

The Biden Executive Order on Competition in Agriculture: Progress and Prospects

BY MARK TOBEY

THE STARS MAY BE ALIGNED—particularly in agriculture—to see marketplace competition reform from President Biden’s Executive Order on Promoting Competition in the American Economy (the “Executive Order”),¹ issued with great fanfare in July 2021. Improving agriculture competition is a priority under the Executive Order. It directs the U.S. Department of Agriculture (USDA) to strengthen marketplace fairness rules and increase enforcement aimed at opening market access to farmers and producers, and to coordinate with the U.S. Department of Justice Antitrust Division and the Federal Trade Commission on competition enforcement matters. USDA rulemakings and joint enforcement activities in recent months suggest cooperation is thoroughgoing.

There are at least three reasons to believe the Biden Executive Order may succeed where past government efforts have failed in their stated goals to improve market performance and increase antitrust enforcement in the agriculture sector: (1) the Biden Administration’s whole-of-government approach (new mandate); (2) the antitrust views of political appointees at the White House, the DOJ, the FTC, and the USDA (new orientation); and (3) the new legal tools available to the agencies, such as revised enforcement guidelines, revitalized marketplace enforcement under existing laws, new substantive rules, and the potential for new legislation (new tools).

But change is hard. And changing the regulatory culture at the USDA and in the agriculture sector, which contributes more than \$1 trillion annually to the economy, will be

a tall order. However, early indications are that it may be an opportune moment to bring a more farmercentric orientation to agriculture competition enforcement at the USDA and the DOJ. The calculus appears to be that previous enforcers favored industry too strongly and should be recalibrated. The administration hopes to harness strong support for change from the farming community as a whole. It remains to be seen the extent to which the courts and Congress push back on reform efforts as they have in the past.

Whether the Biden Administration markers for success will result in its stated goal—to address the perceived unfair treatment of farmers and improve conditions of competition in the markets for their products—remains to be seen.² Successful reform may not equal wholesale de-concentration of markets in agriculture, in part because there is much to be gained through economies of scale. For example, scale can provide more innovative and less resource-intensive methods of processing and production. It also mitigates against supply chain disruptions. Even if the Biden Administration achieves some of its goals in the short term, an important measure of success should include whether such changes will enjoy acceptance across future administrations, what former FTC Chairman William Kovacic refers to as the “stability of perspectives.”³

New Mandate

In July 2021, President Biden’s Executive Order unveiled his initiative to address what the White House described as the ill effects of excessive concentration in agriculture, health-care, internet platforms, labor markets, repair markets, and cartelized international markets. The Executive Order includes a laundry list of directives to agencies across the federal government.

First, the Executive Order recognizes “that a whole-of-government approach is necessary to address overconcentration, monopolization and unfair competition in the American economy.” It also seeks to promote interagency cooperation in oversight, investigation, and remedies through the White House Competition Council.⁴ The statutory basis for the new initiative comes primarily from the Sherman, Clayton, and Federal Trade Commission Acts, but also seeks to leverage similar statutory and rulemaking authority wielded by other federal agencies, including independent agencies, such as the Securities and Exchange Commission, the Surface Transportation Board, and the Federal Energy Regulatory Commission.⁵

Second, the Executive Order creates the White House Competition Council.⁶ Tim Wu, Special Assistant to the President for Technology and Competition Policy, is generally considered to have been the primary architect of the Biden Executive Order and works with Brian Deese, Director of the National Economic Council (NEC), to drive its implementation. Wu, an unabashed critic of the “consumer welfare” standard in antitrust, authored influential writings about the ill effects of highly concentrated markets in books,

Mark Tobey is Senior Counsel at Husch Blackwell, LLP in Austin, Texas. Previously, he spent 10 years at the U.S. Department of Justice Antitrust Division in Washington, D.C., where his roles included serving as Special Counsel to the Assistant Attorney General for State Relations and Agriculture. In that capacity he helped organize the 2010 agriculture competition workshops and was co-author of its 2012 public report on those workshops.

such as *The Curse of Bigness*.⁷ The expansive mandate of the White House Competition Council includes identifying new legislation that may be needed to effectuate these goals.

