or dumping of supply.

Indeed, multiple interviewees raised concerns about price transparency. A medium-sized beef packer mentioned that they are sometimes suspicious of the robustness of the market supporting the reported boxed beef prices. They believe that “one packer can influence the market and particular cuts of meat may exhibit extreme price volatility.” An executive in charge of meat sales at a large packer reported that that “it was surprised that retail has not raised the concern that fewer and fewer trades are setting the boxed beef market.” A major beef packing company explained that it is “bothered by the lack of volume reported in the boxed beef AMS report.” A medium-sized beef packer recommended that boxed beef prices should be a “suggested” price because the benchmark can represent less than 20 percent of the total traded volume. According to a small beef packer, many people may not realize that the spot market trade volume on the meat side is just as limited as it is on the cattle side.

Also of note is the emerging trend towards computer algorithms that facilitate pricing decisions; interviewees expressed concerns about algorithmic pricing affecting grocery store price transparency. In general, access to data varies considerably across the supply chain, with large retailers, distributors, and packers possessing considerably more data than smaller firms and consumers. This information asymmetry can facilitate price discrimination, as those with more power and more data are in a better position to utilize that information to their advantage. Major players in the distribution and retail sectors use data from IRI/Circana, Nielsen, and point-of-sale systems, advanced algorithms, and big data analytics to optimize inventory management, personalize marketing, and streamline logistics.

Companies can utilize these data to personalize prices based on consumer data, such as purchasing history, browsing behavior, and location. This use of these data might help companies make more strategic decisions and offer tailored deals for consumers. However, a nonprofit rural advocacy organization commented on “the possibility of information asymmetry and data analytics concerning food logistics,” specifically the ways in which smaller businesses cannot compete and source products when at an informational disadvantage.[143] When one side knows something the other side does not, it makes it that much easier for the side with more information to take advantage of its knowledge-disadvantaged counterpart.

Additionally, the use of “big data” in these ways can lead to predatory pricing and, potentially, to unjust price discrimination within markets, forms of coordinated price hikes, or unwanted invasions of privacy.[144]

Commenters expressed concerns regarding these practices' impacts on the public broadly, including to businesses, workers, and/or consumers.

Labeling Claims and Practices

Another potentially deceptive or anticompetitive concern is in meat labeling practices. Commenters and interviewees discussed their dissatisfaction with the current process for USDA gaining approval and using animal-raising claims on meat products, such as "antibiotic free," "grass-fed," and "free-range."[145] Commenters focused on issues of verification as well as on standards for animal raising and sustainability claims, and suggested that the flexibility inherent in the USDA claim-by-claim review process results, in their view, in leniency, and undermines the competitiveness of the marketplace of those trying to market products under more rigorous standards.[146] As one advocacy group stated, "when a producer is allowed to make high-value claims without adequate substantiation [and traceability], it lowers the value of the claim for producers who invest in higher welfare or sustainable production practices."[147] A label is designed to identify distinct production practices that commonly demand a price premium. Research findings revealed that SMEs are concerned about the misuse of labeling claims by larger entities that erode or eliminate smaller processors' competitive advantage in the market. When larger firms with more brand recognition and consumer "trust" coopt a label from a small, less recognized firm, it can result in widespread welfare losses to misled consumers, as the large firm's mislabeled products likely reach more consumers than the small firm's. If the lesser valued product is misleadingly priced as a higher value product— as a result of mislabeling—it can be viewed as a pricing problem, as consumers pay more than what they should.

In response to these types of concerns, USDA released updated guidance in August 2024 to strengthen substantiation of animal-raising and environment-related claims on meat and poultry labels. USDA underscored the use of third-party certification to substantiate animal-raising or environment-related claims, such as "Raised Without Antibiotics," "Grass-Fed" and "Free-Range," and environment-related claims, such as "Raised Using Regenerative Agriculture Practices" and "Climate-Friendly." It affirmed that having an independent organization verify that their standards are being met on the farm help ensure that such claims are truthful and not misleading. Additionally, the updated guideline highlighted that firms using "negative" antibiotic claims (e.g., "Raised Without Antibiotics" or "No Antibiotics Ever") should implement routine sampling and testing programs to detect antibiotic use in animals prior to slaughter or obtain third-party certification that includes testing.[148]

Most Favored Nation (MFN) Clauses

Research also uncovered the practice of most favored nation (MFN) clauses. In such an agreement between two parties, a seller, or manufacturer, enters an agreement with a buyer and agrees that it will not sell to any other customer—likely a rival of the buyer—at a lower price or better terms compared to those in the agreement. This means that the buyer receives at least the same price as its rivals because the seller agrees to charge its rivals at least the same price (or terms).

