

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

Document Number AMS-TM-22-0023

Competition in Food Retail and Distribution Markets and Access for Agricultural Producers and Small and Midsized Food Processors

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice; request for public comments.

SUMMARY: On July 9, 2021, President Biden issued an Executive Order on “Promoting Competition in the American Economy,” which creates a White House Competition Council and directs Federal agency actions to enhance fairness and competition across America’s economy. The Executive Order directs the Secretary of Agriculture (the Secretary), among other things, to submit a report on the effect of retail concentration and retailers’ practices on the conditions of competition in the food industries. This notice requests comments and information from the public to assist the U.S. Department of Agriculture (USDA) in preparing the report required by the Executive Order and advancing policy steps to promote competition in the food and agricultural markets.

DATES: Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: All written comments in response to this notice should be posted online at www.regulations.gov. Comments received will be posted without change, including any personal information provided. All comments should reference the docket number AMS-TM-22-0023, the date of submission, and the page number of this issue of the

Federal Register. Comments may also be sent to Jaina Nian, Agricultural Marketing Service, USDA, Room 2055-S, STOP 0201, 1400 Independence Avenue, SW, Washington, D.C. 20250-0201. Comments will be made available for public inspection at the above address during regular business hours or via the Internet at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Jaina Nian, Agricultural Marketing Service, at (202) 378-2541; or by email at jaina.nian@usda.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On July 9, 2021, President Biden issued Executive Order 14036, “Promoting Competition in the American Economy” (86 FR 36987) (E.O. 14036). E.O. 14036 focuses on the need for robust and open competition in the American economy to secure broad and sustained economic prosperity, promote the welfare of workers, farmers, small businesses, startups, and consumers, and prevent the threat that excessive market concentration poses to basic economic liberties and democratic accountability. With respect to agriculture E.O. 14036 notes:

Consolidation in the agricultural industry is making it too hard for small family farms to survive. Farmers are squeezed between concentrated market power in the agricultural input industries — seed, fertilizer, feed, and equipment suppliers — and concentrated market power in the channels for selling agricultural products. As a result, farmers’ share of the value of their agricultural products has decreased, and poultry farmers, hog farmers, cattle ranchers, and other agricultural workers struggle to retain autonomy and to make sustainable returns.

In relevant part, E.O. 14036 directs the Secretary, among other things—

to improve farmers’ and smaller food processors’ access to retail markets, not later than 300 days after the date of this order, in consultation with the Chair of the FTC, [to] submit a report to the Chair of the White House Competition Council, on the effect of retail concentration and retailers’ practices on the conditions of competition in the food industries, including any practices that may violate the Federal Trade Commission Act, the Robinson-Patman Act (Public Law 74-692, 49 Stat. 1526, 15 U.S.C. 13 *et seq.*), or other relevant laws, and on grants, loans, and other support that may enhance access to retail markets by local and regional food enterprises.

This notice requests comments and information from the public to assist USDA in preparing and executing the report required by E.O. 14036. To facilitate those comments and information on access to retail markets, we highlight certain questions and concerns that are relevant to our efforts.

Consolidation in food retail and related parts of the supply chain, such as distribution, present potential risks of unfair and anticompetitive practices throughout the food supply chain. Increases in concentration have been an important trend in food retail over the last few decades, as the share of single-store firms or local chains has declined from 55 percent in 1977 to 35 percent as of 2007, while the concentration ratio of the four largest food retailers hit 34 percent in 2019.¹ Food distribution is concentrated in certain

¹ Retail Trends, Economic Research Service, USDA, available at <https://www.ers.usda.gov/topics/food-markets-prices/retailing-wholesaling/retail-trends/> (last accessed March 2022); Lucia Foster, John Haltiwanger, Shawn Klimek, C.J. Krizan, and Scott Ohlmacher, (2016), “The Evolution of National Retail Chains: How We Got Here,” *Handbook of the Economics of Retailing and Distribution*, Emek Basker, ed. London, UK: Edward Elgar Publishing.

markets as well, with two firms dominating upwards of 70 percent of the national broadline distribution market.² Additionally, insufficient analytic attention has been paid to the connections between retail, distribution, and processing firms and the implications for competition in the food and agricultural supply chains.

The rise in food retail and distribution concentration in recent decades potentially impacts agricultural producers and small, midsized and otherwise independent (SME) processors—as well as potentially ultimately impacting consumers. Concentration in food retail and distribution may magnify and contribute to consolidation among meat and poultry processing firms, among other food system market participants.³ Such firms themselves may consolidate to secure leverage against consolidated food retail firms, which in turn may make it more difficult for SME processors to access food retail markets. Concerns relating to exclusionary and predatory conduct in food retail and distribution thus may be particularly relevant to the viability of new and expanded meat and poultry processing facilities and other new food system market entrants, which are receiving over \$1 billion of support under the White House Meat and Poultry Processing Supply Chain Action Plan.⁴

² See *Federal Trade Commission v. Sysco Corporation*, U.S. Dist. Ct. (D.C.), Memorandum of Opinion (2015), available at <https://www.ftc.gov/system/files/documents/cases/150623syscomemo.pdf>; see also, generally, “Wholesaling,” USDA Economic Research Service, available at <https://www.ers.usda.gov/topics/food-markets-prices/retailing-wholesaling/wholesaling/> (last accessed March 2022).

