AMERICAN ECONOMIC LIBERTIES PROJECT

2023 Farm Bill Antimonopoly Reforms

August 2023

The 2023 Farm Bill presents a unique opportunity for the United States to reintroduce competition into the agricultural sector. For at least a generation, American farm policy has favored the interests of large agribusinesses, meatpackers, and seed companies over the interests and needs of independent farmers and ranchers. To shift American farm policy, this brief explains the important priorities for antimonopoly advocates to push for in this year's Farm Bill.[1]

PRIORITIES FOR ANTITRUST AND AGRICULTURE

First, there are several live antitrust and antimonopoly priorities that could and should be included in the 2023 Farm Bill. These include reforming federal checkoff programs, establishing a designated competition enforcer of the Packers and Stockyards Act, codifying regulations proposed by the USDA to strengthen the Packers & Stockyards Act, imposing mandatory country-of-origin labeling (MCOOL) requirements for beef imports, and creating a strong right to repair for farmers to repair their own equipment.

(1) Reform Checkoff Programs with the Opportunities for Fairness in Farming (OFF) Act

1 Economic Liberties thanks Basel Musharbash for research and substantive expertise in developing these proposals.

Federal checkoff programs deliver hundreds of millions of dollars to long-established, Big Ag-dominated trade groups every year,[2] using funds that independent commodity producers are legally required to contribute. These incumbent trade groups — particularly the National Cattlemen's Beef Association (NCBA) — played an instrumental role in killing the Obama administration's Packers & Stockyards Act (PSA) rules in 2014 and are currently threatening the Biden administration's proposed rules. Eliminating the flow of checkoff funds to these front groups for agribusiness would not only degrade their organizational capacity, but also make it easier for alternative trade groups dedicated to the interests of small and midsize farmers to emerge.

Incorporating the Opportunities for Fairness in Farming (OFF) Act into the 2023 Farm Bill would put an end to corruption in checkoff programs. The OFF Act would block agriculture lobbying groups from receiving checkoff funds entirely.[3] It would also, among other things, prohibit members, employees, and agents of checkoff boards — the organizations that administer checkoff programs for each commodity — from having conflicts of interest, providing an effective bar against pervasive dual-employment between agribusiness lobbying groups and checkoff boards.

(2) Establish a Designated USDA Competition Enforcer with The Meat & Poultry Special Investigator Act of 2023

The current organization of the United States Department of Agriculture (USDA) structurally hamstrings enforcement of the Packers & Stockyards Act (P&S Act), a 1921 antitrust law that establishes rules for fair dealing and fair competition in livestock markets.[4] The only unit at the USDA that is familiar with, and interested in, enforcing the Act's protections is the Packers & Stockyards Division. At present, after a reorganization under the Trump administration, that Division is housed within the Agriculture Marketing Service (AMS) — a branch of USDA that has historically focused on expanding markets for agribusiness — and has to seek approval for every enforcement action, study, regulation, or other step it wants to take from AMS's bureaucracy. It is not allowed to prosecute its own cases, either in USDA administrative tribunals or in the court system, or even directly liaison with the DOJ, the FTC, or other agencies. Instead, it must rely on the cooperation

2 For example, the National Cattlemen's Beef Association (NCBA) — a trade group whose membership accounts for less than 4% of cattle producers and is dominated by industrial feedlots — receives around 70% ($45 million) of its annual budget from checkoff funds. *See* **NATIONAL CATTLEMENS BEEF ASSOCIATION INC - Full Filing- Nonprofit Explorer - ProPublica.**
3 Section 4(a)(1) of the OFF Act provides that "a [checkoff] Board shall not enter into any contract or agreement to carry out checkoff program activities with a party that engages in activities for the purpose of influencing any government policy or action that relates to agriculture." **https://www.lee.senate.gov/services/files/83E81675-E514-439E-8508-07FC68924A02**.
4 *See* William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening*, 2004 Wis. L. Rev. 1497 (2004).

of the USDA General Counsel's office, which frequently has neither the expertise nor the interest to enforce the P&S Act or the rules promulgated under it.

A simple, direct solution to this problem would be incorporating The Meat & Poultry Special Investigator Act of 2023 into the Farm Bill, which would consolidate the authority to promulgate regulations, prosecute cases, and collaborate with other agencies to enforce the Packers & Stockyards Act in an independent "Office of the Special Investigator for Competition Matters" within USDA.[5]

(3) Codify Proposed USDA Rules to Strengthen Packers and Stockyards Act Enforcement into Statute

The USDA is currently in the process of finalizing proposed regulations to strengthen enforcement of the Packers and Stockyards (P&S) Act.[6] The P&S Act itself prohibits meatpackers from engaging in any "unfair, unjustly discriminatory, or deceptive" practices against livestock farmers.[7] But hostile judicial interpretations based on purported "policy considerations" instead of the Act's text have made the P&S Act's provisions all but unenforceable, particularly by requiring enforcers to prove that each practice they challenge harms competition industry-wide.[8] The USDA's proposed regulations would push back on this pro-monopoly judicial activism.

The proposed regulations would establish that deceptive practices, practices that take advantage of marginalized or vulnerable farmers, and certain other practices that meatpackers have used to deprive livestock farmers of the fair market value of their product violate the Act regardless of their individual effect on market-wide competition. They would also ban retaliatory practices, which have long dissuaded producers from communicating with the government, serving as witnesses against dominant meatpackers or dealers, and even asserting their own legal rights. Finally, they would set clear terms to protect producers from deceptive or misleading contracts, increase transparency by

5 **Text - S.346 - 118th Congress (2023-2024): Meat and Poultry Special Investigator Act of 2023 | Congress.gov | Library of Congress**.