There are reportedly efficiency gains associated with this practice; however, the gains are not necessarily validated efficiency gains. In theory, gains include reduced transaction costs or "hold up" (exploitation) when it makes relationship-specific investments.[149] For example, if the buyer invests in changes in labor or technology to accommodate a new, unique product from the seller, the buyer wants assurances that the

seller will not sell the same product to a rival competitor, and thus face a free-rider problem whereby a competitor benefits from the first buyer's investments without also making the initial investment.

Terms and conditions of MFN clauses will vary from contract to contract, but commonalities exist. An agreement like the MFN clause may reference comparable prices, or, more generally, insure against "better terms" offered to a rival competitor. Such terms may include prices, rebates, accruals, and promotional allowances. The clause may also specify to whom—specific competitors—the supplier cannot offer more favorable terms. Findings reveal that agreements like the MFN clause may be used by retailers or distributors. These types of clauses also specify the relevant timeframe of the price comparison.[150] The contracted time may be a week, several months, annual, or generally around the same period as the trade.

Reportedly, this practice is often coupled with an agreement that the buyer can audit the seller for compliance.[151] Whether the contracting parties comply with an MFN-like contract agreement depends upon the buyer knowing its competitors' prices (and other terms). Monitoring compliance is not without costs. A buyer might ask for routine verification from the seller that the seller is complying. The buyer might also conduct a test of competitor pricing to verify compliance. According to an FTC filing against Amazon, the large technology company allegedly maintains an "extensive price-tracking operation" that can detect noncompliance with its "anti-discounting" terms "virtually anywhere on the internet within hours."[152]

Some have suggested that this type of MFN agreement can "dampen competition," and "foreclose the entry or expansion of rivals."[153] Overall, this type of agreement means the seller—such as a meatpacker or poultry processor—will not likely compete as aggressively for others' business.[154] The MFN clause makes it challenging for an efficient meatpacker, for example, to enter the market and stimulate competition benefitting consumers.[155] Additionally, MFN clauses may also foreclose business opportunities for competing buyers—other retailers or distributors—because the rival firms cannot negotiate a lower price for meat.[156] If a seller and buyer have a MFN clause, the buyer's rivals cannot get a better deal, and thus gain a competitive advantage in the market. If large meat processors or a sizable share of the market is covered by a MFN clause, then competition on price can be suppressed which may result in higher prices overall for beef, pork, and poultry.[157] In sum, the buyers that do not hold MFN clauses may be effectively taxed on their purchases, as they pay higher prices relative to an industry absent MFN clauses.

These concerns are not limited to only those firms that would be considered "dominant" under antitrust law; however, concerns are especially high when MFNs are used by a dominant firm. If the buyer is a dominant firm in the market, this helps the buyer maintain and perhaps even strengthen its dominant position in the market. If the MFN clause prohibits suppliers from offering a better price to enough of the buyer's rivals, this could be used to "protect market power."[158] Regardless of a firm's market dominance, when MFN clauses comprise an increasing volume of market sales made to customers with MFN protections, the greater is the deterrence on offering discounts to non-MFN buyers.

MFN-like clauses have been the subject of multiple judicial findings and proceedings.[159] On September 10, 2012, the Antitrust Division of the U.S. Department of Justice (DOJ) and the FTC held a joint public workshop on most-favored-nation clauses.[160] In 2013, both the DOJ and the European Commission established a 5-year ban on MFN clauses in consent decrees with Apple and its e-book sales.[161] More recently, FTC has brought cases around alleged anti-discounting and coercive tactics to prevent rivals from gaining the scale they need to meaningfully compete."[162]

In sum, MFN clauses may be an antitrust violation if they are used by companies with market power to harm a competitor and drive a competitor out of a market resulting in higher market prices overall; however, MFN

clauses do not require market dominance, for a given portion of market sales under MFN clauses could have the same effect.

