A Midterm Review of the Biden Administration's Commitment to Food System Competition

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Introduction

The Biden administration inherited a food system in crisis. The Coronavirus pandemic revealed the systemic dangers of allowing a few powerful corporations to concentrate control over food production and distribution. As skyrocketing prices for basic foods, shortages of baby formula, supply chain shutdowns, and rampant speculation in global grain supplies make clear: The threats of corporate consolidation to food and economic security are only getting more acute. For decades, consolidated agribusiness has squeezed and even bankrupted farmers, exploited workers, fouled the environment, hollowed out rural America, and cheated consumers. None of this is the inevitable outcome of natural market forces or efficiencies, but rather the end result of deliberate policy choices. Over the past 50 years both Democratic and Republican administrations chose to weaken antitrust laws, which has allowed corporations to merge into monopolies and deploy previously illegal business practices, such as predatory pricing, exclusive dealing, vertical restraints, and economic discrimination.

The Biden administration faces a critical window of opportunity to reverse this trend and rebuild a more safe, fair, competitive, and equitable food system. In July 2021, President Biden issued a sweeping executive order that directed multiple federal agencies to revive antitrust enforcement and promote competition throughout the U.S. economy. In this report, we assess how the Department of Agriculture (USDA), the Department of Justice (DOJ), and the Federal Trade Commission (FTC) are progressing on the measures within the executive order that are related to food and agriculture. In doing so, we use a weighted grade system, in which more substantial directives are given more weight than some of the less-impactful instructions. These report cards are not final. Rather, we hope they will be considered as an honest midterm evaluation, with the assumption that each agency has until the end of the Biden administration's first term to complete these directives. Each report card is followed by an assessment that justifies the basis for these grades. We also detail the specific steps agencies must take to improve their marks.

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DOJ Report Card

General call for more vigorous antitrust enforcement (Section 5, b) (50%)	B
General call for agency cooperation in cases of antitrust enforcement that have some agency overlap (Section 3, a-d)	No Grade
DOJ and FTC will review merger guidelines (Section 5, c) (50%)	B-
Overall	B-

Assessment: Given the late start in bringing new leadership to the Justice Department's Antitrust Division, the agency is making a commendable effort. Enforcers are investigating mergers that may have previously been waived through, such as Cargill-Continental's joint acquisition of Sanderson Farms. Enforcers have also shown perseverance throughout a tough price-fixing trial in the poultry industry. And in their merger review process, the agency has been reaching out to farmers and workers to learn about the real-world harms of corporate consolidation.

We had some difficulty measuring interagency cooperation, since much of that work is behind the scenes, but it is worth noting that the USDA and DOJ set up a joint portal for farmers to report unfair practices. That said, the agency is still sitting on a long-overdue investigation into beef cattle market manipulation. Also, in December, Farm Action sent the DOJ a letter requesting they investigate suspicious spikes in fertilizer prices, but we have seen no action. DOJ also has yet to indicate any intention to use its legal authority to attempt to break up food industry monopolists. Encouraging enforcement actions against concentrated buyer power (as seen in DOJ's challenge to the Penguin Random House and Simon & Schuster merger and Atlanta Opera amicus brief) could also be applied to food and agriculture monopolists. We think DOJ is making a strong effort but not yet fulfilling its potential. We therefore believe that a fair grade for the Division's work on this set of issues, thus far, **is a B-**.

In order to raise their grade to an A by the end of President Biden's term, the Division must at a minimum issue strong merger review guidelines, issue and begin to act on their report on beef cattle market manipulation, and bring at least one major monopolization case that seeks to break up a harmful food industry monopoly. To achieve exceptional marks, they should not stop at just one monopolization case.

FTC Report Card

General call for more vigorous antitrust enforcement (Section 5, b) (20%)	B
General call for agency cooperation in cases of antitrust enforcement that have some agency overlap (Section 3, a-d)	No Grade
DOJ and FTC will review merger guidelines (Section 5, c) (30%)	B-
FTC directed to “curtail the use” of non-compete clauses (Section 5, g) (20%)	D
FTC encouraged to issue fair competition rules generally (Section 5, h) (20%)	C
USDA and FTC joint report on improving access to retail markets, issues with retail concentration, and the Robinson-Patman Act (Section 5, i, iv) (10%)	B-
Extra Credit: Investigations into grocery and food processor price-gouging and baby formula consolidation, plus policy statement on Right to Repair	A-
Overall	B-

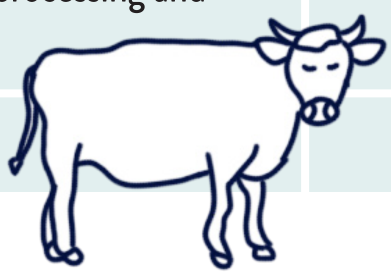
Assessment: FTC leadership has made it clear that they’re seeking to overhaul an agency with substantial untapped authorities as part of a larger effort to strengthen antitrust enforcement. We recognize this is no easy task and commend them for the steps they’ve taken thus far, which include: beginning a new merger guidelines process, passing “Made in the USA” rules, and issuing a congressional report and enforcement commitment to ensure farmers’ right to repair. Their recent inquiry into consolidation in the infant formula market is also commendable, although the current shortage is a testament to decades of lax enforcement by both antitrust agencies.