Third, the Executive Order encourages the antitrust agencies—the DOJ and the FTC—to consider revising current merger guidelines to promote increased scrutiny of potentially anticompetitive transactions.⁸ It further asks the FTC to exercise its statutory rulemaking authority to address unfair occupational licensing regimes and the unfair use of noncompete clauses, as well as anticompetitive practices in data collection and unfair practices that deter self repair. The Executive Order’s emphasis on the FTC’s statutory rulemaking authority and the agencies’ merger guidelines revisions rely on relatively quick notice and comment mechanisms rather than the much lengthier case-by-case adjudication litigation to achieve a longlasting impact on policy. Rulemakings can and will be opened up to input from the agriculture community outside the Beltway, and the FTC is counting on broad support from farmers and producers. Finally, and crucially for the agriculture sector mandates, the Executive Order sets forth numerous sector-specific priorities for executive branch and independent authorities within its purview, including a number of directives to the USDA.

Directives to the USDA. The Executive Order directs the USDA to “address the unfair treatment of farmers and improve conditions of competition in markets for their products”⁹ by strengthening regulations or initiating new rulemakings under the Packers and Stockyard Act (PSA), which was enacted in 1921 and is administered and enforced by the USDA.¹⁰ It generally prohibits unfair and deceptive practices in agriculture markets, including manipulating or controlling prices and giving “undue preferences” to certain market participants compared to others. The Executive Order directs the USDA to identify and deter recurrent market practices in livestock, meat, and poultry that are “unfair, unjustly discriminatory, or deceptive” to farmers by providing “clear rules”¹¹ under the PSA.

The USDA was given 180 days after the Executive Order to announce plans for creating better access to agriculture markets for growers and producers. Such plans were meant to push the USDA to develop tools like libraries of sample production and marketing contracts to facilitate market access and establish new data reports to improve market transparency and price discovery. The Executive Order also stresses the need for the USDA to facilitate complaints about anticompetitive practices in agriculture and to protect complainants from retaliation.

The USDA took steps, in close collaboration with the DOJ, to implement what was mandated. For example, in January 2022, the DOJ and the USDA announced¹² a shared commitment to enforce federal competition laws in the agriculture sector. The agencies agreed to prioritize enforcement matters relating to agriculture and to coordinate matters under the PSA and the antitrust laws. A

month later, in February, these same agencies launched a new online tool called “farmerfairness.gov” which allows farmers and ranchers to report potentially unfair practices anonymously. The agencies urged farmers and ranchers to avail themselves of the opportunity to complain and promised to triage and act quickly on meritorious complaints.¹³ A new proposed rule regarding the poultry tournament system under the PSA was issued in June. Rules prohibiting undue preferences and retaliation against farmers who complain to the federal authorities were published in early October.¹⁴

Importantly, the Executive Order directs the USDA to reinstate its longstanding legal interpretations of the PSA, often called the “Farmer and Rancher Bill of Rights,” that would allow enforcement for violations that affect a single farmer without the need to show marketwide impact.¹⁵ The Executive Order also directs the USDA to submit to the Competition Council a series of reports. In the first report, due within 180 days of the Order, the USDA must address the ways it plans to promote market access to farmers and improve the functioning of livestock markets. In the next report, due within 300 days, in consultation with the FTC, the USDA must address retail market competition and anticompetitive retail practices that may deter access to markets. The Executive Order also requires the USDA to issue reports on whether intellectual property policies unnecessarily reduce competition in seed and other input markets and include strategies for addressing those concerns in consultation with the Commerce Department and Patent and Trademark Office.

Initial Response From USDA. The USDA responded to its first competition mandate at 180 days by announcing in its “Agricultural Competition: A Plan in Support of Fair and Competitive Markets” report (1) new support for independent meat and poultry processing, (2) proposed market reports that enhance pricing transparency by reporting on formula transactions in the cattle industry, and (3) efforts to prioritize competition enforcement in agriculture through improved case cooperation with the DOJ.¹⁶ Also of importance, the USDA announced it will engage in a top-to-bottom review of its existing programs, which comprise billions of dollars in grants and loans annually, to make sure it is supporting systems and market structures that are more dispersed, resilient, and competitive. The USDA admits that it has employed systems and paradigms that “value hyperefficiency over competition and resiliency.”¹⁷

The USDA report outlines the agency’s plan to decrease concentration and increase competition in the agriculture sector, with a focus on several strategies:

- Direct investment in meat processing and fertilizer. The report cites the Biden Administration’s efforts to expand meat and poultry processing capacity by improving access to capital through two programs: the Meat and Poultry Processing Expansion Program¹⁸ and the Meat and Poultry Intermediary Lending Program.¹⁹ The programs redirect funds from Inflation

Reduction Act and American Rescue Plan to invest in food safety, skills training, and other measures that are intended to ensure success for independent processors, as well as in local and regional food infrastructure options for producers and consumers.

