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Competition in the Food Supply Chain – Contribution from the United States

- Session IV -

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Competition in the Food Supply Chain

- Contribution from the United States -

1. Introduction

1. The U.S. Federal Trade Commission (“FTC”) and Antitrust Division of the U.S. Department of Justice (“DOJ”) (collectively, “the Agencies”) are pleased to provide our perspective on competition issues in the U.S. food supply chain.
2. In 2022, food—whether eaten at home or away from home—accounted for 12.8% of U.S. households’ expenditures.¹ During that year, prices for food eaten at home increased by 11.4%, placing significant strain on consumers’ budgets.² Since then, the inflation rate for food eaten at home has slowed considerably to about 1% on an annual basis in 2024.³
3. Higher food prices disproportionately affect low-income households that spend a larger share of their income on food than higher-income households.⁴ Many Americans also experience food insecurity, meaning they lack access to enough food for an active, healthy lifestyle.⁵ High food prices make it even more challenging for these Americans to get the food and nutrients they need. By promoting and maintaining competition throughout the food supply chain, the Agencies can help lower food prices and increase food quality,⁶ thereby improving affordability and accessibility for more Americans.
4. The COVID-19 pandemic underscored the importance of competition at all levels of the U.S. food supply chain and the risks of over concentration in this vital sector. Before

¹ *Ag and Food Sectors and the Economy*, U.S. Dep’t of Agriculture, Economic Research Service, <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/> (last visited Oct. 11, 2024).

² *Summary Findings of Food Price Outlook, 2024 and 2025*, U.S. Department of Agriculture, Economic Research Service. <https://www.ers.usda.gov/data-products/food-price-outlook/summary-findings/> (last visited Oct. 11, 2024) (“In 2022, food prices increased by 9.9 percent, faster than in any year since 1979. Food-at-home prices increased by 11.4 percent, while food-away-from-home prices increased by 7.7 percent.”); Statistics News Release, OECD, OECD Headline Inflation Falls to 5.6% in June 2024, at Table 2, Aug. 5, 2024, <https://www.oecd.org/content/dam/oecd/en/data/insights/statistical-releases/2024/8/consumer-prices-oecd-08-2024.pdf>.

³ OECD, “OECD headline inflation falls to 5.6% in June 2024”. Statistics News Release: Consumer Price Index, at Table 1, Aug. 5, 2024, <https://www.oecd.org/content/dam/oecd/en/data/insights/statistical-releases/2024/8/consumer-prices-oecd-08-2024.pdf>.

⁴ OECD, OECD Economic Surveys: United States 2024, at 35, 2024, https://www.oecd-ilibrary.org/economics/oecd-economic-surveys-united-states-2024_cdf156-en.

⁵ *Food Security in the U.S. - Overview*, U.S. Department of Agriculture, Economic Research Service, <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-u-s/>.

⁶ Complaint ¶¶ 60-67, *FTC v. Kroger Co.*, No. 24-cv-00347 (D. Or.), ECF No. 1; see also Anna Langlois, *Kroger Exec Describes Pricing Pressure from Albertsons*, Global Competition Review, Aug. 28, 2024, <https://globalcompetitionreview.com/gcr-usa/article/kroger-exec-describes-pricing-pressure-albertsons> (summarizing testimony that Kroger matches Albertsons’ prices for eggs).

the pandemic, many sectors within the U.S. food supply chain experienced increasing market concentration or persistent high concentration levels. In the infant formula market, the FTC found that the top four manufacturers have controlled over 97% of the market from 2000 to 2021.⁷ Elsewhere in the food supply chain, research shows that by 2016-2017 the top four suppliers controlled 80% of the corn seed market and 75% of the soybean seed market.⁸ Finally, driven by consolidation by national and large regional food retailers, food retailer market concentration at the county level increased by 94% between 1990 and 2019.⁹ When the pandemic began, disruptions and product shortages throughout the food supply chain provided some firms with the opportunity to exploit or solidify their market power. For instance, FTC research found that some food retailers initially suspended policies that would penalize suppliers for not filling orders of items that were in shortage.¹⁰ Eventually, however, simply having product in stock became a point of competitive differentiation for retailers.¹¹ To secure access to scarce products, and therefore a competitive advantage, other retailers—most often larger ones—imposed strict delivery requirements on their upstream suppliers and threatened financial penalties for noncompliance.¹² Walmart, for example, tightened the delivery requirements its suppliers had to meet to avoid contractual penalties as the pandemic continued.¹³ Evidently, some suppliers preferentially allocated product to the purchasers threatening to penalize them.¹⁴ The potential for powerful retailers to distort product allocations during a shortage suggests that crises and high market concentration may create an opportunity for certain firms to buttress their market power.

5. Although supply chains have recovered and the inflation rate for food has slowed, prices for many food items have remained considerably higher than they were pre-pandemic.¹⁵ In addition to higher prices, consumers may also be facing another round of shrinking package sizes, often called “shrinkflation,” for at least some food items, such as

⁷ Federal Trade Commission, *Market Factors Relevant to Infant Formula Supply Disruptions*, at Table 1 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/infant_formula_report_final.pdf [hereinafter *Infant Formula Report*].

⁸ James M. MacDonald et al., *Concentration and Competition in U.S. Agribusiness*, U.S. Department of Agriculture, Economic Research Service, June 2023, at 10, <https://www.ers.usda.gov/publications/pub-details/?pubid=106794>.

⁹ Eliana Zeballos et al., *A Disaggregated View of Market Concentration in the Food Retail Industry*, U.S. Department of Agriculture, Economic Research Service, Jan. 2023, at 16, <https://www.ers.usda.gov/publications/pub-details/?pubid=105557>.

¹⁰ Fed. Trade Comm’n, *Feeding America in a Time of Crisis: FTC Staff Report on The United States Grocery Supply Chain and the COVID-19 Pandemic*, at 1 (2024), <https://www.ftc.gov/reports/feeding-america-time-crisis-ftc-staff-report-united-states-grocery-supply-chain-covid-19-pandemic> [hereinafter *Supply Chain Report*].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See, e.g., Madeline Ngo, *How Food Prices Have Changed Over the Past Four Years*, New York Times, Aug. 13, 2024, <https://www.nytimes.com/2024/08/13/business/economy/inflation-food-prices.html> (“The average price for a dozen eggs . . . has doubled from four years ago, to \$2.72 from \$1.55. Prices for cereals and bakery products have climbed about 25 percent over the same period, while fruits and vegetables were up about 14 percent.”).

snacks.¹⁶ With further shrinkflation, consumers may continue paying more and receiving less than they did before the pandemic.¹⁷ Coupled with higher profit margins, these higher quality-adjusted prices may indicate that some firms in the U.S. food supply chain are successfully exercising their market power.¹⁸ While the Agencies have deep experience promoting and maintaining competition in the U.S. food supply chain, pandemic-induced shortages and price increases have highlighted the importance of targeted efforts to use the full complement of the Agencies' powers to identify and address market failures.

