Farm Action

The Fall of Antitrust, the Rise of Corporate Power:

Impacts of Market Concentration on Farmers and Ranchers

A Special Report by Farm Action

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Introduction

In this paper, we will demonstrate the importance of the Packers and Stockyards Act (P&S Act) and antitrust law for American farmers raising livestock and poultry. We begin by recounting the rise of these protections, then document the effects of the concentrated market power made possible by their fall. We then illustrate the failed attempt of the Obama administration to step up enforcement in the early 2000s. Finally, we chart a path forward for the Biden administration to foster a healthy, competitive, and resilient economy where farmers, ranchers, and rural communities thrive.

How Did We Get Here?

Meatpacker Trust-Busting in the Early 20th Century

Around the turn of the 20th century, the U.S. government boldly confronted its agriculture market concentration problem by erecting guardrails in the form of antitrust law and producer protections. The Sherman Antitrust Act of 1890 was the first law in U.S. history to safeguard economic competition by curbing the concentration of power. In 1914, Congress passed two measures to help bolster and expand the Sherman Antitrust Act. The first was the Clayton Antitrust Act of 1914. The second was the creation of the Federal Trade Commission (FTC), a governmental agency empowered to investigate matters of antitrust violations and issue orders that restricted anticompetitive practices.[1]

Market concentration within the meatpacking industry was on the rise and the publication of Upton Sinclair's *The Jungle* in 1906 had brought the abusive practices of the meatpacking industry into the public spotlight. In 1919, an FTC report revealed that meatpackers were manipulating market prices, restricting the flow of goods, controlling the price of dressed meat, defrauding producers and consumers of food, and crushing competition. In fact, the FTC recommended governmental ownership of stockyards and their related infrastructure.[2]

In response to this report and public outcry, the P&S Act was passed in 1921. Often called the "Farmer and Rancher Bill of Rights," this comprehensive law was established to protect livestock and poultry producers from unfair monopolistic market practices. Since its passage, various United States Department of Agriculture (USDA) agencies have been empowered to enforce the P&S Act, holding meatpackers legally responsible for unfair and exploitative practices.

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[1] Britannica, T. Editors of Encyclopedia. "Sherman Antitrust Act." Encyclopedia Britannica, June 4, 2020. https://www.britannica.com/event/Sherman-Antitrust-Act

[2] United States Federal Trade Commission, *Food Investigation: Report of the Federal Trade Commission on the Meat-Packing Industry.* Washington: FTC, 1919, 76-78, https://babel.hathitrust.org/cgi/pt?id=pst.000008113016&view=1up&seq=76

The Department of Justice (DOJ), FTC, and USDA used the authority from these laws to curtail monopolistic practices and keep the playing field level. Farmers and ranchers enjoyed protection from the discriminatory treatment, constrictive pay schemes, and uncompetitive market conditions formerly inflicted by monopolistic meatpackers, and were for the most part able to sell their products freely on the open market. Over time, the P&S Act was able to successfully chip away at the power of the meatpackers. In 1918, the country's five largest beef meatpacking companies controlled 55% of the meat market. By 1976, the market share of the four largest companies had been reduced to 25%.[3]

Reversal of Farmer and Rancher Protections in the Late 1900s

This all changed in the 1980s when a group of Chicago School economists and lawyers working in the Reagan administration introduced a new interpretation of antitrust law. Traditionally, antitrust law was tasked with promoting competition and preventing corporations from amassing enough political power to threaten democracy. Under Reagan, the DOJ redesigned the scope of those laws to instead promote efficiency.[4] This was a radical digression from the existing antitrust law interpretations — the purpose of antitrust law would no longer be to promote competition through the maintenance of open markets; instead it would increase and maintain our access to cheap goods.[5]

Initially, centrists from both parties opposed this dramatic shift in policy, but they were overpowered by a number of left-wing academics and consumer activists in the Democratic Party who supported the goal of promoting efficiency. Before long, the courts began to reflect this shift in antitrust legislation interpretation.[6]

