

ASSESSING THE BIDEN ADMINISTRATION'S ACTIONS ON AGRICULTURE ANTITRUST

SPENCER PARTS

In President Biden's 2021 speech announcing his administration's approach to antitrust enforcement, the President sounded a revolutionary note: America had been doing antitrust wrong, and it was time for change.

"Forty years ago, we chose the wrong path," President Biden intoned, "following the misguided philosophy of people like Robert Bork." Now 40 years into the Borkian experiment in lax competition enforcement,¹ Biden pronounced it a failure. He promised "full and aggressive enforcement of our antitrust laws." Farmers had gotten a particularly raw deal in the free-market era of antitrust, the President noted: "[T]hey're seeing price hikes for seed, lopsided contracts, shrinking profits, and growing debt."²

In the executive order on antitrust that Biden announced in those remarks, he ordered the Secretary of Agriculture to act to improve treatment of small farmers by the corporations on which they depend for supplies and to market their goods. In particular, he suggested rulemaking on the scope of the Packers and Stockyards Act (PSA),³ an agricultural regulatory law, wading into a longstanding legal-political fight over the proper application of the antitrust laws in agriculture and the interpretation of the PSA.⁴

The action Biden promised in his speech has been relatively slow coming. Instead of the aggressive course correction Biden appeared to advocate for in his remarks, the USDA's enforcement approach under the Biden administration has been measured. Notably, the administration has shied away from directly confronting courts on whether private plaintiffs must prove harm to competition to successfully bring a PSA claim.

WHAT THE BIDEN ADMINISTRATION HAS DONE

The USDA has proposed two rules pursuant to the President's executive order. One rule, announced in May, requires poultry companies to provide more information to poultry growers than they do currently.⁵ These, "transparency requirements," as the USDA described them, are intended to help poultry growers become better-informed about the risks and opportunities of poultry-growing operations.⁶

Chicken farmers have complained in recent years that the modern system for growing poultry—in which chicken processors provide growers with chicks and feed, and then collect the full-grown chickens—gives chicken farmers little control over the success of their farming operations while, nevertheless, penalizing farmers for poor performance. Some farmers also claimed that chicken companies retaliated against them for

¹ See Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219 (1995) for a descriptive account of the rise of market efficiency as the lodestar of antitrust analysis.

² President Joseph R. Biden, Jr., Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>.

³ Exec. Order No. 14036, 86 Fed. Reg. 36987, 36992 (July 14, 2021), <https://www.federalregister.gov/d/2021-15069/p-81>.

⁴ I wrote in UChiBLR's inaugural print edition about that fight, arguing that the USDA's position on the proper interpretation of the PSA should receive deference from courts. See Spencer J. Parts, *Tyson and Leviathan: USDA Rulemaking and the PSA Harm-to-Competition Requirement*, 1 U. CHI. BUS. L. REV. (forthcoming 2022).

⁵ Transparency in Poultry Grower Contracts and Tournaments, 87 Fed. Reg. 34980 (June 8, 2022) (to be codified at 9 C.F.R. pt. 201).

⁶ USDA Targets Transparency and Competition in Suite of Actions to Promote Fair and Competitive Markets, USDA (May 26, 2022), <https://www.ams.usda.gov/press-release/usda-targets-transparency-and-competition-suite-actions-promote-fair-and-competitive>.

criticizing the company or attempting to organize farmer associations by giving them low-quality chicks, which eventually reduces the farmer's pay. Others have argued that the chicken companies force farmers to make expensive improvements to their facilities that the farmers did not anticipate when they first agreed to work with the chicken companies, which also hurts profitability.⁷

Under the proposed transparency rule, chicken companies would provide farmers a "Live Poultry Dealer Disclosure Document," including information on the supplies it provides to farmers, and also on profits made by other farmers with whom the company contracts.⁸ The USDA official responsible for the division that oversees competition enforcement, Jenny Lester Moffitt, suggested the new rule would help farmers "better manage their operations, monitor for risks, and snuff out abuses early."⁹

A second rule, announced last month, would prohibit certain market practices that are widespread in the agricultural industry under the PSA's ban on "unfair, unjustly discriminatory, or deceptive practice[s]." The rule includes an anti-discrimination provision aimed to benefit protected classes, as well as a prohibition on retaliating against farmers for sharing information amongst themselves or participating in farmer associations.¹⁰ The rule also prohibits certain specific deceptive contracting practices by meatpackers, such as giving growers false and pretextual reasons for terminating a contract.¹¹

This new rule is the most significant action the USDA has taken to create a paradigm shift in PSA enforcement, and to potentially reverse the trend towards consolidation in agriculture that President Biden identified as a problem. With the rule, the USDA is asserting its authority to regulate meatpackers more aggressively than it has done in recent years. The preamble to the proposed rule also argues forcefully that the PSA goes further than the antitrust laws in regulating the actions of meatpackers.¹²

In addition, the USDA has launched a complaint portal where farmers can report alleged violations of the Packers and Stockyards Act,¹³ and the Biden administration has also requested a 40% increase in the enforcement budget of the USDA division responsible for enforcing the PSA.¹⁴

Finally, the USDA released a lengthy report on competition in agriculture in May, identifying future actions the agency plans to take to improve competitiveness in the industry. The report placed special emphasis on investing in improved food distribution channels and using government procurement to support small farmers.¹⁵

WHAT THE BIDEN ADMINISTRATION HAS NOT DONE

⁷ See Transparency in Poultry Grower Contracts and Tournaments, 87 Fed. Reg. at 34982–34991 (describing poultry market structure and grower complaints).

