Livestock Marketing and Competition Issues

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Summary

Changes in the structure and business methods of livestock and meat production and marketing—sometimes referred to as consolidation, concentration and/or vertical integration—have long generated interest and controversy in Congress. The top four firms slaughtered 69% of all U.S. cattle in 2006. In 1985, the then-top four packers accounted for 39% of all cattle slaughter, according to industry and USDA statistics. Since 2007, however, some approved and planned acquisitions in the beef packing sector could further alter these statistics. In the beef sector, one company now accounts for a large and growing share of the market and may push the four-firm concentration ratio in this sector to as much as 75%. Live hog production has seen sweeping changes over the past 25 years. Four firms slaughtered 64% of all U.S. hogs in 2006, compared with 32% in 1985. The number of U.S. farms with hogs has declined sharply, and those remaining have become much larger and less diversified. Many hogs today are sold through production contracts, where a pork processor might provide the pigs and other inputs, and a contracting producer (farmer) provides facilities and labor.

Debate has revolved around the impacts of such changes on farm prices, consumers, global competitiveness, and the traditional U.S. system of independent farms and ranches. Inherent in these questions is the role government should play in monitoring and regulating agricultural markets. Some groups believe that federal officials have not enforced existing laws designed to prevent anti-competitive behavior, and/or that the laws themselves should be strengthened to better address today's market realities. Others assert that present competition and antitrust policies remain adequate and effective. They believe that the sector's structural changes are a desirable outgrowth of other factors such as technological and managerial improvements, changing consumer demand, and more international competition.

Concerns about the growing market power of large corporations in general, and of meat packers in particular, date back to the late 1800s and culminated, by the early 1900s, in the passage of several major antitrust laws, including the Sherman and Clayton Acts and other general antitrust laws. Laws such as the Packers and Stockyards (P&S) Act of 1921 were enacted specifically to address concerns in the livestock and poultry sectors. Other laws, such as the 1967 Agricultural Fair Practices Act (AFPA), were enacted to provide protection to producers from buyers of their products. Congress has also continued to introduce legislation intended to address various perceived problems in livestock markets, which sponsors often broadly refer to as "competition issues."

The 2008 omnibus farm bill (Food, Conservation, and Energy Act of 2008, P.L. 110-246) contains a number of animal-related provisions as part of its new Livestock title (Title XI) that may affect how USDA is to regulate livestock and poultry markets. These include provisions that change AFPA definitions of associations and handlers and require USDA to issue rules and specify requirements regarding breach of contract and the venue for any litigation. The farm bill also requires USDA to issue an annual report detailing investigations into possible violations under the P&S Act. The 2008 farm bill, however, did not include other provisions that were part of the Senate-passed version of the farm bill, such as provisions prohibiting ownership among large meat packers, provisions strengthening enforcement authorities over live poultry dealers, and certain changes to the Mandatory Livestock Price Reporting Program. These types of competition and marketing issues could continue to be of interest to some Members of Congress, and may likely resurface during the 111th Congress. This report will be updated as warranted.

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Introduction

Farmers and ranchers have had to adjust to significant changes in the structure and business methods of the livestock and meat sectors in recent decades. At the farm level, animal production in general and hog production in particular have undergone significant consolidation since 1980. Beef and pork packing (slaughtering) and processing have consolidated rapidly since 1980 into fewer and larger plants. As an industry consolidates, it can become highly concentrated, with a relatively small number of firms accounting for most production or sales.

The successive stages of cattle and hog production, processing, and marketing also are becoming more carefully managed and aligned, often referred to as vertical coordination or, in its most advanced form, vertical integration, where most stages are owned or financially controlled by a single entity.

Some farm constituencies assert that these structural changes have undermined the more "traditional" U.S. system of smaller-scale, independent, family-based farms and ranches; created closed markets with less price transparency; eroded farmers' negotiating power; and contributed to lower prices paid to farmers. These groups believe that federal officials have not enforced existing laws designed to prevent anti-competitive behavior, and that the laws themselves should be strengthened to better address today's market realities.

Others assert that present competition and antitrust policies remain adequate and effective. They believe that the sector's structural changes are a desirable outgrowth of other factors such as technological and managerial improvements, changing consumer demand, and more international competition. Many of the changes in business relationships along the livestock and meat marketing chain have brought U.S. consumers the ample variety of high-quality, low-priced products they now enjoy, it is argued. New laws or more aggressive interpretation of existing laws will stifle private investment and innovation, and make the industries less competitive, defenders of current policies argue.

The 2008 omnibus farm bill (Food, Conservation, and Energy Act of 2008, P.L. 110-246) contains a number of animal-related provisions as part of its new Livestock title (Title XI) that may affect how USDA is to regulate livestock and poultry markets. These include provisions that change Agricultural Fair Practices Act (AFPA) definitions of associations and handlers and require USDA to issue rules and specify requirements regarding breach of contract and the venue for any litigation. The farm bill also requires USDA to issue an annual report detailing investigations into possible violations under the Packers and Stockyards (P&S) Act. The 2008 farm bill, however, did not include other provisions that were part of the Senate-passed version of the farm bill, such as provisions prohibiting ownership among large meat packers, provisions strengthening enforcement authorities over live poultry dealers, and certain changes to the Mandatory Livestock Price Reporting Program. These types of competition and marketing issues could continue to be of interest to some Members of Congress.

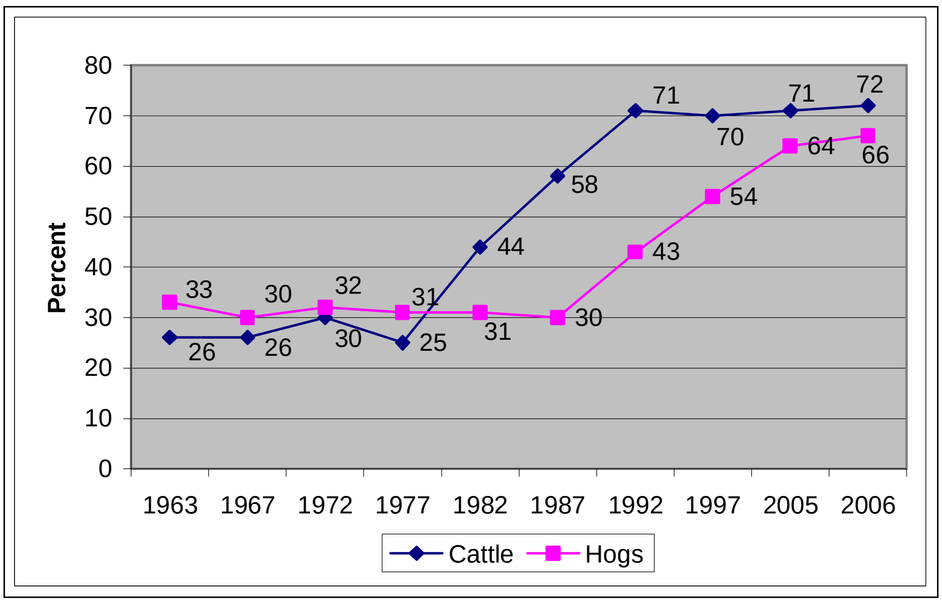
Other livestock title provisions in the enacted 2008 farm bill include permitting some state-inspected meat and poultry products to enter interstate commerce, just like USDA-inspected products; bringing catfish under mandatory USDA inspection; and modifying the mandatory country-of-origin labeling (COOL) law to ease compliance requirements affecting meats and other covered commodities. The enacted bill also contains amendments aimed at further protecting primarily companion animals, which are regulated under the Animal Welfare Act

(AWA). For information on these other livestock provisions adopted in the 2008 farm bill, see CRS Report RL33958, *Animal Agriculture: 2008 Farm Bill Issues*.