- Working cooperatively with the DOJ and the FTC to restore confidence, fairness, and integrity to the regulation of livestock and poultry markets. In partnership with the DOJ and the FTC, the report states that the USDA is committed to robust antitrust enforcement to enhance food and agricultural supply chain resiliency. In addition, the USDA and the DOJ established FarmerFairness.gov, billed as a “onestop shop” for ranchers and farmers to provide complaints and tips related to unfair and anticompetitive practices. The USDA also is developing new ways to use its authority under the PSA and the Livestock Mandatory Reporting Act to address transparency, unfair practices, undue and unjustly discriminatory preferences, and deceptive practices in livestock markets.
- Facilitating access for farmers to value-added markets. The report commits the USDA to support programs funding local and regional market development for regional farmers and ranchers, food businesses, and rural communities.

Progress on these strategies has not been fast enough for some progressive farm groups such as Farm Action and Open Markets, which gave the USDA an overall grade of D+ on its implementation of the Biden Executive Order in a report from June.²⁰

Ongoing Response from USDA. Over the summer and into the fall, the USDA announced new proposed PSA rules and an Advance Notice of Proposed Rulemaking (ANPR) regarding the so-called tournament payment system used by most poultry companies to pay independent growers for their services and new proposed rules under the PSA regarding undue prejudices, retaliation, and deceptive practices under the Act. Each of these actions was required in response to directives in the Executive Order.

The tournament system proposed rule, published in June 2022, requires more fulsome disclosure by poultry processors to poultry growers concerning the financial risks. For example, chicken processors must disclose information to assist prospective growers in understanding the costs they will bear should they build or expand chicken houses. Similarly, processors who supply the chicks and feed must inform growers of the expenses growers can incur to meet the technical specifications for each flock raised.²¹ The rule also requires poultry growers to provide additional disclosures up front of each flock’s characteristics and how growers will be compensated using the tournament ranking system on the back end. The ANPR requests comments about deception in the use of the tournament system.

The undue prejudice proposed rule, aptly entitled the “Inclusive Competition and Market Integrity” rule, was

published in early October and adds two new sub-sections to Section 201 of the PSA: undue prejudices or disadvantages and unjust discriminatory practices (§ 201.304) and deceptive practices (§ 201.306).²² The proposed rule, to be administered by the Agricultural Marketing Service (AMS) within the USDA, is aimed at prohibiting three types of conduct: (1) undue prejudices against “market-vulnerable” individuals, as that term is defined; (2) unjust discrimination resulting from retaliatory practices or adverse actions that imperil the assertion of certain rights by market-vulnerable individuals; and (3) deceptive practices with respect to contract formation, contract performance, contract termination, and contract refusal. The new language on retaliation prohibits retaliation such as by non-renewal or refusal to deal against a covered producer for participating in protected activities. Protected activities include complaining to a government agency for redress of grievances and communicating with a different processor to explore a new business relationship.

The prohibitions in the proposed rule apply to regulated entities, “packers, swine contractors and live poultry dealers,” as those terms are defined in the PSA with respect to “livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry. . . .” The rules protect covered livestock producers, as broadly defined, from unjustly prejudicial and discriminatory actions, such as refusal to deal or non-renewal, based upon their status as a market-vulnerable individual or as a cooperative. A market-vulnerable individual means or refers to a person who is a member of a group whose members have been subjected to adverse treatment because of their identity as a member of the group without regard to their individual qualities such as on the basis of race, gender, religion, or other bases.

The new proposed rule on undue prejudices and discriminatory practices is not aimed at price discrimination as a form of discrimination and does not expand those criteria. Rather, the new rule seeks to fill in gaps in terms of protecting market-vulnerable individuals and coops from retaliation and deception as well as discrimination.²³ The new deceptive practices rule prohibits the use of false or misleading statements or the omission of material facts with regard to livestock and poultry contracting. In this respect it goes beyond the new tournament system proposed rule to condemn the use of deception as well as inadequate financial disclosures in the poultry contracting process.

The USDA’s choice to ground undue prejudices and retaliation in the historical exclusion of certain individuals and groups from federal agricultural programs based on race or ethnicity takes the new rules in a direction the regulated community might not have anticipated. Many industry observers were likely expecting a set of prescriptive marketplace-oriented rules more closely resembling the “GIPSA Rules” from the USDA in 2010 designed to level the playing field, but were eventually withdrawn or watered-down to appease Congressional objections of undue burden on the

industry. The new rule does not address those issues directly or with specificity but also does not withdraw “example factors” of permitted and prohibited pricing preferences from the current version of the rule. Of note, the new rule fills a gap in regulation concerning both retaliation and deception.