6. High concentration and monopsony power also harm producers throughout the food supply chain, including farmers, ranchers, feed lot owners, chicken growers, and processing plant workers.¹⁹ Farmers, for example, face concentrated markets on all sides, when purchasing seeds or machinery, when obtaining financing or crop insurance, or when selling to meatpackers or other buyers.²⁰ Our food supply chain works best when farmers and other producers get the benefit of competitive markets for the supplies they need and the food that they grow.²¹

2. Promoting competition through enforcement

7. The Agencies take a comprehensive approach to addressing competition issues in the U.S. food supply chain. In particular, the Agencies enforce a range of general and industry-specific statutes to challenge anticompetitive mergers and conduct by market participants at all levels of the food supply chain, including suppliers of inputs used in food production; farmers, growers, and food manufacturers; distributors of food to restaurants and food retailers; and food retailers. The Agencies seek to promote competition in the food supply chain for the benefit of consumers, farmers, workers, retailers, and restaurants.

¹⁶ Jeanna Smialek, *Shrinkflation 101: Economics of Smaller Groceries*, New York Times, Mar. 1, 2024, <https://www.nytimes.com/2024/03/01/business/economy/shrinkflation-groceries.html>.

¹⁷ Liz Young, *FTC Finds Large Grocers Used Size to Stock Shelves During Pandemic*, Wall Street Journal, Mar. 21, 2024, <https://www.wsj.com/articles/ftc-finds-large-grocers-used-size-to-stock-shelves-during-pandemic-1db4c870>.

¹⁸ Lina M. Khan, Fed. Trade Comm'n, *Remarks at the Public Convening of the Strike Force on Unfair and Illegal Pricing*, at 3, Aug. 1, 2024, <https://www.ftc.gov/news-events/news/speeches/remarks-chair-lina-m-khan-strike-force-unfair-illegal-pricing-public-convening>.

¹⁹ Press Release, U.S. Dep't of Justice, *Assistant Attorney General Jonathan Kanter Meets with National Farmers Union*, Sept. 13, 2022, <https://www.justice.gov/opa/pr/assistant-attorney-general-jonathan-kanter-meets-national-farmers-union>.

²⁰ Basel Musharbash, *"Kings Over the Necessaries of Life": Monopolization and the Elimination of Competition in America's Agriculture System*, Farm Action, Sept. 2024, https://farmaction.us/wp-content/uploads/2024/09/Kings-Over-the-Necessaries-of-Life-Monopolization-and-the-Elimination-of-Competition-in-Americas-Agriculture-System_Farm-Action.pdf.

²¹ Jonathan Kanter, U.S. Dep't of Justice, *Remarks at the American Economic Liberties Project 2024 Antimonopoly Summit*, May 21, 2024, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-american-economic-liberties>.

2.1. Suppliers of inputs used in food production

8. Farmers and other food producers such as ranchers, feed lot owners, and chicken growers rely on many inputs to grow, raise, and produce their products, whether fruits, vegetables, poultry, cattle, or packaged foods, and the Agencies must act to prevent mergers that reduce competition among suppliers of critical inputs.²² Crop farmers, for instance, buy seeds, fertilizer, and pesticides to grow any number of crops, such as potatoes, vegetables, soybeans, corn, and peanuts.²³ Farmers, manufacturers, and consumers also rely on transportation services throughout the food supply process. Farmers and food manufacturers benefit when their input suppliers compete to offer them lower prices and higher quality products.

9. In 2022, the FTC and ten state attorneys general sued Syngenta and Corteva, two of the largest producers of crop protection products (commonly known as pesticides) in the United States, alleging that they unlawfully maintained their monopoly positions by paying distributors to block competitors from selling their cheaper generic products to farmers.²⁴ Farmers often use pesticides to control pests that would otherwise harm their crops. In this way, pesticides help farmers to increase crop quality and yields. As alleged in the complaint, Syngenta's market share for three pesticides exceeded 70%; Corteva similarly had market shares above 70% for two other pesticides.²⁵ Under the terms of the loyalty programs, Syngenta and Corteva made payments to distributors as long as the distributors kept their purchases of Syngenta's and Corteva's products above a specified threshold, generally at least 85% and as high as 99%.²⁶ According to the complaint, this scheme permitted Syngenta and Corteva to block competition from generic pesticide competitors,

²² See, e.g., Press Release, Fed. Trade Comm'n, *FTC Approves Final Order Requiring Animal Health Product Suppliers Elanco Animal Health, Inc. and Bayer Animal Health GmbH to Divest Assets in Three Product Markets as a Condition of Acquisition*, Sept. 11, 2020, <https://www.ftc.gov/news-events/news/press-releases/2020/09/ftc-approves-final-order-requiring-animal-health-product-suppliers-elanco-animal-health-inc-bayer> (approving an order that maintains competition in markets for insecticides used to treat livestock); Fed. Trade Comm'n, *FTC Approves Final Order Requiring Canadian Fertilizer and Chemical Companies PotashCorp and Agrium to Divest 2 Production Facilities as Condition of Merger*, Feb. 7, 2018, <https://www.ftc.gov/news-events/news/press-releases/2018/02/ftc-approves-final-order-requiring-canadian-fertilizer-chemical-companies-potashcorp-agrium-divest-2> (approving an order that maintains competition in two fertilizer markets); Press Release, DOJ, *Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto*, May 29, 2018 (announcing structural resolution of competition concerns in areas including certain genetically-modified seeds and traits, certain types of herbicides, and weed-management systems, raised by Bayer's proposed acquisition of Monsanto).

²³ Complaint ¶ 106, *FTC v. Syngenta Crop Protection AG*, No. 22-cv-828 (M.D.N.C. Sept. 29, 2022), ECF No. 1; Amy Mayer & Luke Runyon, *Seeds, Pesticides, Fertilizer: How Big Companies Harnessed the "Holy Trinity" of Modern Agriculture*, Kansas City News and NPR (KCUR), Oct. 31, 2016, <https://www.kcur.org/agriculture/2016-10-31/seeds-pesticides-fertilizer-how-big-companies-harnessed-the-holy-trinity-of-modern-agriculture>.

²⁴ Press Release, Fed. Trade Comm'n, *FTC and State Partners Sue Pesticide Giants Syngenta and Corteva for Using Illegal Pay-to-Block Scheme to Inflate Prices for Farmers*, Sept. 29, 2022, <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-state-partners-sue-pesticide-giants-syngenta-corteva-using-illegal-pay-block-scheme-inflate>.

²⁵ Complaint, *supra* note 23, ¶¶ 161-62.

²⁶ *Id.* ¶¶ 67, 75.

allowing them to charge higher prices than they could if they faced competition.²⁷ In addition to higher prices, this conduct also stifles innovation by preventing generic manufacturers from bringing differentiated pesticide products to market. The FTC’s complaint alleges that Syngenta’s and Corteva’s conduct harms farmers by forcing them to pay higher prices and leaving them with fewer options to protect their crops, as well as consumers who ultimately bear the higher prices for these critical agricultural inputs.