In 1983, Cargill, the second largest meatpacker in the U.S., moved to purchase Spencer Beef, the nation's third largest meatpacker. A rival meatpacker, Montfort, filed a lawsuit claiming the acquisition would harm competition. Three years later, the Supreme Court ruled 6-2 in Cargill's favor, setting a precedent that dramatically limited competitors' ability to challenge mergers and consequently triggering a flood of acquisitions across the agriculture industry. In beef, market consolidation happened so

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[3] United States Department of Agriculture, Packers and Stockyards Programs, Grain Inspection Packers and Stockyards Administration, *Assessing Competition in Meatpacking: Economic History, Theory, and Evidence,* Azzedine M. Azzam & Dale G. Anderson. Washington: USDA, 1996, 30-31, https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.457.1087&rep=rep1&type=pdf

[4] United States Department of Justice, *1982 Merger Guidelines.* Washington: US DOJ. 1982. https://www.justice.gov/archives/atr/1982-merger-guidelines; Federal Trade Commission, *The Evolution of U.S. Merger Law,* Debra Valentine. Washington: US FTC, 1996, https://www.ftc.gov/public-statements/1996/08/evolution-us-merger-law

[5] Lina Khan, "Obama's game of chicken." *Washington Monthly*, November 9, 2012, https://washingtonmonthly.com/2012/11/09/obamas-game-of-chicken/

[6] Ibid.

quickly and so aggressively that within 10 years, the market control of the top four meatpacking companies in the U.S. doubled from 36% in 1980 to 72% in 1990.[7]

Courts next moved against the original intent of the P&S Act as the "Farmer and Rancher Bill of Rights." In a series of cases in the 4th, 5th, 6th, and 11th[8] Circuits, the courts stripped farmers and ranchers of their ability to prevail on a claim under the P&S Act without first showing a "harm to competition." For an individual farmer or rancher this is an insurmountable burden of proof. Today, the P&S Act no longer has the strength to offer farmers and ranchers the same level of protections it offered in the first three quarters of the 20th century.

Market Concentration in the Real World

Due to intentional shifts away from policies that support and regulate healthy levels of competition and toward those that prioritize efficiency standards, the agriculture industry is facing record-high levels of corporate concentration. When the market share of the top four corporations, or CR4, is above 40%, economists say that market abuses are likely. Today, beef processing concentration is at 85%, pork processing is at 67%, and chicken is at 54%.[9] Such levels of concentration skew the power relationships in the food system and threaten both our economic and political democracy.[10]

Increased vertical and horizontal consolidation have had detrimental impacts on farmers and ranchers. When processing companies horizontally integrate by buying up their competitors, the number of processors in a region declines dramatically. At the local level, farmers may only have the choice of one or two processors; if the processor offers unfavorable contract terms or prices, the farmer has nowhere else to go.

When processing companies integrate vertically, they control the entire supply chain. The market power this gives them effectively eliminates any need to compete, as

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[7] United States Department of Agriculture and Grain Inspection Packers and Stockyards Administration, *Packers and Stockyards Statistical Report: 1995 Reporting Year, GIPSA 97-1,* Azzedine M. Azzam & Dale G. Anderson. Washington: USDA, 1996, 31, https://www.ers.usda.gov/webdocs/publications/47232/17820_tb1874h_1_.pdf?v=0

[8] See *Philson v. Goldsboro Milling Co.*, 164 F.3d 625 (4th Cir. 1998); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009); *Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010); *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005); and *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005)

[9] Mary K. Hendrickson, Philip H. Howard, Emily M. Miller, and Douglas H. Constance, *The Food System: Concentration and its Impacts* (A special report to the Family Farm Action Alliance, 2020), https://farmaction.us/concentrationreport/

[10] Ibid.

competitors cannot enter the market and business partners have no alternatives.[11] In the poultry industry, vertically-integrated corporations own or control the hatcheries, feed, specifications for the buildings animals are housed in, veterinarians, trucking, processing, and retail. This corporate hold over the market leaves no room for small local businesses and extracts all possible profits from rural communities. The Small Business Administration determined that today's contract poultry grower has no independence and operates under the mandate of the processor.[12]

When politicians and economists argue about the merits of a competitive versus efficient market, it is a theoretical exercise. But American farmers and ranchers have had to live with the real-world consequences of these decisions: under a disempowered P&S Act and antitrust law, corporations have freely consolidated market power while producers have been left without protection from that power. Contract poultry growers in restrictive contracts carry untenable debt loads; cattle ranchers are forced to sell at below-production prices while their share of the food dollar spirals downward; producers face financial repercussions for speaking out against exploitative corporate practices; and smaller meat processors and feedlots are driven out of business by their larger consolidated counterparts, further diminishing farmers' options.