6 *See* **Inclusive Competition and Market Integrity under the Packers and Stockyards Act | Agricultural Marketing Service (usda.gov); Transparency in Poultry Grower Contracting and Tournaments | Agricultural Marketing Service (usda.gov)**.

7 Enacted as "a most comprehensive measure" to "assure fair competition and fair trade practices in livestock marketing," *see* H.R. Rep. No. 67-77, at 2 (1921), the P&S Act prohibited meatpackers not only from monopolizing or restraining livestock markets, but also from using "any unfair, unjustly discriminatory, or deceptive practice," from imposing "any undue or unreasonable preference or . . . prejudice" on any "particular person or locality," and from engaging in any course of business "for the purpose or with the effect of manipulating or controlling prices." *See* Ch. 64, Title II, § 202, 42 Stat. 161 (Aug. 15, 1921) (codified in 7 U.S.C. § 192). The Act also gave the Secretary of Agriculture the authority to interpret and enforce its provisions in a manner that "keeps pace" with "issues of [market] access and industry practices" as they evolve over time. *See* Ch. 64, Title IV, § 407(a), 42 Stat. 169 (Aug. 15, 1921) (codified in 7 U.S.C. § 228(a)); William E. Rosales, *Dethroning Economic Kings*, 2004 Wis. L. Rev. 1497 (2004).

8 *See Wheeler v. Pilgrim's Pride Corp.*, 536 F.3d 455, 460–61 (5th Cir. 2008), rev'd on reh'g en banc, 591 F.3d 355 (5th Cir. 2009) (criticizing other circuit courts for "reach[ing] beyond the [P&S Act's] clear and unambiguous text" and requiring farmers seeking relief under the Act to prove anticompetitive harm based on questionable inferences from "[the Act's] legislative history, 'antitrust ancestry,' and 'policy considerations.'").

allowing the USDA to examine relevant company records, and protect people at heightened risk of market discrimination, including based on race, gender, or religion.[9]

Not for the first time,[10] packers and processors are now attempting to use an appropriations rider to stop the USDA rulemaking. Sections 737 and 738 of the House FY24 Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations bill currently prohibit the USDA from finalizing the proposed rules. These riders also prohibit the Department from engaging in any further rulemaking before the House Committee on Agriculture has had the opportunity to consider what the Department may propose.

The USDA's proposed rules should be codified into statute. Doing so would both make permanent the rules for fair competition being developed by the USDA and entirely circumvent the ability of packers and processers to stymie the law through underhanded riders such as this. While the USDA's proposed rule is an appropriate rulemaking to give teeth to the existing Packers and Stockyards Act, it could potentially be vulnerable to riders like this in the future, or it could be revised by a future administration less supportive of fair competition in agriculture.

(4) Establish Mandatory Country of Origin Labelling (MCOOL) for Beef Imports

In November 2011, a World Trade Organization (WTO) dispute settlement panel found that, as applied to beef and pork products, a statutorily mandated USDA rule requiring country-of-origin labeling (COOL) violated the WTO Agreement on Technical Barriers to Trade (TBT). After the WTO's Appellate Body upheld that finding in June 2012, the USDA rescinded its COOL rule and issued a revised one in May 2013. However, later that year, a WTO compliance panel found that the revised rules still unfairly discriminated against foreign livestock.[11] After the U.S. lost a final appeal in May 2015, the WTO authorized Mexico and Canada, the countries that had instigated the WTO challenge, to impose $1 billion in trade sanctions annually against the United States until and unless the U.S. law was revoked. After a major lobbying campaign by the Obama administration to push for compliance with the WTO order, Congress repealed COOL requirements when the 2015 *Country of Labelling Amendments Act* was slipped into a must-pass spending bill.[12]

9 *See* Agricultural Marketing Service, Department of Agriculture (USDA), "Inclusive Competition and Market Integrity Under the Packers and Stockyards Act": Proposed Rule, 87 FR 60010 (2022).

10 *See* **Obama's Game of Chicken | Washington Monthly**.

11 World Trade Organization, DS384: United States -- Certain Country of Origin Labelling (COOL) Requirements, **https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm**.

12 **Text - H.R.2393 - 114th Congress (2015-2016): Country of Origin Labeling Amendments Act of 2015 | Congress.gov | Library of Congress**.

As a consequence, multinational meatpackers from Canada, Mexico, Brazil, and elsewhere have been able to import foreign cattle, hogs, beef, and pork from abroad and sell them in the United States, without any country-of-origin label. Simultaneously, under a USDA policy adopted in 2005, meatpackers were allowed to voluntarily label beef and pork derived from imported livestock, carcasses, or even cuts as "Product of USA" or "Made in the USA" if they undergo minimal further processing in a domestic plant.[13]

This regulatory scheme has systematically enabled dominant meatpackers to hide the true provenance of their imported products, undermining the ability of American producers to differentiate their domestic-origin products. Rampant origin-washing in the nation's beef and pork markets has been especially harmful to independent producers, whose primary competitive advantage is their relationship to consumers as neighbors and stewards of the land. The domestic grass-fed beef industry — which is composed primarily of independent ranchers and processors — offers a particularly stark example. Until COOL was repealed in 2015, U.S. producers enjoyed 60 percent of the American grass-fed market despite selling their beef at a higher price point than importers. By 2017, just two years after COOL was repealed, that share had fallen to 20-25 percent.[14] Ranchers, journalists, and market analysts alike have attributed the shift to the "rampant mislabeling" of cheaper grass-fed imports.[15]

