Sarah J. Helming
United States Department of Agriculture
Whitten Building—Suite 312-E
1400 Independence Avenue SW
Washington, DC 20250

Re: Investments and Opportunities for Meat and Poultry Processing Infrastructure

Docket ID: AMS-TM-21-0058

Via Online Submission

Dear Ms. Helming:

The Open Markets Institute thanks the U.S. Department of Agriculture for seeking public input on how to invest in a more robust, diverse, and competitive meatpacking sector. The Open Markets Institute is a group of reporters, policy analysts, lawyers, and economists who work to study and expose the dangers of monopolization and identify changes in law and policy to establish open, competitive markets that support a strong, just, and inclusive democracy.

We submit these comments in response to the agency's notice *Investments and Opportunities for Meat and Poultry Processing Infrastructure*, 86 Fed. Reg. 37728. This request for information asks several important questions about how the USDA can best invest roughly $500 million in American Rescue Plan funds to diversify the meatpacking industry. We applaud this step to develop strategies to improve competition in agriculture markets as a part of President Biden's Executive Order on Promoting Competition in the American Economy.

Understanding and Addressing Meatpackers' Oppressive Market Power

As the agency's request for information acknowledges, decades of lax antitrust enforcement have created an incredibly consolidated meatpacking sector. This consolidation undermines food systems resiliency and increases the power of a handful of firms over competitors, farmers, workers, and consumers. Specifically, dominant meatpacking corporations have bought up or pushed out small and midsize meat processing facilities that once served smaller or niche farmers and ranchers, increased competition for livestock producers' animals, and structurally and regionally diversified meatpacking infrastructure for greater resiliency.

The number of USDA-inspected beef and pork plants has declined 36% since 1990, and the number of non-federally inspected plants has declined 42%.[1] This decline happened after dramatic meatpacking consolidation through the 1980s already had shuttered more than 400

[1] National Agricultural Statistics Service (NASS), Agricultural Statistics Board, United States Department of Agriculture (USDA), "PDF," October 27, 2016.

plants.[2] Through the '80s and '90s, processing shifted to much larger plants, and smaller and medium-sized plants saw the most plant closures.[3] This consolidated the market share of the largest meatpackers both nationally and regionally, to the point that today half of all chicken farmers report having just one or two places to sell their animals in their area.[4]

While new technologies and increased mechanization undoubtedly allowed packers such as Iowa Beef Packers, ConAgra, and Cargill to achieve greater economies of scale, changes in plant design and size do not fully explain the dramatic increases in concentration and loss of plants seen through the 1980s and 1990s. [5] For instance, one 1990 study estimated that if the top four meatpackers operated large enough plants to exhaust all theoretical economies of scale, they would still only control anywhere from 24% to 48% of the market.[6] In reality, together the top four controlled 70% of the market at that time, suggesting that dominant packers' market share was not simply gained through internal growth due to greater efficiencies, but through takeovers of competitors aimed at building their market power.

Landmark cases such as *Cargill v. Monfort* adopted a consumer welfare interpretation of antitrust law to pave the way for large meatpacking mergers that may have previously been deemed illegal.[7] For instance, pork processor Smithfield acquired some 40 businesses between 1981 and 2006, helping it become the world's largest pork packer.[8] Leading meatpackers have also spread their reach into more alternative markets, such as Perdue's 2011 acquisition of Coleman Natural Foods and 2015 acquisition of humane pork, lamb, and beef supplier Niman Ranch.

In addition to more mega-mergers, meatpackers maintain dominance by violating antitrust prohibitions on loyalty rebates and de facto exclusive dealing. Top meatpackers' tight and at times exclusionary relationships with wholesalers and dominant retailers prevent regional and niche meatpackers from accessing markets, even where there is demonstrated consumer willingness to pay a higher price for a humane or sustainable product.[9]

