

# A 2023 Review of the Biden Administration's Commitment to Food System Competition



# Introduction

Decades of corporate concentration have created a food system that cheats workers, farmers, and consumers by fixing prices and wages, stifling innovation, and dominating independent businesses through restrictive contracts. The Biden administration has a vital window of opportunity to reverse course. The pandemic awakened the public to the fragility of concentrated supply chains and a new generation of antitrust leaders and enforcers are ready to pick up the policy tools that can tame monopoly power.

In July 2021, President Biden issued a sweeping executive order, *Promoting Competition in the American Economy*, that directed multiple federal agencies to revive antitrust enforcement and promote competition throughout the U.S. economy. A year ago, Farm Action and the Open Markets Institute released a report, “A Midterm Review of the Biden Administration’s Commitment to Food System Competition,” which assessed the Biden administration’s progress on its promises to take on corporate consolidation in the food system, as laid out in the executive order. Specifically, we assessed how the Department of Agriculture (USDA), the Department of Justice (DOJ), and the Federal Trade Commission (FTC) had fulfilled the food and agriculture-related directives of that executive order, grading each agency accordingly.

One year later, we’ve updated those report cards. The assessments utilize a weighted grading system in order to give more weight to the most impactful directives. ‘A’s represent agency actions that exceed expectations for that directive, while ‘F’s represent an agency’s apparent failure to achieve specific directives.

Since our last report, all three agencies have continued to make progress, as reflected by their improved grades. However, they are running out of time to deliver results by the end of Biden’s first term. As we enter the final two years of the Biden administration, we strongly urge these agencies to take swifter, more aggressive action before their window of opportunity closes.

# DOJ Report Card

General call for more vigorous antitrust enforcement (Section 5, b) (50%)

B+

General call for agency cooperation in cases of antitrust enforcement that have some agency overlap (Section 3, a-d)

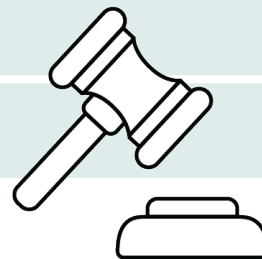
No  
Grade

DOJ and FTC will review merger guidelines (Section 5, c) (50%)

C+

Overall

B



**Assessment:** Over the past year, the Justice Department's Antitrust Division has shown a commitment to addressing concentration in agriculture markets. The DOJ filed a lawsuit against major poultry companies Sanderson Farms, Wayne Farms, and Cargill, alleging that the corporations suppressed worker pay and deceived contract farmers through the tournament payment system. The agency [proposed a consent decree](#) that would impose a court-appointed antitrust compliance monitor to the companies and prevent Wayne and Sanderson from docking contract farmers' base pay. Once approved by a judge, this consent decree will represent a more substantial policy change to poultry payment systems in the 15% of the market that Cargill-Sanderson controls than USDA's rulemaking to date. The DOJ Antitrust Division also persevered through challenging poultry price-fixing cases and mounted an effort to block U.S. Sugar's acquisition of Imperial Sugar, though both were ultimately unsuccessful. For these reasons, we raised the DOJ's enforcement grade to a B+. We did not give the DOJ an A in this category because there's still so much more that could be done. The agency has yet to release its long-overdue investigation into beef cattle-market manipulation. And while it has made efforts to block further consolidation, the agency has not shown any signs of breaking up some of the largest, monopolistic corporations.

Further, the DOJ and FTC still have not introduced new merger guidelines. Current merger guidelines are too permissive of corporate deals and downplay the harms of concentrated market structures for workers, producers, consumers, and business innovation. The DOJ and FTC must update these guidelines and revive the core goals of antitrust laws to prevent abuses of market power in their incipiency. While the agencies have proposed changes to improve merger reporting and asked for public comments on the merger guidelines, over the past year they have yet to take any additional steps to finalize new guidelines. Therefore, we gave the DOJ a **B** overall.