Recommendations to Address Identified Concerns

Over the course of the 3 years since the President issued the Competition EO, USDA has already taken a wide range of steps designed to promote fairer, more competitive markets across food and agriculture, and in particular, livestock and meat markets.

This report represents a multiyear effort to **refresh and deepen the Packers and Stockyards Division's understanding** of pricing practices, labeling, fees, and other marketing practices in meat merchandising in light of fair-trade practice requirements governing such activity under the P&S Act. It is an important marker of progress but represents only a midpoint in the effort. Careful examination will need to be given to each potential concern, including its legal, economic, and practical business implications, and whether solutions require additional transparency or reporting, or whether more vigorous enforcement actions are necessary to prevent unfair practices or undue preferences.

Enhanced cross-agency collaboration will be necessary to develop an administration-wide approach to understand market concerns in the food industries and protect market participants. Thanks to the Competition EO and the ongoing work of the White House Competition Council, USDA has already worked in greater collaboration with its partners, in particular with the Federal Trade Commission (FTC), the Department of Justice (DOJ), and the State attorneys general in order to improve oversight over meat merchandising competition and fair-trade practices. USDA intends to work more closely with the FTC to address meat merchandising practices that may cross jurisdictional lines.

To address the burdens on smaller processors and producers that may be arising from potentially deceptive practices, unfair practices harming markets, and other violations arising from animal-raising claims made by the packers, USDA will also enhance **cooperation between the USDA, Food Safety Inspection Service and AMS's Packers and Stockyards Division** to enhance market monitoring, rulemaking, and enforcement. These efforts will complement FSIS's ongoing Animal Raising Claims Review and updates to relevant guidance.

Of particular note, individuals can file a complaint or tip on competition matters related to meat merchandising for livestock producers and poultry growers under the P&S Act with PSD and DOJ. Complaints can be filed by emailing PSDComplaints@usda.gov and ATR-USDA-PSAComplaints@usdoj.gov, by calling toll free 1-833-DIAL-PSD (1-833-342-5773), or by mail to USDA, AMS, FTPP-Packers and Stockyards Division, Stop 3601, 1400 Independence Ave., SW, Washington, DC 20250-3601.[163]

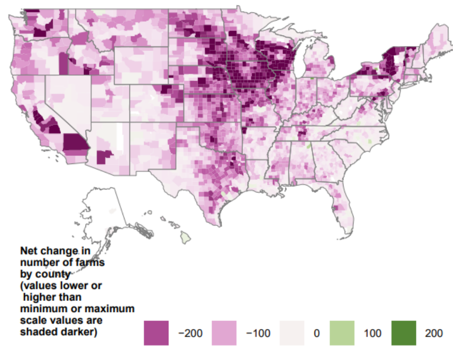
Going forward, USDA seeks to **respond thoughtfully to a changing market environment in meat merchandising**. Key goals include lowering costs for working families and promoting a transparent, competitive, and inclusive market for the benefit of improved market access for small, independent meat processors and grocers. To that end, USDA will be expanding and deepening its investigation, **issuing subpoenas** focused on (i) **potential unfair or deceptive fees** that may be unfairly harming market participants or reflect undue preferences and also on (ii) **pricing practices that may tilt the playing field in favor of those with market power** and may reflect unfair practices harming markets or undue preferences.

Based on the investigative efforts reflected in and accelerated as a result of this report, USDA intends to issue regulations that clarify illegal conduct under the P&S Act and **more vigorously enforce** the P&S Act in meat merchandising. This effort will commence with an **Advanced Notice of Proposed Rulemaking** to invite further comment on the competitive impact of practices highlighted in this report, as well as the contours of potential prohibitions, disclosures, and other interventions.