Although the proposed rule on prejudices and retaliation may seem somewhat far afield, the emphasis on disadvantaged groups and coops might help satisfy the market-wide impact showing required under most federal circuits. The preamble to the proposed rule also suggests that violation of this rule should be treated as per se unlawful without a need to show broader harm. It is not clear from the proposed rules how any economic or business justification would be factored into the analysis, if at all.

The new USDA rule does not expressly condemn the trend toward vertical integration or the use of production and marketing contracts. Yet it targets excessive market concentration because it leads to power imbalances that, in turn, lead to discrimination, retaliation, market exclusion, and deception. In this respect, the rule reflects the Biden administration’s orientation toward addressing the ill effects of overconcentration.

New Orientation

Farmers, ranchers, and agriculture industry observers—including political appointees and other officials now part of the Biden Administration—have bemoaned for decades what they view as a lack of robust competition in agriculture. Competition regulators from past administrations have listened to their concerns and criticisms with intent to address them for just as long. As the DOJ catalogued in its May 2012 report on the series of agriculture competition hearings it launched along with the USDA in 2010, the range of complaints from farmers and ranchers was lengthy, from traditional antitrust themes like market consolidation and loss of access to wholesale and retail markets, to a wealth of concerns that sounded less like competition issues, such as marketplace fairness, workplace safety, restraints on labor markets, promotion of foreign trade, environmental welfare, and lack of access to capital.²⁴

The current FTC Chair, Lina Khan, wrote about agriculture concentration issues long before her legal career began. Prior to law school, Chair Khan worked as a researcher for a Washington, D.C.-based monthly magazine. Writing in *Washington Monthly* Magazine in 2012 as a policy analyst for the New America Foundation commenting in the aftermath of the 2010 DOJ-USDA competition workshops, Khan concluded: “What applies across the board—in cattle ranching and dairy and hog farming—is the stark and growing imbalance of power between farmers who grow our food and the companies who process it for us, and how this imbalance enables practices unimaginable in any competitive market.”²⁵

Echoing many of the same themes, in its 180-day report to the White House Competition Council, the USDA

catalogued many of the same far-reaching harms of a lack of competitive markets in food and agriculture:

The harms from concentration and anticompetitive practices are increasingly recognized to include but extend far beyond, consumer price, product quality and innovation harms. Competitive harms to worker wages and economic opportunity, supply chain resiliency, functioning transportation channels, price discovery, systemic financial risks, rural communities and more are becoming clearer than ever before, thanks in part to analysis and reforms coming out of the Biden Executive Order on Competition.²⁶

As the USDA now sees it, the Covid-19 pandemic exposed a variety of underlying problems in agricultural systems and made things worse. It “brought home to farmers, workers, and consumers the harms caused by bottlenecks in the center of America’s agricultural and food systems,” USDA says in the introduction to its report.²⁷

That bleak vision of agricultural and distribution systems and markets as stunted by the effects of overconcentration, was underscored by the anecdotes from the listening forum hosted by FTC Chair Lina Khan and AAG Jonathan Kanter on March 28, 2022, with a select lineup of testimony from businesses complaining that they have been affected adversely in different ways by concentration in the agriculture space. Chair Khan’s summary of takeaways from that listening forum restates the same themes as her *Washington Monthly* piece 10 years earlier: these vignettes illustrate “the very real ways in which significant consolidation can result in higher costs, lower quality, reduced choice, but can also enable firms to engage in business practices, such as dictating terms or engage in discriminatory conduct that can also undermine open and fair competition.”²⁸

Proponents of sweeping change in the agricultural marketplace may be counting on the ire of farmers, ranchers, and producers of all stripes, who are fed up with the dysfunction of agriculture markets as the energy to power market reform. Part of what is new about the Executive Order is its acceptance of this broader vision of the harms of perceived concentration on the economy as a whole and on agriculture competition in particular. Under this broader view, many of the concerns raised by farmers during the 2010 DOJ-USDA competition hearings that the DOJ dismissed in its report on the workshops as “non-antitrust,” now seem germane to describing the perceived problem of concentration. The Executive Order’s pronouncements that agriculture needs a dose of competition are not new, but this administration may be surmising that agriculture is a suitable use case for the application of the broader vision of competition articulated by scholars like Tim Wu and Lina Khan, and new tools, tactics, and legislative authority.