10. Also in 2022, China International Marine Containers Group (“CIMC”) announced that it was abandoning its intended acquisition of Maersk Container Industry after DOJ’s investigation raised antitrust concerns.²⁸ The proposed transaction would have combined two of the world’s four suppliers of insulated container boxes and refrigerated shipping containers, critical products in the global cold supply chain. The acquisition threatened higher prices, lower quality, and less resiliency in global supply chains. It would have cemented CIMC’s dominant position in an already consolidated industry and eliminated Maersk as an innovative, independent competitor.

2.2. Farmers, growers, and manufacturers

11. Competition at the stage of the supply chain where food is grown or manufactured is also important. This includes direct price competition between firms at the various stages of the food supply chain as well as other forms of competition.

12. DOJ has challenged information sharing among processors that allegedly increased prices for turkey, poultry, and pork products. In September 2023, DOJ, later joined by the Attorneys General of four states, filed a complaint alleging that Agri Stats suppresses competition by collecting, integrating and distributing competitively sensitive information related to price, cost and output among competing meat processors.²⁹ The complaint alleges that Agri Stats has for years produced comprehensive weekly and monthly reports for participating meat processors, which use the data from competing meat processors to set prices and output levels. The complaint further alleges that Agri Stats understood that meat processors have used these reports for anticompetitive purposes and, in some instances, even encouraged meat processors to raise prices and reduce supply. This alleged conduct harms customers, including grocery stores and American families. Earlier this year, the district court denied Agri Stats’ motion to dismiss, allowing DOJ’s case to go forward.³⁰

13. DOJ has also emphasized the harms from information sharing in a private antitrust case involving Agri Stats and pork producers. There, DOJ filed a statement of interest explaining how information sharing can harm competition and violate the antitrust laws by

²⁷ *Id.* ¶¶ 5-7.

²⁸ Press Release, U.S. Dep’t of Justice, *Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation*, Aug. 25, 2022, <https://www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and-maersk>.

²⁹ Press Release, U.S. Dep’t of Justice, *Justice Department Sues Agri Stats for Operating Extensive Information Exchanges Among Meat Processors*, Sept. 28, 2023, <https://www.justice.gov/opa/pr/justice-department-sues-agri-stats-operating-extensive-information-exchanges-among-meat>.

³⁰ *United States v. Agri Stats, Inc.*, No. CV 23-3009 (JRT/JFD), 2024 WL 2728450 (D. Minn. May 28, 2024).

“corrupt[ing] the competitive process.”³¹ DOJ’s statement of interest explained that information sharing can harm competition even if the information shared does not identify specific competitors and that the defendants were seeking to impermissibly narrow what types of information sharing violated the antitrust laws.

14. The Agri Stats lawsuit follows on prior efforts by DOJ to challenge anticompetitive information sharing in the agriculture industry. DOJ’s complaint and subsequent consent decree with Cargill, Sanderson Farms, Wayne Farms, and other defendants, discussed further below, alleged that the defendants exchanged compensation information as part of a long-running conspiracy to suppress worker pay at poultry processing plants. Among other things, the consent decree prohibited defendants from sharing competitively sensitive compensation information in the future.³²

15. Manufacturers of consumer-packaged foods compete in several ways. Branded manufacturers often provide different types of payments to retailers to increase sales of their packaged foods to consumers, including “trade funds” and “slotting allowances.” Retailers often use trade funds to reduce the shelf price that consumers pay for a product, whether by offering a temporary discount or an “everyday low price.” Slotting allowances, on the other hand, are payments made by manufacturers to retailers to secure sufficient shelf space at the retailer’s stores. Private label manufacturers compete on price and quality to supply retailers with packaged goods bearing the retailer’s own label. If the retail market is competitive, competition among manufacturers that benefits retailers should also benefit consumers in the form of lower prices, higher quality, and wider product variety. For instance, the FTC challenged J.M. Smucker’s acquisition of Conagra’s Wesson brand of cooking oil, alleging that it would substantially lessen competition in the market for branded canola and vegetable oils.³³ Canola and vegetable oil are two of the least expensive cooking oils and are used by consumers for a wide range of purposes, including baking, frying, and sauteing, as well as in marinades and vinaigrettes. As alleged in the complaint, the transaction would have given Smucker, which owns the Crisco brand of cooking oils, control over at least 70% of the market for branded canola and vegetable oils sold to supermarkets and other retailers.³⁴ The FTC alleged that the transaction would increase Smucker’s negotiating leverage against retailers by eliminating the vigorous head-to-head competition between the Crisco and Wesson brands that resulted in significant trade funds offered to retailers.³⁵ Eliminating competition and reducing the amount of trade funds meant that retailers, and ultimately consumers, likely would have faced higher prices for

³¹ [Statement of Interest of the United States](#), *In re Pork Antitrust Litig.*, No. 0:18-cv-01776-JRT-JFD (D. Minn. Oct. 1, 2024).

³² Press Release, U.S. 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>.

³³ Press Release, Fed. Trade Comm’n, *FTC Challenges Proposed Acquisition of Conagra’s Wesson Cooking Oil Brand by Crisco owner, J.M. Smucker Co.*, March 5, 2018, <https://www.ftc.gov/news-events/news/press-releases/2018/03/ftc-challenges-proposed-acquisition-conagras-wesson-cooking-oil-brand-crisco-owner-jm-smucker-co>.

³⁴ *Id.*

³⁵ *Id.*

branded canola and vegetable oils.³⁶ Smucker and Conagra abandoned their proposed transaction following the filing of the complaint challenging the merger.

16. In addition to challenging anticompetitive mergers between manufacturers of branded food products, the Agencies have also scrutinized potential consolidation by private label manufacturers. In 2019, the FTC challenged Post's proposed acquisition of TreeHouse, which would have combined two of only three significant manufacturers and distributors of private label ready-to-eat cereal in the United States and given Post control of over 60% of the market.³⁷ In the United States, food retailers often procure private label products by conducting a "request for proposal" ("RFP") process where they solicit bids from manufacturers. Under such a process, retailers typically allow potential suppliers to improve their initial offers in order to solicit the best possible price, quality, and other terms. The FTC's complaint alleged that the acquisition would have eliminated significant head-to-head competition between Post and TreeHouse, citing numerous examples of RFPs where the two manufacturers competed against each other and lowered their prices to beat the other.³⁸ The FTC alleged that eliminating such competition would harm retailers and consumers through higher prices and lower quality products.³⁹ Post and TreeHouse abandoned the proposed acquisition after the FTC challenged it.

17. DOJ is committed to holding companies and executives accountable for collusion that affects staple foods and agricultural markets more broadly.⁴⁰ For example, DOJ charged two companies (Bumble Bee and Starkist) and four executives with conspiring to fix prices of packaged seafood products, particularly canned tuna, between 2010 and 2013. Three executives pleaded guilty, and the fourth executive, the former President and Chief Executive Officer of Bumble Bee Foods, was convicted in December 2019 following a four-week jury trial in San Francisco. In June 2020, he was sentenced to serve 40 months in prison.⁴¹ In July 2021, his conviction was affirmed on appeal by the Ninth Circuit. Bumble Bee pleaded guilty and was sentenced to pay a \$25 million criminal fine.⁴² StarKist also pleaded guilty.⁴³ In September 2019, following a series of contested sentencing

³⁶ *Id.*

³⁷ Press Release, Fed. Trade Comm'n, *FTC Alleges Post Holdings, Inc.'s Proposed Acquisition of TreeHouse Foods, Inc.'s Private Label Ready-to-Eat Cereal Business Will Harm Competition*, Dec. 19, 2019, <https://www.ftc.gov/news-events/news/press-releases/2019/12/ftc-alleges-post-holdings-incs-proposed-acquisition-treehouse-foods-incs-private-label-ready-eat>.