Our recommendations remain the same: in order to raise their grade to an A by the end of President Biden's term, the Antitrust Division must at a minimum issue strong merger review guidelines, issue and begin to act on their report on beef cattle-market manipulation, and bring at least one major monopolization case that seeks to break up a harmful food industry monopoly. To achieve exceptional marks, it should not stop at just one monopolization case.

# FTC Report Card

General call for more vigorous antitrust enforcement (Section 5, b) (20%)

B+

General call for agency cooperation in cases of antitrust enforcement that have some agency overlap (Section 3, a-d)

No  
Grade

DOJ and FTC will review merger guidelines (Section 5, c) (30%)

C+

FTC directed to “curtail the use” of non-compete clauses (Section 5, g) (20%)

A

FTC encouraged to issue fair competition rules generally (Section 5, h) (20%)

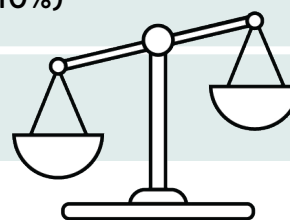
B

USDA and FTC joint report on improving access to retail markets, issues with retail concentration, and the Robinson-Patman Act (Section 5, i, iv) (10%)

C

Overall

B



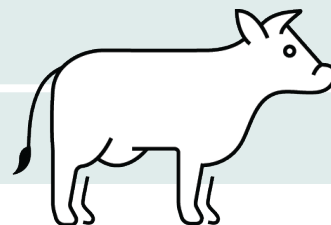
**Assessment:** The Federal Trade Commission has made key strides in advancing fair competition policy over the past year. In November 2022, the FTC [issued a policy statement](#) defining its interpretation of Section 5 of the FTC Act, which gives the agency rulemaking authority to ban unfair methods of competition. This statement superseded previous efforts by the FTC to narrow its Section 5 rulemaking authority and paved the way for rulemaking to outlaw deceptive, coercive, and otherwise unfair business tactics. The agency followed up by proposing the first unfair methods of competition rule in several decades to ban noncompete agreements. The rule takes a strong stance and bans noncompete agreements across the economy. Now the agency needs to finish the rule as well as close a few loopholes that could allow for noncompetes to effectively continue, such as training repayment agreements (TRAPs). Reviving this fair competition rulemaking authority is a monumental achievement, and for that we increased the FTC’s grade for fair competition rulemaking to a B. However, we did not give them an A in this category because the agency must not stop with its noncompete rule. The executive order encouraged the FTC to issue more fair competition rules, and the food sector could particularly benefit from a rule that makes exclusive dealing by dominant firms *per se* illegal.

The FTC also increased antitrust enforcement in the agriculture sector. In September the agency sued pesticide manufacturers Syngenta and Corteva for allegedly paying their distributors not to carry cheaper generic pesticides. The suit draws on an underenforced section of the Clayton Act (Section 3) and sends a warning shot to all food and agricultural corporations that abusing loyalty payments, exclusionary rebates, and other pay-to-block tactics to lock up markets and stifle new competitors. Additionally, reporting in January indicated that the FTC is pursuing investigations under another dusty yet essential antitrust statute, the Robinson-Patman Act. While these suits have not come to fruition, reviving the Robinson-Patman Act would help tame abuses of buyer power by dominant manufacturers and retailers, particularly in the grocery sector.

To increase their grade, the agency must act on its Robinson-Patman investigations and issue guidance and advisory opinions to better articulate ambiguous aspects of the Act, thus clarifying enforcement. The FTC should also prevent further grocery consolidation by blocking the mega-merger between Kroger and Albertsons and refusing to accept the failed solution of store selloffs. And at a minimum, it must complete its report with USDA on retail market concentration (we gave both agencies a C on this directive because they've started the process with public requests for information). The FTC should also use its authority to ban tactics that monopolize repair markets, ensuring farmers and other customers have the right to repair their products. FTC enforcers must investigate and take action against potential fertilizer price gouging. Finally, as with the DOJ, the FTC needs to finish updating its merger guidelines. Given this important work outstanding, we gave the FTC a **B** for their work thus far.