A recently proposed rule by the USDA would address part of the mislabeling problem by restricting the voluntary use of "Product of USA" labels to meat, poultry, egg, and certain other products derived from animals born, raised, slaughtered, and processed in the United States.[16] But only a restoration of COOL on beef and pork products will give consumers a standardized basis for identifying — and comparison-shopping between — products from different countries. Moreover, particularly in the meat sector, consumers often assume that products with USDA grading stickers but without country-of-origin labeling are domestically produced. As such, restoring COOL through legislation is necessary to level the playing field for American producers — as well as to give American consumers the information about where their food comes from, which surveys indicate they overwhelmingly want.[17]

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13 *See* Food Safety and Inspection Service, Food Standards and Labeling Policy Book (August 2005); Food Safety and Inspection Service, USDA, "Voluntary Labeling of FSIS-Regulated Products With U.S.-Origin Claims": Notice of Proposed Rule, 88 FR 15290, 15292 (2023).

14 *See* Stone Barnes Center for Food & Agriculture, Back to Grass: The Market Potential for U.S. Grassfed Beef (2016). *See also* Western Organization of Resource Centers, "WORK Network Demands USDA Close Its 'Product of the U.S.A.' Loophole" (2018), available at: **https://www.worc.org/worc-network-demands-usda-close-its-product-of-the-u-s-a-loophole/**.

15 *See* Joe Fassler, "How rampant mislabeling puts America's grass-fed beef producers out of business," The Counter (July 16, 2018).

16 *See* Food Safety and Inspection Service, USDA, "Voluntary Labeling of FSIS-Regulated Products With U.S.-Origin Claims": Notice of Proposed Rule, 88 FR 15290 (2023).

17 In 2010, a Consumers Reports poll found that 93% of consumers want country of origin labeling on meat products, and 95% agree that Country of Origin labeling for products should always be available at the point of purchase. *See* Consumer Reports Nat'l Res. Center, Country of Origin labeling Poll (Oct. 2010). In 2016, a more comprehensive Consumer Reports study found that 87% of consumers want labels on meat to reflect the country of origin, with the majority of consumers (60%) further confirming that they want the label to include information on where the animal was born, raised, and slaughtered. *See* Consumer Reports Nat'l Res. Center, *Food Labels Survey: 2016 Nationally-Representative Phone Survey* 3, 9 (Apr. 6, 2016).

The bipartisan American Beef Labeling Act requires that within one year of enactment, the United States Trade Representative (USTR) and the Department of Agriculture develop a means of reinstating mandatory country-of-origin labelling for beef that complies with World Trade Organization rules.[18] This is broken between a six-month period to develop a COOL reinstatement plan and six months to implement it. The legislation helpfully elevates the need to restore mandatory COOL for beef – and the same need is true for pork.

However, the bill's requirement that a new policy be compliant with WTO rules could undermine the legislation's goals. That criteria should not limit policy creativity. Absent needed reform of the WTO's enforcement tribunal system, and perhaps its overly expansive substantive rules, a new, effective COOL policy might be found to violate the WTO rules again.[19] However, thankfully, the U.S. has blocked appointments of WTO appellate judges, and as a result the WTO has lost it power to impose sanctions. The new COOL policy should be designed with its effectiveness, not WTO compliance, in mind.

(5) Enact "Right to Repair" Protections that Affirm the Illegality of Tying Arrangements

Farmers require large agricultural machinery, like tractors, to complete every stage of the farming cycle: soil preparation, seeding/planting, crop management, and harvesting. This equipment represents a huge capital investment for farmers, with a single piece often costing hundreds of thousands of dollars. Controlling when and how a tractor is maintained and, if necessary, repaired is a business imperative for farmers. A tractor failure can cause delays in planting, tending, or harvesting — any of which can severely impact a farm's seasonal output and economic viability. Over the past two decades, however, the two dominant tractor manufacturers (Deere and CNH) have increasingly designed tractors to deprive farmers of that control.

Starting around 2000, manufacturers began equipping tractors with central computers called "Engine Control Units" ("ECUs") that use proprietary firmware and hundreds of sensors to run the tractor. When an ECU notices an error — whatever it may be — it can put the machine into "limp mode," which disables most of the tractor's functionality until the error code is cleared. To recover functionality, a farmer has to first diagnose the error code, then fix the underlying problem, and finally "re-calibrate" the ECU to "clear" the error. Because of how manufacturers have designed their tractors, however, each of these

18 **Text - S.52 - 118th Congress (2023-2024): American Beef Labeling Act of 2023 | Congress.gov | Library of Congress**.

19 The logic underlying the WTO ruling against the original COOL legislation would make it nigh impossible for most COOL labeling regimes to pass scrutiny. Indeed, the case was cited by USTR as an example of WTO overreach in a 2020 report issued in conjunction with USTR's decision to blocking appointment of new WTO Appellate Body judges, which shut down the WTO's ability to authorize sanctions for violations. This creates an auspicious context for the enactment of new mandatory COOL labeling rules. U.S. Trade Representative, Report on the Appellate Bode of the World Trade Organization, February 2020, page 95. Available at: **https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf**.

steps can now only be done using manufacturer-controlled software and tools — which manufacturers, in turn, have licensed exclusively to their authorized dealers, giving those dealers an effective monopoly on the repair aftermarkets for newer-model tractors. Using their market power, authorized dealers now typically charge farmers $150 to $200 per hour for repair services, while farmers routinely complain of undertrained and overworked technicians, incorrectly performed or incomplete repairs, and extensive delays during the time-critical harvest season.