Structural Trends

Market concentration in the cattle and hog sectors has increased sharply in the last two decades, with a few firms now dominating each sector. The "four-firm concentration ratio," which measures the four largest firms' share of total shipment values, is commonly cited as a summary indicator of concentration and overall structural change in the industry. As shown **Figure 1**, the four-firm concentration ratio for cattle and hog slaughter indicates that, over time, the top four firms are accounting for a growing share of the overall market (based on slaughter volumes). Four-firm concentration ratios from 1963 to 2004 rose from 26% to 72% of the cattle slaughtered, and from 33% to 66% of all hogs slaughtered. Continued consolidation and recent mergers could raise these concentration ratios even more, particularly in the beef sector.

Figure 1. Four-Firm Concentration Ratios: Cattle and Hog Sectors, 1963-2006



Source: Compiled by CRS using USDA reported data. For 1963-1997 data: USDA, *Consolidation in U.S. Meatpacking*, AER-785, March 1999, http://www.ers.usda.gov/publications/aer785/aer785.pdf. For 2005-2006 data: *Cattle Buyers Weekly*, posted as of January 2009.

Although observations about concentration and vertical integration are often ascribed to the meat and poultry sectors as a whole, individual production and marketing segments within these sectors do differ in how they are structured and function. The following discussion focuses primarily on the beef and pork industries, with some limited information for poultry production focused mostly on broiler meat. [1]

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[1] Information from A. Barkema et al., "The New U.S. Meat Industry," *Economic Review of the Federal Reserve Bank of Kansas City*, 2nd quarter 2001; Doug O'Brien, *Developments in Horizontal Consolidation and Vertical Integration*, National Agricultural Law Center and The Drake Agricultural Law Center, January 2005; American Farm Bureau Federation, *Making American Agriculture Productive and Profitable*, December 2005; and various reports from (continued...)

Beef Production

Most U.S. beef cattle are born, bred, and pastured on a large number of widely dispersed, often small-sized farms and ranches, called cow-calf operators. These operators keep some heifer calves from each year's crop for breeding herd replacement; the rest generally are sold at from 6 to 12 months of age to feedlots (or sometimes to an intermediary known as a backgrounder who readies them for feedlots). These lots fatten them to slaughter weight and sell them to the packing houses.

Overall, the trend in U.S. agriculture is toward fewer, larger farms. This is also true in the beef industry: the number of beef operations has declined dramatically over the past few decades, and the largest operations now account for a growing share of total marketings. Still, operations with small herd sizes continue to provide calves to feedlots and backgrounding operations, and despite concentration in larger operations, the cattle sector remains structurally diverse.

Cattle feeding has also become more concentrated into larger feedlots, fewer facilities, and fewer states. A relatively small number of feedlots now fatten and market a significant portion of fed cattle (those ready for slaughter). In 2008, the top 10 companies had the capacity to feed more than 3.2 million cattle in 58 feedlots, representing about one-fourth of all cattle on feed on January 1, 2008 (at facilities with 1,000+ capacity feedlots). At these larger facilities, the top 30 operations account for nearly one-half of all cattle on feed.[2] There were 2,170 feedlots with 1,000+ capacity in 2006. Feedlots with a one-time capacity of less than 1,000 head still account for a large share (about 95%) of all U.S. feedlots, but these facilities account for a small share (less that 10%) of annual marketings.[3] Cattle feeding is now concentrated in the middle part of the country, where five states marketed 80% of all fed cattle: Texas, Kansas, Nebraska, Colorado, and California.[4] Beef cow facilities are more widely dispersed, but also tend to be located in the central states.

Meatpacking is more concentrated than the production phase. Since the 1970s, the number of meatpacking plants has decreased from nearly 2,500 plant to 1,400 plants in 1992. In meat processing, the number of facilities remained more or less unchanged.[5] Concentration in meatpacking has increased: In 1985, the then-top four firms claimed 50% of all steer/heifer slaughter and 39% of all cattle slaughter; by 2007, four firms slaughtered 84% of all young cattle (steers and heifers), and 72% of U.S. cattle of all types.[6] Recent concentration numbers approach

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USDA's Economic Research Service (ERS), including *Structural Change in the Meat, Poultry, Dairy, and Grain Processing Industries*, ERR-3, March 2005; and *The Transformation of U.S. Livestock Agriculture: Scale, Efficiency, and Risks*, EIB-43, January 2009.

[2] USDA/National Agricultural Statistics Service (NASS), "Cattle on Feed," at http://www.nass.usda.gov/Statistics_by_Subject/index.asp. Another statistical illustrator of recent change: feedlots that could hold more than 32,000 cattle each accounted for less than a third of all cattle marketed in the leading cattle feeding states in 1980; by 2006 these large feedlots were marketing approximately half of all U.S. fed cattle (USDA data).

[3] C. E. Ward and T. C. Schroeder, "Structural Changes in Cattle Feeding and Meat Packing." Data are for 1995.

[4] USDA/NASS, *Commercial Slaughter,* Cattle on Feed (Feedlots, Inventory and Marketings, U.S. and by State), http://www.nass.usda.gov/Publications/Statistical_Highlights/2007/tables/livestock.html#catslaugh (2006 marketings). Data are based on facilities with 1,000+ capacity feedlots.

[5] USDA/ERS, *Structural Change in the Meat, Poultry, Dairy, and Grain Processing Industries*, ERR-3, March 2005.

[6] *Cattle Buyers Weekly,* as of January 2008. The 1985 figures are from various USDA data sources.

those of the early 1900s, when 50% to 75% of the market was dominated by five firms that slaughtered several species.[7]

Another way the federal government weighs concentration is the so-called Herfindahl-Hirschman Index (HHI), which is considered to be a more comprehensive measurement than the four-firm percentage cited above. An industry with an HHI below 1,000 is considered to be unconcentrated. An industry with an HHI between 1,000 and 1,800 is considered to be moderately concentrated; an HHI above 1,800 is highly concentrated. The beef packing industry reached the highly concentrated level by the mid 1990s; its 2004 HHI was 1,900.[8]

Table 1 shows the market shares and related information for the top U.S. packers and feeding companies based on available data.

Table 1. Top Beef Packers and Cattle Feeders, 2006-2007

Cattle Slaughter (2007)		**Cattle Feeding (2006)**	
Company	***Market Share***[a]	***Company***	***Marketings***[b]
Tyson Foods	23.6%	JBS Five Rivers Ranch	1.6 (~14%)
Cargill Meat Solutions	22.0%	Cactus Feeders, Inc.	unavailable
JBS-USA	14.6%	Cargill Cattle Feeders, LLC	0.725 (~6%)
National Beef Packing Co.	11.4%	Friona Industries, LP	0.476 (~4%)
Smithfield Beef Group	6.5%		
Top Four Firms	**71.6%**		
Top Five Firms	**78.1%**	**U.S. (million head)**	**11.970**

Source: *Cattle Buyers Weekly*, posted as of January 2009.

a. Market share data are for 2007, based on percentage of total number of U.S. commercial cattle slaughter, In October 2008, JBS acquired Smithfield Beef Group; as of January 2009, JBS continues to try to finalize its proposal to purchase National Beef Packing Company.

b. Marketings are approximate for 2006; firms are ranked by one-time capacity (head per day) in 2008.

Market concentration in the U.S. beef sector could increase considerably following a series of mergers and acquisitions starting in 2007. In July 2007, JBS—a Brazilian company regarded as the world's largest meat processor—purchased the U.S. beef processor Swift & Co., then the third-largest U.S. beef processing company. In February and March 2008, JBS signed agreements to acquire the fourth- and fifth-largest U.S. beef packers, National Beef Packing Company and the Smithfield Beef Group, respectively. These planned acquisitions have undergone customary regulatory review by the U.S. Department of Justice's (DOJ's) Antitrust Division. In October 2008, DOJ and 13 states filed a complaint in U.S. District Court to block the JBS buyout of National Beef Packing Company, citing concerns that it could contribute to higher consumer prices and also to lower producer prices. That same day DOJ announced it would not challenge the JBS acquisition of Smithfield Beef Group, which was later purchased by JBS.

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[7] USDA/ERS, *U.S. Beef Industry: Cattle Cycles, Price Spreads, and Packer Concentration*, Technical Bulletin No. 1874, April 1999.

[8] Barkema; and USDA, Grain Inspection, Packers and Stockyards Administration (GIPSA), *Assessment of the Cattle, Hog, and Poultry Industries, 2005 Report*, March 2006.