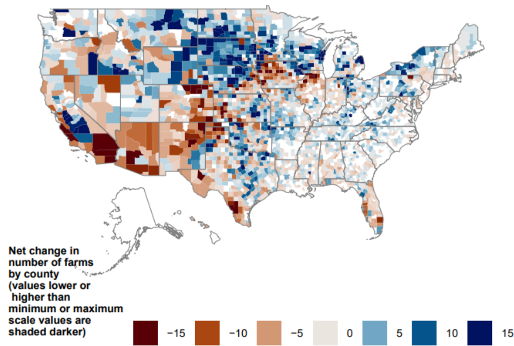
Appendices

Figure 1: Map of appx. change in number of cattle, hog, and broiler farm operations of various sizes, by county, with net change nationally shown in parentheses, 1978 – 2022[164]

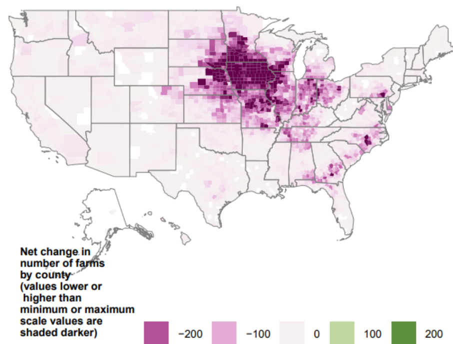
Cattle: 20 TO 499 HEAD (−274k)



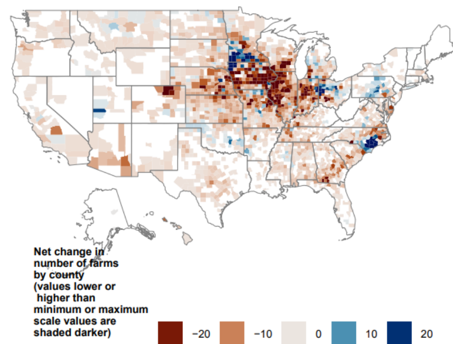
Cattle: 500 OR MORE HEAD (+3k)



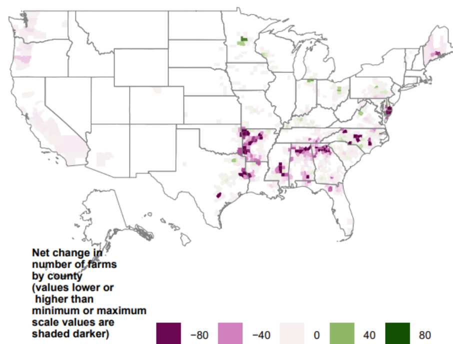
Hogs: 50 TO 999 HEAD (−199k)



Hogs: 1,000 OR MORE HEAD (−7k)



Broilers: 60,000 TO 499,999 HEAD (−10k)



Broilers: 500,000 OR MORE HEAD (+7k)

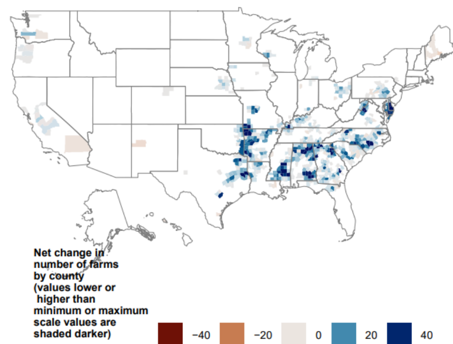
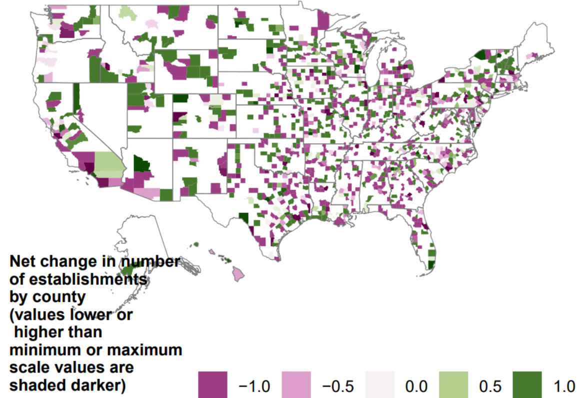


Figure 2: Map of appx. change in number of meatpacking establishments with fewer than 500 employees compared to with more than 500 employees for each U.S. county, with net change nationally indicated in parentheses, 1978 – 2016[165]