# USDA Report Card

General call for all agencies' heads to use their procurement power to improve competition by supporting small businesses (Section 2, f-g, and Section 5, a, ii) (18%)	C
General call for agency cooperation in cases of antitrust enforcement that have some agency overlap (Section 3, a-d)	No Grade
USDA encouraged to issue "Product of U.S.A." rulemaking (Section 5, i, ii) (18%)	A+
USDA and FTC joint report on improving access to retail markets, issues with retail concentration, and the Robinson-Patman Act (Section 5, i, iv) (8%)	C
USDA and Commerce joint report on intellectual property, seeds, and competition (Section 5, i, v) (8%)	B
USDA report on promoting alternative food distribution and value-added products (Section 5, i, iii) (8%)	B
USDA encouraged to issue new rules under the Packers & Stockyards Act (P&S Act) that "identify recurrent practices in the livestock, meat, and poultry industries that are unfair, unjustly discriminatory, or deceptive" (Section 5, i, i, A) (7%)	D
USDA encouraged to issue P&S Act rules that "[reinforce] the long-standing Department of Agriculture interpretation that it is unnecessary under the Packers and Stockyards Act to demonstrate industry-wide harm to establish a violation of the Act" (Section 5, i, i, B) (12%)	F
USDA encouraged to issue P&S Act rules that "[prohibit] unfair practices related to grower ranking systems" (Section 5, i, i, C) (7%)	D
USDA encouraged to issue P&S Act rules that update the definitions of "undue or unreasonable preferences, advantages, prejudices, or disadvantages" (Section 5, i, i, D) (7%)	C
USDA encouraged to issue P&S Act rules that protect farmers from retaliation (Section 5, i, i, E) (7%)	A
Overall	C



**Assessment:** While we applaud the progress USDA has made to promote a more competitive agricultural economy, we are concerned that it is running out of time to address several key directives contained within the executive order.

Since our last report card, USDA has published one additional report, consequently completing two of the three reports it was directed to produce. Both reports, [A Plan in Support of Fair and Competitive Markets](#) and [Promoting Fair Competition and Innovation in Seeds and Other Agricultural Input Industries](#), were thorough and well-executed and so received Bs for their acceptable completion. The report on the seed industry also included the promising establishment of a new Farmer Seed Liaison to help smaller producers and breeders navigate this complicated space, but we would have liked to see some of its recommendations include more aggressive enforcement actions. However, USDA is limited in this regard because the Justice Department has jurisdiction over antitrust enforcement in the seed industry. We are still waiting on the delivery of the third report on retail market concentration, the importance of which has only grown with the looming Kroger-Albertsons merger.

The executive order included clear language directing all agencies to use their procurement power to improve competition by supporting small businesses. As USDA attempts to foster competition by investing in a more diverse set of producers, it is critical to offer marketing opportunities through its own procurement to these producers until other antitrust policies help to create more market space for them. Unfortunately, USDA's progress has been slow at the best of times. USDA failed to finalize proposed changes to Agriculture Acquisition Regulation (AGAR) that would have required firms contracting with USDA to disclose labor law violations, require consideration of those violations, and pursue corrective actions against vendors with labor law violations. Agriculture Secretary Tom Vilsack has [defended](#) USDA's choice to continue to contract with giant meatpacker JBS despite its numerous violations and bribery convictions, arguing that removing them from USDA contracts could raise prices and "impair competitive choice for the taxpayer."

USDA's recent deployment of a tool intended to assist small and disadvantaged entities in identifying potential procurement opportunities should begin to reduce barriers for those producers, and as such we have raised their procurement grade from a D to a C this year. Now it needs to take aggressive actions to incentivize their purchases through set-asides and other tools.

In order to promote competition, the executive order directs USDA to strengthen the Packers and Stockyards Act and close exploited loopholes in the "Product of U.S.A." label through rulemaking. We were pleased to see that USDA recently proposed a thorough "Product of U.S.A." rule that would effectively close voluntary origin-labeling loopholes. We were also excited to see them take labeling integrity one step further with their new plan to reign in false "antibiotic-free," "free-range," and other animal-welfare claims. Their strong actions on this front allowed us to raise their labeling grade from an F all the way to an A+ this year.