By coercing farmers who buy their tractors into also buying their dealers' repair services — that is, tying the two products — Deere and CNH have been able to entrench themselves while subjecting their customers to extortion. On the one hand, they have driven large numbers of independent repair shops out of business, making it difficult for non-dominant tractor manufacturers to compete for sales without rolling out their own exclusive dealer networks. On the other hand, they have been able to extract more revenue out of the market, not by competing with each other for tractor sales, but by forcing their customers to use their affiliated services over the entire lifecycle of each tractor. This is not unique to tractor manufacturers. Dominant incumbents across the agricultural sector have deployed tying arrangements in recent years to similarly restrict competition and reap monopoly profits — including tying arrangements between seeds, agrochemicals, and related digital services, between fertilizers and related logistical and monitoring services, between grain trading, storage, and processing services, and more.

In this context, the enactment of robust agriculture right-to-repair protections — mandates requiring manufacturers to make available all repair software, tools, manuals, and other resources on fair and reasonable terms to all comers — would deliver tangible benefits to small and midsize farmers. Simultaneously, it would bar Deere and CNH from using a critical method for maintaining their duopoly in the market for large agricultural equipment. There are several existing right-to-repair proposals that could be included in the farm bill to accomplish these goals, including the Agricultural Right to Repair Act,[20] the Fair Repair Act,[21] and the Freedom to Repair Act.[22] If these are supplemented with provisions affirming the anticompetitive nature of tying arrangements more broadly, they could also strengthen the ability of enforcers to use litigation and rulemaking to attack this keystone method of monopoly in the agriculture sector.[23]

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20 **Text - S.3549 - 117th Congress (2021-2022): Agricultural Right to Repair Act | Congress.gov | Library of Congress.**

21 **Text - H.R.4006 - 117th Congress (2021-2022): Fair Repair Act | Congress.gov | Library of Congress.**

22 **Text - H.R.6566 - 117th Congress (2021-2022): Freedom to Repair Act of 2022 | Congress.gov | Library of Congress.**

23 These may include: (1) a provision identifying violations of the right-to-repair legislation as violations of § 2 of the Clayton Act and § 5 of the FTC Act; (2) a savings clause clarifying that nothing in right-to-repair legislation should be construed to abridge rights of action under existing antitrust laws, or imply that, outside of the legislation's scope, repair restraints and other tying arrangements are legal or have to be tested under the Rule of Reason; and (3) a congressional policy or findings section providing that (a) repair restraints are part of a growing trend of tying arrangements across the agriculture sector, (b) that Congress has enacted legislation against such arrangements in the past, including § 1 of the Sherman Act, § 2 of the Clayton Act, and § 5 of the FTC Act, because they inherently tend to harm competition; and (c) that, as a result of the harm they cause to competition, tying arrangements often lead to higher prices, lower quality, and fewer choices, to the detriment of the public.

FOOD SECURITY AND NATIONAL SECURITY

There are also several aspects of the agricultural economy and farm policy which present both unique national security risks and significant competition concerns. The consolidation of meatpacking capacity into plants of unprecedented size has minimized inter-plant competition for farmers' livestock while compromising the ability of food inspectors to do their jobs and creating national security risks. Likewise, the acquisition of agricultural land and industry by foreign capital has contributed to the consolidation of industry in the hands of multinational firms and left key nodes of the American food system under foreign control.

(6) Restrict the Size of Livestock Processing Plants on National Security Grounds

A key tool that dominant meatpackers have used to avoid competing against each other, maximize their buying power, and minimize their regulatory burden has been the consolidation of plant processing capacity. As of 2021, 21 large plants (annual capacity of 500,000+) processed over two-thirds (67.4 percent) of all cattle processed in the United States, while 12 mega-plants with an annual capacity of 1,000,000+ alone processed nearly half (49 percent).[24] Fourteen plants processed nearly 6 out of every 10 hogs (59 percent), each with an annual capacity of 4,000,000+ hogs, and almost all hogs (91.4 percent) were processed in large plants with 1,000,000+ capacity.[25] Before meatpacking consolidation took off, in 1982, only 28 percent of cattle and only 59 percent of hogs were processed in large plants with 500,000+ head or 1,000,000+ hog capacity, respectively.[26]

By concentrating processing capacity in two or three dozen locations for each species, meatpackers appear to have eliminated inter-plant competition for farmers' cattle, hogs, and poultry in the majority of geographic regions. A 2012 study found that fully one-half of poultry growers have a choice of only one or two poultry processors to work with in their area. Likewise, "there are commonly only one or two buyers" in local geographic markets for cattle, and few producers "have the option of selling fed cattle to more than three or four packers" in their region.[27] Although local-market-specific data is unavailable for the hog sector, research suggests regional concentration among hog packers has increased dramatically since the 1980s.[28]

24 **Livestock Slaughter 2022 Summary 04/19/2023 (cornell.edu)**.
25 **Livestock Slaughter 2022 Summary 04/19/2023 (cornell.edu)**.
26 **Consolidation in U.S. Meatpacking (usda.gov)**.
27 **P & S Act Market Integrity Comment 1.17.23.docx (farmaction.us)**.
28 Timothy A. Wise and Sarah E. Trist, "Buyer Power in U.S. Hog Markets: A Critical Review of the Literature," Global Developement and Environment Institute, August 2010, **https://sites.tufts.edu/gdae/files/2020/03/10-04HogBuyerPower.pdf**.

