USDA Agricultural Marketing Service
U.S. DEPARTMENT OF AGRICULTURE

Agricultural Competition: A Plan in Support of Fair and Competitive Markets

USDA'S REPORT TO THE WHITE HOUSE COMPETITION COUNCIL

May 2022

Introduction

The COVID-19 pandemic brought home to farmers, workers, and consumers the harms caused by bottlenecks in the center of America's agricultural and food systems. The pandemic exposed the risks and dangers created by many of today's production systems, which value hyper-efficiency over competition and resiliency. Moreover, longstanding challenges of market concentration and unbalanced market power, which have been part of the agricultural sector for decades, have in many cases worsened. This report highlights the United States Department of Agriculture's (USDA) robust and aggressive plan to decrease concentration and increase competition in the agricultural sector and to safeguard against future harm to our nation's agricultural and food systems.

Concentration undermines economic resiliency and robust price competition. It lowers farmers' and ranchers' earnings, hamstrings their ability to compete, and limits the ability for rural economies to secure robust, self-sustaining prosperity. President Biden's Executive Order on Promoting Competition in the American Economy puts competition at the core of the Biden-Harris Administration's economic agenda and calls for a "whole-of-government approach" to promoting competition.[1]

The historic Executive Order directs 72 specific actions across the Federal government and includes important directives to the USDA to support competition and fairness in livestock and poultry markets, seeds and other inputs, retail food markets, and more. The steps are complementary to and supportive of the goals of the Executive Order on America's Supply Chains. [2]

Since President Biden issued the Executive Order on Competition in July, USDA has taken a range of actions to tackle competition issues in agricultural markets. To address these large and complex problems, USDA is using all of the tools available, including working in concert with the rest of the Administration.

Among other USDA initiatives, the Order included the following directive:

to ensure that farmers have greater opportunities to access markets and receive a fair return for their products, not later than 180 days after the date of this order, submit a report to the Chair of the White House Competition Council, with a plan to promote competition in the agricultural industries and to support value-added agriculture and alternative food distribution systems

This report responds to that directive and lays out USDA's approach to promoting competition in agricultural markets. Highlights of USDA's efforts include:

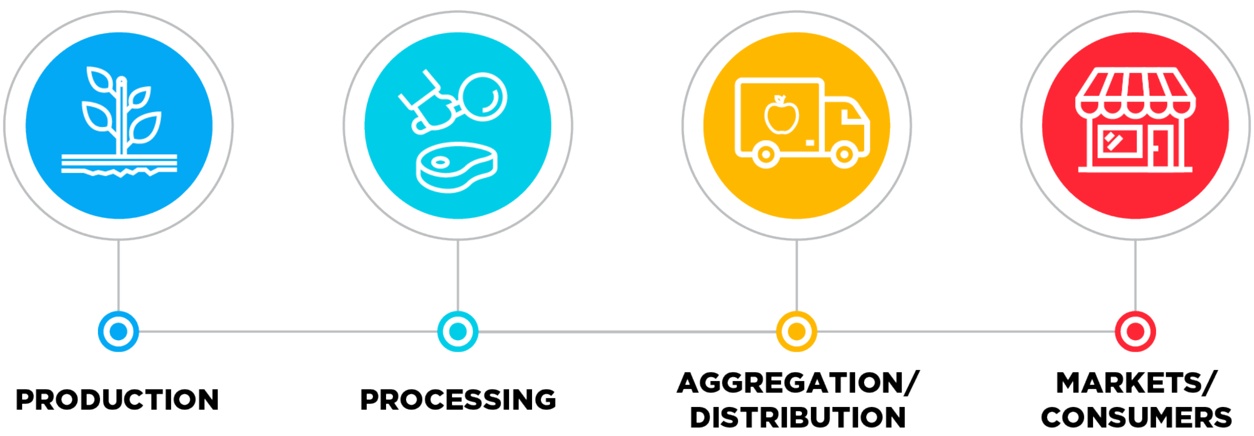
- Launching an unprecedented *multibillion* dollar investment plan to *directly* incentivize competition in food processing and fertilizer, creating more market opportunities and input options for producers.

[1] Executive Order 14036, Promoting Competition in America's Economy, 86 FR 36987, July 9, 2021, sec. 2.
[2] Executive Order 14017, America's Supply Chains, 86 FR 11849, February 24, 2021.

- Reinvigorating USDA's century-old fair and competitive market laws to establish a regime that counters unfair and anti-competitive practices and empowers producers and growers.
- Partnering with the Department of Justice (DOJ) to enforce antitrust laws vigorously. This includes standing up a new one-stop shop at FarmerFairness.gov to make it easier to report complaints of potential violations, with confidentiality protections and whistleblower protections against retaliation for reporting criminal antitrust concerns.
- Working in concert with the White House and other agencies to call out bad actors and firms that are padding their profits at the expense of farmers, ranchers, workers, and consumers.
- Partnering with the Federal Trade Commission (FTC) to enhance access to retail markets for farmers and smaller food processors.
- Working with the Department of Commerce's United States Patent and Trademark Office to promote access to affordable seeds, fertilizer, and other inputs.
- Reviewing USDA programs to encourage fair competition and ensure that they are not inadvertently supporting systems and relationships that are prone to abuse.
- Providing technical assistance and support as Congress considers legislation to modernize and improve transparency and price discovery in livestock markets.
- Enhancing value-added market access and protecting those markets from consumer confusion.
- Promoting competition in transportation networks that producers depend on.

USDA's work in this area is part of its broader initiative to enhance supply chain resiliency by supporting more and better markets across multiple components of the food system.

Figure: Creating More and Better Markets Across the Supply Chain



Addressing Competition: USDA's Approach

The meat and poultry processing sector is perhaps the best-known example of a highly concentrated agricultural industry. The supply chain lacks competition, choice, and resiliency, with adverse impacts on America's producers, consumers, rural prosperity, and economic resiliency. Half of poultry growers have a choice of only one or two poultry companies with which they can work.[3] Almost 85 percent of U.S. fed cattle slaughter is controlled by four companies, and the market power of those companies is often even greater in the local markets in which they acquire livestock.[4] The pork packing industry is also

[3] James MacDonald, "Technology, Organization, and Financial Performance in U.S. Broiler Production," Economic Research Service, June 2014, p. 30, available at https://www.ers.usda.gov/publications/pub-details/?pubid=43872.
[4] Annual Report, Packers and Stockyards Division, available at https://www.ams.usda.gov/publications/content/packers-and-stockyard-publications.
See also Andrew Green and Bruce Summers, Testimony for "Legislative hearing to review S. 4030, the Cattle Price Discovery and Transparency Act of 2022, and S. 3870, the Meat and Poultry Special Investigator Act of 2022," U.S. Senate Committee on Agriculture, Nutrition, and Forestry, April 26, 2022, fn 3, available at https://www.agriculture.senate.gov/hearings/legislative-hearing-to-review-s-4030-the-cattle-price-discovery-and-transparency-act-of-2022-and-s3870-the-meat-and-poultry-special-investigator-act-of-2022.
Using data on cattle purchases collected by AMS under Mandatory Prices Reporting (MPR), the HHI (Herfindahl–Hirschman Index) are calculated for beef cattle purchases based on their regional origin. The regions are based on the 5-areas of the AMS 5-Area Weekly Weighted Average Fed Cattle reports. These regional HHI values are then compared to the nationally calculated HHI.

Table 1: Adjusted HHI for Purchases from Different Regions (All Purchase Types) Feb. 2020-2021.

	CO	IA, MN	KS	NE	Other	TX, OK, NM	All States
Purchase Shares	8.1%	11.6%	23.9%	20.6%	15.0%	20.9%	100.0%
Head	3,841	1,703	3,026	2,060	2,702	2,296	1,882
Purchases	3,831	1,697	3,063	2,049	2,616	2,277	1,864

Adjusted to account for the purchase by packers that are in P&S data but not MPR data due to MPR excluding packers with less than 125,000 from reporting. This difference represents 6.33 percent in unreported sales.

Table 2. Adjusted HHI for Purchases from Different Origins (Negotiated Sales) Feb. 2020-21

	CO	IA, MN	KS	NE	Other States	TX, OK, NM	All States
Head	3,484	1,743	2,218	2,412	2,124	3,317	1,776
Purchases	3,488	1,734	2,221	2,377	2,106	3,262	1,758

Iowa & Minnesota register HHI levels only slightly below the national level of approximately 1800.
Note, AMS cannot release *weekly* regional HHI because of confidentiality concerns.
Source: USDA-AMS Market News, Feb. 2022.

considerably concentrated with four large firms holding 64 percent of the total capacity in 2020.

This high degree of concentration makes our food supply system—and ultimately, American families—more vulnerable. One fire at a slaughterhouse, a cyberattack, or a human health crisis can disrupt a significant share of the nation's meat and poultry capacity, placing consumers and producers at exceptional risk. During the early stages of the pandemic, when large meat-processing plants shut or slowed down due to COVID-19 outbreaks, producer prices in livestock markets collapsed and poultry and hog growers incurred significant economic costs such as depopulation or reduced flock placements.[5]

Total 2020 cattle and sheep slaughter fell 3.0 percent and 6.50 percent respectively, relative to 2019. During the height of the pandemic, the weekly total for cattle slaughter was 30.8 percent lower and sheep slaughter was 25.1 percent lower when compared to 2019 weekly averages. Total 2020 poultry slaughter was 0.9 percent lower, with the weekly slaughter being 10.4 lower at its lowest point when compared to 2019 weekly averages. Average weekly hog slaughter at the height of plant shutdowns and slowdowns in April-May 2020 was 11.5 percent lower than the same period in 2019. Meanwhile, meat prices have been the largest contributor to the rising cost of food at the retail counter over the years 2020-2021.[6] The farm-to-wholesale gap had grown by approximately 25 percent between 2010 and 2020, and it exploded by over 500 percent during the height of the pandemic.[7]

The Biden-Harris Administration took unprecedented steps to stabilize agricultural markets during the pandemic, with the American Rescue Plan delivering emergency financial assistance to farmers, ranchers and agricultural producers and businesses impacted by COVID-19 market disruptions. These pandemic investments help to fill the gaps in previous

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[5] USDA, Agricultural Marketing Service, "Boxed Beef & Fed Cattle Price Spread Investigation Report," July 22, 2020, see p. 6 and figures 1-4, available at https://www.ams.usda.gov/sites/default/files/media/CattleandBeefPriceMarginReport.pdf; Farm Service Agency, USDA, "USDA Issuing Approximately $270 Million in Pandemic Assistance to Poultry, Livestock Contract Producers," November 18, 2021, available at https://www.fsa.usda.gov/news-room/news-releases/2021/usda-issuing-approximately-270-million-in-pandemic-assistance-to-poultry-livestock-contract-producers.

[6] Brian Deese, Sameera Fazilli, and Bharat Ramamurti, "Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families," White House Blog, September 8, 2021, available at https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/; Brian Deese, Sameera Fazilli, and Bharat Ramamurti, "Recent Data Show Dominant Meat Processing Companies Are Taking Advantage of Market Power to Raise Prices and Grow Profit Margins," White House Blog, December 10, 2021, available at https://www.whitehouse.gov/briefing-room/blog/2021/12/10/recent-data-show-dominant-meat-processing-companies-are-taking-advantage-of-market-power-to-raise-prices-and-grow-profit-margins/.

