



October 18, 2022

WHAT YOU NEED TO KNOW ABOUT

# The Administrative and Legislative Ag Competition Push

## PRO POINTS

- **In mid-summer last year, President Joe Biden** signed an executive order promoting competition and singled out agriculture as a particularly egregious example.
- **The Agriculture Department has since** announced a number of actions to meet the White House's call to action, including issuing rulemakings to increase competition, making it easier for farmers and ranchers to complain about unfair practices and directing new funding to increase processing capacity in the meatpacking sector.
- **The Justice Department has also challenged** significant mergers and taken corporate executives to task for alleged antitrust violations, albeit with mixed success. DOJ secured a key settlement that will change how poultry farmers are paid and requires restitution for alleged wage-theft.
- **The Federal Trade Commission appears poised to take more** aggressive action in the agricultural space. This fall, the FTC sued pesticide companies alleging price-gouging and the agency recently announced a settlement forcing farm store chain to divest some of the stores it acquired to a competing chain.
- **The administration's push to confront consolidation in** agriculture is happening alongside several bills in Congress addressing market power. A bipartisan group of senators have advanced a bill to make cattle markets more competitive and improve enforcement measures for anticompetitive conduct in livestock.

## HOW WE GOT HERE

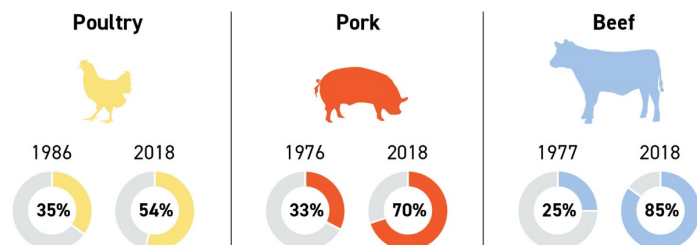
Over the last 40 years, concentration in agriculture has increased across sectors. The White House took note of this trend last summer in its executive order promoting competition across the economy and in more recent economic reports.

Advocates for increased antitrust enforcement point to monopolies in beef and pork, foodservice distributors, grocery retail, fertilizer and seed. With inflationary pressures making it harder for farmers to make a profit, Democrats are increasingly blaming food and production agriculture companies for increasing food prices on cash-strapped families while raking in record profits.

## Meatpacking consolidation increased in the last 40 years

In poultry, pork and beef, four companies dominate 55 to 85 percent of the market, with some companies dominating in more than one sector.

Market share of top processors in previous years



Sources: White House, Open Markets Institute

In response, agencies across the government have gone to work. The shift signals a pivotal moment in antitrust, where government agencies tasked with enforcing laws nearly a century old are forced to confront courts which have spent 40 years making decisions based on an entirely different framework of antitrust law.

Despite significant losses in court, the Agriculture Department, Justice Department and Federal Trade Commission show no sign of letting up the pressure on the agricultural sector. Significantly, USDA has begun writing rules to change how poultry farmers are paid and used administrative action to strengthen the

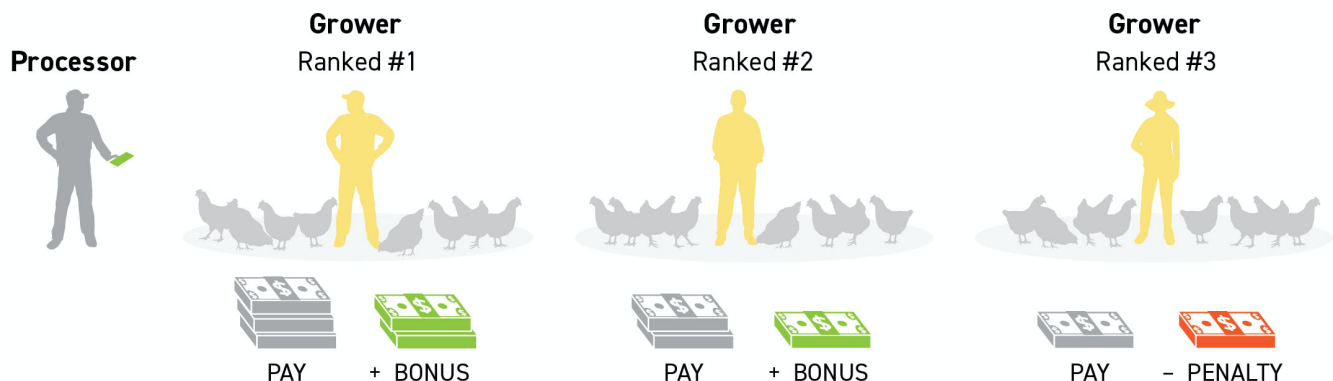


Packers and Stockyards Act, a 1921 agricultural antitrust law. The administration also plans to make it easier for farmers and ranchers to sue for anticompetitive conduct.