Impacts of Beef Processing Concentration on Cattle Ranchers

In the cattle industry, the largest meatpackers either own or control the majority of the livestock needed to meet their plants' demands. As a result of this vertical integration, livestock producers are in direct competition with the corporations they depend on to buy their livestock. The beef packer can then control the price paid to farmers for their cattle by flooding the market with their own stock whenever they need to lower the market value. Due to the simultaneous horizontal integration, there are rarely any other options and cattle feeders are forced to accept whatever price they are offered.

Since 1970, the top four meatpackers' share of the beef market has jumped from 21% to 85% while the producer's share of the consumer beef dollar has plummeted from around 70% to 37%. In this transition, cattle producers have lost an estimated $1,500 per head of their share of the consumer beef dollar to the meatpacker.[13] Consider the

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[11] Adil Abdela, Kristina Karlsson, and Marshall Steinbaum, *Vertical Integration and the Market Power Crisis* (Washington: Roosevelt Institute, 2019), https://rooseveltinstitute.org/publications/vertical-integration-and-the-market-power-crisis/

[12] United States Small Business Administration, *Evaluation of SBA 7(A) Loans Made to Poultry Farmers.* Report Number 18-13, Washington: USDA/GIPSA, 2018, https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report-18-13_0.pdf

[13] Mike Callicrate, "Story of the Steer and a Theft of Epic Proportions," No-Bull Food News, November 16, 2021, https://nobull.mikecallicrate.com/2021/11/16/story-of-the-steer-and-a-theft-of-epic-proportions/

hypocrisy of a market where the producer is being paid record low prices while the consumer pays record high prices.

The Holcomb Fire

The Holcomb fire of 2019 highlights precisely how the consolidation of the meatpacking industry allows for such unethical price manipulation schemes. On Friday, August 9, a fire in Holcomb, Kansas shuttered a Tyson plant that handled five to six percent of beef processed in the U.S. By Monday morning, the packers' dire warnings of shortages caused retail grocers to make a run on beef in order to secure the expected Labor Day sales. Beef packers simultaneously cut the price paid to cattle producers with excuses about lost processing capacity.

By August 24th, the result was a 67% spread in what beef packers paid the cattle producer and how much they charged the retail grocery. To put this in perspective, this spread reflected a 143% increase over the average from 2016-2018. What is most telling about the market power of the dominant beef packers is that in the three weeks that followed the fire, the beef industry actually slaughtered 5,000 more cattle than the three weeks prior to the fire.[14] In reality, the packers had the processing capacity to replace the Holcomb plant's capacity all along.

Today, meatpackers use the pandemic and its related supply chain issues to hike prices excessively. While farmers earn less and consumers pay more than ever, companies like Cargill and Tyson are reporting record-high profits.[15]

Discrimination and Abuse in the Poultry Industry

Contract growing has dominated the poultry industry since the 1950s; however, at its introduction there were still healthy levels of competition in the market.[16] If farmers did not like the contract offered by one integrator, they were able to negotiate with another. But as antitrust enforcement diminished and consolidation escalated, poultry growers quickly began losing options.