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[2] Maria L. La Ganga, "Competition in Meatpacking Is Dwindling as Three Big Companies Gain Market Share and Power. Smaller Competitors and State Regulators Are Alarmed." *Los Angeles Times*, April 22, 1990, https://www.latimes.com/archives/la-xpm-1990-04-22-fi-486-story.html.
[3] James M. MacDonald et al., "Consolidation in U.S. Meatpacking" (U.S. Department of Agriculture, February 2000), https://www.ers.usda.gov/webdocs/publications/41108/18011_aer785_1_.pdf?v=0.
[4] https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=7014.5
[5] Clement E. Ward, "Economics of Competition in the U.S. Livestock Industry," U.S. Department of Justice (Department of Agricultural Economics Oklahoma State University, January 2010), https://www.justice.gov/sites/default/files/atr/legacy/2011/09/09/AGW-15639-a.pdf.
[6] Maria L. La Ganga, "Competition in Meatpacking Is Dwindling as Three Big Companies Gain Market Share and Power. Smaller Competitors and State Regulators Are Alarmed." April 22, 1990.
[7] Cargill v. Monfort (U.S. Supreme Court, December 9, 1986).
[8] Emily Green, "Unpacking the Meat Industry: Changes in the Meat Supply Chain Have Brought Benefits, but Are Vulnerabilities a Cause for Concern?" Federal Reserve Bank of Richmond, 2020, https://www.richmondfed.org/-/media/richmondfedorg/publications/research/econ_focus/2020/q4/feature1.pdf.
[9] Niche Meat Processor Assistance Network, "Niche Meat Processor Assistance Network at 10 Years: Connection, Community, and Peer Problem-Solving for a Thriving Niche Meat Processing Sector," June 2018, https://www.nichemeatprocessing.org/wp-content/uploads/2018/08/NMPAN_V31.pdf.

For instance, the top three foodservice management corporations control more than three-quarters of all contracts to provide outsourced foodservices for colleges, business headquarters, sports stadiums, hospitals, and other institutions. These corporations purchase more than $40 billion worth of foods and goods annually, and regional economic development advocates are increasingly interested in leveraging purchases of so-called "anchor institutions" to invest in local economies, including regional food systems.[10] However, exclusionary loyalty rebate arrangements between dominant meat corporations and foodservice management corporations effectively set a cap on how much money cafeteria contractors can spend locally.

Leading foodservice management corporations generally require their client institutions to purchase 80% to 100% of their foods from "on-contract" vendors that have negotiated purchasing arrangements with the corporate parent corporation.[11] Virtually all these purchasing arrangements include steep cash-back rebates on all sales ranging from 5% to 50%.[12] Regional producers cannot afford to offer these kickbacks, inhibiting them from becoming contracted vendors. Other loyalty rebates or otherwise exclusionary conduct, such as slotting fee agreements with grocery stores, block market access for competing packers even in regional markets.

Consolidated control over this critical bottleneck in the supply chain creates inherent fragility, as seen during the pandemic, but it also promotes consolidation among livestock producers. Without rightsized infrastructure, smaller- and medium-sized producers, including those using more sustainable and regenerative practices, cannot access affordable further processing necessary to scale up and compete.[13]

More consolidated packers also used their market power to shift the terms of livestock dealing away from negotiated auctions or cash market sales to more marketing contracts.[14] Packers prefer predictable contracts to secure a steady supply of livestock for operating their plants at full capacity. Several economic studies find the increased use of marketing contracts is associated with lower cash market prices, though the magnitude varies.[15] This harms smaller independent producers who cannot secure contracts with large packers and suppresses livestock prices overall where contracts are tied to the cash market.

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[10] Puanani Apoliona-Brown et al., "Be-Trayed: How Kickbacks in the Cafeteria Industry Harm Our Communities -- And What To Do About It" (Real Food Generation, May 13, 2020), https://www.realfoodgen.org/kickbacks-report-2020; Chris Schildt and Victor Rubin, "Leveraging Anchor Institutions for Economic Inclusion" (PolicyLink, January 2015), https://www.policylink.org/sites/default/files/pl_brief_anchor_012315_a.pdf.
[11] Claire Fitch and Rachel Santo, "Instituting Change: An Overview of Institutional Food Procurement and Recommendations for Improvement" (Johns Hopkins Center for a Livable Future, February 1, 2016), https://clf.jhsph.edu/publications/instituting-change-overview-institutional-food-procurement-and-recommendations.
[12] Puianani Apoliona-Brown et al, Be-Trayed: How Kickbacks in the Cafeteria Industry Harm Our Communities -- And What To Do About It." May 13, 2020.
[13] Niche Meat Processor Assistance Network, "Niche Meat Processor Assistance Network at 10 Years: Connection, Community, and Peer Problem-Solving for a Thriving Niche Meat Processing Sector." June 2018.
[14] Clement E. Ward, "Economics of Competition in the U.S. Livestock Industry." January 2010.
[15] Ibid.; Clement E. Ward, "A Review of Causes for and Consequences of Economic Concentration in the U.S. Meatpacking Industry," *Current Agriculture, Food and Resource Issues*, no. 3 (January 6, 2002): pp. 1-28, https://doi.org/10.22004/ag.econ.45696.