Unfortunately, the FTC has been slow to issue a rule banning non-compete agreements and exclusive dealing, among the many unfair business tactics the agency could define and prevent. We recognize that the Senate’s delay in approving a third Democrat-nominated commissioner contributed to some of this inaction. We therefore believe that a fair grade for the Commission’s work on this set of issues thus far **is a B-**.

In order to raise this grade to an A by the end of President Biden’s term, we would like to see fair competition rules banning non-compete agreements and exclusive dealing, more development of Robinson-Patman enforcement (especially in tandem with USDA), and bolder actions to bust grocery monopolies.

USDA Report Card

All agencies' heads should examine "the potential for their procurement or other spending to improve the competitiveness of small businesses and businesses with fair labor practices" (Section 5, a, ii) (18%)	D
General call for agency cooperation in cases of antitrust enforcement that have some agency overlap (Section 3, a-d)	No Grade
USDA encouraged to issue new rules under the Packers & Stockyards Act (Section 5, i, i, A-E) (40%)	D
USDA encouraged to issue "Product of U.S.A." rulemaking (Section 5, i, ii) (18%)	F
USDA and FTC joint report on improving access to retail markets, issues with retail concentration, and the Robinson-Patman Act (Section 5, i, iv) (8%)	B-
USDA and Commerce joint report on intellectual property, seeds, and competition (Section 5, i, v) (8%)	B-
USDA report on promoting alternative food distribution and value-added products (Section 5, i, iii) (8%)	B
Extra Credit: Allocating $4 billion in American Rescue Plan funds into a series of promising programs aimed at supporting small- to mid-scale food processing and supply chain resiliency.	A-
Overall	D+



Assessment: In general, we are disappointed by the lack of action we have seen at the USDA. We appreciate that the Department's messaging has notably shifted to highlight issues of competition, and that they have made significant investments to diversify supply chains. But they have missed several deadlines and, in certain key policy areas, have largely or entirely failed to take substantial policy action.

The Department's inaction is especially notable given that, taken as a whole, the directives within the executive order that relate to the USDA are not as pioneering as those directed at the DOJ and FTC. Many of the issues raised in the executive order have been on the USDA's radar for decades. For instance, during Secretary Vilsack's first term in office, under President Obama, the USDA failed to implement new rules for the Packers and Stockyards Act (P&S Act). Today, 12 years later, the Department has been slow to issue three promised P&S Act rules, which take on similar subjects to their 2010 predecessors. While USDA did propose one rule regarding transparency in poultry contracts and tournaments, it stopped short of banning unfair tournament payment systems and setting fair base prices, opting for a comment period to gather more information on these actions instead. Further, USDA has not introduced rules to address the four other considerations for P&S Act rulemaking named in the executive order.

The USDA has a history of operating as a revolving door for industry representatives, as highlighted in the recent report by the Select Subcommittee on the Coronavirus Crisis; this is one possible factor contributing to the Department's lack of action. If structural and resource challenges are contributing to these delays, the White House needs to ensure the USDA has the support it needs to accomplish its mandates. The 40% proposed budget increase for USDA's Packers and Stockyards division in the President's 2023 fiscal year budget is a promising step.

We have chosen to avoid grading interagency cooperation, which we felt was too difficult to assess. We would like to note approvingly the joint portal set up by the USDA and DOJ for farmers to report unfair practices. It is also worth acknowledging that the USDA has taken initiative against concentration on several occasions. They've committed and begun distributing $4 billion in American Rescue Plan Funds to invest in small- to mid-sized food processing capacity and supply chain resiliency. This includes $1 billion for meatpacking plants, $1 billion for other food processors and regional food business centers, and $500 million for domestic fertilizer production. USDA also issued an additional competition request for information that included the fertilizer industry, which was not directly mentioned in the original executive order on competition.

But absent a policy to support these investments, we expect they will not change the imbalance of power that exists within most food and farming markets. For instance, new or existing meatpacking plants that receive the $1 billion in USDA funds will still struggle to compete without supporting procurement policies from the USDA and fair competition rules that shore up these emerging markets. Further, the smallest meatpacking plants have been promised their own round of funding that has yet to start.

The bottom line: We need to see real action by the USDA now. We therefore believe that a fair grade for the Department's work on this set of issues thus far **is a D+**. If the USDA wants to pass this term, they have a lot of catch-up work to do. They need to issue new rules and fully enforce the P&S Act, strengthen "Product of U.S.A." labeling, improve price discovery and transparency, and identify clear procurement targets that support fair and regional food systems.

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