Some in Congress publicly applauded DOJ's lawsuit; opinion within the U.S. meat industry is mixed. If the DOJ lawsuit is not successful and JBS acquires National Beef in addition to Smithfield, this could raise the JBS combined share of the U.S. commercial cattle slaughter market to about 30%, assuming it does not divest some facilities. [9] JBS's acquisition of Five Rivers Ranch Cattle Feeding, which was part of the Smithfield deal, made JBS the largest cattle feeder in the United States. For more information on the JBS merger, see CRS Report RS22980, *Recent Acquisitions of U.S. Meat Companies*.

Pork Production

Hog production has experienced perhaps the most sweeping changes over the past 25 years. The number of U.S. farms with hogs declined from 667,000 in 1980 to 67,000 in 2005; those remaining have become much larger and less diversified. The average 1980 farm with hogs had less than 100 head and likely raised them from birth to slaughter weight as part of a more diversified crop-livestock operation. In 2005, the average hog farm had more than 900 head and might typically specialize in a single stage of hog production, such as finishing, according to USDA. Operations with at least 10,000 head now represent less than 1% of all producers but more than half of total U.S. production, USDA reports.

In fact, the hog production segment of the industry now has about 30 key firms, plus several hundred additional "significant" operators.[10] Rapid adoption of vertical coordination methods (see below) drove much of the consolidation in the hog industry, particularly during the 1990s, when farm prices declined to historic lows, causing tens of thousands of small operators to cease raising hogs. From 1993 to 1998 alone, U.S. farms with one or more hogs declined by nearly half, from 218,060 to 114,380, according to USDA. Six large producers—Smithfield, Premium Standard Farms, Seaboard, Prestage, Cargill, and Iowa Select—together accounted for nearly 30% of U.S. hog production in 2003.[11]

In hog packing in 2007, four firms slaughtered 64% of all U.S. hogs, compared with 32% in 1985 (**Table 2**). The HHI for the hog slaughter industry climbed above 1,000, the numerical threshold for moderately concentrated (see above) during the 1990s.[12]

Poultry Production

The poultry meat sectors have long been highly concentrated, owing in part to vertically integrated production, processing, and distribution systems, where a large share of production is organized and grown under contract between farmers and their poultry processors and handlers. In the U.S. broiler industry, processing firms called "integrators" own hatcheries, processing plants, and feed mills. These integrators contract with independent farmers to "grow out" broiler chicks to market weight, and to produce replacement breeder hens for hatcheries. This

[9] Some media reports indicated the likelihood that JBS may be required to shed some plants under the acquisition (mostly located in the Southwest) to avoid antitrust concerns. See, e.g., "JBS Is Closer to Completing Acquisitions," *Cattle Buyers Weekly*, Sept. 22, 2008.

[10] Informa Economics, *Special Report: The Changing U.S. Pork Industry*, November 1, 2004, at http://www.informaecon.com/LVNov1.pdf.

[11] Informa.

[12] *Cattle Buyers Weekly*; Barkema; and GIPSA.

relationship is formalized under a production contract, whereby the integrator provides the farmer/grower with chicks, feed, and veterinary and transportation services, while the farmer provides labor, capital in the form of housing and equipment, and utilities. Typically, the birds are sent to slaughter after five to nine weeks on the farm, and the farmer is paid for its growing services.[13]

Among broiler processors, market shares for the top four U.S. companies accounted for nearly three-fourths of all broiler meat processed in 2007 (**Table 2**). Broiler production is more highly concentrated within the area between Delaware, Georgia, and Alabama, Mississippi and Arkansas. The top producing states include Georgia, Arkansas, Alabama, Mississippi, North Carolina, Texas, Kentucky, and Maryland. In the turkey meat sector, a few of the larger companies also account for a large share of the industry.

Table 2. Top Hog Packers and Broiler Processors, 2007

Hog Slaughter		**Broiler Processing**	
Company	***Market Share***[a]	***Company***	***Market Share***[a]
Smithfield	28.4%	Pilgrim's Pride	31.3%
Tyson	17.6%	Tyson Foods	25.9%
JBS USA	11.1%	Perdue Farms	10.0%
Hormel	8.7%	Sanderson Farms	7.0%
Cargill	8.5%	Wayne Farms	6.2%
Top Four Firms	**65.8%**	**Top Four Firms**	**74.2%**
Top Five Firms	**74.3%**	**Top Five Firms**	**80.4%**

Source: Hogs: *Cattle Buyers Weekly*, posted as of January 2009. Broilers: 2007 estimates from *WattPoultry USA*..

a. Market share: percentage of total number of U.S. commercial hog slaughter; broiler production based on ready-to-cook volume.

Vertical Coordination and Contracting

Also apparent in the red meat industry in recent decades is the trend toward vertical coordination of production with processing and marketing. The Barkema article has characterized this trend as "supply chains—tightly orchestrated production, processing, and marketing arrangements stretching from genetics to grocery. Supply chains bypass traditional commodity markets and rely on contractual arrangements among the chain participants to manage the transformation of livestock on the farm to meat in the cooler."

[13] J. M. MacDonald, *The Economic Organization of U.S. Broiler Production*, EIB-38, June 2008, http://www.ers.usda.gov/Publications/EIB38/EIB38.pdf; J. M. MacDonald and W. D. McBride, *The Transformation of U.S. Livestock Agriculture: Scale, Efficiency, and Risks*, EIB-43, January 2009, http://www.ers.usda.gov/Publications/EIB43/EIB43a.pdf. Also see USDA/ERS, *Structural Change in U.S. Chicken and Turkey Slaughter*, AER-787, September 2000, http://www.ers.usda.gov/publications/aer787/aer787.pdf.

This business model was pioneered in agriculture by the poultry industry, which began to integrate shortly after World War II.[14] Poultry producers were "the clear leader" in delivering nutritional and convenient products to consumers while at the same time sharply controlling costs, according to Barkema. The hog industry has been closely following in poultry's footsteps. Now typical are contract production arrangements with large integrators who may provide the genetics, pigs and other inputs, and a contracting producer (farmer) who provides facilities and labor. These arrangements take the form of agricultural contracts or agreements between farmers and their commodity buyers that are reached before harvest or the completion of a livestock production stage. Other alternative marketing arrangements also are used.

Contracts

Contracts can govern the terms for a promised transaction such as date of delivery, the expected price, and other specifications. Contracts enable a farmer to shift some financial risk to the buyer, cushion widely fluctuating price swings, and guarantee an outlet for production. In return, buyers gain a reliable and uniform supply of raw material. Consumers also benefit through lower prices, consistently higher quality, and a wider array of convenient products, it is argued. "The growth in contracting has come largely at the expense of spot (or cash) markets, where farmers retain full autonomy and receive prices based on prevailing market conditions and product attributes at the time of sale," USDA observes.[15] It distinguishes two types:

- **Production contracts** are when the farmer provides a service to the contractor who usually owns the commodity. The farmer's payment may resemble a fee for service rather than a payment for the commodity's value. For example, in poultry production, processing companies provide the chicks, feed, veterinary services, transportation and production specifications to farmers who raise the chicks for the companies, usually in facilities the farmers own.
- **Marketing contracts** emphasize the value of the commodity rather the farmer's services. They can specify in advance the basis for the price that will be paid, the quantity to be delivered and where, and product attributes, but the farmer retains major management control and ownership of the commodity until delivery.

In 2005, contracts (production or marketing) covered 50% of all livestock production value, up from 33% in 1991-1993. This compares with 30% of all crop production in 2005 and 25% in 1991-1993, according to USDA (see **Table 3** for breakout by selected commodity).

Use of production (as opposed to marketing) contracts in the hog industry grew sharply from 34% of production value in 1996-1997 (1991-1993 data not available) to 76% in 2005, according to USDA. Use of contracts in cattle production has been more or less constant at about 20%. Poultry and eggs have long been raised by farmers under contract with a processing firm; today the value of production under contract is approximately 95% under contract. Marketing contracts are the prevalent type in dairy, with more than 50% produced under contract in 2005. Regardless of commodity type, larger farms tend to use contracts much more than smaller farms, studies have found.