[7] The farm-wholesale gap grew from $39.4 in January 2010 to over $50.8 in January 2020. But in May 2020, Choice boxes reached a record high of $459.00, with negotiated cash cattle only bringing $180.20 at the same time. This indicates that live cattle are trading at a $282.60 discount to the Choice box. Data from the Economic Research Service.

pandemic assistance and provide a foundation to enable producers to supply surging demand. They also help ensure that smaller and independent producers can recover.

As part of the Biden-Harris Administration's Pandemic Assistance for Producers initiative, USDA has provided a broad range of support to America's farmers and ranchers, including:[8]

- More than $19 billion in Coronavirus Food Assistance Program 2 (CFAP 2) payments, including a fourfold increase in participation by historically underserved producers since the program reopened in April 2021.
- Approximately $270 million in payments to contract producers of eligible livestock and poultry.[9]
- Over $43 million in assistance for those who had to depopulate livestock and poultry due to insufficient processing access related to COVID-19 backups and exacerbated by a just-in-time system (Pandemic Livestock Indemnity Program).
- $1 billion to purchase healthy food for food insecure Americans and build food bank capacity, ensuring that a portion of these funds are used to purchase from local and underserved producers.
- $350 million in additional dairy assistance related to market volatility.

USDA expects further Pandemic Assistance to continue to fill remaining gaps this year.

Stabilizing markets and providing emergency relief was merely the first step. The Biden-Harris Administration is committed to structural reforms to create better, fairer, and more resilient agricultural markets—to addressing the longstanding competition problems that made our food systems so fragile. To mitigate the impact of future unforeseen economic shocks, improve supply chain resiliency, and address the broader problems of insufficient competition, the Biden-Harris Administration has prioritized building new, better, and more competitive markets, with a particular focus on livestock and poultry processing. Fair and competitive markets policy, as set forth in the Executive Order on Competition, forms a central component of that effort.

In directing USDA to prepare this report, President Biden's Executive Order succinctly frames a central tenet of agricultural competition policy: "to ensure farmers have greater opportunities to access markets and receive a fair return for their products."[10] Specifically, the Executive Order directed USDA to set out:

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[8] USDA "Pandemic Assistance for Producers," available at https://www.farmers.gov/coronavirus/pandemic-assistance (last accessed December 2021).
[9] Farm Service Agency, USDA, "USDA Issuing Approximately $270 Million in Pandemic Assistance to Poultry, Livestock Contract Producers," November 18, 2021, available at https://www.fsa.usda.gov/news-room/news-releases/2021/usda-issuing-approximately-270-million-in-pandemic-assistance-to-poultry-livestock-contract-producers.
[10] Executive Order 14036, Promoting Competition in America's Economy, 86 FR 36987, July 9, 2021, sec. 5(i)(iii).

a plan to promote competition in the agricultural industries and to support value-added agriculture and alternative food distribution systems through such means as:

> (A) the creation or expansion of useful information for farmers, such as model contracts, to lower transaction costs and help farmers negotiate fair deals;
>
> (B) measures to encourage improvements in transparency and standards so that consumers may choose to purchase products that support fair treatment of farmers and agricultural workers and sustainable agricultural practices;
>
> (C) measures to enhance price discovery, increase transparency, and improve the functioning of the cattle and other livestock markets;
>
> (D) enhanced tools, including any new legislative authorities needed, to protect whistleblowers, monitor agricultural markets, and enforce relevant laws;
>
> (E) any investments or other support that could bolster competition within highly concentrated agricultural markets; and
>
> (F) any other means that the Secretary of Agriculture deems appropriate.[11]

As this roadmap highlights, the challenge of bringing competition to these markets requires the deployment of as many tools as possible. USDA is broadly focused on creating new opportunities for sustained on-farm profitability, especially as we work to address a consolidated food industry and return a larger share of the food dollar to those growing, harvesting, and processing our food. Our tools to do so can be grouped into four strategies:

1. Investing in promoting competition in meat and poultry processing;
2. Restoring confidence, fairness, and integrity to the regulation of livestock and poultry markets;
3. Enabling farmers and ranchers to fairly access value-added markets, where they can earn a greater share of the food dollar; and
4. Promoting competition analysis, advocacy, and action across the food system.

Across all our work, USDA is committed to a strategy of engagement with stakeholders and openness to ideas and feedback.

The efforts summarized in this report represent USDA's commitment to fair and competitive markets. Valuing fairness for the individual producer and in markets can have broader positive impacts: keeping rural communities vibrant, creating jobs and choices for rural workers and families, adding value that reaches the producer and rural communities instead of boosting short-term profits for a select few, and lowering prices for consumers and providing them better options. While some claim that the current, highly concentrated system yields short-term efficiency and economies of scale, any such marginal benefits do

[11] Executive Order 14036, Promoting Competition in America's Economy, 86 FR 36987, July 9, 2021, sec. 5(i)(iii).

not justify the costs. Too often, corporate consolidation is destroying the livelihoods of far too many farmers and rural communities. Moreover, any short-term efficiency gains are often eclipsed in the longer term when firms with market power use their dominance to charge consumers more, produce fewer or lower quality products, and innovate less. And as the pandemic laid bare, consolidation can have devastating consequences for the resiliency of our food supply chains.

Any single step on its own may not be enough, so our strategy is to work on multiple fronts simultaneously such that the combined result is more than the sum of its parts. Together, these steps provide a pathway towards building more, new, and better agricultural markets for producers, food businesses, and consumers alike.

1: Investing in Promoting Competition

Tackling the bottlenecks at the center of America's agricultural supply chains requires a multipronged strategy. Robust antitrust and fair markets enforcement are critical—as discussed in section II—yet direct assistance can also play pivotal roles in facilitating new market entrants by helping them tackle a range of financial and other barriers and risks to entering the market. That's why under President Biden and Secretary Vilsack's leadership, USDA is investing directly in spurring competition in meat and poultry processing, in domestic fertilizer capacity, and more.

Promoting new competition is not only a direct and powerful tool for securing resiliency in America's food supply, but it can also enhance access to healthy, nutritious, and affordable food for America's working families. With these new tools to invest in competitive markets, USDA plans to do just that. These investments will address critical gaps in the market, and support improved access to new capital and training on food safety, workforce training, technical capacity, research and innovation, and more. Significant investments in these areas will protect our nation's food supply from future disruptions.

These efforts complement historic investments by the Biden-Harris Administration in infrastructure, the success of working families, climate, and equity, which play a foundational role in enabling economic and social vitality in rural communities. For example, USDA announced $75 million to 20 organizations to provide technical assistance to connect underserved producers with USDA programs and services. [12] With 50 percent of Black farmers in cattle and dairy—predominantly in cattle—fair and competitive markets are an equity issue.[13] Across all our investments in new and expanded competitive capacity, USDA is placing equity, opportunity, and sustainability at the center of the pro-competition efforts.

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[12] "USDA Announces American Rescue Plan Technical Assistance Partnerships Focused on Underserved Producers," Nov. 24, 2021, available at https://www.usda.gov/media/press-releases/2021/11/24/usda-announces-american-rescue-plan-technical-assistance.

[13] National Agricultural Statistical Service, USDA, "Black Producers," 2017 Census of Agriculture, October 2019, available at https://www.nass.usda.gov/Publications/Highlights/2019/2017Census_Black_Producers.pdf.

Expanding Meat and Poultry Processing Capacity

The Biden-Harris Administration's Action Plan for A Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain (the Meat and Poultry Supply Chain Action Plan), released at the White House's January 3, 2022 roundtable with farmers and ranchers, announced that USDA is dedicating a combined $1 billion in American Rescue Plan and Consolidated Appropriation Act funds for the expansion of independent processing capacity.[14] These efforts are designed to further expand local and regional meat and poultry processing capacity so that farmers, ranchers, and consumers have more choices in the marketplace. Specific elements already announced under this effort include the following:

Access to Capital. Meat and poultry processing enterprises are complex, competitive, and therefore perceived by lenders as high-risk investments. More than 40 respondents to the Request for Information for Meat and Poultry Processing[15] As evidenced by the responses received, meat and poultry processing facilities take significant start-up capital to get off the ground. Most private loans are asset-secured, requiring significant collateral prior to entry. Providing a capital stack through the USDA portfolio of programs for resilient meat and poultry processing program that includes grants with guaranteed loans and allowing lenders to advance collateral rates against completed projects significantly reduces the barriers to entry and expansion in this critical sector. The following are several new programs that will facilitate the capital needed to invest in new competitive enterprises.

Meat and Poultry Processing Expansion Program. Announced in February 2022, the Meat and Poultry Processing Expansion Program (MPPEP) offers $150 million in grants for gap financing to independent meat and poultry processors. The primary goal of the program is to provide more and better processing options to producers as soon as possible. Applicants must demonstrate how their project will expand capacity in the applicant's market to accommodate additional species, increased volumes, or otherwise expand capacity.

MPPEP focuses on projects in the later stages of development. The program will not only help meet independent processors' immediate financing needs but is also designed to enhance and promote competition in the long term. The program is not available to firms that are nationally dominant in beef, pork, chicken, or turkey processing, defined as holding a market

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[14] White House, "Readout of President Joe Biden's Event with Farmers, Ranchers on his Action Plan for a More Competitive Meat and Poultry Supply Chain," January 3, 2022, available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/readout-of-president-joe-bidens-event-with-farmers-ranchers-on-his-action-plan-for-a-more-competitive-meat-and-poultry-supply-chain/; White House, "FACT SHEET: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain," January 3, 2022, available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/; USDA, "Meat and Poultry Supply Chain," available at https://www.usda.gov/meat (last accessed Jan. 2022).

[15] Competition and Meat Supply Chain Investments: Highlighted Comments from the Request for Information (RFI), available at https://www.usda.gov/sites/default/files/documents/Competition-RFI-Anecdotes-010322.pdf (last accessed May 2022).

share greater than or equal to the entity that holds the fourth largest share of the market for any of the listed species.[16] In the case of any change in total or partial ownership within 10 years of the funding award, the awardee must notify USDA and will be subject to a review by USDA, in consultation with relevant antitrust agencies if and where appropriate,) to determine if the sale or partial sale is consistent with the purposes of the program.[17]

USDA also intends to make an additional $225 million in financing assistance grants available to meat and poultry processors later in 2022.

Meat and Poultry Intermediary Lending Program. Under a new program to further support lending to meat and poultry processing, USDA will work with lenders to make more capital available to independent processors that need credit. To address the credit access gap, USDA will deploy up to $275 million in partnership with lenders that will, in turn, provide loans and other support to businesses at rates and on terms that increase access to long-term, affordable capital. USDA will put an initial emphasis on supporting lenders that invest in underserved communities.

Food Safety, Workforce Training, Technical Capacity, and Research and Innovation.