If competition is stunted in agriculture markets, then this may have serious implications for the ability of the United States to help feed a growing world population. According to the new vision, buyside market power (monopsony), market access, and “environment, social, and governance”

(ESG) practices have meaning in the physical world and are not just academic concepts. As applied to agriculture, access to local processing, retail markets, well-functioning supply chains, and corresponding price transparency are not merely nostalgia for the good old days when agriculture was more atomistic. Rather, these are components to a well-functioning agriculture sector because it is critical to get the necessary inputs to farmers and their output, agricultural commodities, to hungry consumers. Loss of access to local markets and processing can mean the loss of livelihood, as organic dairy farmers in the Northeast have complained.²⁹

New Tools

In his one-year progress report on the Executive Order, NEC Director Brian Deese makes his case that the Executive Order is a necessary step in dealing with the “core problem” of “excessive market power” in the U.S. economy and that it is already yielding positive results.³⁰ He sees the initiative as going beyond vigorously enforcing current competition laws by using new “tools from across the government to implement structural changes to enhance competition” in order to reshape the regulatory framework for competition itself.³¹

These new tools include new legislation embodying additional statutory authority and budgetary resources, but also the revival of tools that have atrophied over time, such as substantive rulemaking, resurrection of the PSA,³² and perhaps even reinvigoration of the Robinson-Patman Act³³ to address supply chain dysfunction. Deese also cites to examples of “underreported legal victories” stemming from the Executive Order. These examples include abandoned mergers, merger challenges, and procompetitive actions achieved through “collaboration and cross-pollination” between Executive Branch agencies coordinated through the White House Competition Council, which he leads.³⁴ Deese touts these interagency competition collaborations as “something that’s never been done before in history.”³⁵ According to Deese, the new tools are unprecedented and innovative, including the USDA’s direct intervention in the marketplace to sponsor new local meat processing projects and grants to develop new domestic fertilizer production.³⁶ Deese also points to the launch of the farmerfairness.gov mailbox for reporting suspected legal violations as “not just another website—it reflects an innovative approach to enforcement, where these two departments now review every complaint together to assess how to deploy *both* sets of legal authority.”³⁷

How successful will these new tools be? Although more is to come, there are some indications that the Biden administration is making significant investments to implement these new tools, even if some remain uncertain. For example, with the secure complaint mailbox, it remains to be seen whether farmers and ranchers will trust the administration enough to follow through with reporting the types of legal violations enforcers can address. Farmers and ranchers have had their hopes of reform raised before, most recently in

the 2010 agriculture competition hearings, only to watch as powerful forces in industry and Congress rose up in opposition. Similarly, restoring the viability of the PSA to its original status as the “Farmer and Rancher Bill of Rights,” going beyond the scope of the antitrust laws, faces daunting challenges. As DOJ Deputy AAG Michael Kades has previously raised, the PSA cannot effectively protect against deception, unfair practices, and market manipulation without overturning court precedents that unduly burden plaintiffs with proving competitive harm.³⁸ Although some noted antitrust commentators agree that restoring the PSA is important,³⁹ it will take time and concerted effort to turn the federal courts around.

In something of a summer surprise, the DOJ unveiled another new tool: suing directly under the PSA. In late July, the DOJ announced the resolution of an investigation involving three poultry companies, Sanderson Farms, Wayne Farms, and Cargill Meat Systems.⁴⁰ Importantly, the proposed settlement requires Wayne and Sanderson to abandon using downward grower pay adjustment features of the tournament system to compensate its poultry growers. The remedy is stated to be a penalty for failing to disclose adequately the financial risks of being a poultry grower and of the often unexplained changes in grower pay from flock to flock in violation of the PSA. The DOJ’s remedy goes well beyond the disclosure requirements in the proposed tournament system rule that the USDA promulgated earlier this summer and represents the first instance in recent memory of the DOJ suing directly under the PSA.

Rulemaking compared to case-by-case adjudication can have many benefits in terms of forcing change more quickly and building a regulatory framework that will endure beyond the current administration. The USDA may be hoping that new rules under the PSA will receive strong public support outside the Beltway like the GIPSA rules did in the 2010s.⁴¹ But as was the case with those rules, Congress, although it cannot formally vote on new agency rules, can still weigh in on behalf of industry by using its weighty, indirect leverage. Furthermore, recent trade press articles suggest that opposition is starting to grow—at least one poultry processor is encouraging its independent growers to file form comments drafted by the company in opposition to the tournament system rule, a tactic used effectively in the 2010s.⁴²