[14] Although this CRS report focuses primarily on beef and pork, references are made to the poultry sector when pertinent, particularly since this sector competes with beef and pork for the consumer dollar.

[15] USDA/ERS. "Agricultural Contracting: Trading Autonomy for Risk Reduction," *Amber Waves*, February 2006.

Table 3. Production Under Contract, Selected Commodities

(percent of production value under contract)

Commodity	1991-1993	2005
All Livestock	32.8	50.1
Cattle	17.0[0]	17.6
Hogs	34.2[0]	76.2
Poultry and Eggs	88.7	94.2
Dairy	36.8	59.2
All Crops	24.7	29.9
Corn	11.4	19.6
Wheat	5.9	7.5
Sugar Beets	91.1	82.1
Fruits	56.8[a]	63.6
Vegetables	38.5[a]	54.3

Source: USDA/ERS, *Agricultural Contracting Update*, 2005, EIB-35, Table 5, April 2008., http://www.ers.usda.gov/Publications/EIB35/.

a. Available data from 1996 to 1997.

Other Livestock Marketing Arrangements

A comprehensive study of livestock transaction methods by USDA's Grain Inspection, Packers and Stockyards Administration (GIPSA) describes a number of other "alternative marketing arrangements" (AMAs). The study defines AMAs as all alternatives to the cash market, including forward contracts, marketing agreements, procurement or marketing contracts, production contracts, packer ownership, custom feeding, and custom slaughter. (Cash transactions are those that occur immediately or "on the spot.")

The study, conducted by a private contracting firm, determined that all types of AMAs accounted for an estimated 38% of fed (slaughter-ready) beef cattle volume, 89% of finished hog volume, and 44% of lamb volume sold to packers between October 2002 and March 2005, the period studied. Within the beef sector, the 29 largest beef packing plants had obtained 62% of their cattle on the cash or spot market; 29% through marketing agreements; 4.5% through forward contracts; and 5% through packer ownership or other unknown methods. The use of one type of AMA—that is, packer ownership of the livestock they intend to slaughter—accounted for 5% or less of all beef and lamb transactions, but 20% to 30% of all pork transactions, the study found.[16]

[16] GIPSA, "Livestock and Meat Marketing Study," February 2007, at http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=lmp&topic=ir-mms.

Relevant Authorities and Agencies

Historical Context

Concerns about the growing market power of large corporations in general, and of meat packers in particular, were widespread by the late 1800s and culminated, by the early 1900s, with the passage of several major antitrust laws, including the Sherman and Clayton Acts (see below).

These laws notwithstanding, five large meat packers were continuing to make agreements that set prices and divided their territory and business, effectively barring others from entering the market. The so-called Big Five—Armour, Morris, Swift, Cudahy and Wilson—had exercised monopolistic control over the livestock industry by owning and/or controlling public stockyards, transportation and distribution, slaughter plants, and even retail outlets, according to a 1917-1918 investigation by the Federal Trade Commission (FTC). The Commission reportedly found that the Big Five's share of interstate slaughter was 75%-82% of the cattle market, 77% of calves, 61% of hogs, and 86% of sheep and lambs.[17]

Threatened with government legal action, the Big Five in 1920 agreed to a consent decree whereby they would refrain from: owning any interest in a stockyard; owning retail meat markets or cold storage facilities except for their own products; or entering other food processing and marketing sectors (like fruits and vegetables, fish, grain products, and so forth). Still, there was continuing dissatisfaction in Congress with the performance of the markets.

Packers and Stockyards (P&S) Act of 1921

Passage of the P&S Act in 1921 was "in response to concerns that, among other things, the marketing of livestock presented special problems that could not be adequately addressed by existing antitrust laws."[18] Parts of the act, as amended (7 USC §181 *et seq.*) prohibit unjustified discriminatory practices, as well as certain, specific activities that might adversely affect competition. As stated in 7 USC §192 of the act, it is unlawful for a packer or poultry dealer to: "engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; give undue/unreasonable preference/advantage to [persons or localities]"; apportion supply among packers in restraint of commerce or create a monopoly; trade in articles to manipulate or control prices, if such apportionment tends to restrain commerce or to create a monopoly; or conspire to apportion territory, or sales, or to manipulate or control prices.

The Secretary of Agriculture has assigned regulatory responsibility for the act to the Department's Grain Inspection, Packers and Stockyards Administration (GIPSA). GIPSA does not have a direct antitrust authority, and the P&S Act does not provide the agency with premerger review authority.

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[17] William E. Rosales, "Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening." *Journal of Agricultural & Food Industrial Organization*, vol. 3, 2005. Other sources for the historical material in the section are Jon Lauck, "Concentration Concerns in the American Livestock Sector: Another Look at the Packers and Stockyards Act," October 2004, and Harrison M. Pittman, "Market Concentration, Horizontal Consolidation, and Vertical Integration in the Hog and Cattle Industries: Taking Stock of the Road Ahead," August 2005, National AgLaw Center, http://www.nationalaglawcenter.org/research/#marketconcentration.

[18] Government Accountability Office (GAO), *Packers and Stockyards Programs: Continuing Problems with GIPSA Investigations of Competitive Practices*, March 9, 2006 testimony before the Senate Agriculture Committee.

The agency's role, however, is to maintain fair competition regulations. GIPSA is authorized to initiate and conduct investigations of alleged violations in the livestock industry, but generally not in the poultry industry. A violator of GIPSA regulations may, after a hearing before a USDA administrative law judge, be served a "cease and desist"order, and civil fines may be imposed.

If a packer disregards an order or refuses to pay fines, GIPSA may refer the case to DOJ, which can enforce the order/fine through court action. According to GIPSA, most violations are corrected voluntarily by the individuals or firms when a violation is brought to their attention. Except for serious violations, disciplinary action tends to be the last resort, and is imposed only after substantial efforts to obtain compliance have failed.

General Antitrust Laws

Several laws, which cover but are not specific to agriculture, prohibit certain activities, such as mergers and acquisitions that may restrict market access or suppress competition. These laws are the **Sherman Act (15 USC §§1-8)** and **Clayton Act (15 USC §12 *et seq.*)**. In addition, Title II of the **Hart-Scott-Rodino (HSR) Act (15 USC §18)** requires parties to file notification of proposed mergers or acquisitions if the action will trigger certain size and/or ownership criteria set forth by HSR.

Such notifications must be made to the agencies that administer these laws [the Department of Justice (DOJ) and the Federal Trade Commission (FTC)], which have 30 days to review them and to determine the need for any further information. (USDA's role here is advisory.) Mergers or acquisitions likely to substantially lessen market competition are a violation of Section 7 of the Clayton Act. DOJ or FTC merger review is intended to prevent anti-competitive conduct before it occurs. The principal focus during merger review is not on the merging parties, but on whether the merger would change the market structure to such a degree that competition likely would be substantially lessened. The pre-merger remedies DOJ/FTC might seek with respect to a proposed merger that would violate Section 7 of the Clayton Act are either filing legal action to stop the merger, or else conditioning federal approval on modifications to remove perceived antitrust concerns [e.g., divestiture by one or another party of assets/operations that duplicate or overlap those of the other part(ies)]. Negotiating such changes often is seen as in the interests of all parties, because going to court can be expensive, time-consuming, and risky.

Two other classes of anti-competitive behavior may be subject to findings of antitrust unlawfulness. First, a violation of Section 1 of the Sherman Act (collusion) can occur when separate firms agree among themselves not to compete with each other; this would include such matters as the prices to be paid for product resources or prices charged to consumers. Second, a violation of Section 2 of the Sherman Act (monopolization or attempt to monopolize) can occur in several ways, including the use of predatory practices and/or exclusionary conduct. (See CRS Report RL31026, *General Overview of United States Antitrust Law.*)

Agricultural Cooperative Protections

The **Capper-Volstead Act (7 USC §§291-292)** confers limited exemption from antitrust liability to farmer cooperatives, both for their existence and their joint processing and marketing of their commodities. The act specifically states, in part: "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged."[19] USDA may, but has never utilized its power to, file complaints against cooperatives that monopolize or restrain competition to the extent that the price of any agricultural product is "unduly enhanced."