The access to capital programs described above provide only one leg of the stool needed to ensure enhanced competitive capacity in meat and poultry processing. That is why USDA is also investing in food safety capacity, workforce capacity and training, and other aspects of technical capacity needed to ensure a successful independent processor industry. Specific elements include the following:

Overtime and Holiday Inspection Costs for Small and Very Small Processing. USDA directly assisted small and very small USDA-inspected meat and poultry facilities to help them compete despite the pandemic. Many facilities incurred extraordinary expenses during the pandemic due to increased demand for locally processed food. To respond, USDA deployed $100 million in American Rescue Plan funding to reduce overtime and holiday inspection fees for small and very small establishments.[18] To date, this provision has helped approximately 2,600 small and very small facilities expand their business, thus allowing them to better compete.

Meat and Poultry Inspection Readiness Grants. USDA provided more than $30 million in grants to more than 150 meat and poultry slaughter and processing facilities through the

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[16] Grants Notice, Meat and Poultry Processing Expansion Program, Rural Business-Cooperative Service, USDA, RD-RBS-22-01-MPPEP, available at https://www.grants.gov/web/grants/view-opportunity.html?oppId=338342 (last accessed Feb. 2022).

[17] Reporting Requirements and Accountability within Program Solicitation Information, Meat and Poultry Processing Expansion Program, Rural Business-Cooperative Service, USDA, Feb. 24, 2022, RD-RBS-22-01-MPPEP, available at https://omb.report/icr/202202-0570-002/doc/119007101 (last accessed Feb. 2022).

[18] USDA Food Safety and Inspection Service, "Overtime and Holiday Inspection Fee Reductions for Small and Very Small Establishments, July 15, 2021, available at https://www.fsis.usda.gov/policy/federal-register-rulemaking/federal-register-notices/overtime-and-holiday-inspection-fee.

Meat and Poultry Inspection Readiness Grants and has now launched a second round of funding to provide more than $20 million in additional assistance.[19] These grants assist processing facilities with costs to make improvements necessary to obtain a Federal Grant of Inspection or otherwise comply with requirements to ship meat across state lines, therefore expanding market opportunities for these facilities.[20]

Workforce Capacity and Training. A reliable supply of skilled workers will play an important role in the success of new and expanded meat and poultry processing capacity. USDA is providing up to $100 million to fund training and coordination for meat and poultry processing jobs, to support development of a well-trained workforce with safe workplaces and fair wages. USDA will work closely with partner organizations, including workers and researchers, with expertise in workforce development and worker health and safety. Creating new, good-paying job opportunities in rural communities is an important part of this initiative.

Technical Assistance. Standing up new and expanded competitive meat and poultry processing capacity also requires sustained access to expert knowledge. Strict adherence to environmental, food safety, and worker safety requirements is vital. And in a sector with complex markets and competitive challenges, business management requires skill and innovation. To help new entrants gain a firmer toehold in the sector, USDA is providing $25 million to launch a nationwide network of technical assistance providers to support new entrants and smaller firms in this complex and technical sector.[21]

Research and Innovation. Local and regional independent processors also need access to new and emerging innovative practices and technologies, and cultivating more innovative practices and technologies play a role in success. USDA will invest an estimated $20 million in publicly accessible research and development.

Addressing Bottlenecks in the Food Supply Chain

The pandemic revealed the vulnerabilities that arise from a range of bottlenecks in the middle of the food supply chains, including all range of food processors, cold storage, distribution, and more. (These efforts may include, but will also go beyond, meat and poultry supply chains.) To enhance the resiliency of these key supply chains, increase competition,

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[19] Agricultural Marketing Service, MPIRG Description of Funded Project, FY 2021, available at https://www.ams.usda.gov/sites/default/files/media/FY21MPIRGDescriptionofFundedProjects.pdf; USDA, USDA Announces More Resources to Increase and Expand Meat and Poultry Processing Capacity, March 25, 2022, available at https://www.usda.gov/media/press-releases/2022/03/25/usda-announces-more-resources-increase-and-expand-meat-and-poultry.
[20] USDA, "USDA Invests $32 Million to Strengthen U.S. Food Supply Chain; Solidifies Commitment to Helping the Meat and Poultry Sector Recover from the Pandemic," (covering the Meat and Poultry Inspection Readiness Grant, November 22, 2021, available at https://www.usda.gov/media/press-releases/2021/11/22/usda-invests-32-million-strengthen-us-food-supply-chain-solidifies.
[21] Agricultural Marketing Service, Meat and Poultry Processing Capacity - Technical Assistance, available at https://www.ams.usda.gov/services/grants/mppta (last accessed May 2022).

and enhance choice for producers and consumers, USDA established a new loan-guarantee program that will make approximately a billion dollars available to help create competition in the middle of agricultural supply chains. The Food Supply Chain Guaranteed Loan Program will leverage $100 million from the American Rescue Plan and public and private-sector investments to provide a billion dollars in financing.[22] Together, these investments will support a more robust set of local and regional food infrastructure options for producers and consumers alike.

Supporting Sustainable, American Fertilizer Capacity

In 1984, many small and medium-sized firms produced nitrogen fertilizer in quantities that met or exceeded domestic demand. However, between 1984 and 2008, the number of U.S. firms producing nitrogen fertilizer fell from 46 to 13 firms. Now, just two companies supply the vast majority of fertilizer potash in North America, while just four companies supply 75 percent of U.S. nitrogen fertilizers. These companies' possession of scarce resources and control over distribution channels raises risks relating to concentration and competition. The increasing concentration of elemental reserves exposes farmers to a range of pricing-related risks, as fertilizers are one of the top three costs for farmers.

Farmers depend on nitrogen, phosphate, and potassium as key nutrients that are included in manufactured fertilizer, yet a handful of fertilizer companies control the channels in which farmers obtain these nutrients to grow a productive crop. In 2021, prices U.S. farmers paid for fertilizers increased 60 percent, with nitrogen fertilizer prices increasing 95 percent. Factors include a limited supply of the minerals and high energy costs, high global demand and agricultural commodity prices, reliance on fertilizer imports, and lack of competition in the fertilizer industry.[23]

Fertilizer production is also concentrated globally, with prices susceptible to trade disruptions—a vulnerability unfortunately exhibited in Russia's recent invasion of Ukraine. Russia accounts for 15 percent and 17 percent of global nitrogen and potash exports, respectively. Belarus, a close ally of Russia, makes up an additional 16 percent of potash exports.[24] U.S. and global fertilizer price pressures have been severely amplified with Russia's

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[22] USDA, "USDA Launches Loan Guarantee Program to Create More Market Opportunities, Promote Competition and Strengthen America's Food Supply Chain," December 9, 2021, available at https://www.usda.gov/media/press-releases/2021/12/09/usda-launches-loan-guarantee-program-create-more-market.

[23] USDA Agricultural Marketing Service, "Access to Fertilizer: Competition and Supply Chain Concerns," March 17, 2022, available at https://www.federalregister.gov/documents/2022/03/17/2022-05670/access-to-fertilizer-competition-and-supply-chain-concerns.

[24] Joseph Glauber and David Laborde, "How will Russia's invasion of Ukraine affect global food security?," International Food Policy Research Institute, Feb. 24, 2022, available at https://www.ifpri.org/blog/how-will-russias-invasion-ukraine-affect-global-food-security.

aggression in Ukraine. Texas A&M recently projected that nitrogen fertilizer costs per acre in 2022 would increase 134 percent and phosphorus and potassium fertilizer by 93 percent.[25]

USDA is taking action to address challenges in the fertilizer market which are threatening adequate production of agricultural commodities, with special interest in how market challenges affect small to mid-sized producers. First, USDA is investing $500 million from the Commodity Credit Corporation to develop a grant program, like the recently announced meat and poultry grants, to support fertilizer production in the United States by making available fertilizer materials required in connection with the production of agricultural commodities.[26] The new program will support fertilizer production that is:

- Independent – Outside the dominant fertilizer suppliers, increasing competition in a concentrated market;
- Domestic – Produced in the United States, benefitting domestic companies and domestic production;
- Innovative – Takes the opportunity to make improvements in conventional fertilizer production methods and ramp-up use of fertilizer substitutes;
- Sustainable – Uses renewable energy sources or uses a smaller environmental footprint; and
- Farmer-focused—projects must support new supplies for U.S. farmers instead of other industries.

Details on the application process are to be announced in the summer of 2022.

USDA is also working closely with relevant Federal and state antitrust enforcers as they evaluate the competitive state of the market and address concerns regarding potentially anticompetitive practices. As discussed below in section IV, USDA is also conducting its own request for information as well.

Although building new capacity in any sector will take time, the investments will ultimately form a more regionally accessible and dispersed network of meat and poultry processing availability, enhancing supply chain resiliency, competitive choice for producers and consumers, and food security. Yet, we must also remain vigilant, as investments such as these may face risks of elimination and appropriation from potential anticompetitive and abusive practices in the marketplace. These could include predatory pricing by existing competitors in input markets and in wholesale distribution, retail grocers, and other food service markets. These could also include exclusionary or discriminatory tactics, including even threats of

[25] Texas A&M Agricultural and Food Center, "Economic Impact of Higher Crop and Input Prices on AFPC's Representative Crop Farms," May 2022, available at https://afpc.tamu.edu/research/publications/files/716/BP-22-06.pdf.

[26] USDA, "USDA Announces Plans for $250 Million Investment to Support Innovative American-made Fertilizer to give US Farmers more choices in the Marketplace," March 11, 2022, available at https://www.usda.gov/media/press-releases/2022/03/11/usda-announces-plans-250-million-investment-support-innovative.

retaliation against producers and retail partners with new with new market entrants. Regulators will remain vigilant and are increasing enforcement against anticompetitive mergers and conduct, including in food, agriculture and retail markets.[27]

To further support the competitive environment for these capacity-building investments, USDA will continue working with antitrust and competitive market enforcement partners, including DOJ, FTC, and other Federal and state antitrust agencies, as we as other members of the White House Competition Council, to strengthen enforcement and enhance protections for farmers, ranchers, processing competitors, and consumers. More is discussed below in Section II. USDA and these agencies are also seeking to comprehensively understand agricultural markets in the digital age. To that end, USDA has launched public requests for information, hosted a research conference to elucidate competition issues in retail markets, and expanded interagency information sharing, including for investigations.[28] More is discussed below in section IV.

2: Modernizing and Reinvigorating the Oversight of Livestock and Poultry Markets

Investing in new and expanded local and regional processing capacity can powerfully and directly enhance farmers' and ranchers' access to more competitive markets. But robust antitrust and fair markets rules and enforcement are equally critical—not only to rein in problematic practices in the existing sector but also to prevent new entrants from being undermined by the existing dominant players. Fair and competitive markets rules and robust enforcement, thus are part and parcel of USDA's broader efforts to enhance food and agricultural supply chain resiliency, which has broad implications for economic resiliency, nutrition security, and even national security.[29]

That is why USDA is deploying every regulatory and enforcement tool at its disposal to enhance fair and competitive markets. In partnership with the DOJ, the FTC, and other members of the White House Competition Council, USDA is reinvigorating and modernizing

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[27] See, e.g., Federal Trade Comm'n, "FTC Requires Northeast Supermarkets Price Chopper and Tops Market Corp. to Sell 12 Stores as Condition of Merger" (Nov. 9, 2021 available at https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-requires-northeast-supermarkets-price-chopper-tops-market-corp-sell-12-stores-condition-merger See, e.g., Federal Trade Commission v. Facebook, Inc., 1:20-cv-03590-JEB (D.D.C. 2021), available at https://www.documentcloud.org/documents/21177063-memorandum-opinion.