Naturally, this regional concentration has enhanced the buying power of dominant meatpackers over the farmers from whom they source cattle, poultry, and hogs. It has also given those meatpackers an unfair regulatory advantage over smaller processors, as large plants can process animals faster and in greater volume than USDA inspectors can effectively monitor. In this context, even if dominant meatpackers were broken up, competition would not necessarily return to livestock markets — which are inherently local in nature due to physical limits on how far an animal can be safely shipped — unless the resulting firms opened more and smaller plants with intersecting draw areas.

The average mega-plant processes nearly 5 percent of the nation's cattle and hog supply every day. This makes our food supply unacceptably vulnerable to natural disasters and foreign attacks. A Russian-linked cyberattack on JBS in May 2021 forced the abrupt closure of its handful of large plants across the nation—disrupting roughly a fifth of U.S. beef, pork, and poultry production until the company paid a ransom.[29] A year earlier, in April 2020, major hog and chicken processing plants nationwide became COVID-19 hotspots, prompting a cascade of shutdowns that included a Smithfield Foods plant processing more than 15 percent of U.S. pork.[30] And the year prior to that, a fire in Holcomb, Kansas, destroyed a Tyson Foods plant that processed about 5 percent of U.S. beef.[31] All of this pales in comparison, however, to the vulnerability of these processing plants in the event of a hot conflict — when the loss of a few key bottlenecks could easily disrupt the majority of America's supply of all meat and poultry products.

Advocates should seek to incorporate a limit on plant size in the 2023 Farm Bill based on national security grounds. Enacting a statutory cap on the capacity of new meat processing plants to, for example, no more than 2.5 percent of the nation's supply would enhance our food supply's resilience to threats and promote competition for the benefit of farmers and consumers.

(7) Prohibit Foreign Ownership of Farmland

A growing number of dominant incumbents in the agriculture sector are foreign corporations that achieved their strategic positions in U.S. markets by leveraging foreign capital to acquire domestic firms, undertake strategic expansions, and conduct other domestic operations. In meatpacking, for example, Brazilian giant JBS gained control over one-sixth to one-fourth of our beef, pork, and chicken supply after going on an acquisition

29 JBS Cyberattack Shows Vulnerability of World Food Supplies - Bloomberg.
30 JBS Cyberattack Shows Vulnerability of World Food Supplies - Bloomberg.
31 JBS Cyberattack Shows Vulnerability of World Food Supplies - Bloomberg.

spree financed by Brazil's development bank between 2005 and 2015,[32] while Chinese firm WH Group became the nation's largest pork producer after acquiring Smithfield Foods in 2013 with financing from Bank of China, a state-backed entity.[33] Outside of the protein sector, the German biotech giant Bayer acquired Monsanto in 2017 and divested several of its seed divisions to another German biotech firm, BASF — giving the two firms leading positions in U.S. seed and agrochemical markets. So far, these foreign monopolists have benefitted from an almost complete lack of scrutiny on foreign investments in our food system.

Imposing a blanket ban on the ability of these foreign-based incumbents to tap overseas capital would undermine their financial power and give regulators a significant lever over their conduct — all while ensuring that our food supply is not susceptible to hostage-taking by foreign powers or multinational giants.[34] Such a prohibition could block any investment by a foreign person or entity in either (a) real estate that is used in agriculture or (b) any United States business that is engaged in agriculture, the processing of agricultural products, or biotechnology related to agriculture. Limiting foreign investments in U.S. agricultural industry would limit the potential for such investment to undermine U.S. agricultural production and agricultural supply chains, among other things.

CONSOLIDATION INCENTIVES IN FARM POLICY

Furthermore, the financial subsidies, insurance guarantees, and support structures for federal farm programs play a key, if less visible, role in promoting consolidation in the agricultural sector. These include insurance programs that largely backstop the profit margins of large agribusinesses, subsidy programs which incentivize further consolidation, and farm credit institutions that primarily provide loans to larger farms and dominant processors. Several targeted reforms to these programs could level the playing field for smaller and independent farmers and create a more diversified and decentralized food system.

32 **Hendrickson et al., 2020, The Food System: Concentration and Its Impacts (farmaction.us)**; **JBS: The Brazilian butchers who took over the world — The Bureau of Investigative Journalism (en-GB) (thebureauinvestigates.com)**; **JBS: The Brazilian butchers who took over the world — The Bureau of Investigative Journalism (en-GB) (thebureauinvestigates.com)**; **Brazilian Barons Become Five Slaughterhouse Billionaires - Bloomberg**.

33 **Foreign Ownership — Food & Power (foodandpower.net)**.

34 Recent events involving WH Group make clear that the risk of foreign, state-backed corporations taking America's food supply hostage for their own benefit is not speculative. For example, in a recent **interview with Fox News**, Smithfield VP Jim Monroe was asked what could happen to the firm's sprawling pork-processing plants and thousands of workers in the United States should conflict erupt with China. Mr. Monroe declined to answer. We do have a case study of sorts, however: When the pandemic hit, Smithfield **increased** pork exports to China even as the United States experienced widespread **meat shortages** due to supply chain disruptions, and even as the company **closed** some of its domestic plants due to poor working conditions.