³⁸ Administrative Complaint ¶¶ 34-35, *Post Holdings, Inc. and TreeHouse Foods Inc.*, Docket No. 9388, 2019 WL 7168936 (F.T.C. Dec. 19, 2019).

³⁹ *Id.* ¶ 37.

⁴⁰ Jonathan Kanter, U.S. Dep't of Justice, *Remarks at the Procurement Collusion Strike Force's Fifth Anniversary Event*, Nov. 21, 2024, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-procurement-collusion-strike>.

⁴¹ Press Release, U.S. Dep't of Justice, *Former Bumble Bee CEO Sentenced to Prison for Fixing Prices of Canned Tuna*, June 16, 2020, <https://www.justice.gov/opa/pr/former-bumble-bee-ceo-sentenced-prison-fixing-prices-canned-tuna>.

⁴² Press Release, U.S. Dep't of Justice, *Bumble Bee Agrees to Plead Guilty to Price Fixing*, May 8, 2017, <https://www.justice.gov/opa/pr/bumble-bee-agrees-plead-guilty-price-fixing>.

⁴³ Press Release, U.S. Dep't of Justice, *StarKist Co. Agrees to Plead Guilty for Price Fixing*, Oct. 18, 2018, <https://www.justice.gov/opa/pr/starkist-co-agrees-plead-guilty-price-fixing>.

hearings, a district court judge sentenced StarKist to pay a \$100 million statutory maximum fine.⁴⁴

18. DOJ has also aggressively prosecuted bid rigging affecting farmers. In May 2021, the DOJ obtained an indictment against two individuals for conspiring to rig bids at an auction for hundreds of acres of farmland and a tract of timber rights. The indictment alleged that two individuals demanded and accepted a \$40,000 side-payment to stop bidding on the farmland, artificially suppressing the price of the land sold at auction. The two individuals pleaded guilty in November 2022.⁴⁵ These guilty pleas helped to ensure the integrity of farmland auctions and ensure competitive pricing for the land where crops are grown.

19. In addition to enforcement actions under the antitrust laws, DOJ has prioritized enforcement of the Packers and Stockyards Act (“PSA”).⁴⁶ The Packers & Stockyards Act is a landmark 1921 law that protects livestock and poultry processors by prohibiting a range of harmful, unfair, discriminatory, or anticompetitive practices.⁴⁷ It was signed into law in 1921, after a Congressional investigation found that the incumbent meat packers had “attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands.”⁴⁸ DOJ shares enforcement authority under the Packers & Stockyards Act with the U.S. Department of Agriculture (“USDA”), and the cases DOJ has brought under the Act are a testament to the close partnership that DOJ has cultivated with the USDA.

20. In July 25, 2022, DOJ filed a civil antitrust complaint and concurrent proposed consent decree to stop three of the nation’s largest poultry processors—Cargill, Sanderson Farms, and Wayne Farms—and a data consultant and its president from suppressing the pay of hundreds of thousands of poultry processing plant workers and to stop Sanderson and Wayne Farms from engaging in deceptive practices regarding their contracts with poultry growers.⁴⁹ On May 17, 2023, DOJ filed an amended complaint and proposed consent decree, adding a fourth poultry processor—George’s—as a defendant.⁵⁰ The

⁴⁴ Press Release, U.S. Department of Justice, *StarKist Ordered to Pay \$100 Million Criminal Fine for Antitrust Violation*, Sept. 11, 2019, <https://www.justice.gov/opa/pr/starkist-ordered-pay-100-million-criminal-fine-antitrust-violation>.

⁴⁵ Press Release U.S. Dep’t of Justice, *Two Kentucky Real Estate Professionals Plead Guilty to Bid Rigging Farmland Auction*, Nov. 30, 2022, <https://www.justice.gov/opa/pr/two-kentucky-real-estate-professionals-plead-guilty-bid-rigging-farmland-auction>.

⁴⁶ Kanter, *Remarks at the American Economic Liberties Project 2024 Antimonopoly Summit*, *supra* note 21.

⁴⁷ 7 U.S.C. §§ 181-229.

⁴⁸ Fed. Trade Comm’n, *Report of the Federal Trade Commission on the Meat-Packing Industry*, Pt. 1, at 24, June 24, 1919.

⁴⁹ Press Release, U.S. 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>.

⁵⁰ Press Release, U.S. Dep’t of Justice, *Justice Department Files Proposed Amended Complaint and Consent Decree with Fourth Poultry Processor, Further Addressing Long-Running Conspiracy to*

complaint alleged 20 years of collaboration on wages between 21 competing chicken and turkey processors that suppressed wages for plant workers. It also alleged a history of camouflaging the true range of financial outcomes for growers by using a “tournament system” to pay growers, which constituted a deceptive practice in violation of the Packers & Stockyard Act.⁵¹ Under the consent decree, which the court entered as a final judgment, the defendants are required to pay over \$90 million in restitution to workers, change the tournament system, pay workers fairly, and cooperate with DOJ’s ongoing investigation. Defendants also may not share competitively sensitive information amongst each other or other competitors. The court appointed a global monitor to ensure compliance not only with the settlement but with all federal antitrust laws as they relate to poultry processing, poultry processing workers, poultry growers, the transportation and sale of poultry products, and other aspects of the defendants’ businesses.

21. Last year, DOJ filed its second recent case under the Packers & Stockyards Act, alleging that Koch Foods Inc. anticompetitively and unfairly required chicken growers to pay a termination penalty to switch from working for Koch to a rival chicken processor. This termination penalty operated as a de facto noncompete clause that restricted growers’ freedom to choose with whom to work. At the same time, DOJ filed a proposed consent decree, later entered by the court, requiring Koch to reimburse growers for all termination penalties and expenses, not impose any termination penalties going forward, and refrain from “retaliating against, intimidating or harassing” a grower due to a dispute over a termination penalty or due to their cooperation with DOJ or USDA.⁵² As with the prior consent decree under the Packers & Stockyards Act, this case emerged from DOJ’s strong partnership and close coordination with USDA.

22. DOJ also filed a statement of interest in a private antitrust lawsuit alleging that egg producers conspired to restrict the supply of eggs using a trade association program. DOJ’s statement of interest argued that the plaintiffs did not have to rely on the market shares of parties who were proved to be conspirators in order to demonstrate anticompetitive effects and that a trade association program can harm competition even if it is voluntary.⁵³ The district court agreed with DOJ’s arguments and upheld a jury verdict finding the defendants liable.⁵⁴

Suppress Workers’ Compensation, May 17, 2023, <https://www.justice.gov/opa/pr/justice-department-files-proposed-amended-complaint-and-consent-decree-fourth-poultry>.