This law and farmer antitrust immunity was among the topics reviewed by the Antitrust Modernization Commission, an expert panel established by Congress in 2002 (P.L. 107-273; §§11051-60). The commission reported its findings to Congress in April 2007. Among its findings, the commission concluded that the state of U.S. antitrust laws is "sound," although there are ways in which antitrust enforcement can be improved. It also stated that no new or different rules are needed to address so-called "new economy" issues; however, the commission did provide a list of recommendations for changes to certain laws and policies.[20]

The **Agricultural Fair Practices Act (AFPA; 7 U.S.C. 2301 *et seq.*)** was enacted in 1967 to protect farmers from retaliation by handlers (buyers of their products) because the farmers are members of a cooperative. The act permits farmers to file complaints with USDA, which can then institute court proceedings, if they believe their rights under the law have been violated.

Selected Issues and Legislation

Research on Competition and Price Impacts

Have increased market concentration and vertical integration, including production contracts, made livestock markets less competitive and depressed farm prices? Answering this question might help lawmakers in deciding future competition policy.

Studies in the 1990s

After Congress in 1991 provided funding for one of the most extensive recent examinations of meatpacking concentration, GIPSA contracted six projects to five universities. It also helped researchers collect, organize and analyze livestock transaction data over several years, according to an Oklahoma State University fact sheet.

Among the consistent findings from the six projects were that:

- A few major cattle feeding states including Texas, Nebraska and Kansas represent the core geographic market for fed cattle and price discovery;

[19] 7 U.S.C. §291. According to the National Agricultural Law Center, "Although there is no universally accepted definition, a cooperative can be defined as a legal business entity created under state law that is owned and operated for the purpose of benefitting those individuals who use its services. A farmer cooperative can serve one or more functions including but not limited to providing loans to farmers, supplying information pertinent to agricultural production, selling inputs necessary to agricultural production, bargaining on behalf of its members, providing transportation services, and marketing agricultural products for its members." See http://www.nationalaglawcenter.org/readingrooms/cooperatives/ for more information on agricultural cooperatives.

[20] For more information, see the Antitrust Modernization Commission (AMC), *Report And Recommendations*, April 2007, http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

- All other areas are linked to this market center, although the strength of the linkage diminishes as plants are located farther from the core (where the highest cattle prices are paid by packers);
- Larger and more efficient packers appeared to be passing back some of their efficiency gains to the feeders, with higher prices paid for larger sale lots of cattle and to the largest feedlots;
- Higher prices were paid by larger packers with larger slaughter capacities and high plant utilization, and higher prices were paid for cattle purchased closer to their plants;
- Higher prices were paid for marketing agreement cattle relative to cash market cattle, but lower prices were paid for contract cattle relative to cash market cattle.[21]

A related Oklahoma fact sheet also summarizes the price impact research:

> Concentration in meatpacking is high, especially for fed cattle slaughtering and fabricating. We must not lose sight of the fact that concentration has increased in part as meatpacking firms increased industry efficiency. Research to date suggests price impacts from packer concentration have been negative in general, but small. Also, research shows that efficiency gains from moving to fewer and larger meatpackers have more than offset any market power impacts. Use of captive supply methods remained reasonably stable from 1988 to the mid-1990s. Captive supply usage has a seasonal component and can vary widely from plant to plant and week to week. Evidence suggests captive supplies increased in the last half of the 1990s. Buyers and sellers use captive supplies for various reasons but most believe they are beneficial or they would not be used. Research suggests that larger plants make greater use of captive supply procurement methods to keep plant utilization high. Evidence suggests larger plants use captive supplies strategically, i.e., increasing the use of captive supplies as cash market prices and price variability increased. Price impacts from captive supplies have been negative in general but small.[22]

Other research has documented either negative or positive price impacts, with each study's outcome dependent upon what assumptions were used and what particular aspect of livestock marketing was examined. Noting the particular controversy over whether contracts and other marketing arrangements besides open cash transactions could lead to abuse of market power, a USDA official commented:

> Typically, contract prices for cattle and hogs are tied to the spot market price. As a result, as more animals are sold through contracts or other arrangements and fewer through the spot market, the actual number of transactions on which contract payments are based becomes smaller. This "thinning of the market" is often alleged to increase the ability of large buyers to manipulate prices. Research on this issue has been mixed.[23]

[21]Clement E. Ward, Oklahoma Cooperative Extension Service, "Summary of Results from USDA's Meatpacking Concentration Study" (fact sheet F-562), last edited December 2004. This and other fact sheets on livestock pricing research and information may be accessed at http://pods.dasnr.okstate.edu/docushare/dsweb/View/Collection-236.

[22] Ward, "Packer Concentration and Captive Supplies" (fact sheet F-554), last edited December 2004. "Captive supply" generally refers to animals that are either owned by, or committed to, a meat packer except for the short time just before slaughter.

[23]James E. Link, March 9, 2006, testimony before the Senate Agriculture Committee.

GIPSA Livestock and Meat Marketing Study

Congress provided $4.5 million, via the consolidated appropriations measure for FY2003 (P.L. 108-7), to GIPSA for a "study on the issues surrounding a ban on packer ownership," according to the measure's accompanying conference report language. Results of the study were to be reported within 24 months of enactment (i.e., by February 20, 2005), but this deadline was not met. GIPSA contracted with a private firm, RTI International of North Carolina, to conduct what it now calls the GIPSA Livestock and Meat Marketing Study, making it "a broad study of marketing practices in the entire livestock and red meat industries from farmers to retailers, food service firms, and exporters."[24]

RTI had delivered an interim report in July 2005 describing "alternative marketing arrangements" (AMAs) and why they are used. GIPSA released the final RTI report in February 2007, which contains a more quantitative analysis of these AMAs, including the extent of their use and possible price effects on industry participants.

The final RTI report asserted that many packers and livestock producers prefer AMAs, because they provide such benefits as cost and risk management, and better product quality assurance. Given the current marketing environment and recent trends, use of AMAs can be expected to increase moderately for lamb but very little or not at all for the beef and pork industries, the report predicted. However, the report observed: "Cash market transactions serve an important purpose in the industry, particularly for small producers and small packers." Reported cash prices also are frequently used as the base for formula pricing for cash market and AMA purchases of livestock and meat, RTI reported.

RTI reported that 85% of small producers surveyed said they relied only on the cash market when selling to packers, compared with 24% of large producers. Likewise, 10% of large beef packers surveyed reported using only the cash/spot market to purchase cattle, compared with 78% of small packers. With regard to price impacts, the RTI study concluded that "[t]he use of AMAs is associated with lower cash market prices, with a much larger effect occurring for finished hogs than for fed cattle." However, in aggregate, "restrictions on the use of AMAs for sale of livestock to meat packers would have negative economic effects on livestock producers, meat packers, and consumers." The RTI report did caution that U.S. meat industry market conditions during the period it studied were "unusual." These conditions included record high cattle prices and the discovery of BSE in North America.

USDA Office of Inspector General Report and GAO Study

In January 2006, USDA's Office of Inspector General (OIG) reported that GIPSA was not able to adequately oversee and manage its investigative activities. GIPSA had difficulties defining and tracking investigations, planning and conducting complex investigations, and making agency policy, OIG found. For example, databases were incomplete, and investigations often broadly defined to count even routine letters to companies and monitoring of publicly available records, OIG said. USDA's general counsel had not filed an administrative complaint on anti-competitive

[24] GIPSA, "Livestock and Meat Marketing Study," February 2007, http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=lmp&topic=ir-mms.

practices since 1999, due to GIPSA's failure to refer cases—although agency staff were considering dozens of investigations at the time, OIG concluded.[25]

The OIG report was discussed at a hearing on GIPSA's management of the P&S Act, which was convened on March 9, 2006, by the Senate Agriculture Committee. At the hearing, GAO also testified that in 2000 it had "identified two critical factors that detracted from the agency's ability to investigate anticompetitive practices in livestock markets": (1) investigations were being planned and conducted by economists without formal involvement of attorneys from USDA's Office of General Counsel (OGC), resulting in a lack of legal perspective on potential violations; and (2) the agency's investigative practices were not suited for the more complex competition-related concerns recently being raised. Moreover, USDA had not fulfilled promises to implement the 2000 GAO recommendations—such as integrating OGC attorneys into GIPSA investigations, and improving more effective management procedures for approving and reviewing investigations.[26]

At the Senate hearing, GIPSA's then-incoming administrator said that USDA generally agreed with and was implementing the OIG recommendations, such as the development of a management structure for receiving, reviewing, and acting on policy issues and internal requests for guidance; clarification of agency policy directives on investigations versus routine regulatory activities; and encouragement of GIPSA legal specialists to work more directly with OGC.