[28] In 2021, the Federal Trade Commission launched a 6(b) Inquiry into supply chain disruptions and ordered a number of agricultural and retail firms to provide detailed information to understand the causes of ongoing supply chain disruptions. Fed. Trade Comm'n, FTC Launches Inquiry into Supply Chain Disruptions (2021), available at https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions.

[29] USDA, "USDA Agri-Food Supply Chain Assessment: Programs and Policy Options for Strengthening Resilience," February 2022, available at https://www.ams.usda.gov/sites/default/files/media/USDAAgriFoodSupplyChainReport.pdf; https://www.ams.usda.gov/supply-chain.

the full range of tools to ensure fair and competitive markets. USDA is also modernizing its own fair and competitive markets toolkit by proposing a modern set of rules under the Packers & Stockyards Act, enhancing the transparency reporting regime under the Livestock Mandatory Reporting Act, and aligning other USDA programs with the goal of promoting competition.

Partnering on Antitrust Enforcement

The last 40 years have seen significant underenforcement of the antitrust laws.[30] As President Biden stated in his remarks on the Executive Order:

Forty years ago, we chose the wrong path, in my view, following the misguided philosophy of people like Robert Bork, and pulled back on enforcing laws to promote competition. We're now 40 years into the experiment of letting giant corporations accumulate more and more power. And where — what have we gotten from it? Less growth, weakened investment, fewer small businesses. Too many Americans who feel left behind. Too many people who are poorer than their parents.[31]

The harms from concentration and anticompetitive practices are increasingly recognized to include, but extend far beyond, consumer price, product quality, and innovation harms.[32] Competitive harms to worker wages and economic opportunity,[33] supply chain resiliency,[34]

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[30] "Fact Sheet: Executive Order on Promoting Competition in the American Economy," The White House, July 9, 2021, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

[31] Hon. Joseph R. Biden, "Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy," The White House, July 9, 2021, available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/.

[32] See, e.g., Marc Jarsulic, "Antitrust Enforcement in the 21st Century," The Antitrust Bulletin, September 2019, available at https://journals.sagepub.com/doi/full/10.1177/0003603X19877008.

[33] See, e.g., Caius Z. Willingham and Olugbenga Ajilore, "The Modern Company Town," Center for American Progress, 2019, available at https://www.americanprogress.org/article/modern-company-town/. See also U.S. Department of the Treasury, "The State of Labor Market Competition in the U.S. Economy," March 7, 2022, available at https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf; https://home.treasury.gov/news/press-releases/jy0634.

[34] USDA, "USDA Agri-Food Supply Chain Assessment: Programs and Policy Options for Strengthening Resilience," February 2022, available at https://www.ams.usda.gov/sites/default/files/media/USDAAgriFoodSupplyChainReport.pdf; https://www.ams.usda.gov/supply-chain.

functioning transportation channels,[35] price discovery,[36] systemic financial risks,[37] rural communities,[38] and more are becoming clearer than ever before, thanks in part to analysis and reforms coming out of President Biden's Executive Order on Competition.[39]

In the food and agriculture sector, these problems have been brought to the fore in recent years. In this sector, even compliance with the most basic elements of antitrust law appear to remain at issue. DOJ's criminal prosecution of price fixing in the poultry markets reflects a determined and persistent approach to combatting these blatant violations.[40] USDA also is committed to partnering with the DOJ, FTC, and state attorney generals to enable vigorous enforcement of the Sherman Antitrust Act, the Clayton Antitrust Act, Federal Trade Commission Act, the Packers and Stockyards Act, and other relevant laws. Over the course of the past year, USDA has been working with DOJ on investigations affecting competition in the livestock and poultry markets.

This year, the two departments established FarmerFairness.gov, a joint "one-stop shop" complaint and tips portal that will allow both departments to review information about possible fair and competitive markets violations, and also make it easier for farmers and ranchers to report unfair and anticompetitive practices. Complaints reporting what they reasonably believe to be a criminal antitrust violation may be entitled to whistleblower protection under the Criminal Antitrust Anti-Retaliation Act, 15 U.S.C. 7A-3. As of May 18, 2022, the portal received 66 submissions.

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[35] The White House, "FACT SHEET: Lowering Prices and Leveling the Playing Field in Ocean Shipping," February 28, 2022, available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-lowering-prices-and-leveling-the-playing-field-in-ocean-shipping/.

[36] Jon Lauck, "Toward An Agrarian Antitrust: A New Direction for Agricultural Law," 75 N. D. L. REV. 449 (1999).

[37] See, e.g., Hon. Rohit Chopra, "How Should Regulators Review Bank Mergers?" Consumer Financial Protection Bureau, December 9, 2021, available at https://www.consumerfinance.gov/about-us/blog/how-should-regulators-review-bank-mergers/; Hon. Gary Gensler, "Testimony Before the United States House of Representatives Committee on Financial Services," U.S. Securities and Exchange Commission, October 5, 2021, available at https://www.sec.gov/news/testimony/gensler-2021-10-05.

[38] See, e.g., Mary K. Hendrickson, Phillip H. Howard, Emily M. Miller, and Douglas Constance, "The Food System: Concentration and Its Impacts," Farm Family Action Alliance, Nov. 2020/May 2021, available at https://farmaction.us/wp-content/uploads/2021/05/Hendrickson-et-al.-2020.-Concentration-and-Its-Impacts_FINAL_Addended.pdf.

[39] These concerns may also be relevant to the interpretation of harms to competition under the Packers and Stockyards Act. See Michael Kades, "Protecting Livestock Producers and Chicken Growers," Washington Center for Equitable Growth, May 5, 2022, available at https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.

[40] Department of Justice, "One of the Nation's Largest Chicken Producers Pleads Guilty to Price Fixing and is Sentenced to a $107 Million Criminal Fine," Feb. 23, 2021, available at https://www.justice.gov/opa/pr/one-nation-s-largest-chicken-producers-pleads-guilty-price-fixing-and-sentenced-107-million.

Deploying and Enhancing USDA Fair and Competitive Markets Tools

USDA will use its full authority to set modern and effective ground rules for fair and competitive livestock and poultry markets. Enacted in 1921, the 100-year old Packers and Stockyards Act (7 USC sec. 181 et seq) governs fairness and competition in the livestock and poultry markets. It limits unfair, unjustly discriminatory, and deceptive practices, undue preferences and prejudices, and anticompetitive practices by packers, swine production contractors, and live poultry dealers on both sides of the meat and poultry supply chain—that is, in the acquisition of livestock and poultry for processing and the sale of meat in the wholesale meat market. This authority is broader than what exists under the Sherman Act.

For many decades, USDA enforcement helped ensure open markets for producers and competitive market entry for packers and poultry companies into the wholesale and retail meat markets.[41] However, in recent decades, the strength of the Act has been undermined by a combination of regulatory narrowing and underenforcement by past Administrations, budget and administrative cuts (to the agency's policy development and enforcement capacities, and its critical enforcement partners in the Office of General Counsel), and judicial constraints. From the overall concentration in livestock and poultry markets to specific troubling practices, such as the opacity and lack of control growers face under the tournament system, the result has been a law that has been underutilized, given the demands of the time. The challenge is to develop rules, policy rules, policy, and enforcement capabilities to address the markets as they exist today so that the Packers and Stockyards Act fulfills Congress's goal to protect livestock producers and poultry growers. USDA will also identify targeted pathways to develop legal rules that address these challenges

A Modern Set of Packers and Stockyards Rules. USDA has already announced that it is preparing new rules under the Packers and Stockyards Act to address poultry contracting and tournaments;[42] unfair practices, undue preferences, unjustly discriminatory practices, and deceptive practices; and the limitations on the Act's effectiveness owing to requirements imposed by some courts to show harm to competition.

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[41] See, e.g., *Wilson & Company v. Benson*, 286 F.2d 891 (1961) (preventing predatory pricing risks in wholesale meat markets); *Swift & Co. v. United States,* 393 F.2d 247, 253 (1968) (finding refusal to bid in the open market an anticompetitive practice).

[42] Tournaments are the overwhelming grower contracting and compensation method in poultry, especially broiler chickens. Under this system, poultry companies manage an entirely vertically integrated production system except for the stage where poultry farmers "grow out" chicks into chickens ready for processing. Poultry farmers must provide the land, the poultry grow-house structure, and labor services in raising the chicks, while poultry companies provide the chicks and feed. Growers are paid based on their efficiency in increasing the pounds of poultry meat based from the feed utilized. However, pay varies based on a grower's ranking compared to their neighbors in a "tournament" that is run by the poultry company (called the "integrator") for each flock. Contracts may not provide any guarantees of flocks or chicks (density) but are commonly amendable, unilaterally, at any time. 50% of growers have two or fewer choices of integrators in their local area.

USDA has released the first of these proposed rules to significantly expand transparency in poultry contracting and tournaments. The proposal is designed to address information asymmetries and related deception risks that harm growers' abilities to make effective decisions in poultry contracting and in the operation of their farms under the tournament system. First, the rule proposes to give growers a Poultry Disclosure Document that provides clear, accountable disclosure of their earnings opportunities and certain risks, such as flock placement and sale-of-farm policies, before they consider whether to become a poultry grower or upgrade their poultry housing facilities. Disclosures would address risks of deception from promises that grower earnings are higher than what growers' actually make or more variable than reasonably understood from averages—hence a proposed requirement to disclose the range of actual earnings outcomes in quintiles, and a comparison to similarly situated growers. The risks of deception from economically incomplete information in contracts would also be addressed by proposed requirements governing disclosure of annual flock placement and density guarantees.

To ensure accuracy and honesty to growers, the Poultry Disclosure Document would be subject to anti-fraud protections, record-keeping requirements, and a governance framework with CEO-level accountability. Poultry growers would also be protected in discussing this information with key advisors, business partners, and other growers. The proposal would exempt small live poultry dealers, those harvesting less than 2 million live pounds of poultry weekly, from the disclosure requirements.

Additionally, the rule proposes to require tournament-specific disclosures: first, of inputs delivered to growers at the time of delivery, and then, the distribution of input differences at settlement. These disclosures would give growers critical information about the inputs they receive at the point of receiving the inputs, in particular—

- stocking density of the placement;
- all ratios of breeds of the poultry delivered;
- ratios of male and female poultry delivered (if so determined);
- the breeder facility;
- breeder flock age;
- health impairments; and
- adjustments, if any, to the calculation of the grower's pay based on the inputs.