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[14] United States Department of Agriculture, *Boxed Geef & Fed Cattle Price Spread Investigation Report.* Washington: USDA, 2020, https://www.ams.usda.gov/reports/boxed-beef-and-fed-cattle-price-spread-investigation-report

[15] Javier Blas, "Crop Giant Cargill Reports Biggest Profit in 15 Year History," *Bloomberg,* August 6, 2021, https://www.bloomberg.com/news/articles/2021-08-06/crop-giant-cargill-reports-biggest-profit-in-156-year-history; Tom Polansek and Ananya Mariam Rajesh, "Tyson Food Shares Set Record as High Meat Prices Fatten Profits," *Reuters,* February 7, 2022, https://www.reuters.com/business/retail-consumer/tyson-foods-beats-revenue-estimates-higher-meat-prices-2022-02-07/

[16] Dan Fesperman and Kate Shatzkin, "The Plucking of the American Chicken Farmer," *The Baltimore Sun,* February 28, 1999, https://www.baltimoresun.com/business/bal-pecking-order-day1a-story.html

Today, contracts from consolidated processing corporations routinely demand expensive equipment and infrastructure upgrades that require untenable levels of debt to fund. Many of these contracts only last 60 days. Still, farmers are forced to accept the terms, often mortgaging their farms and even their homes to avoid losing their contracts and facing bankruptcy.

Lacking the natural checks and balances of a competitive market, contract farming has become increasingly predatory. Farmers own everything that depreciates in value, such as the expensive infrastructure and equipment, while the processing companies own the only component that accrues value: the birds. While farmers take on all the risk, they have almost no authority over their own operations.[17]

Poultry Grower Tournament System

One of the poultry industry's best tools for financial punishment and control is the tournament system, a payment scheme touted as a way to promote efficiency among producers. In practice, it actually pits farmers and neighbors against each other by ranking them based on their performance: The healthier and heavier the chickens, the higher the farmer ranks. The higher the farmer ranks, the higher the farmer is paid. That pay is then deducted from the check of the lower-ranking farmers.[18] Because the processors control which farmer gets what feed and chicks, they can punish famers who don't toe the company line while rewarding those who do. This is one mechanism processing companies use to exhibit unfair and undue preferences.

Broken Promises: The Impact of the 2010 DOJ and USDA Hearings

In 2008 Senator Barack Obama, running as a populist candidate, took up the cause of farmers and ranchers and the abuses they endured.[19] As President, Obama demonstrated his commitment by organizing a series of hearings to investigate the state of the agricultural industry. At the March 2010 opening event in Ankeny, Iowa, Attorney General Holder assured the crowd that reform was now a cabinet-level priority: "Big is

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[17] Lina Khan, "Obama's game of chicken." *Washington Monthly*, November 9, 2012, https://washingtonmonthly.com/2012/11/09/obamas-game-of-chicken/

[18] Dan Charles, "The System Supplying America's Chickens Pits Farmer Vs. Farmer," *NPR*, February 20, 2014, https://www.npr.org/sections/thesalt/2014/02/20/279040721/the-system-that-supplies-our-chickens-pits-farmer-against-farmer

[19] "Exclusive video: How Obama won the Iowa Caucus and what Hillary and Bernie can learn from him." *Ecowatch,* January 27, 2016, https://www.ecowatch.com/exclusive-video-how-obama-won-the-iowa-caucus-and-what-hillary-and-ber-1882160212.html

not necessarily bad, but big can be bad if the power that comes from being big is misused…That is simply not something that this Department of Justice is going to stand for. We will use every tool we have to ensure fairness in the marketplace."[20]

The five full-day workshops represented the highest-level examination of the agriculture industry in decades, paralleling the FTC's 1919 review of the meat industry that led to the adoption of the P&S Act. Farmers responded to the administration's promises by driving hundreds of miles for a chance to be heard — despite the grave risk they took in doing so.

One Producer's Story: John Ingrum from Mississippi

John Ingrum, a poultry farmer in Mississippi, testified at the 2010 hearings about his experiences as a Black farmer in contract with Koch Foods. His testimony illustrated how Koch Foods, a dominant market power, discriminated against him as a Black farmer without repercussions. He explained he'd been lured into a contract with promises of impressive income streams, but that after signing began to receive lists of expensive upgrades. As the mistreatment worsened, so too did Ingrum's debt load. Ingrum explained that the company paid him less if the birds were sick or underfed, despite the fact that both the chicks and the feed were supplied by the company. After he suspected his feed deliveries were being shorted, he installed sensors to alert him of the drivers' arrival, only to catch them failing to fill an entire feed bin. He said that in a tray of 100 chicks, he would find 35 to 40 already dead, and on another occasion he ran out of feed for three days and the chickens started to eat one another. "There's no way it could be fair," he said at the hearing. "I had no control over the feed they brought me."[21]