(8) Implement Strict Payment Caps and Income-Eligibility Limits on Farm Subsidy Programs

The Farm Bill has two major farm subsidy programs: the commodity-linked programs under Title I, and the crop insurance program under Title XI. These programs are supposed to work together to provide a "farm safety net" against volatility in commodity prices and natural disasters. As currently structured, however, these programs channel the overwhelming majority of their subsidies to large, industrial-scale, monoculture operations. This finances an expansion flywheel for agribusiness incumbents while providing minimal support to small and midsize farmers.[35] Reforming these programs to exclude large agribusiness operations by imposing effective limits on the amount any given farmer can receive in payments from these programs would substantially eliminate their incumbent-entrenching effects.

By statute, the Title XI crop insurance program currently operates without any caps or limits, paying unlimited premium subsidies based on the value of a farm's insured acres regardless of the farm's ownership, size, or income.[36] While Title I commodity programs nominally restrict eligibility to persons with less than $900,000 in adjusted gross income (revenue net of operating expenses) annually and cap the subsidy payment that any person may receive at $125,000 a year, loopholes have made these limitations largely illusory. To begin with, if a farm is majority-owned by family members (including the principal operator and their children, parents, grandparents, cousins, nieces, or nephews), the farm can draw a commodity-subsidy payment up to the $125,000 limit on account of each of its adult family-member owners with an AGI below $900,000 — and on account of each of their spouses — regardless of whether any of them are actively engaged in farming.[37] Further, the farm can draw additional payments on account of (1) the owner of its land; and (2) up to three non-family owners if they meet the AGI limit and are (a) individuals "actively engaged in farming"; or (b) corporate entities majority-owned by individuals "actively engaged in farming."[38] Exploiting these loopholes, large agribusiness operations

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35 In 2021, the top 10% of subsidy recipients received 81% of payments from the Price Loss Coverage (PLC) program and 77% of payments from the Agriculture Risk Coverage (ARC) program — these being the two main commodity-linked subsidy programs — while the top 1% received 43% and 35% from each program, respectively. **EWG Farm Subsidy Database | Subsidy Concentrations for Price Loss Coverage Program (PLC) in the United States**. Between 2012 and 2019, 56% of crop insurance premium subsidies went to the largest 10% of US farms by crop sales, and only 2.9% went to the bottom 50%. **Who Receives Crop Insurance Subsidy Benefits? | American Enterprise Institute - AEI**. Since payouts from crop insurance claims exceed the out-of-pocket premiums paid by insured farms nearly every year, premium subsidies routinely translate into net revenue for the largest farms. **Options to Reduce the Budgetary Costs of the Federal Crop Insurance Program (cbo.gov)**. Between 2000 and 2016, for example, insured farms received, on average, $2.22 in claim payments for every $1 they spent on crop insurance premiums. **Options to Reduce the Budgetary Costs of the Federal Crop Insurance Program (cbo.gov)**.

36 **Farm Bill: Reducing Crop Insurance Costs Could Fund Other Priorities | U.S. GAO**

37 Congressional Research Service, "U.S. Farm Programs: Eligibility and Payment Limits," 2020, **https://crsreports.congress.gov/product/pdf/R/R46248**.

38 Congressional Research Service, "U.S. Farm Programs: Eligibility and Payment Limits," 2020, **https://crsreports.congress.gov/product/pdf/R/R46248**.

have long used sophisticated ownership structures to evade payment limits and draw down millions of dollars in commodity subsidies.

Incorporating the following eligibility and payment limits in the 2023 Farm Bill would end this system:

(a) A restriction on eligibility for Title XI crop insurance premium subsidies to persons with less than $750,000 ($1,500,000 if married filing jointly) in annual AGI;

(b) A $125,000 cap on the total amount of Title XI premium subsidies any person can receive every year, regardless of the farm's ownership, acreage, or income; and

(c) An express provision limiting the number of payments any farm operation can receive under any Title I or Title XI program to a single payment up to the program cap for a person who performs over 500 hours or 25 percent of the total management hours the farm requires annually.[39]

The Senate-passed version of the 2018 Farm Bill, § 1705, contained model language to effectively restrict payment recipients to persons "actively engaged in farming" and ensure that no farming operation receives more than one payment from any Title I program. If this language is expanded to cover Title XI crop insurance programs and incorporated into the 2023 Farm Bill, it would strip agribusiness incumbents of approximately $20 billion in federal largesse over the next 10 years.[40]

(9) Restrict Further Consolidation Among Farm Credit System (FCS) Institutions

The Farm Credit System (FCS) is a network of cooperative financial institutions chartered by Congress in 1916 to provide a dependable and affordable source of credit to U.S. farmers. Today, FCS is composed of 60 lending associations and four district banks that focus on lending to specific regional territories. FCS associations do not accept deposits or offer traditional banking services. Instead, associations acquire loanable funds by borrowing from their district bank, which is owned cooperatively by the associations it serves. The four district banks, in turn, acquire funds from the Federal Farm Credit Banks Funding

39 A "significant contribution" in each of these categories was defined as follows: (1) 1,000 hours of personal labor or 50% of the total labor hours required by the farm annually; (2) 500 hours of active personal management or 25% of the total management hours required by the farm annually; and (3) depending on the mix of capital, land, and equipment contributed, between 30% and 50% of certain farm asset values. *See* **https://crsreports.congress.gov/product/pdf/R/R45525**.
40 **2023-Farm-Bill-Platform.pdf (sustainableagriculture.net).**