Input disclosure at delivery would help the grower immediately address the risk of deception and improve outcomes based on their skills as a grower. Settlement disclosures would help them address deceptive risks and plan better. They would be broken out by housing specification and also would disclose gaps in feed placement, so that growers may better address risks of whether their performance is a function of skill and effort, investment in housing, or other factors.

These additional disclosures would address a range of information asymmetries and other deception risks that may arise under the vertically integrated poultry system. USDA estimates that benefits from the improved availability of information for growers outweigh any modest costs.

This first round of rules, focused on poultry, would address information asymmetries and other deception risks through the powerful, yet flexible and market-oriented tool of transparency. As former Justice Louis Brandeis famously stated, sunlight is the best disinfectant. Of course, specific prohibitions and regulatory limitations also have an important role to play, particularly in concentrated markets where poultry processors have significant power over growers. To facilitate additional input, data, and ideas that may inform additional efforts to regulate the poultry tournament system, USDA has also put forward an Advance Notice of Proposed Rulemaking requesting and welcoming engagement with interested stakeholders around ideas to be developed in further rulemaking on poultry tournaments.

Later this summer, USDA intends to publish a second rule which will cover issues relating to discrimination, retaliation, and deception. Following that, the third rule will focus on certain unfair practices and undue preferences, as well as explain whether and when a showing of harm to competition is—and is not—required under sections 202(a) and (b). These rules will facilitate the development of a robust enforcement agenda that will promote fair and competitive markets for the benefit of consumers and producers, competitive markets and price discovery, and supply chain resiliency, among other goals. USDA may also engage in additional rulemaking under the Packers and Stockyards Act in the future.

Even while the new rules are being crafted, USDA is committed to the enforcement of the Packers and Stockyards Act to the maximum extent possible under current law. For example, in August 2021, USDA announced a new enforcement policy that represents a significant departure from the 2020 undue preferences rule.[43]

Elevating and Upgrading Competition Policy at USDA. USDA is committed to building new competition analysis, policy, and enforcement capacity and elevating competition policy's status. Already, with the appointment of a Senior Advisor for Fair and Competitive Markets, Secretary Vilsack has ensured that competition policy and Packers and Stockyards Act issues enjoy sustained attention at the highest levels of the Department. But even more needs to be done to rebuild the capacity of USDA's competition regulatory unit. Budgets, structure, and leadership are all critical.

Today, competition and regulatory work at USDA largely resides within the Agricultural Marketing Service (AMS), and in particular the Fair Trade Practices Program's (FTPP) Packers

[43] Agricultural Marketing Service, USDA, "USDA Celebrates Landmark Agricultural Legislation's Century of Service by Committing to Maximum Enforcement of the Packers and Stockyards Act," August 24, 2021, available at https://www.ams.usda.gov/press-release/usda-celebrates-landmark-agricultural-legislation%E2%80%99s-century-service-committing.

and Stockyards Division (PSD).[44] FTPP was a newly created program area at AMS dedicated to fair market regulatory standards and enforcement, covering not only Packers and Stockyards Act but also Country-of-Origin Label (COOL) enforcement, the regulation of unfair and deceptive practices in fruits and vegetables, and warehouse regulation. While AMS is known as a marketing agency, regulatory standards have long been an important part of its toolkit: from specialty crops anti-fraud oversight to quality grading to organic standard-setting and more. AMS brings diverse expertise and capacity to the table, and today's AMS is fully committed to the mission of ensuring fair and competitive markets.

AMS is further committed to investing and elevating Packers and Stockyards Act investigative and enforcement capacity. A major challenge is PSD's budget, which has been heavily constrained— resulting in a 40 percent decline in staff since 2010. Going further back, units that focused, for example, on wholesale meat sales were abolished and policy expertise and investigative resources were lost as staff departed but were not replaced. Information technology, research, data analysis, market surveillance, and on-the-ground engagement with producers have all suffered amidst severe resource constraints. Additionally, the Office of General Counsel (OGC), which plays a critical role as the legal review and litigation arm for PSD, has been constrained heavily by resource shortages over the years as well.

The President's FY2023 Budget includes a critical down-payment to rebuild the Packers and Stockyards Act enforcement capacity with a proposed 40 percent budget increase of $10.3 million.[45] These additional resources will be critical for enabling PSD, together with OGC, to deliver on sustained policy and enforcement efforts in complex competition matters—including protecting new market entrants in meat and poultry processing from anticompetitive practices.

In addition to more budgetary resources, there are several legislative authorities that would be helpful in facilitating the enforcement of the Packers and Stockyards Act. These include—

(a) A special investigator's office with a fully-funded team of enforcement attorneys and investigators, dedicated to preventing and addressing anticompetitive practices in the meat and poultry industries, would provide critical capacity and skills resources needed to tackle the challenges in this complex market;

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[44] PSD had previously been a program, at the same level as FTPP, within the Grain Inspection and Packers and Stockyards Administration (GIPSA). Established in 1994, GIPSA also included the Federal Grain Inspection Service (FGIS). GIPSA was dissolved by the previous administration, and both PSD and FGIS were transferred to AMS. FGIS continues as a program to manage the grading and inspection of grain, much the way several other AMS programs engage in grading services and oversight of livestock, eggs, seeds, and crops. The previous Packers and Stockyards Program was downgraded to be a division of the newly established FTPP. Other divisions transferred to FTPP also handle regulatory compliance matters, such as unfair and deceptive practices in specialty crops and country-of-origin labeling enforcement.

[45] 2023 USDA Budget Explanatory Notes. Agricultural Marketing Service. Available at https://www.usda.gov/sites/default/files/documents/24-2023-AMS.pdf.

(b) Administrative litigation authority for poultry violations—similar to that which exists for livestock already—would increase USDA's enforcement efficiency, improve consistency in case management, and ease the burden on scarce DOJ resources that could be better utilized in other ways;

(c) Access to Livestock Mandatory Reporting data to enable much-needed competition research and ongoing market surveillance;[46]

(d) Civil investigative demand authority, such as that which the FTC has, to enable more comprehensive, efficient, and orderly collection of relevant information in complex investigations;[47] and

(e) Whistleblower protection provisions for employees and contractors of regulated entities who report suspected violations of the Packers and Stockyards Act, similar to that which was recently provided for criminal antitrust whistleblowers and which also exist in Federal financial regulation, food safety regulation, and elsewhere, would help bring to light—and stop—bad practices.

Assessing Livestock Trading Markets

The Livestock Mandatory Reporting Act (7 USC sec. 1635 et seq), enacted in 1999 as an amendment to the Agricultural Marketing Act of 1946, responds to concerns about market concentration in meatpacking and the ability of meatpacking companies to use and control information around transactions and pricing in the marketplace. The law sets forth a mandatory data collection regime from packers and provides transparency by making market prices in cattle, hogs, and certain other livestock available to the public.

USDA remains committed to enhancing transparency, price discovery, and fairness in the livestock markets through available tools under the Livestock Mandatory Reporting (LMR) Act. In August 2021, the AMS Market News service announced two new reports that enhanced transparency in cattle markets for cattle traded today through formula marketing arrangements, which make up a majority of cattle traded today.[48] The first report provides transparency into the base price of these formula marketing arrangements. The second shows the distribution of net sales prices after the base prices of the cattle have had premiums added and discounts subtracted based on the performance of the particular cattle.

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[46] See Government Accountability Office, "U.S. Department of Agriculture: Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market," April 10, 2018, available at https://www.gao.gov/products/gao-18-296.

[47] Section 13 of PL 96-232 added CIDs to the Federal Trade Commission's investigative tools in 1980. (15 USC §57b-1.) The FTC describes the use of CIDs and subpoenas as "critical" in its work. Burke Kappler, Office of the General Counsel, "The FTC takes its subpoenas and CIDs seriously – and you should, too," Federal Trade Commission, March 6, 2019, available at https://www.ftc.gov/enforcement/competition-matters/2019/03/ftc-takes-its-subpoenas-cids-seriously-you-should-too.

[48] Agricultural Marketing Service, USDA, "New USDA Market News Reports to Enhance Price Transparency in Cattle Markets," August 5, 2021, available at https://www.ams.usda.gov/press-release/new-usda-market-news-reports-enhance-price-transparency-cattle-markets

The combination of these two reports gives producers important information about where the cattle market is.

AMS's Livestock and Poultry Program also supports producers through trainings to facilitate producers' ability to effectively utilize the LMR data. These types of educational and technical assistance programs play important roles in enabling producers to remain independent. This year, USDA also released a new mobile application to enable farmers and ranchers to access market news data directly from their mobile phones.[49]

Transparency is only part of the market structure issues at play in the cattle industry. A key concern is whether the cash negotiated market is sufficiently deep and competitive to serve as a reference rate that fairly reflects the market value of cattle and fairly distributes the risks and costs of price discovery. Since 2005, negotiated cash trade market accounted for nearly 52 percent of live cattle sales nationally. Today, they account for little more than 19 percent. Some regional markets experience even thinner negotiated cash markets where trade falls below 15 percent. Indeed, one of these regional markets, where the bidding actually occurs, are so thin that USDA cannot release weekly concentration (HHI[50]) numbers because of confidentiality requirements. Moreover, volume fluctuates on a week-to-week basis as packers move in and out of the markets. This combination of thin and volatile markets creates high levels of risk for producers that utilize the market, giving rise to questions about its utility for others that rely on it to send market pricing signals.[51]

Significant market power in livestock markets increases the risk that packers can and do either engage in anticompetitive conduct that suppresses livestock prices or manipulate livestock markets, resulting in unfair pricing for producers.[52] Thin cash markets also heighten the risks of market manipulation and other problematic conduct.[53] And it is easy to understand why this accusation is regularly leveled by producers: thanks to contractual formulas where the base reference price of the cattle are tied to cash prices, every additional dollar that a packer spends in the cash negotiated market ripples through the packer's much

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[49] Agricultural Marketing Service," USDA, USDA Introduces First Market News Mobile App Providing Instant Access to Market Information," February 1, 2022, available at https://www.ams.usda.gov/press-release/usda-introduces-first-market-news-mobile-app-providing-instant-access-market.
[50] Herfindahl-Hirschman Index (HHI) presents a market's concentration by adding the square of each participants' market share.
[51] Andrew Green and Bruce Summers, Testimony for "Legislative hearing to review S. 4030, the Cattle Price Discovery and Transparency Act of 2022, and S. 3870, the Meat and Poultry Special Investigator Act of 2022," U.S. Senate Committee on Agriculture, Nutrition, and Forestry, April 26, 2022, available at https://www.agriculture.senate.gov/hearings/legislative-hearing-to-review-s-4030-the-cattle-price-discovery-and-transparency-act-of-2022-and-s3870-the-meat-and-poultry-special-investigator-act-of-2022.
[52] See Michael Kades, "Protecting Livestock Producers and Chicken Growers," Washington Center for Equitable Growth, May 5, 2022, available at https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.
[53] See Gina-Gail Fletcher, Benchmark Regulation, 102 Iowa Ls. Rev. 1929 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776731.

larger volume of formula trades.[54] That is, when formula contracts are exclusively based on cash prices, a packer has strong disincentives against bidding higher in the cash market because higher cash prices will trigger increases in its formula contract obligations.