Unfortunately, we are deeply concerned with their progress thus far on the Packers and Stockyards rulemaking. Since our last report, USDA has issued one additional proposed rule. To add transparency and clarity to our grades, we separated out the five Packers and Stockyards-related directives in the executive order. The harm-to-competition rule is widely acknowledged as the most important rule, since its absence essentially leaves the law toothless, and as such, this directive was given additional weight.

Of those five items, only protection from retaliatory practices has been adequately addressed thus far. In addition to offering protection from retaliatory practices, [Inclusive Competition and Market Integrity Under the Packers and Stockyards Act](#) takes a creative approach to addressing “undue or unreasonable preferences, advantages, prejudices, or disadvantages” by offering protections to “market-vulnerable” farmers. While this rule is less expansive than its 2010 predecessor, we think it does a reasonable job improving farmers’ protections. Neither of the proposed rules effectively identify and ban recurrent unfair practices, such as sweetheart deals between packers and large feedlots, and so we felt a D was appropriate for this directive. In fact, by declaring the tournament system deceptive in their Cargill-Continental-Sanderson consent decree, the DOJ has arguably done more to strengthen Packers and Stockyards Act enforcement than the USDA.

Without swift action, USDA will run out of time to make meaningful and lasting change. Any rules that are issued after this summer will more than likely be vulnerable to repeal by the Congressional Review Act. This would not only undo the rules but prevent USDA from ever issuing substantially similar ones. Unfortunately, according to the [Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions](#), we should not expect to see the harm-to-competition rule until November. Implementing these rules is arguably the most important action the USDA can take to ensure fair conduct in livestock markets and late, incomplete, weak, or repealed rules would represent a massive failure by USDA to protect farmers and fulfill the executive order.

We are also concerned that USDA seems to be missing the bigger picture. It is clearly committed to supporting a broader range of producers and has introduced improvements to its anticompetitive enforcement toolbox, but USDA appears to lack conviction when it comes to confronting corporate control of our food supply chain. The highly concerning disbursement of substantial taxpayer funds to the largest, most harmful players in the food industry through the [“Climate-Smart” grants](#) is a classic example of a failure to apply the Biden administration’s approach to competition beyond the explicit directives outlined in the executive order.

And without fair competition rules and supportive federal purchasing policies to improve market access, USDA’s historic \$1 billion investment in new meatpacking plants could go to waste. [At least one processor](#) who was awarded this funding declared bankruptcy before receiving it.\* Without immediate support, more will fail and inevitably the larger dominant packers will purchase the remnants.

The bottom line is that the agency needs to act aggressively now. We therefore believe that a fair grade for the Department’s work on this set of issues thus far is a C. In order to improve its grade, the USDA needs to issue strong Packers and Stockyards rules before the end of summer that ban the poultry tournament system and affirm that it is not necessary to demonstrate industry-wide harm in order to establish a violation of the Act. It also needs to establish clear procurement targets and do a better job supporting small and mid-size producers interested in becoming vendors for USDA Foods.

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\* **Correction:** This report was updated July 2023 to clarify a previous claim that some meat processors who received American Rescue Plan funds have “already begun to fail and declare bankruptcy.” In fact, just one known plant that was awarded a grant through this program has declared bankruptcy and it did not receive the funds before closing. This sentence was adjusted accordingly.



# Addendum: Rulemaking Progress Chart

EO Objectives: Rulemaking or Guidelines	Request for Information or Advanced Notice of Proposed Rulemaking (optional)	Proposed Rule Introduced for Notice and Comment	Publication of Final Rule
Ban on Non-Competes (FTC)	✓	✓	
Merger Guidelines (DOJ & FTC)	✓		
Inclusive Competition and Market Integrity (USDA)	N/A	✓	
Harm to Competition (USDA)			
Tournament System (USDA)	✓		
Poultry Payment Transparency Rule (USDA)	✓	✓	
Product of USA Labeling Rule (USDA)	✓	✓	