Corporation (FFCBFC), which generates capital for the FCS by selling bonds to investors. In total, the system has more than $300 billion in assets and serves more than 500,000 borrowers.[41]

The current structure of the FCS is shockingly concentrated by historical standards. The number of FCS banks and associations has been declining for decades through mergers and reorganizations. In the mid-1940s, there were over 2,000 lending associations. There were nearly 900 in 1983, fewer than 400 by 1987, 200 in 1998, 95 in 2006, and 80 in 2015. The system operated with 12 bank districts well into the 1980s, 8 districts in 1998, 5 districts in 2004, and 4 regional banks since 2012.[42] As of March 2022, the six largest, multistate FCS lending associations held slightly over half of the total assets of all 65 associations. The median-size association had $1.44 billion in assets while the bottom half of the associations, in terms of asset size, held less than 10% of total association assets.[43]

Twenty years ago, the typical FCS association covered several counties and specialized in either land or farm production loans. Today, the typical FCS association covers a much larger region, delivers multiple farm and rural credit programs and services, and has an extensive loan portfolio. Mergers are already pending that will further consolidate the FCS system, particularly in those regions of the country — such as Texas, the lower Plains states, and the Southeast — where the remaining smaller associations are concentrated.[44]

This consolidation has had three troubling consequences.

First, it has facilitated a hijacking of FCS credit by dominant agribusiness and meatpacking interests at the expense of family farmers. In large parts of the country today, FCS is no longer an effective lender for young, beginning, and small farmers, particularly those with diversified or non-conventional operations. Although FCS is not a lender of last resort, Congress has repeatedly emphasized that FCS should be a decentralized, farmer-controlled system that is "responsive to the credit needs of all types of agricultural producers having a basis for credit."[45] FCS institutions, however, are increasingly financing only one type of agricultural producers: large, specialized grain and livestock operations. The share of total new FCS loans going to small farms by dollar volume declined from 30.3% in 2003 to reach a nadir of 13.9% in 2014 before increasing slightly to 15.9% by 2019.[46] Although that

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41 **AETR_2020_016RRissue_v3.pdf (aaea.org); Farm Credit System (congress.gov).**
42 **Farm Credit System (congress.gov).**
43 **Farm Credit Watch: Has rural America been set up for another farmland bust? | ABA Banking Journal.**
44 **Farm Credit Watch: My Farm Bill wish list | ABA Banking Journal.**
45 *See*, e.g., 12 U.S.C. § 2001 ("It is the objective of [the Farm Credit Act of 1971] to continue to encourage farmer- and rancher-borrowers participation in the management, control, and ownership of a permanent system of credit for agriculture which will be responsive to the credit needs of all types of agricultural producers having a basis for credit[.]").
46 **How Well Is the Farm Credit System Serving Young, Beginning, and Small Farmers? - National Sustainable Agriculture Coalition; 2019 Annual Report of the Farm Credit Administration (fca.gov).**

share increased to 18.8% in 2021, that was because the Farm Credit Administration (FCS's regulator) determined it had previously undercounted loans to small farms.[47] Meanwhile, a network analysis of the pork industry by Loka Ashwood *et al.* (2022) recently found that FCS institutions have become the predominant source of financial capital for dominant pork processors, including China-backed WH Group.[48]

Second, while the FCA does not publish data on FCS branch office numbers and locations, as the lending associations themselves have reported occasionally, they have been consolidating and closing branch offices. Not only do office closures distance FCS lenders from the farmers and ranchers they are lending to, but those lenders are likely to be less in touch with local agricultural conditions, which could increase the riskiness of FCS lending.[49] Indeed, there are indications that the size and complexity of FCS institutions are already creating oversight difficulties for the Farm Credit Administration.[50]

Third, the largest FCS associations now pose unresolvable solvency risks for the entire Farm Credit System. As of 2022, ten FCS associations had more than $10 billion in assets; that same year, the Farm Credit System Insurance Corporation (FCSIC) — the element of the FCS that ensures payment on $370+ billion in FCS debt — had a net worth of less than $7 billion and a $10 billion line of credit from Treasury Department. Given this, the failure of any large FCS association has a high likelihood of destabilizing the FCSIC and, with it, the creditworthiness of the entire Farm Credit System.[51]

Placing constraints on further FCS consolidation in the 2023 Farm Bill would limit the further aggregation of systemic risk in FCS while refocusing its banks and associations on their original purpose of providing agricultural credit to independent farmers. Such constraints should include:

(a) A prohibition on further mergers between FCS institutions (with an exception for failed institutions);

(b) Alternatively, a requirement that FCA (i) solicit public comments prior to approving each FCS merger and (ii) block any merger if its effect may be to decrease the adequacy of FCSIC's financial capacity to absorb losses arising from the failure of any FCS institution or reduce the availability of credit

47 **Fact sheet on Farm Credit System young, beginning, and small (YBS) farmer lending results for 2020 (fca.gov).**
48 **From Big Ag to Big Finance: a market network approach to power in agriculture | Agriculture and Human Values.**
49 **Farm Credit Watch: Congress must determine if FCS consolidation has impaired the system's mission while increasing taxpayer risk | ABA Banking Journal.**
50 **Resolving the Farm Credit System's Growing Credit-Quality Problems | ABA Banking Journal.**
51 **Farm Credit Watch: Congress must determine if FCS consolidation has impaired the system's mission while increasing taxpayer risk | ABA Banking Journal.**

to young, beginner, or small farmers, or to any other type of agricultural producer, in any community or section of the country; and,

(c) A prohibition on the provision of any FCS financing to non-family farms, operations that are foreign-owned or -controlled, and non-cooperative utilities.