Packers may also provide additional support to certain larger feedyards, where cattle are fed to finish and marketed to the packer, to engage in risk-sharing, financing, and partial ownership, to provide additional benefits to those producers above and beyond the prices paid for the cattle and reported by LMR. To that end, up and down the cattle supply chain, producers work with each other to capitalize on individual strengths. The cow-calf producer is efficient at producing calves that are sold to feedyards whose strengths are to grow the cattle and aid in marketing to packers. Relationships are key always, but in today's capacity-constrained and concentrated markets—especially regionally—securing shackle space is extremely valuable to all producers.[55] At the same time, producers and commentators have raised concerns about whether markets are sufficiently open and competitive.[56]

Deepening the cash market is one way to reduce the risks in that market and enhance price discovery. Requiring exchange trading is another time-tested way to promote competition, open markets, and reliable price discovery.[57] Properly designed and effectively regulated, exchange trading can have the dual benefits of strong competitive pricing signals and a more level form of market access for smaller participants.[58]

Incorporating other pricing data into base prices may be another tool to help relieve the pricing risks in the cash market—and thus benefit producers trading in those markets—since the adverse impact of limited cash market bidding on formula pricing is dampened. Moreover, where the base price is tied to a market where the producer and packer's interests are aligned—a wholesale or retail market such as boxed beef—then the contract may actually

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[54] See, e.g., Francisco Garrido, Nathan H. Miller, Minji Kim, and Matthew C. Weinberg, "Buyer Power in the Beef Packing Industry: An Update on Research in Progress," April 13, 2022, available at http://www.nathanhmiller.org/research.

[55] See, e.g., Bart L. Fischer, et al eds., "The U.S. Beef Supply Chain: Issues and Challenges," June 2021, available at https://www.afpc.tamu.edu/research/publications/710/cattle.pdf.

[56] Peter C. Carstensen, "Dr. Pangloss as an Agricultural Economist," available at American Antitrust Institute, "AAI Senior Fellow Peter Carstensen Responds to Economic Research on Marketing of Beef Cattle, Says it Fails to Address Market Power and Buying Methods," March 3, 2022, https://www.antitrustinstitute.org/work-product/aai-senior-fellow-peter-carstensen-responds-to-economic-research-on-marketing-of-beef-cattle-says-it-fails-to-address-market-power-and-buying-methods/ and https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049230.

[57] Darrell Peel et al, "Fed Cattle Price Discovery Issues and Considerations," (E-1053), Oklahoma State University Extension, available at https://extension.okstate.edu/fact-sheets/print-publications/e/fed-cattle-price-discovery-issues-and-considerations-e-1053.pdf (last accessed May 2022).

[58] C. Robert Taylor, "Harvested Cattle, Slaughtered Markets," April 27, 2022, available at American Antitrust Institute: https://www.antitrustinstitute.org/work-product/aai-advisor-robert-taylor-issues-new-analysis-on-the-market-power-problem-in-beef-lays-out-new-policy-framework-for-ensuring-competition-and-fairness-in-cattle-and-beef-markets/.

become a tool for delivering shared value and managing risk.[59] That is, packers' incentives to secure the best price for their beef may be expected to be passed on, in part, to the producers that use them.[60] As a result, because both the producers that use these contracts and those who may trade in the cash markets also benefit, these "shared value" contracts under the right circumstances may contribute to a fairer marketplace overall.

Notably, concerns with pricing issues are largely focused on how the base price is set. They have little if anything to do with how quality may be incentivized or determined—be it through the eye of a skilled cattle buyer, through premiums or discounts (the "grid") above and beyond a base price, or through standards which may otherwise be set in a contract or handled in a marketplace through certifications and verification audits.

USDA is also moving quickly to establish a Cattle Contract Library pilot program, as directed in the most recent appropriations legislation and as considered under the Executive Order on Competition. USDA held a listening session on this topic in April 2022. Parallel to any legislative effort by Congress, USDA continues to examine ways to enhance transparency and fairness in these markets under our existing authorities.

Aligning USDA Programs with Competition Objectives

With this report, USDA is announcing that it will engage in a top-to-bottom review of existing programs to make sure we are supporting systems that are more dispersed, resilient, and competitive. Procurement is a prime example of how taxpayer dollars may help encourage the development of more competitive, resilient supply chains. USDA procures several billion dollars in food annually, largely on behalf of school lunch and food assistance programs nationwide and in facilitation of market support initiatives.[61] Already, many school districts, hospitals, and other institutions measure and work to increase diversity and resiliency in procurement.[62] Partnering with states or local institutions can support local producers and leverage existing state and local relationships and networks. To that end, USDA announced in December a Local Food Purchase Assistance Cooperative Agreement Program to provide $400 million for state agencies to purchase local food for food banks and other feeding sites.

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[59] See Caius Z. Willingham and Andy Green, "A Fair Deal for Farmers," Center for American Progress, May 2019, available at https://www.americanprogress.org/article/fair-deal-farmers/.

[60] Retail food market firms' market power and trading practices in wholesale meat markets are an area worthy of further analysis. See C. Robert Taylor, "Harvested Cattle, Slaughtered Markets," April 27, 2022, available at American Antitrust Institute: https://www.antitrustinstitute.org/work-product/aai-advisor-robert-taylor-issues-new-analysis-on-the-market-power-problem-in-beef-lays-out-new-policy-framework-for-ensuring-competition-and-fairness-in-cattle-and-beef-markets/.

[61] Agricultural Marketing Service, USDA, "AMS Purchases by Commodity," available at https://www.ams.usda.gov/reports/ams-purchases-commodity; Agricultural Marketing Services, USDA, "How the Process Works," available at https://www.ams.usda.gov/selling-food/how-process-works (last accessed Jan. 2022).

[62] See, e.g., Center for Good Food Purchasing, "Program Overview," available at https://goodfoodpurchasing.org/program-overview/ (last accessed November 2021).

[63] A similar effort to use $200 million to provide local food to schools using Commodity Credit Corporation funds was announced in March.[64] USDA will continue reviewing existing programs to identify ways to better promote competition through procurement and avoid rewarding anti-competitive behavior and systems through either limits on procurement or program eligibility.

3: Promoting Access and Fairness in Value-Added Markets

USDA is investing in more and better markets across the food system.[65] These efforts are designed to strengthen our local and regional food systems, create new market opportunities, add value for agricultural producers and consumers, and spur economic activity locally—helping communities that have been left behind by the current agricultural models and supporting good-paying jobs throughout the supply chain.[66]

An important part of fair and competitive markets is enabling farmers and ranchers to earn a fairer share of the food dollar—ensuring the "sweat equity" that goes into producing America's food stays in local communities. Special designations like local, grass-fed, certified humane, certified Halal, or certified Kosher enable farmers to access niche opportunities to differentiate their products and thus, at least in some circumstances, compete more fairly and earn a better return. The USDA National Organic Program also provides access to new markets for producers. These often-higher value markets increasingly reflect consumer interest in making purchases that aligns long-term economic outcomes with those of environmental stewardship, workers, and the community.

Bolstering Local and Regional Markets

Growing consumer demand for locally and regionally raised food presents new value-added, competitive market alternatives for producers. As USDA explained in its recent report on agricultural supply chains:

An increasing number of producers, especially small producers, have gravitated toward local and regional markets due to market accessibility and the promise of a greater portion of the food dollar, which has significantly declined in mainstream markets over the past 50 years.

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[63] USDA, "USDA Establishes Food Purchase Program to Transform the Food System, Build Back Better via Local Food Purchase," Dec. 6, 2022, available at https://www.ams.usda.gov/press-release/usda-establishes-food-purchase-program-transform-food-system-build-back-better-local.
[64] USDA, "USDA Now Accepting Applications for the Local Food for Schools Cooperative Agreement Program, Providing Up To $200 Million to Purchase Local Food for Schools," March 17, 2022, available at https://www.usda.gov/media/press-releases/2022/03/17/usda-now-accepting-applications-local-food-schools-cooperative.
[65] USDA, "Build Back Better," available at https://www.usda.gov/build-back-better (last accessed March 2022).
[66] USDA, "Meat and Poultry Supply Chain," available at https://www.usda.gov/meat (last accessed Jan. 2022); USDA, "USDA to Invest More Than $4 Billion to Strengthen Food System," June 8, 2021, available at https://www.usda.gov/media/press-releases/2021/06/08/usda-invest-more-4-billion-strengthen-food-system.

Producers receive a greater share of retail prices in local food supply chains than they do in mainstream chains, and, based on a 2010 study, producer net revenue per unit in local chains ranges from about equal to more than seven times the price received in mainstream chains.[67]

During the pandemic, demand for local food increased when customers turned to farmers market and other farm-direct options for outdoor shopping options, fewer handling steps, and availability when large meat processing plant closures resulted in fewer products on shelves. But decades of consolidation, especially in meat and poultry, left insufficient local processing capacity to meet demand. Investments across the supply chain, including in expansion of new meat and poultry processing capacity discussed above, as well as other items such as cold storage and local processing, will enable greater access to local and regional value-added markets for producers of all types.[68] For example, local processing is needed for grain producers to meet demand from bakeries focused on local and specialty grains and flours, for fruit and vegetable growers to access institutional markets that require sliced, diced, and year-round products (frozen or otherwise preserved), and for dairy producers who find it increasingly challenging to compete with the larger dairies and who respond by diversifying into new, local, and value-added markets.[69]

Local Agricultural Marketing Program (LAMP). LAMP grants at USDA's Agricultural Marketing Service include Farmers Market and Local Food Promotion Program (FMLFPP), Regional Food Systems Partnerships (RFSP) as well as Value-Added Producer Grants (VAPG) administered by USDA Rural Development. Together, these programs fund local and regional market development, build producer capacity to access those markets, and support regional coordination and collaboration to increase economic opportunities for local and regional farmers and ranchers, food businesses, and communities. In FY2021, USDA added $100 million to FMLFPP and RFSP, using pandemic assistance funds, in response to high demand for these programs and with a goal to bolster local and regional food systems development for greater supply chain resilience. For FY2022, USDA has added $130 million in funds from the American Rescue Plan to LFPP and RFSP and added an emphasis on farm-to-institution projects that support local food connections for schools, hospitals, and other institutions, which were disproportionately disadvantaged during 2021 supply chain disruptions, as food manufacturers and distributors prioritized other customers.

Dairy Business Innovation (DBI) Initiatives. Since its inception in 2019, DBI initiatives have provided valuable technical assistance and sub-grants to dairy farmers and businesses across

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[67] USDA, "USDA Agri-Food Supply Chain Assessment: Programs and Policy Options for Strengthening Resilience," February 2022, 15, available at https://www.ams.usda.gov/sites/default/files/media/USDAAgriFoodSupplyChainReport.pdf; https://www.ams.usda.gov/supply-chain.
[68] USDA, "USDA Invests $92.2 Million in Grants for Local, Regional Food Producers Affected by the Pandemic," May 5, 2021, available at https://www.usda.gov/media/press-releases/2021/05/05/usda-invests-922-million-grants-local-regional-food-producers.
[69] See, e.g., USDA Agricultural Marketing Service, Dairy Business Innovation Initiatives, available at https://www.ams.usda.gov/services/grants/dbi (last accessed March 2022).

their regions, assisting them with business plan development, marketing and branding, as well as increasing access to innovative production and processing techniques to support the development of value-added products. The program provides resources to regional centers for geographically relevant response. Most recently, USDA supplemented the program with $80 million in American Rescue Plan funds to further support processing capacity expansion, on-farm improvements, and technical assistance to producers.