⁵¹ The “tournament system” is a common practice used to compensate poultry growers in the U.S., whereby poultry companies pay growers according to their relative rankings, effectively pitting farmers against one another.

⁵² See Complaint, *United States v. Koch Foods Inc.*, 1:21-cv-15813 (N.D. Ill. 2023).

⁵³ Statement of Interest of the United States, *Kraft Foods Glob., Inc. v. United Egg Producers, Inc.*, No. 1:11-cv-08808 (N.D. Ill. Jan. 26, 2024).

⁵⁴ *Kraft Foods*, 2024 WL 4346418 (N.D. Ill. Sept. 30, 2024).

2.3. Food distribution to restaurants and other institutions

23. Dining out is highly popular in the U.S., and Americans' spending on food away from home continues to increase.⁵⁵ Those restaurants often obtain the raw materials for the food they prepare from third-party distributors, who buy food and beverage products from farmers and manufacturers, warehouse them, and then sell and distribute them to restaurants, bars, and retailers. These distributors compete not only to sell to and serve downstream customers, such as restaurants, hotels, and other institutions where food is served, but also to buy from and serve upstream suppliers. Promoting competition at the distribution level helps to ensure that suppliers and customers receive competitive prices and high-quality service, as well as minimizes the risk of distribution bottlenecks impeding products from reaching end consumers.⁵⁶

24. In *FTC v. Sysco Corp.*, the FTC went to court and obtained a preliminary injunction to block the proposed merger between Sysco and US Foods, the two largest broadline food distributors in the United States.⁵⁷ As the name implies, broadline food distributors sell a "broad" range of food and related products to establishments where food is consumed outside the home, such as restaurants, bars, hotels, and cafeterias. Both Sysco and US Foods serve national customers—who operate many foodservice locations throughout multiple parts of the United States—and local customers. Relying on expert analysis showing that the merging parties' combined market share would be at least 59% in the national broadline distribution market and between 63% and 90% in many local markets, the court found that the merger would significantly increase concentration nationally and locally.⁵⁸ Based on documentary, testimonial, and economic evidence, the court further found that the merger was likely to harm competition in the national market and local markets, because it would result in unilateral effects from the elimination of a close competitor.⁵⁹ In their defense, Sysco and US Foods made several arguments that the merger would enhance competition, but the court rejected all of them. Perhaps most notably, the court disagreed that the proposed divestiture of 11 distribution centers to Performance Food Group ("PFG"), the third-largest broadline distributor, would remedy the harm.⁶⁰ First, even with 11 additional distribution centers, PFG would not replace US Foods' competitive intensity. Post-divestiture, PFG's 35 distribution centers would have been fewer than the number of

⁵⁵ In the U.S., spending on food-away-from home increased from \$1.3 trillion to \$1.5 trillion from 2022 to 2023, and is expected to continue to grow. See *Food Prices and Spending*, U.S. Department of Agriculture, Economic Research Service, <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-prices-and-spending/> (last visited Oct. 10, 2024).

⁵⁶ For example, during the FTC's investigation of the proposed merger between Republic National Distributing Company and Breakthru Beverage, two wine and spirits distributors that operate in multiple states, the FTC gathered extensive evidence that the merger would harm upstream wine and spirits manufacturers, downstream retail and foodservice customers (e.g., liquor stores and restaurants), and end consumers through higher prices and worse service. Press Release, Fed. Trade Comm'n, *Statement of the FTC's Bureau of Competition Regarding Announcement that Republic National Distributing Company and Breakthru Beverage Group have Terminated Their Acquisition Agreement*, Apr. 8, 2019, <https://www.ftc.gov/news-events/news/press-releases/2019/04/statement-ftcs-bureau-competition-regarding-announcement-republic-national-distributing-company>.

⁵⁷ *F.T.C. v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015).

⁵⁸ *Id.* at 54-55, 61.

⁵⁹ *Id.* at 65-66, 70, 72.

⁶⁰ *Id.* at 72-79.

distribution centers that many national customers relied on to meet their needs.⁶¹ Second, the court was concerned that PFG's smaller volume of purchases than the merged firm would result in higher costs of goods sold, making it difficult for PFG to compete.⁶² Third, the divestiture would not have created an *independent* competitor for at least several years. Under the terms of the divestiture, PFG would have been reliant on the merged firm to obtain certain private label products and would have had the right to license a database from US Foods.⁶³ Sysco and US Foods abandoned their proposed merger shortly after the court issued the preliminary injunction.⁶⁴

2.4. Groceries and food retailers

25. After being farmed, processed, or manufactured, many food products ultimately reach American consumers at supermarkets, where they take them home to consume, or food service outlets, where they consume them onsite. For the past several years, the Agencies have been monitoring competition in the supermarket industry, which has undergone years of consolidation.⁶⁵ Maintaining competition between supermarkets is particularly important because they are a leading source of food for many Americans.

26. For many decades, the FTC has taken action to preserve competition among supermarkets in local areas where they compete and where consumers shop for their weekly groceries. Earlier this year, the FTC and nine state attorneys general sued to block Kroger's proposed acquisition of Albertsons, the two largest operators of traditional supermarkets in the United States and the largest proposed supermarket merger in U.S. history. If the merger were completed, Kroger and Albertsons would operate more than 5,000 stores and approximately 4,000 retail pharmacies and would employ nearly 700,000 employees across 48 states. As alleged in the complaint, the merger would result in combined market shares exceeding 30% in local markets surrounding more than 1,500 Kroger and Albertsons stores and eliminate fierce competition between the two direct competitors.⁶⁶ Such a loss of competition likely would lead to higher prices for groceries and other essential household items for millions of Americans, as well as lower quality products and services.⁶⁷ In an attempt to address antitrust concerns about the merger, Kroger and Albertsons proposed to divest several hundred stores and other assets to C&S Wholesale Grocers, which today operates just 23 supermarkets and a single retail pharmacy.⁶⁸ The complaint alleges that the

⁶¹ *Id.* at 74.

⁶² *Id.* at 76-77.

⁶³ *Id.* at 77-78.

⁶⁴ A few years after the FTC blocked the Sysco-US Foods merger, US Foods proposed to acquire Services Group of America, a regional broadline food distributor. To resolve the FTC's concerns that the acquisition would likely substantially lessen competition in several local markets and for national and multi-regional customers, the parties agreed to divest multiple distribution centers. Press Release, Fed. Trade Comm'n, *FTC Requires Divestitures and Imposes Conditions on US Food Holding Corp.'s Acquisition of Services Group of America, Inc.*, Sept. 11, 2019, <https://www.ftc.gov/news-events/news/press-releases/2019/09/ftc-requires-divestitures-imposes-conditions-us-foods-holding-corps-acquisition-services-group>.

⁶⁵ *See, e.g.*, Complaint, *supra* note 6, ¶ 4.