Legal Action: Pickett v. Tyson Fresh Meats, Inc.

The U.S. Supreme Court in 2006 declined to hear what many analysts considered to be a landmark legal case under the P&S Act. In *Pickett v. Tyson Fresh Meats, Inc.*, a group of cattle feeders in 1996 sued Iowa Beef Packers (IBP), now part of Tyson, for violating the P&S Act, reportedly the first class action certified for producers against a packer in the act's long history.[27] Following eight years of litigation, a jury in early 2004 agreed with producer arguments that the packer had used captive supplies to control the supply of cattle available on the market, thereby causing lower cattle prices. The jury set damages at more than $1.2 billion. However, the federal judge in the case set aside the verdict on the grounds that the jury had insufficient evidence to find that Tyson had no legitimate business reason for using captive supplies.

The plaintiffs appealed, but a U.S. Court of Appeals in August 2005 upheld the lower judge's decision. The appeals court rejected the plaintiffs' argument that there was a violation of the P&S Act. "If a packer's course of business promotes efficiency and aids competition in the cattle market, the challenged practice cannot, by definition, adversely affect competition," the court

[25] USDA, *GIPSA's Management and Oversight of the Packers and Stockyards Programs*, OIG Audit Rept. No. 30601-01-Hy, January 2006, http://www.usda.gov/oig/webdocs/30601-01-HY.pdf.

[26] GAO, March 9, 2006, testimony before the Senate Agriculture Committee; GAO, *Continuing Problems with GIPSA Investigations of Competitive Practices*, GAO-06-532T, March 2006, http://www.gao.gov/new.items/d06532t.pdf.

[27] Pickett v. Tyson Fresh Meats Inc., 11th Cir., No. 04-12137.

declared.[28] The plaintiffs and their supporters had asked the U.S. Supreme Court to review the case, but the Court declined to do so in early 2006.[29]

Congressional Action

Early in the 110th Congress, a number of bills were introduced to address one or more of these perceived "competition issues" in livestock markets. Both the House- and Senate-passed versions of the farm bill (H.R. 2419) contained a number of animal-related provisions, many related to market competition (especially in the Senate version of the bill). The enacted 2008 farm bill (Food, Conservation, and Energy Act of 2008, P.L. 110-246) contains a new Livestock title (Title XI) and includes provisions affecting how USDA is to regulate livestock and poultry markets. These provisions change Agricultural Fair Practices Act (AFPA) definitions of associations and handlers and require USDA to issue rules and specify requirements regarding breach of contract and the venue for any litigation. The farm bill also requires USDA to issue an annual report detailing investigations into possible violations under the Packers and Stockyards (P&S) Act.

The 2008 farm bill, however, did not include other provisions that were part of the Senate-passed version of the farm bill, and scaled back much of the language in the Senate-passed version aimed at more closely regulating livestock and poultry markets. Not included were Senate-passed provisions that would prohibit ownership among large meat packers, strengthen enforcement authorities over live poultry dealers, and make certain changes to the Mandatory Livestock Price Reporting Program. These types of competition and marketing issues could continue to be of interest to some Members of Congress, and may likely resurface during the 111th Congress. This report will be updated as warranted.

Proposed Farm Bill "Competition Title"

The *Pickett* case, along with several other federal court rulings under the P&S Act, including against state restrictions on "corporate" farming,[30] added impetus to the efforts of a number of producer and allied groups that wanted a so-called competition title to be included in an omnibus farm bill. Advocates urged lawmakers to strengthen existing antitrust authorities, to impose more mandates on the executive branch to enforce these authorities, and to provide new contract protections for farmers, among other options.

Early in the 110th Congress, Senate Agriculture Chairman Harkin had introduced a wide-ranging bill (S. 622) that, he said, would be "the basis for developing a proposed competition title in the new farm bill this year,"[31] replacing the 2002 farm bill (Farm Security and Rural Investment Act of 2002, P.L. 107-171). S. 622 included many of the provisions not retained in the final version. Also introduced and considered during the farm bill debate were bills by Senator Grassley that

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[28] *Pickett v. Tyson Fresh Meats Inc.*, as reported in *Daily Report for Executives*, August 24, 2005. Some discussion of the case also is from David A. Domina, "Proving Anti-Competitive Conduct in the U.S. Courtroom: The Plaintiff's Argument in *Pickett v. Tyson Fresh Meats, Inc.*," *Journal of Agricultural and Food Industrial Organization*, vol. 2, 2004; as well as Rosales and O'Brien.

[29] "Supreme Court upholds contracts," *Feedstuffs*, April 3, 2006.

[30] As discussed earlier, these efforts generally have not been successful in the courts.

[31] Senator Harkin's statement on S. 622 is in the Feb. 15, 2007, *Congressional Record*, pp. S2052-S2053.

would have prohibited meat packers from owning or feeding livestock, with some noted exceptions (S. 305); and that would have established a USDA Special Counsel for Competition Matters, a Deputy Attorney General for Agricultural Antitrust Matters in the Department of Justice, and an Agriculture Competition Task Force to examine agricultural competition matters, among other funding and programmatic changes (S. 1759). Several provisions from these bills were in the Senate-passed farm bill.

Some of these options had been considered previously. In legislative activity leading to enactment of the 2002 farm bill, the Senate Agriculture Committee voted in November 2001 to delete a competition title from the omnibus farm bill (S. 1628), also proposed by Chairman Harkin. During subsequent floor action on the bill, the Senate did approve a number of individual "competition" amendments. Two such amendments were retained by House-Senate conferees in early 2002 in the final version of the bill (H.Rept. 107-424). One gives producers the right to discuss their contracts with family members and advisors. The other extends some new P&S Act protections to swine producers with production contracts. Conferees also included in the final farm bill a new program requiring many retailers to provide country-of-origin labeling (COOL) for red meat and several other commodities. Since then, Congress twice postponed mandatory meat COOL, but it is now being implemented by USDA.[32]

In the House, Representative Boswell, chairman of the House Agriculture Subcommittee on Dairy, Livestock, and Poultry, had introduced the House version of S. 622 as H.R. 2135. However, with the exception of a provision on arbitration clauses in livestock and poultry contracts, other elements of H.R. 2135 were not included in the draft bill forwarded to the full committee. The Boswell arbitration provision was further altered during committee markup. The arbitration provision in the House-passed bill directed USDA to establish regulatory standards for arbitration provisions in livestock and poultry contracts. Among other things, such regulations are intended to permit a producer to seek relief in a small claims court, if within the court's jurisdiction, regardless of a contract's arbitration clause. The House-passed bill contained no other major "competition" language.

House and Senate Farm Bills

The Senate-passed version of the farm bill also contained a new title on Livestock, Marketing, Regulatory, and Related Programs (Title X) that was based in part on Chairman Harkin's wide-ranging bill (S. 622), among other Senate provisions. In the House, although Representative Boswell had introduced the House version of S. 622 as H.R. 2135, few elements of H.R. 2135 were included in the draft bill forwarded to the full committee and passed off the House floor. In fact, a major organizational difference between the House- and Senate-passed farm bills is that the Senate bill contained a separate livestock competition title, whereas the House bill instead contained a separate title on Horticulture and Organic Agriculture (Title X).

Enacted Farm Bill

The enacted bill included both new titles, but renamed the livestock title as "Livestock."