Specialty Crop Block Grant Program (SCBGP). The SCBGP provides funds to state departments of agriculture to enhance the competitiveness of specialty crops in the state or region and support specialty crop growers through marketing, education and research. State departments of agriculture work with local specialty crop stakeholders to determine priorities and distribute funding. In FY2021, USDA added $100 million to the SCBGP, using pandemic assistance funds, to address and mitigate the impacts of COVID-19 on specialty crops.

Supporting Consumer Transparency

American consumers depend upon accurate, transparent labels to obtain important information about the food they consume. American farmers and ranchers depend upon those same labels to accurately convey information about their products that consumers value and demand.[70]

USDA is already hard at work to clarify the “Product of USA” label for meat. Under current labeling rules, meat can be labeled “Product of USA” if the cattle were raised in another country and then processed into cuts of meat in the U.S.[71] Such a standard could be confusing for American consumers, making informed choices more challenging at the grocery store. Additionally, it is important that all companies follow the same labeling standards to ensure fairer markets. USDA has contracted with RTI International to conduct a nationwide consumer survey to inform planned rulemaking on the voluntary “Product of USA” label.[72] USDA will complete its survey process and will publish a proposed rule in 2022.

With this report, USDA is announcing that it will also update guidance to strengthen the verification requirements for the most widely used “animal-raising claims,” another type of label claim that can confuse consumers. As part of its authority to ensure that product labels are truthful and not misleading, the Food Safety and Inspection Service (FSIS) pre-approves label claims that address how a food animal is raised (e.g., “grass fed” or “humanely raised”).

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[70] U.S. Department of Agriculture, “USDA Announces Efforts to Promote Transparency in Product of the USA Labeling,” July 1, 2021, available at https://www.usda.gov/media/press-releases/2021/07/01/usda-announces-efforts-promote-transparency-product-usa-labeling.

[71] Use of this label is voluntary by the packer, as beef and pork are no longer covered under Mandatory Country-of-Origin disclosure law.

[72] USDA Food Safety and Inspection Service, “Notice of Request for a New Information Collection: Analyzing Consumers’ Value of ‘Product of USA’ Labeling Claims,” Docket No. FSIS–2021–0031, February 1, 2022, available at https://www.federalregister.gov/documents/2022/02/01/2022-02042/notice-of-request-for-a-new-information-collection-analyzing-consumers-value-of-product-of-usa.

Some producers may be using animal-raising claims even if they do not meet the relevant standards, and this enables them to compete unfairly with those that qualify for the claims. Furthermore, consumers who purchase products with inadequately substantiated claims may not be getting what they paid for. To address these concerns, FSIS is undertaking a review of animal-raising claims to determine whether more should be done to ensure that they support fair competition and prevent consumer confusion.

4: Expanding Analysis, Advocacy, and Action on Competition Across the Food System

USDA is committed to further expanding its work to promote competition in additional agricultural industries, and to doing what it can to ensure that farmers have access to critical inputs at fair prices. This in turn will allow producers and entrepreneurs in the agricultural supply chains to maintain and grow their businesses, ensuring diversity and competition to strengthen the industry and boost supply chain resiliency into the future.

Research and analysis are important key tools for understanding the challenges, mapping out solutions, and pressing for change. The work of the Transportation Services Division of AMS highlights the important role that research and advocacy play in promoting competition. USDA has also commenced research into fertilizer, seeds and other inputs, and retail that will lead to reports and other initiatives.

Promoting Competition in Transportation Markets to Serve Producers

The nature of transportation markets like railroads and ocean carriers is complex due to the essential nature of the underlying service, high fixed costs, and the potential for the decisions by the carriers to distort competition in dependent markets, like agricultural markets.

Of particular relevance, the Surface Transportation Board's annual rail rate index study shows that grain shippers, many captive to a single railroad, have disproportionately born the costs of past rail mergers and deregulation, with grain rail rates above their levels prior to deregulation – in stark contrast to other commodities.[73] In addition, containerized agricultural exports between July and December 2021 fell 16 percent relative to the year before. Many exporters claim that this reduction is due to high ocean container rates and ocean carriers' refusal to ship agricultural products because it is more profitable to send the containers to Asia without any goods in them.

Under the Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946, USDA represents the interests of agricultural producers and shippers in improving transportation services and facilities through making complaints or petitions to the Surface Transportation Board (STB), the Federal Maritime Commission (FMC), other Federal or State

[73] Office of Economics, Surface Transportation Board, "Annual Rail Rate Index Study: 1985-2019," December 2, 2021, available at https://www.stb.gov/wp-content/uploads/Annual_Rail_Rate_Index_Study_2019.pdf.

transportation regulatory bodies, or the Secretary of Transportation. While there are many challenges and concerns impacting the agricultural transportation network, competition-related issues in rail and ocean shipping are a top concern for agricultural shippers. As part of Secretary Vilsack's work as co-chair of the Biden-Harris Administration's Supply Chain Disruptions Task Force, USDA has been supporting whole-of-government efforts to address supply chain disruptions related to ports, availability of truck drivers, and poor or inadequate service being provided to U.S. companies exporting agricultural commodities by ocean carriers.[74]

At the end of September 2021, USDA set aside $500 million from the Commodity Credit Corporation to provide relief from agricultural market disruption, such as increased transportation challenges, and other near-term obstacles related to the marketing and distribution of certain commodities.[75] In December 2021, Secretary Vilsack and Transportation Secretary Buttigieg sent a letter[76] to the main ocean carriers that have been providing poor service or refusing to serve US exporters of agricultural commodities as the ocean carriers ignore their responsibilities to support reciprocal trade in order to chase profits that have reportedly topped $100 billion. On January 31, 2022, USDA announced a partnership with the Port of Oakland to ease port congestion and encourage restored service for exporters of US-grown agricultural commodities.[77] Under this effort, USDA supports new "pop-up" site to make it easier for agricultural companies to fill empty shipping containers with commodities. A similar effort with the Northwest Seaport Alliance in Seattle was announced on March 18, 2022.[78]

AMS regularly conducts and sponsors research and engagement on the impact of competition in transportation on agricultural markets. Additionally, in regulatory proceedings before the Surface Transportation Board, which oversees the railroads, USDA has advocated for better and more accessible rate review processes for shippers, wider and more transparent data, and competitive switching as a way to enhance railroad competition.

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[74] USDA and Department of Transportation, "Transportation and Agriculture Departments Urge End to Reduced and Poor Service for U.S. Grown Agricultural Commodities," December 17, 2021, available at https://www.usda.gov/media/press-releases/2021/12/17/transportation-and-agriculture-departments-urge-end-reduced-and.
[75] Food and Nutrition Service, USDA, "USDA Announces $3 Billion Investment in Agriculture, Animal Health, and Nutrition; Unveils New Climate Partnership Initiative, Requests Public Input," September 29, 2021, available at https://www.fns.usda.gov/news-room/usda-0209.21.
[76] USDA, "Transportation and Agriculture Departments Urge End to Reduced and Poor Service for U.S. Grown Agricultural Commodities," December 17, 2021, available at https://www.usda.gov/media/press-releases/2021/12/17/transportation-and-agriculture-departments-urge-end-reduced-and.
[77] USDA, "USDA Announces Partnership to Ease Port Congestion and Restore Disrupted Shipping Services to U.S. Grown Agricultural Commodities," Jan. 31, 2022, available at https://www.usda.gov/media/press-releases/2022/01/31/usda-announces-partnership-ease-port-congestion-and-restore.
[78] USDA, "USDA Announces Partnership with Northwest Seaport Alliance to Ease Port Congestion and Restore Disrupted Shipping Services to U.S. Grown Agricultural Commodities," March 18, 2022, available at https://www.usda.gov/media/press-releases/2022/03/17/usda-announces-partnership-northwest-seaport-alliance-ease-port.

For example, in May 2022, USDA participated in an STB hearing highlighting problems in rail service quality, supporting STB's proposal for emergency rulemaking to provide shippers faster access to emergency relief. USDA has also communicated with the Federal Maritime Commission, which oversees the ocean shipping carriers, on competition issues such as those involving chassis pools—i.e., pools where truckers can rent the trailers needed to haul containers—and on issues involving detention and demurrage charges—i.e., fees that ocean carriers charge exporters or importers for the time that their freight sits waiting to be loaded or unloaded.

Through stakeholder outreach and its own research, AMS has identified several priorities for advancing competition in agricultural transportation, including relating to railroads' common carrier obligations,[79] shipper chassis rules,[80] rate dispute process reforms for smaller shippers,[81] competitive switching,[82] first-mile/last-mile data collection,[83] and detention and demurrage interpretations.[84] USDA stands ready to support fair and competitive transportation markets for America's agricultural producers and to assist fellow member agencies of the White House Competition Council in using all available tools to promote competition and fair markets.

Tackling New Challenges in Agricultural Competition

In today's rapidly evolving and high-tech agricultural economy, farmers and ranchers face a host of new, complex competition-related challenges—from seeds and intellectual property, to farmers' right to repair equipment, concentrated food retail businesses, and more. President Biden's Executive Order on Competition set out multiple mandates for USDA to address in these areas, which will bear fruit in the coming months.

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[79] According to 49 U.S. Code § 11101, railroads must provide service upon reasonable request. This is known as the common carrier obligation (CCO). While shippers have long questioned whether their service is reasonable, railroads' operational changes in recent years have brought these concerns to the forefront.

[80] Numerous shipper complaints claim unjust and unreasonable regulations and practices by ocean carriers that require use of a particular chassis pool, which denies motor carriers from selecting an available chassis provider or using its own chassis equipment.

[81] Final Offer Rate Review (FORR) is a more effective, quicker, and cheaper process for smaller shippers to dispute unreasonable rates in an arbitration-like environment. See Hon. Jenny Moffitt, "Comments of the U.S. Department of Agriculture, Before the U.S. Surface Transportation Board STB Docket No. EP 755 Final Offer Rate Review," January 14, 2022, available at https://www.ams.usda.gov/sites/default/files/media/USDACommentsEP755EP765.pdf.

[82] AMS's research and comments support implementing competitive switching as a way to introduce more competition into rail markets, while having few distortionary impacts on rail operations and profits.

[83] Shippers complain about ongoing first-mile/last-mile service issues that do not show up in current service metrics. AMS believes collecting the additional data will provide needed transparency into rail service issues.

[84] In May 2020, FMC published its Interpretive Rule on Demurrage and Detention under the Shipping Act to discourage an ocean carrier or marine terminal operator from imposing demurrage or detention charges when delay in returning or picking up a container is not the fault of or within the control of the shipper or supply chain partner. FMC has felt the rule has been ignored and taken further action, and agricultural shippers still report undue hardship in the realm of detention and demurrage charges.