⁶⁶ *Id.* ¶ 56.

⁶⁷ *Id.* ¶ 59.

⁶⁸ *Id.* ¶¶ 10, 111.

merging parties' divestiture proposal is inadequate because it does not involve a standalone business; instead, it includes a hodgepodge of unconnected stores, banners, brands, and other assets that would not mitigate the lost competition between Kroger and Albertsons.⁶⁹ In addition to harming consumers, the FTC alleged that the merger would eliminate competition for union grocery store workers, threatening those workers' ability to secure higher wages, better benefits, and improved working conditions.⁷⁰

27. Earlier this year, Fresh Express Acquisition LLC, a wholly-owned subsidiary of Chiquita Holdings Limited, announced that it was abandoning its proposed \$308 million acquisition of Dole plc's Fresh Vegetables division after DOJ expressed concerns about the transactions impact on competition in the packaged salad market.⁷¹ Packaged salad represents \$3.2 billion in spending by grocers and their customers each year, and the proposed merger would have both reduced the number of competitors in the industry from three to two and raised prices for food products that are purchased by 85% of American households.

28. The cases discussed above illustrate the importance of promoting competition at each stage of the food supply chain. Because many of these markets are already concentrated, further consolidation or anticompetitive conduct may harm competition in other parts of the food supply chain, potentially resulting in adverse effects for upstream suppliers (e.g., farmers, growers, manufacturers), smaller competitors, downstream customers (e.g., restaurants and food retailers), workers, and consumers.

29. To further increase competition in the food supply chain, the FTC has noted its commitment to reinvigorating enforcement of the Robinson-Patman Act, which prohibits, among other things, a seller from charging different prices to competing buyers for "commodities of like grade and quality," where the effect is likely to harm competition.⁷² Indeed, the legislative history of the RPA shows that the law was, at least in part, enacted

⁶⁹ *Id.* ¶ 105. Additionally, the FTC has observed that consent orders requiring divestitures in past mergers between supermarket operators have failed to preserve competition. *See, e.g., id.* at ¶ 115 ("But the divestitures to Haggen and the other buyers did not preserve competition, as Albertsons promised. Within a year, Haggen filed for bankruptcy, most of the divested stores were closed or sold (often converting to a non-supermarket use), and many workers lost their jobs. Shortly after Haggen's failure, Albertsons itself re-acquired 56 of its divested supermarkets, as well as the remains of the original Haggen chain out of bankruptcy."). Based on this experience, challenging an anticompetitive merger may be the more effective approach to maintaining competition.

⁷⁰ *Id.* ¶ 101.

⁷¹ Press Release, U.S. Dep't of Justice, *Fresh Express Abandons Proposed Acquisition of Dole's Packaged Salad Business in Response to Antitrust Division's Concerns*, Mar. 28, 2024, <https://www.justice.gov/opa/pr/fresh-express-abandons-proposed-acquisition-doles-packaged-salad-business-response-antitrust>.

⁷² 15 U.S.C. § 13(a). *See, e.g.,* Press Release, Fed. Trade Comm'n, *FTC Takes Total Wine to Federal Court to Enforce Compliance with Antitrust Civil Investigative Demand*, Oct. 20, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-takes-total-wine-federal-court-enforce-compliance-antitrust-civil-investigative-demand> ("The Commission issued the CID to Total Wine as part of its investigation into whether Southern Glazer's . . . has engaged in discriminatory practices in its sales to retailers like Total Wine in violation of the Robinson-Patman Act[.]"); Alvaro M. Bedoya, Fed. Trade Comm'n, *Returning to Fairness: Prepared Remarks of Commissioner Alvaro M. Bedoya*, at 7, Sept. 22, 2022, <https://www.ftc.gov/news-events/news/speeches/returning-fairness-prepared-remarks-commissioner-alvaro-m-bedoya-midwest-forum-fair-markets>.

to address concerns arising in the food retail business.⁷³ In the context of the food supply chain, manufacturers or distributors may be violating the RPA by charging their customers different prices for the same product, harming competition by providing a price advantage to some food resellers but not others.

30. The Agencies will continue to build on their enforcement work throughout the food supply chain. DOJ has announced the creation of a new team of civil enforcers focused specifically on agriculture. This team is based in Chicago, nearer to the heart of the American agricultural industry, and it reflects DOJ's deep commitment to promoting competition across the food production industry.⁷⁴

3. Promoting competition through advocacy and industry studies

31. As in many other key sectors, the Agencies complement their enforcement efforts by conducting timely and thorough industry studies and advocating for procompetitive policies. This work enables the Agencies to build a holistic understanding of the competition issues throughout the food supply chain and address those where enforcement actions may not be possible. In certain instances, the Agencies have worked with other federal agencies in "whole of government" efforts to promote competition in certain parts of the food supply chain.⁷⁵

3.1. Advocacy

32. Broadly speaking, the Agencies have active advocacy programs and seek to share their expertise in crucial sectors in order to promote competition, including when other government bodies consider rules that may affect competition in the supply chain for food and related products.

33. In 2019, California's legislature considered a bill that would further restrict beer manufacturers' ability to terminate contracts with beer wholesalers for the distribution of beer. In response to a request from a legislator, the Agencies' staffs provided their views on the bill's likely effects on competition.⁷⁶ Like nearly all states, beer distribution in California follows a three-tier system: beer manufacturers (first tier) sell to licensed wholesalers (second tier) who then sell to retailers (third tier), such as restaurants, bars, and liquor stores.⁷⁷ Under this system, wholesalers store and deliver manufacturers' beer in a manner that maintains the beer's quality, establish retail networks to sell the beer brands they carry, and promote those brands by offering various promotional services, such as

⁷³ Erik Peinert & Katherine Van Dyck, *The Needless Desertion of Robinson-Patman*, ProMarket, Oct. 10, 2022, <https://www.promarket.org/2022/10/10/the-needless-desertion-of-robinson-patman/>.

⁷⁴ Michael Kades, U.S. Dep't of Justice, *Remarks at R-CALF USA Annual Conference*, June 21, 2024, <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-kades-delivers-keynote-remarks-cattle-drives>.

⁷⁵ Kanter, *Remarks at the American Economic Liberties Project 2024 Antimonopoly Summit*, *supra* note 21.

⁷⁶ Fed. Trade Comm'n. *Joint Comment of the FTC Staff and DOJ Antitrust Division Staff to the California State Assembly Concerning California Assembly Bill 1541*, Mar. 20, 2020, <https://www.ftc.gov/legal-library/browse/advocacy-filings/joint-comment-ftc-staff-doj-antitrust-division-staff-california-state-assembly-concerning-california>.