Given this context, the USDA asks: *"What competition challenges and risks might new entrants face from high levels of market concentration or other relevant market conditions, and how can USDA and other Federal government agencies assist new entrants in mitigating those risks?"*

The Open Markets Institute argues that permissive merger policy puts successful entrants at risk of acquisition. Dominant meatpackers' abuse of market power and exclusive dealing also blocks market access for new entrants. To address these barriers we suggest:

- The Justice Department and the Federal Trade Commission issue stronger horizontal and vertical merger guidelines. These guidelines should be built on the framework of the 1968 merger guidelines with bright-line prohibitions on mergers based on market shares.[16]

- The Justice Department should also conduct retroactive merger investigations on some of the largest meatpacking acquisitions to determine if they violate antitrust laws and should be unwound.

- The Federal Trade Commission should affirm that exclusivity in all its forms is an unfair method of competition and ban exclusive arrangements by dominant firms with their customers, suppliers, or distributors as *per se* illegal. This includes loyalty rebates, disloyalty penalties, exclusionary payments, and exclusive contracts.[17]

- The Federal Trade Commission and Justice Department should also investigate and take action to address consolidation in foodservice and retailing, which can exert pressure down the supply chain for suppliers to consolidate. This includes retooling the principles of the Robinson-Patman Act to prevent dominant retailers from using their market power to extort better terms, discounts, and kickbacks.

- The USDA should prevent dominant packers from using their market power to compete with new entrants by squeezing livestock and poultry producers. To level terms of trade across the industry and create a baseline standard of fair farmer treatment, the USDA must issue strong rules to improve enforcement of the Packers & Stockyards Act. This includes asserting the agency's long-held standard that farmers do not need to prove harm to industrywide competition to pursue violations under the act, among other reforms.[18]

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[16] Open Markets Institute, "Public Comment to the Federal Trade Commission: The Urgent Need for Strong Vertical Merger Guidelines," December 2018, https://www.ftc.gov/system/files/documents/public_comments/2018/12/ftc-2018-0091-d-0017-163568.pdf.

[17] Open Markets Institute, "Re: Petition for Rulemaking to Prohibit Exclusionary Contracts," Open Markets Institute (Petition before the Federal Trade Commission, July 21, 2020), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f1729603e615a270b537c3d/1595353441408/Petition+for+Rulemaking+to+Prohibit+Exclusionary+Contracts.pdf

[18] Family Farm Action, "Build Back Better" (Family Farm Action, November 2020), https://farmaction.us/wp-content/uploads/2020/11/Family-Farm-Action-Roadmap-for-Rural-America-Biden-Harris-min_compressed.pdf.; Open Markets Institute, Family Farm Action Alliance, and Food & Water Action, "Restructuring America's Meat Industry for Worker and Consumer Safety and Farmer Prosperity" (Open Markets Institute, May 1, 2020),

Prioritizing Cooperative, Sustainable, and Small- to Midsize Plants

In addition to understanding the competitive landscape new meatpacking plants may face, the USDA requests information on *"what business and operating structures (*e.g., *cooperatives, farmer-owned facilities, sole proprietorship, limited liability company, B corporation, etc.) can sustain these operations?"*

Open Markets has studied cooperatives as a democratic alternative to investor- or family-owned firms. By shifting decision-making power and motivations from owners seeking short-term profit maximization to farmers or workers, co-ops tend to prioritize other goals including farmer or worker well-being and sustainability. This can improve resiliency; for instance, during the pandemic some cooperatively run grocery stores with a greater diversity of vendors and strong vendor relationships were able to mitigate product shortages. For decades, small meat producers have come together through cooperatives to invest in mobile slaughter processing or to reach the necessary scale for sustaining small plants.[19] Worker-owned cooperatives also build in mechanisms for promoting workplace democracy and ensuring workers have a say in creating stable and safe jobs.[20] As such, Open Markets endorses investing in cooperatives to improve meatpacking resiliency.