³ Four large meat-packing companies dominate over 80 percent of the beef sales market and, yet, over the last five years, farmers’ share of the price of beef has dropped by more than a quarter—from approximately 52 percent to 37 percent—while the price of beef for consumers has risen. Four large meat-packing companies dominate about 70 percent of the pork market, and four large poultry integrators make up 54 percent of the poultry market, although a pending merger would raise that further. Annual Report, Packers and Stockyards Division, USDA, available at <https://www.ams.usda.gov/reports/psd-annual-reports> (last accessed March 2022).

On monopsony’s effects up the supply chain, generally, see Barry Lynn, *Cornered* (New York: Wiley, 2010).

⁴ Meat and Poultry Supply Chain, USDA, available at <https://www.usda.gov/meat> (last accessed March 2022).

USDA will use public comments received through this notice to inform our policymaking and advocacy to help increase fairness and competition in food retail and related segments of the American food and agricultural markets. We are particularly interested in the role that rules, regulations, enforcement and other actions authorized under the Packers and Stockyards Act of 1921 and the Robinson-Patman Act of 1936—both of which were designed to regulate discriminatory limits on market access—may play in enhancing market access for agricultural producers and SME processors to retail markets, and especially in preventing predatory pricing by incumbent market participants to exclude new market entrants and competitors.

We are also interested in comments addressing the role that grants, loans, and other programs and services may play to enhance access to retail markets by agricultural producers, SME food processors, and other local and regional food enterprises. The Department is particularly interested in the role that cooperative or community-owned grocery retail and food distribution networks have or may play in addressing market challenges and in better serving producer, worker, community, and consumer needs, for example in remote locations or underserved communities.

Commenters may further provide information relevant to promoting local and regional food systems, creating new market opportunities (including for value-added agriculture and value-added products), advancing efforts to transform the food system, meeting the needs of the agricultural workforce, supporting and promoting consumers' nutrition security, particularly for low-income populations, and supporting the needs of underserved and small to mid-sized producers and processors.

II. Written Comments

USDA encourages commenters, when addressing the elements below, to clearly indicate the question their comments are responding to by repeating the text of the question before their response. This would assist USDA in more easily reviewing and summarizing the comments received in response to these specific comment areas. In addition, USDA welcomes commenters to refer, with appropriate explanation, to any views set forth in recently or previously submitted comments, such as those to E.O. 14017 “America’s Supply Chains” (No. AMS-TM-21-0034) (86 FR 20652) or “Investments and Opportunities for Meat and Poultry Processing Infrastructure” (No. AMS-TM-21-0058) (86 FR 37728).

This request for information includes but is not limited to the following elements. The questions below are meant to stimulate comments, and commenters should feel free to respond to those they feel most relevant to them, or as their time and interests permit. Comments may overlap or be organized as the commenter feels most appropriate. Please offer descriptive or quantitative information, as available and relevant.

Competition and Impacts

1) Are market concentration and power, and lack of competition, problems in food retail and distribution markets? If so, where and in what ways? What practices in the food retail and distribution markets are most concerning from a competition standpoint? Are there particular practices that exclude or disadvantage new market participants or potential market participants, unfairly transfer risk, or otherwise abuse market power or make it harder to compete? Please describe specific experiences and challenges, if possible.

2) How do concentration and size in the food retail and distribution markets affect the ability of agricultural producers and new, SME food processors to access the retail marketplace? Are agricultural producers and SME food processors that serve local and regional markets affected differently? Are there regional and other demographic variations to any of the impacts? Please describe specific experiences and challenges, if possible.

3) How does competition and concentration among distributors and other parts of the wholesale food market relate to food retail concentration and competition? How do distribution and wholesale food market competition and concentration affect access to markets for agricultural producers and SME food processors? Does buying power of some retailers at the wholesale level make it difficult for some producers or SME processors to access distribution within these channels?

4) How are SME grocery retailers specifically affected by concentration and potentially anticompetitive practices in food retail markets? What about distributors that may serve them? Do any of those challenges affect agricultural producers and SME food processors? Please describe specific experiences and challenges, if possible.