⁷⁷ *Id.* at 4.

setting up in-store displays, conducting events, and supplying retailers with branded promotional items (e.g., patio umbrellas, napkins, coasters).⁷⁸ The bill would have made it more difficult for a manufacturer to cancel a distribution contract with a wholesaler who failed to provide these services at an acceptable level. In particular, the bill would have required that a manufacturer show that “it has acted in good faith, that it has or had good cause . . . and that it complied with the notice requirements [of the bill]” before cancelling a contract with a wholesaler.⁷⁹ The Agencies’ staffs concluded that the bill would harm competition in several ways. First, it likely would have reduced competition between wholesalers to serve manufacturers, as the heightened standard for manufacturers to cancel a contract would have lessened any threat of switching to a different wholesaler.⁸⁰ This less intense competition would likely result in fewer demand-enhancing services, such as point-of-sale promotions. Second, it likely would have reduced competition between manufacturers, especially by smaller ones.⁸¹ With reduced competition between wholesalers, manufacturers would face even greater difficulty promoting their products without the competitive level of promotional services that wholesalers would otherwise offer, thereby decreasing competition between beer brands. Staff further noted that the bill would likely result in harm to California consumers by increasing beer prices and reducing variety. The bill has not become law.

34. As part of the whole-of-government approach, the Agencies have been closely cooperating with USDA to improve competition in agriculture markets. Since 1999 the Agencies have maintained a Memorandum of understanding (MOU) with USDA which provides for coordinating and sharing information that is otherwise protected by confidentiality restrictions. In February 2022, DOJ and USDA signed a second MOU regarding enforcement of the Packers & Stockyards Act.

35. President Biden’s July 2021 Executive Order on Promoting Competition in the American Economy⁸² directs USDA to improve its ability to enforce the Packers & Stockyards Act and more broadly to maintain competitive markets in agriculture. The Agencies continue to work with USDA to support the revision of the Packers & Stockyards Act rules to improve competition in food supply chains.

36. In a USDA Packers & Stockyard Act rulemaking related to poultry growing, the DOJ and Chair of the FTC filed a comment addressing questions posed by USDA regarding whether certain conduct should be considered unfair practices under the Packers and Stockyards Act, which aims to promote fair competition and fair trade practices to protect farmers, ranchers, growers, and consumers.^{83, 84} DOJ and the FTC Chair supported USDA’s

⁷⁸ *Id.* at 5.

⁷⁹ *Id.* at 6-7.

⁸⁰ *Id.* at 9.

⁸¹ *Id.* at 12.

⁸² Exec. Order No. 14,036, 86 Fed. Reg. 36,987, July 9, 2021.

⁸³ *Written Submission of the U.S. Department of Justice, Antitrust Division and Federal Trade Commission Chair Khan*, Aug. 9, 2024, <https://www.justice.gov/d9/2024-08/424111.pdf>.

⁸⁴ As a further illustration of the whole-of-government approach to increasing competition in the U.S. meat processing market, the USDA recently announced that it awarded grants to 15 independent meat processors to increase capacity and enhance competition. Press Release, U.S.D.A., *Biden-Harris Administration Announces Final Awards through Landmark Meat and Poultry Processing Investment*, Sept. 19, 2024, <https://www.usda.gov/media/press-releases/2024/09/19/biden-harris-administration-announces-final-awards-through-landmark>.

efforts to promote fairness for poultry growers and improve enforcement of the Packers & Stockyards Act and argued that it is presumptively unfair for variable compensation to exceed 25 percent of any grower's total compensation.⁸⁵ The submission also advocated for USDA to clarify that it would be unfair under the Packers and Stockyards Act if a poultry dealer requires a grower to make additional capital investments that the grower cannot reasonably expect to recoup.⁸⁶ In the DOJ and the FTC Chair's view, USDA's proposed rule "is a vital step towards securing fair, competitive, and sustainable poultry markets."⁸⁷

37. In another Packers and Stockyards Act rulemaking, the FTC submitted a comment supporting a proposed rule that would help protect against unfair practices by dominant meat processors.⁸⁸ The FTC's comment supports USDA's efforts to revitalize the PSA by clarifying confusion about its requirements. In particular, the comment notes that imposing a difficult-to-meet competitive injury requirement is contrary to the plain text of the PSA, which grants USDA broad authority to assure "fair competition and fair-trade practices to safeguard farmers and ranchers . . . to protect consumers . . . and to protect members of the livestock, meat, and poultry industries from unfair, deceptive, unjustly discriminatory and monopolistic practices" and makes it unlawful to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device."⁸⁹ In the FTC's view, finalizing the rule would help promote a more fair, free, and resilient food system.⁹⁰

38. In February 2022, DOJ and USDA announced a "Farmer Fairness" online portal, allowing farmers and ranchers anonymously to report anticompetitive abuses and support cooperation among competition partners.⁹¹

39. In September 2022, USDA announced an "Agricultural Competition Challenge" to ramp up enforcement cooperation with State Attorneys General. DOJ has collaborated with

⁸⁵ *Written Submission*, *supra* note 83, at 2.

⁸⁶ *Id.* at 4.

⁸⁷ *Id.*

⁸⁸ Fed. Trade Comm'n, *Written Submission on Proposed Rule on Fair and Competitive Livestock and Poultry Markets Under the Packers and Stockyards Act*, Sept. 11, 2024, <https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-supports-usdas-efforts-protect-farmers-growers-ranchers-consumers-unlawful-conduct-dominant-meat>. Similarly, in 2022, FTC Chair Lina Khan submitted a comment expressing support for proposed USDA rules that would prohibit a wide variety of unfair, deceptive, and discriminatory business practices and reinvigorate competition in the poultry sector. Press Release, Fed. Trade Comm'n, *FTC Chair Lina M. Khan Files Comment Supporting Proposed USDA Protections for Poultry Farmers*, Sept. 1, 2022, <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-chair-lina-m-khan-files-comment-supporting-proposed-usda-protections-poultry-farmers>.

⁸⁹ *Written Submission*, *supra* note 88, at 2-3.

⁹⁰ *Id.* at 5.

⁹¹ Press Release, U.S. Dep't of Justice, *Justice Department and U.S. Department of Agriculture Launch Online Tool Allowing Farmers, Ranchers to Report Anticompetitive Practices*, Feb. 3, 2022, <https://www.justice.gov/opa/pr/justice-department-and-us-department-agriculture-launch-online-tool-allowing-farmers-ranchers>.