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[32] Though COOL has been raised by some as relevant in the competition debate, it is not discussed here; see CRS Report 97-508, *Country-of-Origin Labeling for Foods*.

Packer Ownership/Captive Supply

Producers facing fewer buyers for their livestock frequently express concerns about "captive supply," meaning animals that are either owned by, or committed to, a meat packer except for a short period directly before slaughter. When packers buy fewer animals on the spot (open cash) market, reported prices may no longer accurately reflect the preponderance of prices paid, it is argued. Reduced transparency (i.e., prices and terms that all market players can view equally) works to the disadvantage of the far larger number of producers trying to sell their livestock to the relatively few packers who buy them, it is argued.

In the 110th Congress, a bill introduced by Senator Grassley (S. 305) would have amended the P&S Act to prohibit meat packers from owning or feeding livestock "directly, through a subsidiary, or through an arrangement that gives the packer operational, managerial, or supervisory control over the livestock, or over the farming operation that produces the livestock, to such an extent that the producer is no longer materially participating in the management of the operation ... " Exceptions would be for arrangements made within seven days before slaughter; for producer-owned cooperatives that also slaughter their livestock; and for packers that either slaughter only at one plant or are too small to be covered by Livestock Mandatory Price Reporting (see below).[33]

Opponents of a packer ownership ban countered that evidence of price manipulation is lacking, and that a ban could reverse many of the efficiency gains made by the livestock industry in recent years through closer packer-producer alliances. They also cited the results of the recently released RTI study of marketing practices (see discussion in the section titled "GIPSA Livestock and Meat Marketing Study").

House and Senate Farm Bills

The Senate-passed version of the farm bill included a new provision similar in intent to the Grassley bill. It would have prohibited most major packers from owning or controlling livestock more than 14 days prior to slaughter, allowing for some exceptions. The packer ban would only have applied to packers who are already required to report their prices through the mandatory price reporting law, or packers who slaughter over 120,000 head of cattle each year. The ban would not have applied to ownership arrangements entered into within 14 days of slaughter of the livestock by a packer; or to any cooperative or entity owned by a cooperative where the majority of ownership interest is held by active cooperative members; or to packers not required to report to USDA under Section 212 of the Agricultural Marketing Act of 1946 (7 U.S.C. 1635a); or to a packer that only owns one livestock processing plant. The provision would have allowed for certain transition rules for packers who already own, feed, or control livestock intended for slaughter on the date of enactment of the act. The Senate would have required that USDA promulgate regulations that "prevent discrimination against producers with a smaller volume of business." The House version of the farm bill did not include a comparable provision prohibiting packer ownership or control prior to slaughter.

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[33] The measure was similar to bills (S. 818; H.R. 4713) offered in the 109th Congress by Senator Grassley and by Representative Boswell, respectively. Earlier, in the 107th Congress, during floor action on its version of the 2002 farm bill (S. 1731), the Senate approved a similarly intended amendment that conferees subsequently deleted from the final version.

Enacted Farm Bill

For the enacted 2008 farm bill, the conferees decided to delete Senate language that would have prohibited most major packers from owning, feeding, or controlling livestock except within 14 days of slaughter.

Changes to the Agricultural Fair Practices Act

Several bills in the 110th Congress sought to amend the AFPA to address what their sponsors view as inequities in contracting between agricultural producers and those who buy their commodities. The Harkin bill (S. 622) would have prohibited the use of confidentiality clauses in contracts; required them to more clearly spell out producer obligations; given the producer three days to review or cancel a contract; and limited a processor's right to terminate a contract where the producer had made a capital investment of $100,000 or more to satisfy contract requirements. Both S. 622 and a separate Grassley bill (S. 221) would have allowed the use of arbitration to settle contract disputes only if both parties consented to it in writing.[34] Sponsors argued that such amendments to the AFPA are needed because agricultural consolidation has left producers with so few processor-buyers that some of these processor-buyers can and do impose unfavorable contract terms on the producers, forcing them to either accept or exit the industry entirely.

In the 109th Congress, identical bills by Senator Enzi (S. 960) and Representative Pomeroy (H.R. 4257) would have made it unlawful under the P&S Act for packers to use forward contracts that are based on a formula price, or that do not contain a firm base price. The bills also would have limited the size of all contracts to no more than 40 cattle, 30 swine, or equivalent groups of other livestock, and would have required packers to offer contracts for public bidding open to all traders. Senator Enzi and other supporters argued that packers now can use formula pricing arrangements to avoid participating in a more transparent open market and to unfairly change the prices they pay producers after a sale is made.

Opponents of the various P&S and AFPA proposals have asserted that buyers use these and other contracting arrangements to ensure a steady supply of animals (or other agricultural commodities) to keep high-capacity plants operating efficiently. Such arrangements also allow for necessary price adjustments for quality, grade, or other market-prescribed factors. These types of bills would hurt producers too, opponents have argued—again citing the result of the recent RTI study (see section titled "GIPSA Livestock and Meat Marketing Study")—because many of them use contracts or other marketing agreements with packers to limit their own exposure to price volatility and to obtain capital.

Chairman Harkin's bill (S. 622) also would have significantly altered the AFPA to cover crops in much the same way livestock is covered under the P&S Act. More specifically, it would be unlawful under the AFPA for any covered person (i.e., a dealer, handler, contractor, processor or commission merchant) to engage in "[a]ny unfair, unjustly discriminatory, or deceptive act, device, or anti-competitive practice in or affecting the marketing, receiving, purchasing, sale, or contracting for the production of any agricultural commodity." Many of the same types of

[34] Both the Harkin and Grassley bills were similar to measures (S. 2307 and S. 2121) they had introduced in the 109th Congress. The Grassley bills also mirror a 2001 floor amendment to the 2002 farm bill (S. 1731, §1046) that was adopted by the Senate but then deleted by conferees from the final legislation.

individual practices now cited under the P&S Act as unlawful for livestock buyers would also have been explicitly cited as unlawful for crop buyers, under the proposed new AFPA.

House and Senate Farm Bills

The Senate-passed farm bill proposed certain changes to AFPA, including expanding the definition of "association of producers" to also include general livestock, poultry, and farm groups; broadening the types of prohibited practices; and changing the current enforcement provisions to make the law consistent with amendments to create a Special Counsel for Agricultural Competition. The Senate version also removed aspects of the law that some producer groups believe have made the AFPA less effective—for example, by clarifying civil actions against handlers, including providing for preventive relief, damage, and attorneys fees, and related issues, among other changes; and requiring USDA to promulgate new rules and regulations. The House bill did not provide for amendments to the Agricultural Fair Practices Act.

Enacted Farm Bill

The enacted 2008 farm bill amends AFPA to modify the previous definition of "association of producers" to include organizations with membership exclusively limited to agricultural producers and dedicated to promoting their products. It also modifies the definition of "handler" (Sec. 11003). The farm bill conferees narrowed Senate language governing contractual arrangements between producers and integrators. Under the conference compromise, a poultry or swine grower—a more limited definition of a contract producer than in the Senate-passed bill—has the right to cancel a contract within three business days of execution, unless a later date is specified in the contract. In lieu of Senate language limiting the conditions under which a contractor could require a producer to make additional capital investments, the conference language stipulates that the possibility of such an investment be conspicuously stated in the contract.

USDA Enforcement and Management

Chairman Harkin's bill, S. 622 (similarly to S. 2307 in the 109th Congress), would have required a new USDA Office of Special Counsel for Competition Matters to investigate and prosecute violations of the AFPA and of the P&S Act. This proposal was also adapted from language in a bill introduced by Senator Grassley (S. 1759) that proposed to establish a USDA Special Counsel for Competition Matters, a Deputy Attorney General for Agricultural Antitrust Matters in the Department of Justice, and an Agriculture Competition Task Force to examine agricultural competition matters, among other funding and programmatic changes.

S. 622 also contained language intended to make it easier for producers to prove in a court of law that they were treated unfairly by packers. Sponsors of this proposal said that stronger enforcement authorities were needed in part because GIPSA officials have largely failed to enforce existing laws, and pointed to a report by the Department's Office of Inspector General (OIG), which concluded that GIPSA had not been able to adequately oversee and manage its investigative activities. (See section titled "USDA Office of Inspector General Report and GAO Study.")