Rules face obstacles in the Courts as well. Rules may not be immune from judicial concerns about opening up the floodgates of litigation by enacting broad new market conduct rules in agriculture with a substantial impact on the economy. In the past, courts have refused to accord the USDA’s substantive rules in poultry with expert agency deference under the *Chevron* doctrine. Recent decisions from the current Supreme Court on the “major questions” doctrine, such as *West Virginia v. EPA*,⁴³ underscore the perils of enacting major new regulatory programs, even where expert agency jurisdiction is accepted under *Chevron*, when the enabling legislation may be silent or ambiguous

and Congress has not spoken. At least one FTC Commissioner, Noah Phillips, questioned the wisdom and legislative authority for substantive FTC rulemaking in areas outlined by the Executive Order in a recent speech prior to his departure from the FTC.⁴⁴

The Executive Order also urges the USDA and the FTC together to study the use of the Robinson-Patman Act price discrimination law to address farmers' access to retail markets and supply chain irregularities. In April, a group of 43 House of Representatives members sent a letter to the FTC urging it to revisit the law.⁴⁵ Prominent antitrust commentators disagree on how wise that is.⁴⁶ Despite the skeptics, the FTC leadership have hinted at a revival of Robinson-Patman enforcement.⁴⁷

Partisan clouds are beginning to show on the horizon respecting pending legislation to increase the USDA's resources and statutory authority as the calendar approaches the November midterm elections. What seemed like a solid bipartisan coalition on antitrust reform in agriculture appears to be foundering. Republican farm state legislators appear split on S.B. 4030,⁴⁸ which would require packers to purchase a certain percentage of livestock in the cash market, with Senate Agriculture Committee Chair Charles Grassley supporting it and other Republican colleagues opposing. Similarly, the bill boosting the USDA's authority and resources under the PSA, H.R. 7606⁴⁹ and S. 3870,⁵⁰ passed out of subcommittee in June by a slim margin on a voice vote.

The impetus for reform animating the Executive Order seems bound up with the zeitgeist of the post-pandemic moment: a groundswell of support for new ideas such as Wu's thinking on monopolization and his key role in the White House Competition Council; Chair Khan's similar iconoclastic competition orientation, her historical interest in agriculture and her placement atop the FTC; and AAG Kantor's deep immersion in exclusionary practices in network markets as a private lawyer before heading the Antitrust Division, are important touch points. But the power of the moment may wane. Success is not guaranteed as has been shown by the failure of several recent enforcement losses.⁵¹

Conclusion

Despite headwinds and mixed results in litigation so far, practitioners should expect the DOJ, the FTC, and the USDA to continue to push the boundaries of the law through aggressive rules, revamped guidelines, and novel court challenges. Expect the federal enforcement agencies to argue to Congress that losses in court demand new authority and expanded resources. Practitioners in the agriculture space would also be well advised to study the Packers and Stockyards and Robinson-Patman Act precedents in order to advise clients on how to respond to government's new enforcement priorities.

This administration's whole-of-government competition mandate may achieve success in agriculture markets. The enforcement approach is purpose built to address competition issues in agriculture sectors because it encompasses labor, immigration, ESG, worker fairness, and unfair contracting practices within its framework. But it remains to be seen whether the state of the economy and the multitude of other viewpoints in agriculture, including industry forces and Congress, will add to or upset the Biden Administration's competition apple cart. ■

¹ Exec. Order on Promoting Competition in the American Economy (July 9, 2021) (hereinafter "Exec. Order"), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

² Exec. Order § 5(i)(i).

³ Justin Perkins, *Former Federal Trade Commission Chairman Says Biden is Inappropriately Exhorting the Agency*, BROADBAND BREAKFAST (Jan. 28, 2022), <https://broadbandbreakfast.com/2022/01/former-federal-trade-commission-chairman-says-biden-is-inappropriately-exhorting-the-agency/> (quoting former Chairman Kovacic).

⁴ Exec. Order §§ 2(g), 3.

⁵ *Id.* §§ 13, 2(e), 5.

⁶ *Id.* § 4.

⁷ Tim Wu, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

⁸ Exec. Order § 5(c).

⁹ *Id.* § 5(i)(i).

¹⁰ 7 U.S.C. §§ 181-229.

¹¹ Exec. Order § 5(i)(i)(A).

¹² Press Release, U.S. Dep't of Justice, *Justice Department and Agriculture Department Issue Shared Principles and Commitments to Protect Against Unfair and Anticompetitive Practices* (Jan. 3, 2022), <https://www.justice.gov/opa/pr/justicedepartmentandagriculturedepartmentissuesharedprinciplesandcommitmentsprotect>.