USDA on implementation of this challenge and expansion of its partnerships in agricultural enforcement with individual states.⁹²

40. Supporting farmers and growers is a key focus of the Agencies' efforts to promote competition in the food supply chain. An important aspect of the Agencies' broader efforts to support customers' right to repair products involves ensuring the ability of farmers to repair their equipment.⁹³ Indeed, an FTC report highlighted the problems that can arise when agricultural equipment manufacturers restrict farmers from repairing tractors and other equipment they own.⁹⁴ If a tractor breaks down, especially during the planting or harvesting season, the farmer may be harmed by having to wait days for repairs if the manufacturer prohibits repairs by the owner or third parties who can more readily fix the equipment. In this scenario, the lack of competition for repairs may mean the farmer pays higher prices for repairs and loses money from having less time to plant or harvest crops, ultimately decreasing output for consumers. Last year, DOJ filed a statement of interest addressing precisely this issue in an antitrust case brought by private plaintiffs against Deere & Co.⁹⁵ Deere was trying to dismiss the lawsuit, arguing that it was allowed to deny farmers access to the tools they need to repair Deere tractors. DOJ's brief explained clearly that "Deere is wrong," and the district court agreed, allowing the case to proceed.⁹⁶ The Agencies also submitted a comment to the U.S. Copyright Office supporting the renewal and expansion of exemptions to the Digital Millennium Copyright Act's prohibition against circumventing technology protection measures that control access to copyrighted content.⁹⁷ Like manufacturers of other motorized vehicles, manufacturers of agricultural equipment often use onboard computers for error identification, but these computers can include technology that protects copyrighted works from theft and infringing uses. Significantly, these protection measures can also prevent repairs. In their comment, the Agencies explained that by limiting access to the data and software needed for independent repair and maintenance, these technology protection measures can be used to squash competition for replacement parts, repair, and maintenance, ultimately limiting consumers' and businesses' choices and raises costs.⁹⁸ The comment supported renewing the current

⁹² Michael Kades, Deputy Assistant Attorney General, Keynote Address at the ABA Antitrust Fall Forum, Nov. 22, 2022, <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-kades-delivers-keynote-address-aba-antitrust>.

⁹³ Companies often restrict the ability of customers to repair a product through warranty or other contractual terms, as well as by withholding manuals and replacement parts. See Fed. Trade Comm'n, *Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers*, 2021, <https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-repair-restrictions-imposed-manufacturers-sellers>.

⁹⁴ Fed. Trade Comm'n, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, at 39, 2021, <https://www.ftc.gov/reports/nixing-fix-ftc-report-congress-repair-restrictions>.

⁹⁵ Statement of Interest of the United States, In re Deere & Co. Repair Services Antitrust Litig., No. 3:22-cv-50188 (N.D. Ill. Feb. 14, 2023), available at <https://www.justice.gov/atr/case-document/file/1568686/dl?inline>.

⁹⁶ In re Deere & Co., 703 F. Supp. 3d 862 (N.D. Ill. 2023).

⁹⁷ Press Release, Fed. Trade Comm'n, *FTC and DOJ File Comment with the U.S. Copyright Office Supporting Renewal and Expansion of Exemptions Facilitating Consumers' and Businesses' Right to Repair Their Own Products*, Mar. 14, 2024, <https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-doj-file-comment-us-copyright-office-supporting-renewal-expansion-exemptions-facilitating>.

⁹⁸ *Id.*

exemption related to computer programs that control devices designed primarily for use by consumers for diagnosis, maintenance, or repair of the device and expanding the exemption to include commercial and industrial equipment.⁹⁹

3.2. Industry studies

41. As discussed earlier, the COVID-19 pandemic disrupted the U.S. food supply chain, leading to shortages and higher prices for many critical food products. The FTC quickly responded to reports of shortages by launching two industry studies designed to uncover the factors that contributed to the shortages and supply chain disruptions and identify any opportunities to improve competition.

42. In 2021, when initial product shortages at retailers, including supermarkets, turned into ongoing shortages, the FTC launched an inquiry to understand the causes behind the continued supply chain disruptions and their impact on competition.¹⁰⁰ The FTC found that procurement practices by some large grocery retailers contributed to ongoing product shortages for smaller grocery retailers. In particular, to secure supply of scarce products, some large grocery retailers imposed strict delivery requirements and threatened fines for non-compliance on their suppliers.¹⁰¹ In some instances, those suppliers acquiesced by preferentially allocating their limited supply to larger grocery retailers.¹⁰² The FTC's report also highlighted three ways in which supply chain disruptions impacted competition. First, some grocery retailers, particularly larger ones, sought to avoid disruptions and diversify their supplier base by building or acquiring their own manufacturing capacity.¹⁰³ Such efforts, however, could leave other retailers, especially smaller ones, at a competitive disadvantage if those larger retailers acquired one of a few existing manufacturers rather than building manufacturing capacity themselves. Second, supply chain disruptions led manufacturers to curtail the amount of trade funds and slotting allowances they offered to retailers to increase demand for their products, whether through reduced shelf prices or access to valuable shelf space.¹⁰⁴ These reduced payments had a greater impact on retailers that were more dependent on promotional funds and made it harder for them to compete with rivals that used different pricing strategies. Third, relying on publicly available data, the report noted that supermarket operators' revenue and profits increased faster than their total costs during the pandemic, raising doubt that rising food prices at supermarkets simply reflect supermarket operators' higher costs.¹⁰⁵

43. In a different study, the FTC examined the factors that contributed to shortages of infant formula in 2022.¹⁰⁶ Following a recall of possibly contaminated infant formula and media reports of shortages across the U.S., the FTC's study aimed to identify the level of

⁹⁹ *Id.*

¹⁰⁰ Press Release, Fed. Trade Comm'n, *FTC Launches Inquiry into Supply Chain Disruptions*, Nov. 29, 2021, <https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions>.

¹⁰¹ *Supply Chain Report*, *supra* note 10, at 1.

¹⁰² *Id.*

¹⁰³ *Id.* at 2.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Infant Formula Report*, *supra* note 7.

concentration in the infant formula market and its vulnerability to disruptions. The study found that the infant formula market has been highly concentrated for decades, with the top four manufacturers controlling about 97% of the market in 2022.¹⁰⁷ Additionally, the report found that supply contract practices between infant formula manufacturers and government agencies participating in the Food and Drug Administration’s Women, Infant, and Children (“WIC”) Program—which provides, among other things, formula to nutritionally at-risk infants—may foreclose competition or reinforce barriers to entry by new manufacturers in the infant formula market. Specifically, for many decades, government agencies participating in WIC have procured infant formula pursuant to contracts in which manufacturers agree to provide large rebates in exchange for exclusivity. While such contracts can significantly lower overall WIC costs for government agencies, this practice may exclude competition, as well as make agencies too reliant on a single supplier, a potentially significant risk if the supplier encounters problems with manufacturing or distribution. Finally, the report summarized the regulatory framework that ensures that infant formula is safe and provides infants with the nutrition necessary for healthy development, but also acknowledged criticism that these regulations may create entry barriers.¹⁰⁸ Among other recommendations, the report suggests that policymakers consider whether exclusive WIC contracts contribute to high market concentration and leave states and their populations unnecessarily vulnerable to supply disruptions.¹⁰⁹

44. Apart from these industry studies, FTC economists have conducted empirical analysis of supermarket mergers. Research by three then-FTC economists estimated the price effects of 14 mergers of competing supermarkets in highly concentrated and relatively unconcentrated markets from 2004 to 2009. Their research found that most of the mergers resulting in a significant price increase involved a merger in a highly concentrated market.¹¹⁰

¹⁰⁷ *Id.* at Table 1. Some infants require specialty formula to address allergies, metabolic disorders, or other medical conditions, and the specialty formula market may be even more concentrated than the routine infant formula market. *Id.* at 9.

¹⁰⁸ *Id.* at 17.

¹⁰⁹ *Id.* at 15.

¹¹⁰ Daniel S. Hosken et al., *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing*, 27 J. ECON. & MGMT. STRATEGY 3, 17 (2018).