Over time, Koch Foods began delivering flocks to Ingrum's farm less frequently and he began to fall behind on his loan payments. He looked into selling his farm. On the very night that he returned from his 300 mile trip to testify at the 2010 hearing in Alabama, he arrived home to find a note from Koch Foods saying that his contract had expired. [22]

Failure to Launch: The GIPSA Rules Fall Flat

By midsummer of 2010, the USDA had proposed a series of comprehensive measures to strengthen the P&S Act.[23] Known as the GIPSA Rules, they garnered a total

[20] Lina Khan, "Obama's game of chicken." *Washington Monthly*, November 9, 2012, https://washingtonmonthly.com/2012/11/09/obamas-game-of-chicken

[21] Isaac Arnsdorf, "How a Top Chicken Company Cut Off Black Farmers, One by One," *ProPublica*, June 26, 2019, https://www.propublica.org/article/how-a-top-chicken-company-cut-off-black-farmers-one-by-one

[22] Ibid.

[23] Congressional Research Service. *USDA's 'GIPSA Rule' on Livestock and Poultry Marketing Practices*. Washington: Library of Congress, January 7, 2016, 2.

of 61,000 public comments and addressed many farmers' concerns.[24] The administration stayed committed throughout the process: Dudley Butler, Administrator of GISPA and champion of poultry farmers' rights, attended every hearing.

Less than one month after the USDA published the proposed rules, the House Agriculture Committee called a hearing to question USDA officials. Nearly all of the Republican members plus several Democrats criticized the far-reaching impact of these rules and accused USDA of ignoring the concerns of industry groups such as the National Cattlemen's Beef Association and the National Chicken Council, which represented meatpacking corporations like Cargill and Tyson.[25]

This marked the beginning of a very targeted campaign against the GIPSA Rules: Agribusiness interests spent $7.79 million in 2010 to lobby against them,[26] demonstrating that the power they held over the industry translated to political power as well. This flexing of immense political influence led 115 members of Congress to send a letter to USDA Secretary Vilsack urging the agency to subject the rules to further economic analysis.[27] In June of 2011, the House Appropriations Committee included a crucial rider in its funding bill that stripped the USDA of the funds needed to implement these rules in 2012. The rider passed and was passed again each subsequent year for FY2013, FY2014, and FY2015,[28] until a viral Last Week Tonight with John Oliver episode exposed and called out the elected officials by name who were hampering the rules.[29]

Finally, in 2016, the USDA published a substantially watered-down version called the Farmer Fair Practices Rules — but they waited until the last months of the Obama administration, when the rules would be vulnerable to retraction. Sure enough, the Trump administration withdrew the rules shortly after assuming office.[30] The Trump administration also delivered the final blow to the P&S Act by scaling back GIPSA's

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https://www.everycrsreport.com/files/20160107_R41673_e1d67b445c928f46a6b23a04c38d116fdb819c93.pdf

[24] Ibid, 26.

[25] *Hearing to Review Livestock and Related Programs at USDA in Advance of the 2012 Farm Bill, Before the Subcommittee on Livestock, Dairy, and Poultry of the Committee of Agriculture House of Representatives*, 111th Cong., 27-28 (2010), https://www.govinfo.gov/content/pkg/CHRG-111hhrg58019/pdf/CHRG-111hhrg58019.pdf

[26] "Sector profile: Agribusiness." OpenSecrets, last modified January 24, 2022, https://www.opensecrets.org/federal-lobbying/sectors/summary?cycle=2010&id=A

[27] Congressional Research Service. *USDA's 'GIPSA Rule' on Livestock and Poultry Marketing Practices*. Washington: Library of Congress, January 7, 2016, 26, https://www.everycrsreport.com/files/20160107_R41673_e1d67b445c928f46a6b23a04c38d116fdb819c93.pdf

[28] Ibid, 2.