¹³ Press Release, USDA, *USDA, DOJ Launch Online Tool Allowing Farmers, Ranchers to Report Anticompetitive Practices* (Feb. 3, 2022), <https://www.usda.gov/media/pressreleases/2022/02/03/usdadojlaunchonlinetoolallowingfarmersranchersreport#:~:text=Producers%20who%20choose%20not%20to,Stop%203601%2C%201400%20Independence%20Ave.>

¹⁴ OFFICE OF MANAGEMENT AND BUDGET, *Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions: USDA Agency Statement of Fall 2021 Regulatory Priorities* (Jan. 31, 2022), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_0500_USDA.pdf.

¹⁵ Exec. Order § 5(i).

¹⁶ USDA AMS, *Agricultural Competition: A Plan in Support of Fair and Competitive Markets* (May 2022), https://www.ams.usda.gov/sites/default/files/media/USDAPlan_EO_COMPETITION.pdf.

¹⁷ *Id.* at 2.

¹⁸ Press Release, USDA, *USDA Announces More Resources to Increase and Expand Meat and Poultry Processing Capacity* (Mar. 25, 2022), <https://www.usda.gov/media/pressreleases/2022/03/25/usdaannouncesmoreresourcesincreaseandexpandmeatandpoultry>.

¹⁹ Fact Sheet, USDA, *Meat and Poultry Intermediary Lending Program* (June 2022), https://www.rd.usda.gov/sites/default/files/MPILP_FactSheet_FINAL.pdf.

²⁰ Open Markets and Farm Action, "A Midterm Review of the Biden Administration's Commitment to Food System Competition," (Jun. 12, 2022), <https://farmaction.us/wp-content/uploads/2022/06/Midterm-Review-Report-6.12.22.pdf>.