Enhancing Competition and the Intellectual Property System in Seeds and Other Agricultural Inputs. As directed by the Executive Order on Competition, USDA is preparing a report that will analyze the role of market concentration and intellectual property (IP) in ensuring farmers' access to affordable seeds and other inputs.[85] The (IP) system should incentivize innovation and not reduce competition in seed and other input markets beyond what is contemplated by US patent law.. In past decades, seed firms have increasingly utilized the patent system to protect their plant-related innovations. However, unlike the Plant Variety Act US patent law generally does not permit research or farmer reuse of seeds, which may have adverse impacts on present and future access to affordable seed [86]

At present, four companies account for 85 and 76 percent of corn and soybean seed markets, respectively, thus controlling key sources for a farmers' planting.[87] Four companies account for 90 percent of the global grain trading and processing market, controlling a farmer's means for obtaining livestock feed.[88] Four companies account for 61 percent of farm machinery works.[89] Two companies account for more than 90 percent of chicken genetics for chicks sold in poultry markets.[90] While research has delivered important innovations and productivity

[85] Executive Order 14036, Promoting Competition in America's Economy, 86 FR 36987, July 9, 2021, sec. 5(i)(v).
[86] The Plant Variety Protection Act "afford[s] adequate encouragement for research... to yield for the public benefit of new varieties" and exempts pro-competitive activities like farmers saving protected seed and breeders experimenting with protected varieties (USDA; 7 U.S.C. 2581). Also relevant, the Bayh-Dole Act (Department of Commerce; 18 U.S.C. 200), states that "It is the policy and objective of the Congress to use the patent system to promote the utilization of inventions arising from federally supported research or development... are used in a manner to promote free competition and enterprise without unduly encumbering future research and discovery."
[87] In 2015, the largest four sellers of corn and soybean seed accounted for 85 and 76 percent of U.S. corn and soybean seed sales, respectively, up from 60 and 51 percent in 2000. F. Ciliberto, G. Moshini, and E. Perry, "Valuing product innovation: Genetically engineered varieties in US corn and soybeans," *RAND J. Econ* 50 (2019): 615-644.
[88] In 2012, the largest four firms accounted for 86 and 79 percent of wet corn milling and soybean processing markets, respectively. Four firms accounted for 61 percent of the world's farm machinery, up from 46 percent in 1977. J. MacDonald, (2017), "Consolidation, Concentration, and Competition in the Food System," Economic Review, Federal Reserve Bank of Kansas City, Volume 102, Special Issue: "Agricultural Consolidation: Causes and the Path Forward" (September 2017): 85-105, available at *https://www.kansascityfed.org/ documents/ 765/ 2017-Consolidation,%20Concentration,%20and%20Competition%20in%20the%20Food%20System.pdf*.
[89] In 2012, four firms accounted for 61 percent of the world's farm machinery, up from 46 percent in 1977. MacDonald, J. (2017), "Consolidation, Concentration, and Competition in the Food System", Economic Review, Federal Reserve Bank of Kansas City. Volume 102, Special Issue: "Agricultural Consolidation: Causes and the Path Forward": 85-105, available at: https://www.kansascityfed.org/documents/765/2017-Consolidation,%20Concentration,%20and%20Competition%20in%20the%20Food%20System.pdf.

[90] Two companies, one acquired in 1985 by one of the world's largest meat processing firms, control 90 percent of the chicken breeding market. Dale Weihoff, "How the Chicken of Tomorrow became the Chicken of the World" (Institute for Agriculture and Trade Policy, 2013), available at *https://www.iatp.org/ blog/ 201303/ how-the-*

enhancements, farmers and smaller seed companies have also expressed heightened concerns about rising prices and exclusionary practices.

In March 2022, USDA published a request for comments that seeks input on a wide range of questions around seed competition and intellectual property rights, the right to repair farm equipment, the use and control of data in farm systems, business practices in agricultural input sales, and more.[91] Working with the Department of Commerce's United States Patent and Trademark Office, the DOJ, and the FTC, USDA aims to identify opportunities for immediate action. To the extent that patent licensing or other restrictive practices potentially harm competition in agricultural inputs or other products and services, the Department of Justice or Federal Trade Commission will enforce the antitrust laws to protect competition and innovation in these markets. -.[92]

Food Retail and Distribution Competition. USDA is working to enhance access to retail opportunities for farmers and food processing firms by partnering with the FTC to analyze the impacts of concentration in the retail and distribution segments on the agricultural and food supply chain. Consolidation in food retail and distribution presents potential risks of unfair and anticompetitive practices throughout the food supply chain. In the last few decades, the share of single-store firms or local chains has declined from 55 percent in 1977 to 35 percent as of 2007.[93] Food distribution is also concentrated in certain markets, with two firms dominating upwards of 70 percent of the national broadline distribution market. The rise in food retail and distribution concentration potentially impacts agricultural producers and small, midsized and otherwise independent (SME) processors, as well as consumers.

As directed by the Executive Order on Competition, USDA is supporting research into this area[94] and is coordinating with the FTC in preparing a report with recommendations for tackling those challenges and providing producers and small and medium-sized food processors with enhanced market access and protections against anticompetitive practices.[95]

chicken-of-tomorrow-became-the-chicken-of-the-world; Glenn E. Bugos, "Intellectual Property Protection in the American Chicken-Breeding Industry," Business History Review 66 (1992): 127-168, available at *https://www.jstor.org/ stable/ 3117055.*

[91] USDA Agricultural Marketing Service, "Competition and the Intellectual Property System: Seeds and Other Agricultural Inputs," Federal Register, March 17, 2022, available at https://www.federalregister.gov/documents/2022/03/17/2022-05667/competition-and-the-intellectual-property-system-seeds-and-other-agricultural-inputs.

[92] *See, e.g.,* FTC v. Actavis, 570 U.S. 136 (2013) (holding that the exclusionary potential of a patent does not immunize a patent settlement from antitrust attack); Dep't of Justice & Fed. Trade Comm's, Antitrust Guidelines for the Licensing of Intellectual Property 2.1 (2017) (standard antitrust analysis applies to intellectual property).

[93] USDA Agricultural Marketing Service, "Competition in Food Retail and Distribution Markets and Access for Agricultural Producers and Small and Midsized Food Processors," March 17, 2022, available at https://www.federalregister.gov/documents/2022/03/17/2022-05669/competition-in-food-retail-and-distribution-markets-and-access-for-agricultural-producers-and-small.

[94] Yale Thurman Arnold Project et al, "Reforming America's Food Retail Markets," conference symposium information available at https://law.yale.edu/isp/events/reforming-americas-food-retail-markets.

[95] Executive Order 14036, Promoting Competition in America's Economy, 86 FR 36987, July 9, 2021, sec. 5(i)(iv).

In March 2022, USDA published a request for information.[96] USDA is particularly interested in the role that rules, regulations and enforcement under the Packers and Stockyards Act of 1921 and the Robinson-Patman Act of 1936 can play in addressing discriminatory limits on market access, preferential sharing of data, predatory pricing schemes, and other anticompetitive practices. The fair distribution of products to all sizes and scales of grocery stores in all communities is important to equitable access to food, nutrition security, and rural economic development.

Fertilizer. Additionally, USDA has published a request for comment on anticompetitive practices in fertilizer.[97] Key areas of focus in the request for information include challenges and concerns with market concentration and power; long and short-term trends in fertilizer prices; effect of mergers, including on ability for new fertilizer firms to start up; bundling a main product (fertilizer) with another product or service and impacts on competition; transportation and delivery; U.S. reliance on foreign supply; and sustainability, climate, and other environmental concerns and risks relating to fertilizer markets and relationship to competition.

The information gleaned from this request for information will inform USDA's investment program design and may also be used to assist antitrust enforcers in their efforts to address anticompetitive practices in the marketplace.

New Competition Research. More broadly, USDA recognizes the challenges faced in securing sufficient, contemporary academic analysis in the field of competition and farmer protection. Far too frequently, economic analysis of agricultural market concentration's impacts and risks places too great an emphasis on securing greater savings for business or short-term efficiencies, and ignores the impacts for farmers, workers, consumers, and communities, as well as other long-term risks of consolidation such as to food security, supply chain resiliency, price discovery, and rural economic development. That's why, in addition to the studies noted above, USDA has engaged academic experts to conduct analyses of Packers and Stockyards Act enforcement strategies,[98] livestock and poultry economic analysis,[99] and more. The ultimate products reflect the views of these academics,

[96] USDA Agricultural Marketing Service, "Competition in Food Retail and Distribution Markets and Access for Agricultural Producers and Small and Midsized Food Processors," March 17, 2022, available at https://www.federalregister.gov/documents/2022/03/17/2022-05669/competition-in-food-retail-and-distribution-markets-and-access-for-agricultural-producers-and-small.
[97] USDA Agricultural Marketing Service, "Access to Fertilizer: Competition and Supply Chain Concerns," March 17, 2022, available at https://www.federalregister.gov/documents/2022/03/17/2022-05670/access-to-fertilizer-competition-and-supply-chain-concerns.
[98] Michael Kades, "Protecting Livestock Producers and Chicken Growers," Washington Center for Equitable Growth, May 5, 2022, available at https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.
[99] C. Robert Taylor, "Harvested Cattle, Slaughtered Markets," April 27, 2022, available at American Antitrust Institute: https://www.antitrustinstitute.org/work-product/aai-advisor-robert-taylor-issues-new-analysis-on-the-market-power-problem-in-beef-lays-out-new-policy-framework-for-ensuring-competition-and-fairness-in-cattle-and-beef-markets/.

and not necessarily USDA, but we welcome the opportunity to spur a robust debate around these topics.

5: Commitment to Open Dialogue and Taking Comments

Throughout this process, USDA has been committed to talking to all stakeholders who want to engage. We fully encourage comments both formally and informally. USDA received nearly 500 comments on our request for information on meat and poultry processing investments, and over 400 comments in response to our request for comment on agricultural supply chains, both of which highlighted competition concerns.[100] These comments were enormously helpful in crafting programs and our supply chain efforts. As noted above, we will make available additional opportunities to engage on both seeds/other inputs and access to retail. USDA has met, repeatedly, with a wide range of stakeholders representing producers, processors, rural communities, competition advocates, experts and academics, and more. And we intend to continue to engage widely throughout this process.

Conclusion

This report has set forth USDA's approach to enhancing fair and competitive markets. Key strategies are to stand up investments to increase competition, enhance access to value-added markets, and rebuild antitrust and regulatory rules of the road. The steps set out in this report are just the starting points. There is a lot to do to make each of these steps effective and, ultimately, to build a more competitive, diverse, and resilient agricultural sector.

The Biden-Harris Administration also remains encouraged by bipartisan, bicameral efforts in Congress to address these challenges, and USDA is providing technical assistance to Congress as it evaluates these important issues. The task is not easy and the obstacles are large, but we are committed to progress on behalf of America's farmers and ranchers. We are, and will remain, the farmer's advocate—and ultimately, in the words of President Lincoln, the People's Department.