Additionally, the USDA should prioritize investing in businesses that support farmers using strong environmental stewardship practices. This includes preferencing funding to plants that source from farmers and ranchers using climate-friendly practices, as defined in the Climate Stewardship Act of 2019, Sec. 102(b)(2) and Sec. 103(a)(2)(B). To preserve natural resources and avoid pollution, all plants receiving American Rescue Plan funds should prove compliance with prevailing environmental regulations, and where possible the USDA should invest in technical assistance for plants to improve measures for disposing of effluent waste.

It is also critical that USDA prioritize true small- to medium-sized plants for investment and avoid directing funds to dominant firms. Small- or medium-sized plants that offer further processing or boxing of meats originally slaughtered or processed by a top 10 meatpacking corporation should not be prioritized for funding. And plants with over 300 workers or plants that process more than 5% of the U.S. supply of any given species should not be eligible for funds. The USDA should also prioritize supporting existing small- or medium-sized independent plants to improve or expand their facilities and better withstand pressure from dominant plants.

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https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ed68abba50b606faeff9147/1591118535464/20_04-Restructuring-Meat-Industry_16.pdf.

[19] Stephen Thompson, "Going Mobile: Co-Ops Operate Traveling Slaughter Units to Help Grow Local Foods Movement," *Rural Cooperatives* (U.S. Department of Agriculture - Rural Development, 2010), https://www.rd.usda.gov/sites/default/files/CoopMag-nov10.pdf.; Clement E. Ward, "Cooperative Meat Packing, Lessons Learned from Sterling Colorado Beef Company" (United States Department of Agriculture - ACS Research Report 6, 1981), https://ageconsearch.umn.edu/record/49822.

[20] Claire Kelloway, Alex Spring, and Garphil Julien, "Building Food Systems Resiliency Through Different Business Scales and Forms" (Open Markets Institute, July 2, 2021), https://www.openmarketsinstitute.org/publications/open-markets-institute-publishes-report-laying-out-how-usda-must-rebuild-food-system-resiliency.

Using Public Funds to Promote Fairness for Farmers, Workers

Numerous investigations have documented the ways dominant meatpackers use their market power to extract exploitative, deceptive, and restrictive terms from the farmers who supply them and the workers they employ.[21] In fact, major poultry corporations currently face private lawsuits alleging that they conspired to suppress prices paid to farmers and suppress wages paid to workers.[22] Consolidation and vertical integration in the pork industry, for example, wiped out not only smaller meatpacking plants but most small, independent hog farmers. With the shift to larger scale, contract hog production, about 70% of all hog farmers went out of business between 1992 and 2012.[23]

Working conditions and wages for meatpacking workers also deteriorated precipitously through the 1980s alongside increased consolidation in the industry, workplace safety deregulation, and union-busting. For instance, between 1980 and 1990, injury rates among meatpacking workers increased by 40%, driven largely by an increase in repetitive motion disorders such as carpal tunnel.[24] During roughly the same period, meatpacking wages fell from 15% above the national manufacturing average to 20% below it.[25]

Today, recruiting and training labor is consistently cited as a challenge for small plants, especially after meatpacking plants became outbreak hotspots for COVID-19. Plants of all sizes may bemoan labor shortages, and meatpacking is undoubtedly both dangerous and dirty work requiring a unique skill set, but at the same time plants can reduce turnover and attract more workers by improving the wages and working conditions in the meatpacking industry.

Thus, the USDA asks: *"What steps would require or encourage the creation of high-quality jobs for workers employed during construction and within the operational facility (e.g., prevailing wages and fair opportunities to collectively bargaining)?"*

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21 Christopher Leonard, *The Meat Racket: The Secret Takeover of America's Food Business* (New York: Simon & Schuster Paperbacks, 2015); Isaac Arnsdorf, "How a Top Chicken Company Cut Off Black Farmers, One by One," *ProPublica*, June 26, 2019, https://www.propublica.org/article/how-a-top-chicken-company-cut-off-black-farmers-one-by-one.; Lance Compa, Alison Parker, and Carol Pier, " Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants," ed. Jamie Fellner (Human Rights Watch, January 24, 2005), https://www.hrw.org/report/2005/01/24/blood-sweat-and-fear/workers-rights-us-meat-and-poultry-plants.; Rebecca Boehm, "Tyson Spells Trouble for Arkansas: Its Near-Monopoly on Chicken Threatens Farmers, Workers, and Communities "(Union of Concerned Scientists, August 11, 2021), https://www.ucsusa.org/resources/tyson-spells-trouble#top.