- ²¹ Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg. 34980 (proposed June 8, 2022) (to be codified at 9 C.F.R. pt.201), <https://www.federalregister.gov/documents/2022/06/08/2022-11997/transparency-in-poultry-grower-contracting-and-tournaments>.
- ²² Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 Fed. Reg. 60010 (proposed September 26,2022) (to be codified at 9 C.F.R. pt. 201), <https://www.federalregister.gov/documents/2022/10/03/2022-21114/inclusive-competition-and-market-integrity-under-the-packers-and-stockyards-act>.
- ²³ *Id.*
- ²⁴ USDA AMS, Agricultural Competition: A Plan in Support of Fair and Competitive Markets (May 2022) at 2, https://www.ams.usda.gov/sites/default/files/media/USDAPlan_EO_COMPETITION.pdf.
- ²⁵ Lina Khan, *Obama's Game of Chicken*, WASHINGTON MONTHLY (Nov. 9, 2012) at 8, <https://washingtonmonthly.com/2012/11/09/obamasgameofchicken/>.
- ²⁶ USDA AMS, Agricultural Competition: A Plan in Support of Fair and Competitive Markets (May 2022) at 1516 (internal citations omitted), https://www.ams.usda.gov/sites/default/files/media/USDAPlan_EO_COMPETITION.pdf.
- ²⁷ *Id.* at 2.
- ²⁸ Transcript, FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions: Food and Agriculture (Mar. 28, 2022), <https://www.ftc.gov/news-events/events/2022/03/ftc-justice-department-listening-forum-firsthand-effects-mergers-acquisitions-food-agriculture>.
- ²⁹ See e.g., Murray Carpenter, *Milk Companies Look West, Pressuring Northeast Dairy Farmers*, N.Y. TIMES (Jan. 10, 2022), <https://www.nytimes.com/2022/01/05/business/organicdairyfarmsnewengland.html>.
- ³⁰ Brian Deese, Ass't to the President and Senior Advisor, Brian Deese Remarks on President Biden's Competition Agenda (July 14, 2022) [Hereinafter Deese Competition Remarks], <https://www.whitehouse.gov/briefing-room/statementsreleases/2022/07/14/briandeeseremarksonpresidentbidenscompetitionagenda/>.
- ³¹ *Id.*
- ³² The State AGs, who have a significant role interest in well-functioning agriculture markets, have also urged USDA to revitalize the PSA. See Letter from State AGs to Sec'y of Agriculture Tom Vilsack (Dec. 21, 2021), available at https://oag.ca.gov/system/files/attachments/pressdocs/2021_12_21%20State%20Ltr%20to%20Sec%20Vilsack%20re%20Packers%20and%20Stockyards.pdf. A broad, bipartisan coalition of fifteen state attorneys general—from AG Keith Ellison in Minnesota to AG Sean Reyes of Utah—urged the USDA to use its powers under the Packers and Stockyard Act to counter rapidly increased concentration among meat processors, vertical integration, exclusive production arrangements, new sales and marketing practices, the emergence of third-party data services as key players in the market, and producer attrition.
- ³³ The Robinson-Patman Act of 1936, Pub. L. No. 74-692, 49 Stat.1526 (codified at 15 U.S.C.§13).
- ³⁴ Deese Competition Remarks, *supra* note 30.
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ *Id.*
- ³⁸ *Id.*
- ³⁹ See Herbert J. Hovenkamp, *President Biden's Executive Order on Competition: An Antitrust Analysis*, 64 ARIZ. L. REV. 384, 4156 (2022) (criticizing importation of antitrust concepts by the federal courts into the more “tortlike” approach of PSA, but noting that opening up the statute will increase litigation in the federal courts).
- ⁴⁰ Press Release, Dep't of Justice, *Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers*, (July 25, 2022), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>.
- ⁴¹ Despite strong support for the GIPSA rules from farmers and ranchers, in November 2011, Congress passed the Consolidated and Further Continuing Appropriations Act, 2012 (PL. 11255) that prohibited the USDA from finalizing or implementing the most contentious parts of a proposed rule for enforcing PSA by requiring a finding of “harm or likely harm to competition.”
- ⁴² Leah Douglas, *Big U.S. Chicken Company, Mountaire, Asks Contractors to Oppose Transparency Rule*, REUTERS (Aug. 5, 2022), <https://www.reuters.com/world/us/big-us-chicken-company-mountaire-asks-contractors-oppose-transparency-rule-2022-08-05/>.
- ⁴³ *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022).
- ⁴⁴ Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Prepared Remarks at American Bar Ass'n Antitrust Section In-House Section (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/phillips_aba_inhouse_keynote.pdf.
- ⁴⁵ Bipartisan House Members, Letter to Lina Khan, Chair, et al., Fed. Trade Comm'n (Mar. 30, 2022), https://ci.criticalimpact.com/user/31823/image/Final_Letter_to_FTC_Chair_Khan_3.30.22.pdf.
- ⁴⁶ Professor Hovenkamp is critical of the RPA's policy of forcing higher costs on larger retailers in order to protect smaller ones in part because it hurts low-income consumers the most, Hovenkamp, *supra* note 39, at 39192.
- ⁴⁷ Fed. Trade Comm'n, *Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products* (June 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Policy%20Statement%20of%20the%20Federal%20Trade%20Commission%20on%20Rebates%20and%20Fees%20in%20Exchange%20for%20Excluding%20Lower-Cost%20Drug%20Products.near%20final.pdf; see also Alvaro Bedoya, Comm'r, Fed. Trade Comm'n, Prepared Remarks at Midwest Forum on Fair Markets: What the New Antimonopoly Vision Means for Main Street (Sept. 22, 2022) (endorsing RPA enforcement), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.
- ⁴⁸ Meat and Poultry Special Investigator Act of 2022, S. 3870, 117th Cong. (2022); Cattle Price Discovery and Transparency Act of 2022, S. 4030, 117th Cong. (2022).
- ⁴⁹ Meat and Poultry Special Investigator Act of 2022, H.R. 7606, 117th Cong. (2022).
- ⁵⁰ Meat and Poultry Special Investigator Act of 2022, S. 3870, 117th Cong. (2022).
- ⁵¹ See, e.g., *United States v. Jindal* (E.D. Tex. 2020) (criminal wage-fixing in labor market; verdict of not guilty); *United States v. DaVita* (D. Colo. 2021) (same); (*United States v. Penn*, No. 1:20-cr-00152 (D. Colo. July 7, 2022) (price-fixing in broiler chickens market; verdict of not guilty); *Illumina, Inc.*, Initial Decision, FTC No. 9401 (Sept. 9, 2022) (vertical theory of harm in merger; ALJ denied injunction); *United States v. UnitedHealth Group Inc.*, No. 1:22-cv-0481, Dkt. 138, Memorandum Opinion (D.D.C. Sept. 21, 2022) (horizontal and vertical theories of harm in merger; district court denied injunction); *United States v. United States Sugar Corp.*, No. 1:21-cv-01644, Dkt. 256, Memorandum Opinion (D. De. Sept. 28, 2022) (horizontal theory of harm in merger; district court denied injunction).