However, some critics still want the current administration to reverse certain Trump Administration actions. The previous administration moved the agency tasked with enforcing the Packers and Stockyards Act to the Agricultural Marketing Service, a business promotional USDA agency whose mission, critics say, directly contradicts the goals of the antitrust laws. Agriculture Secretary Tom Vilsack has said he does not see this as necessary to pursue the agency's antitrust goals.

### **In new rule, USDA attempts to improve how contract chicken farmers are paid**

A new USDA rule aims to make the poultry tournament system more fair to farmers. The current system ranks farmers in a given region against one another. Farmers that raise their chickens more efficiently earn bonuses; those who perform poorly are docked penalties.



Sources: Federal Register; USDA

### **WHAT'S NEXT**

The Agriculture Department just announced \$15 million in funding to state attorneys general who want to tackle monopoly power in agriculture. A bipartisan set of state attorneys general have expressed interest in or already begun to confront monopoly power in their states. How this money is distributed and ultimately spent has not yet been determined, but could incentivize new litigation.

The bipartisan Cattle Price Discovery and Transparency Act and the Meat and Poultry Special Investigator Act could get a vote this congress, but not before midterms. The former would require more cattle to be sold on the cash market and the latter would give USDA a dedicated antitrust investigator. Another bill to watch will be Sen. Jon Tester's (D-Mont.) bill, the Agricultural Right to Repair Act, which proponents say would make it easier for farmers to repair their own equipment.

USDA has several ongoing initiatives. The department has designated \$15 million to state attorneys general to confront antitrust violations in their states. In coordination with the DOJ, USDA has also created a web portal where farmers and ranchers can report anti-competitive conduct. It's hard to predict immediate results from these efforts, but officials have said that the agencies are receiving complaints.



Perhaps most significantly, USDA has not yet finalized the three rules the agency said it would propose to strengthen the Packers and Stockyards Act, the nation's agricultural antitrust law. The third rule, which will make it easier for farmers to bring lawsuits alleging anticompetitive conduct, has not yet been released.

Although the Justice Department has endured a string of losses in recent cases, its attorneys don't appear to be letting up. For example, DOJ has made clear it intends to challenge a Delaware federal court's decision to allow two major sugar companies to merge. And the impact of its settlement with the poultry giant Wayne-Sanderson Farms is still unfolding. The company must change how it pays its contract farmers under changes imposed by the settlement, a shift which could ripple across the poultry industry.

The proposed merger of Kroger and Albertsons, combining the nation's second and fourth largest grocery retail stores, will likely receive intense regulatory scrutiny. A recent settlement the FTC secured to clear Tractor Supply Company's acquisition of a rival farm chain store required the company to sell half of the store locations it was acquiring. The settlement may offer a model for how other mergers survive regulatory scrutiny. Nevertheless, the proposed Kroger-Albertsons deal is already grabbing headlines with anti-monopoly groups lining up against it and Sen. Mike Lee (R-Utah) has pledged to support antitrust enforcement for the merger.

## POWER PLAYERS

- **Lina Khan:** Chair of the Federal Trade Commission, former academic Khan has been receptive to advocates' efforts to confront what they see as corporate consolidation across the agricultural sector. Her recent public comment on the Agriculture Department's poultry tournament system rulemaking indicates a keen interest in farmers' issues.
- **Jonathan Kanter:** The head of the Justice Department's antitrust division, Kanter has taken a hard line on challenging anti-competitive conduct, including in agriculture. Earlier this year, the assistant attorney general said, "We're not part of the chickenshit club," a reference to a 2018 book about how the DOJ declines to take difficult cases.
- **Andy Green:** Senior adviser for fair and competitive markets, Green oversees and influences much of the competition efforts at USDA.
- **Anti-monopoly organizations:** Less than five years ago, groups focused on antitrust enforcement held little sway. Now, the opposite is true. Barry Lynn, executive director of the Open Markets Institute, hired and mentored Lina Khan before she went to law school. The American Economic Liberties Project, also influential in Washington, boasts a staff that includes several candidates that have run for federal office on a populist, anti-corporate power message.