[29] Last Week Tonight with John Oliver, "Chickens," YouTube Video, 18:21, May 18, 2015, https://www.youtube.com/watch?v=X9wHzt6gBgI

[30] Leah Douglas, "Antitrust in food and farming under President Trump," *Journal of Food Law and Policy*, 13(1) (2017): 78-88, https://law.uark.edu/jflp/issues/13-1/jflp-2017-spring-78-88.pdf

enforcement authority. Today, GIPSA is a small subdivision of Agricultural Marketing Service (AMS) whose mission is to promote agricultural business, not to regulate or enforce fair marketing practices in the industry.[31]

Farmers and ranchers experienced deep disappointment at the end of this saga. The USDA and DOJ had invested substantial resources documenting the exploitation they experienced under a weakened P&S Act. For the first time in the lifetime of many, there had been a brief moment when they felt the government was prioritizing their needs over the interests of agribusiness corporations. But their own elected officials had blocked the revised rules drafted out of very personal experiences, and instead of any substantive action the DOJ quietly published a summary of these hearings, officially sweeping the farmers' traumas under the rug.[32]

In 2021, the Biden Administration announced new intentions to strengthen the P&S Act[33], but farmers and ranchers have not forgotten the broken promises of the 2010 hearings. To this day, as a direct result of these hearings, many are skeptical and distrustful of the government.

A Way Forward for the Biden Administration

14 years have passed since the 2008 Farm Bill directive to update and reinforce the P&S Act. Today, market concentration in meatpacking is at record levels and abuses run rampant. Since the 2020 election, Farm Action has briefed the Biden administration on policy and personnel recommendations intended to democratize the food system; the USDA's first-ever Equity Commission, investments to build out local and regional food economies, and a number of key cabinet positions were among the Farm Action

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[31] United States Department of Agriculture, "Secretary Perdue Announces USDA Improvements for Customer Service & Efficiency," news release, September 7, 2017, https://www.usda.gov/media/press-releases/2017/09/07/secretary-perdue-announces-usda-improvements-customer-service

[32] United States Department of Justice, *Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward*. Washington: Department of Justice, 2012, https://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf

[33] Brian Deese, Sameeera Fazili, Bharat Ramamurti, "Addressing concentration in the meat-processing industry to lower food prices for American families," White House Briefing Room (blog), September 8, 2021, https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/; "Executive Order on promoting competition in the American Economy, § 5(i)," White House Briefing Room, July 9, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

recommendations implemented by the administration in 2020 and 2021.[34] Farm Action continues to work with the administration toward advancing the following reforms:

1) USDA should restore the Grain Inspection, Packers and Stockyards Administration (GIPSA), armed with a budget to keep it sufficiently staffed and empowered to enforce the P&S Act.
2) Update the P&S Act through USDA rulemaking as follows:
    - Prohibit packers from owning and feeding cattle.
    - Prohibit packers from procuring cattle for slaughter through the use of forward contracts, unless the contract contains a firm base price that can be equated to a fixed dollar amount on the day the contract is signed, and the forward contract is offered for bid in an open, public manner.
    - Ban the tournament system in the poultry industry.
    - Clarify and define what constitutes unfair practices and undue preferences to include racial discrimination and retaliation.
    - Restore farmers' and ranchers' rights to bring a P&S Act claim without the burden of showing competitive injury.
    - Require packers to provide farmers with an option for contract terms that coincide with the terms of their facility mortgages when government loans or guarantees are utilized.
3) FTC and DOJ should reform their acquisition and merger guidelines to include a review of the impact the acquisition and merger has on competition.
4) Congress should grant FTC and DOJ the authority to review past acquisitions and mergers and the impact on competition, with authority to reverse them.
5) The FTC and DOJ should be funded to a level where they can fully enforce the Clayton and Sherman Acts to address the corporate power in the markets.

[34] Farm Action, *Build Back Better: Our Call to Action and Roadmap for Rural America* (A transition plan released to the Biden-Harris Administration, 2020), https://farmaction.us/build-back-better/