House and Senate Farm Bills

In addition to amending the P&S Act to include a packer ownership ban, the Senate-passed bill would have made other changes to the P&S Act to broaden producer rights and protections and strengthen USDA enforcement under the act. Among the principal changes was the creation of a new Special Counsel for Agricultural Competition at USDA to investigate and prosecute violations of competition laws, including the AFPA and the P&S Act. The special counsel would also "serve as a liaison between, and act in consultation with, the Department of Agriculture, the Department of Justice, and the Federal Trade Commission with respect to competition and trade practices in the food and agricultural sector."

Other proposed Senate provisions sought to amend the P&S Act to establish new requirements for contracts between producers and processors: for example, strengthening USDA enforcement authorities over live poultry dealers, including pullet and breeder hens; allowing contract growers to discuss contract terms with business associates, neighbors, and other producers;[35] allowing producers to receive remedy for violations, including litigation costs and attorneys' fees; and allowing USDA to seek outside counsel to aid in investigations and civil cases.

The Senate provisions regarding production contracts sought to allow contract producers to cancel a production contract and also would protect contract producers from contract termination or from being required to make business investments, under certain circumstances. Contract producers would be able to cancel a contract within three business days after the contract execution date. Contract producers who have made an investment of $100,000 or more for purposes of securing the production contract with a packer, live poultry dealer, or swine contractor would be given at least 90 days to correct an alleged breach before a contractor can terminate a contract, except under certain circumstances. A packer, live poultry dealer, or swine contractor would also be prohibited from requiring additional investments of the contract producer during the term of the contract unless the additional investments are offset or agreed to by the contract producer. The Senate bill also provided for producer choice of jurisdiction and venue, and allowed for arbitration to settle disputes, if both parties were to consent in writing.

Some proposals that might have made it easier for producers to prove unfair treatment under the P&S Act were not ultimately included in the Senate-passed bill, although several amendments were submitted and some were debated on the Senate floor. For example, S. 622 included language that would have limited judges deciding court cases under the P&S Act from requiring producers to show both individual harm and "competitive harm" to the entire industry; an amendment to H.R. 2419 was submitted (Harkin, S.Amdt. 3667) to include this language in the Senate farm bill, but was not adopted. Another amendment (Tester, S.Amdt. 3666) also would have limited P&S Act court cases from allowing certain pricing mechanisms in cases where the packer may have a "legitimate business justification"; S.Amdt. 3666 was debated, but voted against when it was brought up during the Senate floor debate. Other submitted Senate amendments included a proposal to require all forward contracts to have a fixed base price (Enzi, S.Amdt. 3691). A series of amendments (Roberts, S.Amdt. 3546, S.Amdt. 3547, S.Amdt. 3548, and S.Amdt. 3549) would have changed AFPA and P&S Act definitions and AFPA enforcement requirements, and packer ban requirements in Senate-passed version of the farm bill. These Senate amendments were not adopted.

[35] Provisions prohibiting the use of confidentiality clauses in contracts and other related proposed changes were adapted from language in S. 622.

Initially, the House farm bill had included a provision on arbitration clauses in livestock and poultry contracts, which evolved from part of the House companion bill to S. 622 (H.R. 2135), introduced by Representative Boswell, chairman of the House Agriculture Subcommittee on Dairy, Livestock, and Poultry. However, the arbitration provision was further altered during committee markup; other elements of H.R. 2135 were not included in the draft bill forwarded to the full committee and passed off the House floor. Another related proposal that was not adopted in the House farm bill was H.R. 2213, introduced by Representative Herseth Sandlin, which would have amended the P&S Act with respect to livestock producer-packer forward contracts. The arbitration provision in the House bill directed USDA to establish regulatory standards for arbitration provisions in livestock and poultry contracts. Among other things, such regulations are intended to permit a producer to seek relief in a small claims court, if within the court's jurisdiction, regardless of a contract's arbitration clause. The House bill contained no other provisions amending the P&S Act.

Enacted Farm Bill

Several of these provisions were retained in the enacted 2008 farm bill in somewhat modified form, and are intended to give producers additional protections when disputing contract terms. However, certain Senate provisions intended to strengthen USDA's oversight and enforcement of the act were deleted, as were Senate provisions to give USDA stronger enforcement authorities over live poultry dealers under the P&S Act, among other changes. Also deleted was a Senate provision to establish at USDA a new Special Counsel for Agricultural Competition to investigate and prosecute violations of competition laws. In their place, conferees added language requiring an annual report detailing investigations into possible P&S Act violations.

The enacted 2008 farm bill amends the P&S Act as follows. The enacted bill requires an annual report from USDA on detailed investigations into possible violations of the P&S Act (Sec. 11004); permits poultry and swine producers to cancel their contracts up to three business days after signing, unless a later date is specified in the contract; requires clear disclosure in contracts of cancellation terms; requires poultry/swine contracts to contain a conspicuous statement that additional large capital investments may be required during the term of the contract; contains provisions intended to assist producers deal with contract disputes, including arbitration terms and venue for any litigation (Sec. 11005); and requires USDA to issue rules on such criteria as, for example, the reasonable period of time a producer should be given to remedy a breach of contract before it is cancelled (Sec. 11006).

One issue that is likely to be of interest to some during the 111th Congress is the provision requiring USDA rulemaking under the P&S Act (Sec. 11006) related to alleged practices in the poultry and hog sectors. Per the 2008 farm bill provision, USDA must publish regulations within two years to establish criteria in determining (1) whether an "undue or unreasonable preference or advantage" has occurred in violation of the act; (2) whether a live poultry dealer has provided "reasonable notice" to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement; (3) when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of such act; and (4) if a live poultry dealer or swine contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of contract that could lead to termination of the poultry growing arrangement or swine production contract. Sponsors of this provision claim USDA's rulemaking is relevant because they claim that many poultry growers have had their deliveries suspended for reasons that might constitute an undue or unreasonable preference, if other growers are not experiencing the same suspension.[36]

Livestock Mandatory Price Reporting (LMPR)

LMPR was first passed in 1999 to address some producers' concerns about low livestock prices, industry concentration, and the availability of accurate market information. The original authority, Title IX of P.L. 106-78, USDA's FY2000 appropriations, lapsed briefly on October 22, 2004, but President Bush signed legislation (P.L. 108-444) extending the program through September 30, 2005, when it again expired. The program then operated on a voluntary basis, as the 109th Congress considered whether to reauthorize LMPR, for how long, and what if any changes should be made. Taking differing approaches in September 2005, the House had approved a bill (H.R. 3408) to extend LMPR for five years and to amend hog reporting provisions, while the Senate had approved a simple one-year extension (S. 1613). In September 2006, the Senate cleared the House-passed version, sending the measure to the President, who signed it into law (P.L. 109-296) on October 5, 2006.[37] During the 110th Congress, some Members indicated the need for further changes in LMPR.

House and Senate Farm Bills

The Senate-passed version of the farm bill would have established a new program for mandatory daily product information reporting for manufactured dairy products, and amended the current program for swine to authorize, after an economic study, the mandatory packer reporting of wholesale pork product sales (such as pork cuts and retail-ready pork products), along with changes to the reporting times of the afternoon swine report. The House-passed version did not include any changes or additions to the current mandatory price reporting program.

Enacted Farm Bill

The enacted 2008 farm bill requires USDA to conduct a study of the economic impacts of requiring plants to report pork product sales, focusing on wholesale pork cuts. It also directs USDA to improve electronic reporting and publishing under the program (Sec. 11001).

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[36] National Campaign for Sustainable Agriculture's Competition and Concentration Committee, *Transition Issues Agricultural Competition And Contract Fairness Issues*, December 2008, http://sustainableagriculturecoalition.org/wp-content/uploads/2009/01/competition_committe_transition_documen_finalt1.pdf

[37] See CRS Report RS21994, *Livestock Price Reporting: Background*, by (name redacted).