(10) Require the Farm Crop Insurance Corporation (FCIC) to Issue Insurance Policies Directly to Farmers

Title XI vests the FCIC, a public corporation, with broad authority to "insure, or provide reinsurance for insurers of, producers of agricultural commodities grown in the United States" for losses due to "drought, flood, or other natural disasters (as determined by the Secretary)." Although empowered by statute to underwrite and issue crop insurance policies directly to farmers, FCIC has opted not to do so. Instead, FCIC authorizes private-sector insurance companies — called Authorized Insurance Providers (AIPs) — on a yearly basis to underwrite and sell crop insurance policies under reinsurance agreements. Pursuant to these agreements, FCIC provides AIPs with: (1) protection against a portion of their losses on policies sold; (2) an operating subsidy equal to 12% or 20.1% of the premium value of issued policies (percentage varying by policy type); and (3) the terms on which FCIC will pay a farmers' premium subsidy to AIPs. In return, AIPs agree to comply with RMA regulations and to underwrite crop insurance policies sold by their networks of crop insurance agencies.

This system for delivering federally subsidized crop insurance has — particularly since a wave of consolidation transformed the private crop insurance industry early in the last decade — utterly failed to meet the needs of small-to-midsize farms and farms with diversified, sustainable operations. As of 2011, there were only 16 national, regional, or single-state AIPs, and "the largest five garner[ed] approximately two-thirds of the business."[52] Although public information is limited, the available evidence indicates that both segments have consolidated dramatically since then. "Crop insurance was once a sector full of smaller players," an *Insurance Journal* article summarizing a proprietary report on the industry by Conning noted in 2017, but a wave of mergers and acquisitions has left the sector with "fewer and larger carriers" and made "corporate owners a dominating force" among agencies.[53] "The high degree of M&A activity in the sector," the

52 RMA shakes up crop insurance (agriculture.com).
53 How Consolidation Has Changed Crop Insurance Sector: Conning (insurancejournal.com).

article continued, had also shifted the ownership of crop insurance policies "toward large corporate customers, which accounted for 93 percent of premiums in 2016."[54]

By 2019, 94 percent of the federally-subsidized policies issued by AIPs were for grain crops only, and around half of the farms insured by AIPs were larger than 500 acres.[55] In contrast, less than 15 percent of insured farms had fewer than 100 acres, and only 4 percent of policies were for specialty-crop or multi-crop operations.[56] In recent years, the hostility of AIPs to serving smaller and less conventional farms has been especially highlighted by their refusal to promote, and repeated sabotage of, the pilot Whole-Farm Revenue Protection policy launched by FCIC in 2015[57] — the first type of policy to allow a diversified farmer to insure their entire operation, instead of having to insure each type of crop or livestock in their operation separately.

To pressure AIPs into servicing long-neglected farms and stop channeling insurance policies (and premium subsidies) almost exclusively to agribusiness incumbents, the 2023 Farm Bill should direct FCIC to develop and implement a plan to begin issuing policies in competition with AIPs within two years. This would steer the AIP market in a different direction while providing an opening for FCIC to deliver direct and substantial benefits to small and mid-size farmers.

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54 This agribusiness-heavy skew in crop insurance enrollment is driven by the business incentives of the sector's dominant carriers. As industry consultancy Conning found in 2017, the primary features that make crop insurance underwriting attractive to large carriers are "large premium volumes," "low consumption of capital," and "low correlation to other perils." *See* **How Consolidation Has Changed Crop Insurance Sector: Conning (insurancejournal.com)**. A carrier with a business model focused on these goals would naturally prefer insuring large, monoculture operations, which can be underwritten with streamlined procedures and are relatively insulated from market and environmental risks by federal commodity programs. In comparison, underwriting a crop insurance policy for a small or midsize farm — particularly a specialty crop or diversified one — would likely result in a lower premium, require more underwriting resources, and receive substantially less (if any) protection from federal programs. In this context, AIPs have a clear incentive to prefer serving established agribusinesses over smaller and nonconventional farms.

55 **Federal Crop Insurance: A Primer (congress.gov)**; analysis of data on size of farms enrolled in crop insurance program from 2017 Census of Agriculture (Table 71).

56 **Federal Crop Insurance: A Primer (congress.gov)**; analysis of data on size of farms enrolled in crop insurance program from 2017 Census of Agriculture (Table 71).

57 *See* **Whole-Farm Revenue Protection Analysis: A Few Bad Apples - National Sustainable Agriculture Coalition**; **NSAC's 2023 Farm Bill Platform - National Sustainable Agriculture Coalition**. The business incentives of dominant AIPs matter to the distribution of crop insurance because, although APIs cannot modify the policies or prices established by RMA, they have wide discretion to structure how they compensate agents to encourage them to sell preferred types of policies to preferred types of customers. *See* **Federal Crop Insurance: A Primer (congress.gov)**. Agents, for their part, have shown little interest in serving beginner, small, or diversified farms, and even in learning about the types of policies geared toward their needs, such as the Whole Farm Revenue Protection policy. **Farm-Viability-Report.pdf (farmbilllaw.org)** ("A frequently noted challenge to access to and uptake of WFRP is the dearth of crop insurance agents knowledgeable of and interested in or willing to sell such policies.").

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