5) How are smaller food service businesses, schools, hospitals, and other institutional food buyers affected by concentration or potentially anticompetitive practices in food processing and distribution? What effects do concentration and potentially anticompetitive conduct have on food prices, quality and safety, distribution and availability of healthy foods that meet nutrition standards, or other needs specific to these buyers and food providers?

6) How are workers, consumers, other small businesses, communities, and others along the food supply chain affected by concentration or potentially anticompetitive practices in food retail and distribution markets? What effects do concentration and potentially anticompetitive conduct have on food prices, quality and safety; distribution and accessibility to healthy foods, and food and nutrition security; and worker empowerment, equity for underserved producers, and environmental sustainability? Are challenges with food deserts aggravated by concentration or competition issues in the food and agricultural supply chains? Do impacts to any of these concerns vary by region, commodity, or by other demographics?

Business Practices

7) Please describe the role that exclusive dealing arrangements play in the food retail and distribution marketplaces. Do they facilitate, inhibit, or otherwise affect opportunities in the industry for SME processors? How do they affect the development of new products and the growth, diversity, or resilience of the industry? Do they facilitate, inhibit, or otherwise affect product quality and risk management? Do differences in commodity, product, or region affect the practices, risks, barriers, or outcomes? Are tribal businesses and enterprises and underserved communities affected differently? Does the size, scale, or market power generally of the companies involved in such an arrangement matter for how these arrangements affect competition?

8) Please describe the role that slotting fees, category captains, and other preferential access or discounts play in retail food markets, including but not limited to meat and poultry. Are certain segments, such as organic or value-added products like grass-fed meats, affected differently? What affect do such behaviors have on access to the

retail marketplace? How are preferential relationships in the marketplace manifested, and do those relationships limit new market entrants from accessing the marketplace? Do those relationships improve risk management or otherwise enhance market access in certain circumstances? Should any of these practices be limited or changed to support new market entrants, and if so, how?

9) If you are a small or mid-sized producer, have you had to change any business or marketing practices in order to effectively navigate required slotting fees to gain market access? Have these changes negatively impacted the overall profits of the products you sell? Do you believe that slotting fees are adversely or unfairly deployed against small or mid-sized producers or otherwise affect market access and what is the basis for your belief?

10) Please share any concerns relating to predatory pricing by incumbent food processors, threats of retaliation by incumbent food processors against retailers for offering new or different products, or other practices designed to exclude competitors from the marketplace. When and where have they occurred? Were antitrust enforcement tools able to address the challenges in a timely and effective manner? If not, why not?

11) Please comment on implications, negative or positive, of mergers in the food retail or distribution sectors. Have certain mergers changed contracting or sales practices? Have certain mergers allowed the acquisition of rivals or technologies or companies that competitor firms rely on? Have mergers negatively or positively impacted workers? Have mergers delivered efficiencies?

Information and Supply Chain Market Structures

12) What roles do control and access to retail data play in competition and access for farmers and SME food processors? Are there significant imbalances in access to information among producers, packers, distributor, and retailers, and how do those imbalances affect choices and outcomes in the market? Describe the role that data sharing between food retail companies and larger food processors, such as packers, plays in the market environment, if any. How do any differences affect competition and market access, and should any of these be limited, and if so how?

13) Describe the role that retailer ownership, including financing, of livestock and packing play in supply chain competition and access to retail for producers and SME processors? Are competition concerns, if any, similar in other agricultural commodity markets? Have these practices reduced or eliminated the need for, or competition among, certain suppliers to some retail firms? Are certain segments, such as organic or value-added products like grassfed meats, affected differently? Should ownership, financing, or other forms of vertical integration be promoted, limited, or otherwise changed, and, if so, how?

14) Please discuss how transportation—including rail and ocean shipping— and delivery systems may affect competition in food retail and distribution. Are certain ownership structures, business relationships, or business practices of particular concern? How do transportation costs, fees, or levels of service affect the competitiveness of downstream businesses? Has concentration in transportation industries led to negative service outcomes or other potentially unfair practices? Have contractual arrangements that penalize suppliers, including transportation companies, for not delivering in

sufficient quantities or on other particular terms become more prevalent? Have they become problematic as market power has grown, or in certain circumstances?

15) Describe the role that label claims and labeling standards play in access to retail markets for agricultural producers. Are public or private resources sufficiently available for smaller agricultural producers seeking to develop or use labels? Do labels standards, verification, and enforcement appropriately support access to markets for agricultural producers and SME processors? Are there any instances when a larger supplier used, including potentially misused, a label to gain market access or advantage over smaller producers or SME processors? Please share concerns and recommendations, if any.

16) What role, if any, does financing or financial markets play any of the issues addressed above?

17) Are there any other aspects of the regulatory environment that affect retail market competition and access to retail for producers and SME processors? Are there specific elements of these requirements that could be more effectively tailored? What types of resources would be helpful to assist SMEs with compliance?