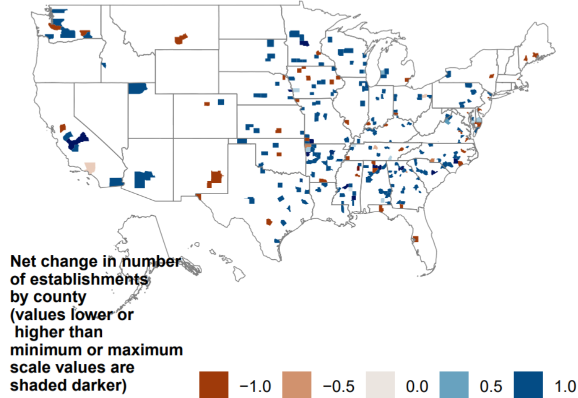
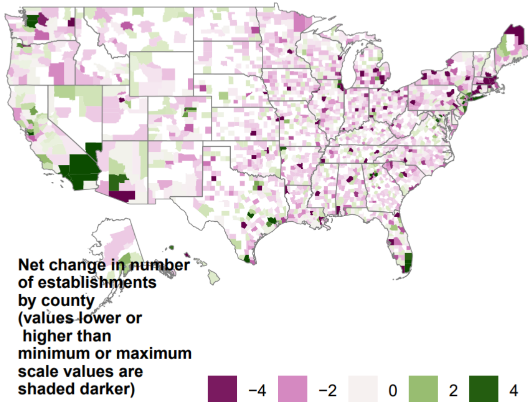


Figure 3: Map of appx. change in number of Census-classified wholesale grocery establishments with under 100 employees vs 100+ employees, with net change nationally indicated in parentheses, 1980 – 2016[166]



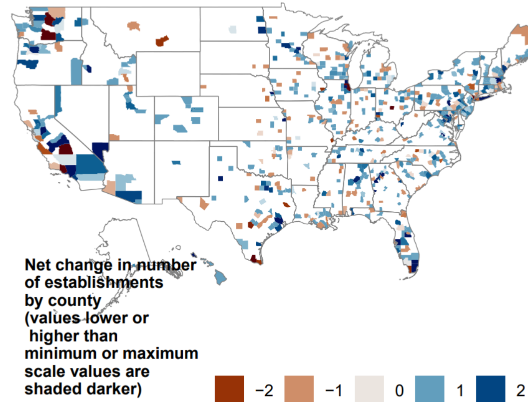
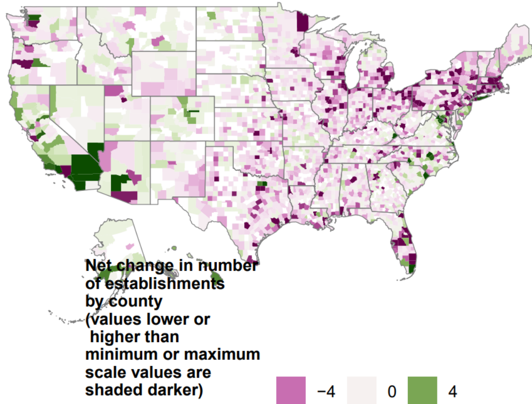
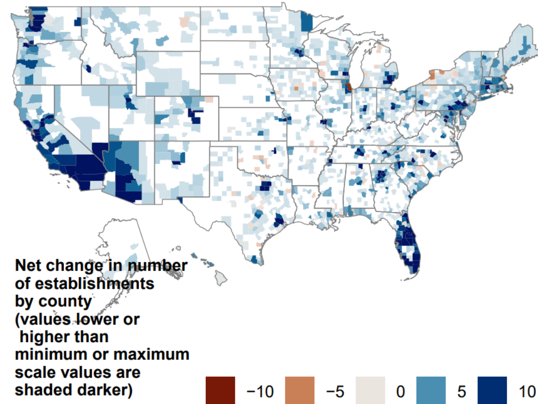


Figure 4: Map of appx. change in number of retail grocery stores with fewer than 100 employees compared to with more than 100 employees for each U.S. county, with net change nationally indicated in parentheses, 1980 – 2016[167]

Retail: Under 100 Employees (−6k)



Retail: 100+ Employees (+7k)



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48. Because the compiled data set includes data calculated using different methodologies to calculate four-firm share, the reader should not interpret the numbers to represent the precise numerical value or the estimate calculated annually by the USDA, but to broadly survey concentration trends over the period. Each point in the graphs represents a value approximated and recorded for the period. Approximates of four-firm market share were compiled from various reports. Reports typically cite as original sources: Census estimates

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