22 Leah Douglas and Christopher Leonard, "Is the US Chicken Industry Cheating Its Farmers?" *The Guardian*, August 2, 2019, https://www.theguardian.com/environment/2019/aug/03/is-the-us-chicken-industry-cheating-its-farmers.; Mike Leonard, "Tyson, Pilgrim's, Hormel to Face Poultry Worker Wage-Fixing Suit," *Bloomberg Law*, March 11, 2021, https://news.bloomberglaw.com/antitrust/tyson-pilgrims-hormel-to-face-poultry-worker-wage-fixing-suit.

23 William D. McBride and Nigel Key, "U.S. Hog Production From 1992 to 2009: Technology, Restructuring, and Productivity Growth" (U.S. Department of Agriculture Economic Research Service, October 2013), https://www.ers.usda.gov/webdocs/publications/45148/40364_err158.pdf.

24 Roger Horowitz, "'That Was a Dirty JOB!' Technology and Workplace Hazards in Meatpacking over the Long Twentieth Century," *Labor: Studies in Working-Class History of the Americas* 5, No. 2 (January 2008): pp. 13-25, https://doi.org/10.1215/15476715-2007-075.

25 Ibid.

We argue that the agency should:

- Require plants supported by American Rescue Plan funds to offer a minimum of $18 per hour for poultry plant workers and $20 per hour for red-meat-processing workers, nationwide. The USDA should also reiterate the White House's call to raise the national minimum wage to at least $15 per hour.

- Require plants supported by American Rescue Plan funds to provide paid medical and family leave. The pandemic has revealed how many workers feel pressure to continue working while sick or injured due to a lack of paid time off.

- Require recipients of American Rescue Plan funds to either enter into labor-peace agreements with organizations representing or seeking to represent a recipient's workforce or certify that the recipient has already entered into a collective bargaining agreement.

- Bar any plants supported with American Rescue Plan funds from retaliating against whistleblowers and require all recipients of these federal funds to establish and meet with independent worker health and safety committees.

- USDA should also advocate for the Occupational Health and Safety Administration to include meatpacking plant workers among those covered by enforceable, mandatory COVID-19 safety guidelines.

Finally, the USDA asks: *"Should USDA have the ability to block the sale of processing facilities built or invested in through federal funds to large or foreign-owned corporations?"* and *"What conditions should be placed on federally funded projects to ensure fair and equitable outcomes*?"

Open Markets suggests that:

- Yes, the USDA should be able to block the sale of processing facilities built or invested in through federal funds to dominant or foreign-owned corporations. Additionally, the USDA could discourage acquisitions of plants that received federal funding by requiring any grant recipients to return all federal funds if acquired by a dominant meatpacking corporation within 10 years of receiving said funds.

- For plants receiving American Rescue Plan funds that procure livestock through contracts, the contracts must not employ tournament payment system arrangements. These plants should also not be able to engage in any form of discriminatory or deceptive contracting as outlawed in the plain text of the Packers & Stockyards Act.

- Further, any contractual relationships that require farmers to build or invest in facilities or equipment to a plants' specifications for the purposes of supplying that plant should ensure contracts guarantee sufficient revenue and time commitment to ensure the ability of farmers to make returns on that investment.

In conclusion, the USDA can inject much-needed resiliency and competition into the highly consolidated meatpacking sector by investing in new or existing independent, small- and medium-sized processing facilities. The agency also has a duty to raise terms of trade and working conditions across the meatpacking industry by supporting businesses with strong labor protections and fair dealing with farmers. At the same time, the agency must establish and advocate for stronger labor, environmental, and antitrust standards across the industry, so that plants receiving American Rescue Plan funds are not at a disadvantage competing with larger plants that are not held to such standards. As Biden's Executive Order notes, this requires a whole-of-government approach, including action from federal antitrust enforcers and the USDA, as outlined in this comment. We look forward to these agencies' actions and are happy to answer any further questions.

Respectfully submitted,

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