Policy Responses

18) How can antitrust and market regulation and enforcement, including relating to mergers, unfair practices, and price discrimination, do more to address competition concerns in food retail and distribution markets? Should Federal and state antitrust enforcers place greater emphasis on adverse consequences of buyer power? Should greater attention be paid to information asymmetries and preferential access to data? How could USDA utilize its regulatory and enforcement authorities more effectively?

19) How can predatory pricing by entrenched market participants be better identified and acted upon by relevant enforcement authorities? Can laws that prohibit discriminatory or preferential pricing, such as the Packers and Stockyards Act and the Robinson-Patman Act, play a greater role in preventing predatory pricing schemes, or otherwise promote greater food market access for agricultural producers and SME processors? Please explain.

20) How could other USDA programs, services, and authorities be further deployed to enhance access to retail markets for agricultural producers and SME food processors? For example—

- How might grants, loans, and other support from USDA enhance access to retail markets by local and regional food enterprises?
- How might USDA marketing programs enhance access to retail markets for agricultural producers and SME food processors, including programs which facilitate access to a variety of markets, support value-added production and product diversification; increase diversification in distribution channels and market development, such as food hubs, non-profit and cooperative distribution models; and provide technical assistance to producers that helps access USDA programs and improve market readiness?⁵
- How might food and nutrition grant and loan programs better support competition in retail and better access for producers and SME processors?⁶

⁵ See, e.g., “USDA Announces Supplemental American Rescue Plan Funding Available through the Local Agriculture Market Program, Including Funding to Expand Farm-to-Institution Opportunities,” USDA, March 1, 2022, available at <https://www.usda.gov/media/press-releases/2022/03/01/usda-announces-supplemental-american-rescue-plan-funding-available>.

⁶ See, e.g., Healthy Food Financing Initiative, available at <https://www.investinginfood.com/what-we-do/> (last accessed March 2022).

- How might government procurement processes further support agricultural producers and SME processors effectively access institutional customers, such as schools and hospitals?⁷
- Are there ways to facilitate easier access to food safety compliance resources, and other ways to level the playing field for SME processors?⁸
- What additional information or transparency could USDA’s Market News Service provide on retail, wholesale, or distribution markets, through the Livestock Mandatory Reporting Act of 1999 or otherwise?⁹ Are there information or educational tools, services, or access to data that could be helpful?
- What additional market analysis or advocacy could USDA do relating to local and regional food systems, transportation, or otherwise that could support fair and competitive food retail and distribution markets?¹⁰
- How else can competition be enhanced in food retail, distribution, and related areas? Please discuss any other relevant matters USDA should consider.

III. Requirements for Written Comments

The <http://www.regulations.gov> website allows users to provide comments by filling in a “Type Comment” field or by attaching a document using an “Upload File” field. USDA prefers that comments be provided in an attached document. USDA prefers

⁷ See USDA Agricultural Marketing Service, “Commodity Procurement,” available at <https://www.ams.usda.gov/commodity-procurement> (last accessed March 2022).

⁸ For more information, see “Food Safety,” Agricultural Marketing Service, available at <https://www.ams.usda.gov/services/local-regional/food-sector/food-safety> (last accessed March 2022).

⁹ See USDA Market News, “Retail Reports,” available at <https://www.ams.usda.gov/market-news/retail> (last accessed Feb. 2022).

¹⁰ See USDA Agricultural Marketing Service, “Market Research and Analysis,” available at <https://www.ams.usda.gov/services/market-research> (last accessed March 2022).

submissions in Microsoft Word (.doc files) or Adobe Acrobat (.pdf files). If the submission is in an application format other than Microsoft Word or Adobe Acrobat, please indicate the name of the application in the “Type Comment” field. Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter within the comments. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file, so that the submission consists of one file instead of multiple files. Comments (both public comments and non-confidential versions of comments containing business confidential information) will be placed in the docket and open to public inspection. Comments may be viewed on <http://www.regulations.gov> by entering docket number **AMS-TM-22-0023** in the search field on the home page. All filers should name their files using the name of the person or entity submitting the comments. Anonymous comments are also accepted. Communications from agencies of the United States Government will not be made available for public inspection. Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and provide a non-confidential version of the submission. The nonconfidential version of the submission will be placed in the public file on <http://www.regulations.gov>. For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters “BC.” Any page containing business confidential information must be clearly marked “BUSINESS CONFIDENTIAL” on the top of that page. The non-confidential version must be clearly marked “PUBLIC.” The file name of the nonconfidential version should begin with the

character “P.” The “BC” and “P” should be followed by the name of the person or entity submitting the comments or rebuttal comments. If a public hearing is held in support of this supply chain assessment, a separate **Federal Register** notice will be published providing the date and information about the hearing.

Melissa Bailey, Associate Administrator,
Agricultural Marketing Service.