⁸ *Id.* at 35022.

⁹ USDA Targets Transparency and Competition in Suite of Actions to Promote Fair and Competitive Markets, USDA (May 26, 2022), <https://www.ams.usda.gov/press-release/usda-targets-transparency-and-competition-suite-actions-promote-fair-and-competitive>.

¹⁰ Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 Fed. Reg. 60010 (Oct. 3, 2022) (to be codified at 9 C.F.R. pt. 201).

¹¹ *Id.* at 60010.

¹² *Id.* at 60014.

¹³ FarmerFairness.gov.

¹⁴ USDA FY2023 Budget Summary, USDA (Mar. 28, 2022), <https://www.usda.gov/sites/default/files/documents/2023-usda-budget-summary.pdf>.

¹⁵ Agricultural Competition: A Plan in Support of Fair and Competitive Markets, USDA (May 2022), https://www.ams.usda.gov/sites/default/files/media/USDAPlan_EO_COMPETITION.pdf

Despite the strong language the USDA is using, there is reason to doubt that it will be able to create a paradigm shift in PSA enforcement at the pace it is currently moving. For one, some actions that President Biden mentioned in his speech have been conspicuously absent. The USDA has not, for example, made a rule stating its position that a plaintiff need not show “harm to competition” to prove a violation of the PSA. Nor has it restricted use of the “tournament system,” a method for paying chicken growers in which growers’ compensation is determined by their rank among other growers in the region.¹⁶ (Chicken farmers complain that this payment system is unfairly punitive and unpredictable, especially since growers have little control over the key determinants of the health of their flocks.)

The USDA has promised to eventually publish a rule on “when a showing of harm to competition is—and is not—required under sections 202(a) and (b).”¹⁷ But seeing as no specific timeline was offered, it seems plausible that harm to competition rulemaking will fall by the wayside, perhaps relegated to the same fate as in the Obama administration: eleventh-hour rulemaking that is quickly reversed by the next administration.¹⁸

The actions the USDA has taken are likely to protect farmers from certain troubling practices—the chicken contracting regulation and the anti-retaliation provision respond directly to concerns farmers have raised. But they do not meaningfully shift PSA enforcement away from a Chicago School-antitrust approach that fosters efficient markets even if those markets concentrate land and agricultural resources in relatively few hands, and make it hard for small farmers to survive.

Even the civil rights-type provision in the most recent rule fits this paradigm.¹⁹ After all, it forbids conduct that is essentially economically irrational: considering non-economic factors when making market decisions.

For those who favor more aggressive enforcement of the PSA, the Biden Administration’s enthusiasm is a welcome development. It has helped create new intellectual ferment around PSA enforcement and produced several legal analyses arguing that the PSA forbids more than conduct that “harms competition.”²⁰

But the Administration as of yet has failed to create the paradigm shift in PSA enforcement that President Biden indicated he is looking for in his speech. It has failed so far to take on the courts that have required

¹⁶ See *Inclusive Competition and Market Integrity Under the Packers and Stockyards Act*, 87 Fed. Reg. at 60014 (explaining operation of tournament system and its prevalence in chicken markets).

¹⁷ *Id.* at 19.

¹⁸ The Obama Administration’s proposed rule asserted that a plaintiff need not prove harm to competition to prove a violation of the PSA, and gave several examples of conduct that violates the PSA regardless of competitive harm or lack thereof. *Undue Practices and Undue Preferences in Violation of the Packers and Stockyards Act*, 81 Fed. Reg. 92703, 92722 (Dec. 20, 2016). The Trump Administration withdrew that rule, and issued a separate final rule in December 2020 that does not take a position on the harm to competition requirement. *Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act*, 85 Fed. Reg. 79779 (Dec. 11, 2020).

¹⁹ See *Inclusive Competition and Market Integrity Under the Packers and Stockyards Act*, 87 Fed. Reg. at 60016 (proposed § 201.304(a)) for this provision and the USDA’s rationale for it.

²⁰ The preamble to the September proposed rule makes such an argument, *Inclusive Competition and Market Integrity Under the Packers and Stockyards Act*, *supra* note 9, at 22–26, as does the USDA’s May report, *Agricultural Competition*, *supra* note 12, at 17, 19, as well as a new study spurred by the USDA’s interest in the topic. Michael Kades, *Protecting livestock producers and chicken growers: Recommendations for reinvigorating enforcement of the Packers and Stockyards Act*, WASHINGTON CENTER FOR EQUITABLE GROWTH (May 2022), <https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/>.

“harm to competition” and so has acquiesced in their view that the PSA is intended to promote economic efficiency rather than protect small farmers.

In the PSA, as in other areas of antitrust reform, the Biden Administration must do more than express dissatisfaction with the status quo if it wants to change enforcement philosophy in a durable way. It must put forward a vision of competition policy that is an intellectual match for the Chicago School²¹ status quo, and put the full weight of executive authority behind that vision.

²¹ See Jacobs, *supra* note 1, at 227.