Policy Approaches to Address Problems Associated with Consolidation and Vertical Integration in Agriculture

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Introduction

For observers of the agricultural sector, the numbers have become familiar: 80% of steer and heifer slaughter is controlled by four firms; 57% of hog slaughter is controlled by four firms; 75% of seed corn and 60% of soybean seed sales are controlled by four firms, while these same firms control large shares of the agricultural chemical market. Just as these industries have become more horizontally consolidated, they have also increased the use of vertical arrangements. Seeming to model itself on the poultry industry, hog packers now have 80% to 90% of their supply tied up in some type of vertical arrangement, while experts report a steep increase in the use of marketing and production contracting in grains. And these are mere examples of the increased consolidation and vertical integration in agriculture.

Federal policy makers have a long history of addressing problems in the agricultural market place resulting from market deficiencies related to such things as lack of transparency or the related problem of unequal bargaining power. Examples include the Commodity Exchange Act, Livestock Mandatory Reporting Act, U.S. Grain Standards Act, establishment of marketing orders for many perishable commodities, Packers and Stockyards Act, Perishable Agricultural Commodities Act, Agricultural Fair Practices Act, Capper Volsted Act (to recognize cooperatives), and the commodity promotion (or checkoff) acts. These legislative initiatives respond to Congress' determination that without legislative action, the unregulated marketing of agricultural commodities would yield unfavorable results, such as unfair treatment of producers or curtailing the growth of a particular sector. Just as Congress has acted to facilitate fair and reasonable market activity in the past, it could respond to the recent changes in the market structure by passing new policy to protect market participants in this new industry structure.

The essential problem with consolidation and vertical integration, when taken too far, is that such trends reduce choice in the marketplace. Problems arise when one player has choices and the other player does not. The lack of choice can lead to unequal bargaining power in business relationships. With unequal market power, the more dominant firm will almost always take advantage of the more vulnerable party by squeezing price, shifting liabilities, or demanding certain things without paying an associated price. Consolidation and vertical integration provide this type of setting.

The question for policy makers is how to deal with the real possibility of abusive practices stemming from consolidation. Before discussing ways to actively address this question, one less

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obvious policy option should be noted. People can always choose to do nothing. One could look at the industry environment and the current rules that help determine activity in the industry and decide that the best option is to let things play out. One cautionary comment to this choice when looked at in the context of the current agriculture structure: Just as with other policy approaches, people need to be concerned with unintended consequences. What are the unintended consequences to Rural America and consumers of continuing to allow increased concentration and unrestrained vertical integration in agriculture?

If, on the other hand, one chooses to change the rules, there are a number of ways to think about different policy initiatives. This outline presents this policy question in terms of different ways to affect the power imbalance found in the food and agriculture sector as a whole. The first two techniques go to the heart of the problem by attempting to equalize the bargaining power of the players, either by (1) reducing the power of the stronger party by affecting the structure of the industry, or (2) increasing the power of the weaker party by encouraging collective bargaining. The second two techniques are closely related, but in a way accept the fact that the power imbalance exists. These techniques try to minimize the negative consequences of too much consolidation by (3) regulating the behavior of the participants, and (4) improving the enforcement of competition or trade practice laws.

1. Affect the structure of the industry. The main argument in support of this approach is that it will decrease the power of one of the players because it will provide more choices in the market place. These laws do this by limiting what certain firms may own or control. The main argument against this policy is that the government might hinder the most efficient means of production, and in any case, the government should not be in the business of dictating who owns what. Because these policies tend to have the greatest effect on the market participants, they can also be the most controversial.

    a. Prohibit certain types of businesses owning certain types of other businesses. The example here is prohibiting packers from owning livestock. (S. 27, H.R. 719, 108th Cong.). A similar approach was utilized in 1920 when the federal government forced packers to agree to no longer own or control the marketing channels of that day, including the railroads and stockyards. The packer consent decree of 1920 enjoined the Big Five meatpackers "both severally and jointly from (1) holding any interest in public stockyard companies, stockyard terminal railroads, or market newspapers, (2) engaging in, or holding any interest in, the business of manufacturing, selling or transporting any of 114 enumerated food products [principally fish, vegetables, fruit, and groceries], and 30 other articles unrelated to the meat packing industry; (3) using or permitting others to use their distributive facilities for the handling of any of these enumerated articles, (4) selling meat at retail, (5) holding any interest in any public cold storage plant, and (6) selling fresh milk or cream.". (*Swift & Co.*). This policy against certain types of vertical integration attempts to thwart market manipulation and encourage access to the market for other participants.

    b. Merger Review. A similar approach are the merger provisions included in the Clayton Act where the Department of Justice (DoJ) or Federal Trade Commission

(FTC) may block a merger or require that for a firm to acquire another firm, it must spin off certain assets first. (U.S. Department of Justice). As a timely example of where this remedy may apply, Smithfield Foods, the nation's largest hog processor, proposed to purchase the pork processing facilities of Farmland Industries, a coop undergoing bankruptcy. Because of the magnitude of the acquisition, Smithfield was required to file merger review documents with the DoJ. A number of federal policy makers, especially those from the upper Midwest, have urged DoJ to review the proposed acquisition closely for the possible negative effects it could have on the hog market. (Shafer).

c. Break up firms. This approach may be the most drastic because it forces firms to divest interests that it already owns. The Sherman Act provides the Department of Justice this power, which it has exercised in various degrees in cases such as the break up of AT&T and in the ongoing Microsoft case. (Microsoft documents).

d. Prohibit certain types of business entities from owning farmland or engaging in farming activities. A number of states have laws on the books that attempt to encourage family farm ownership of agricultural assets by prohibiting certain types of corporations from owning or controlling farms. Recently, however, parties have challenged the constitutionality of these laws on the basis of the dormant commerce clause. In essence, the claimants argue that the state legislatures either intended or that the laws have the effect of discriminating against out-of-state businesses. Significantly, the Eighth Circuit recently held that Amendment E to South Dakota's constitution, which prohibits corporations, subject to certain exemptions, from acquiring land used for farming, was unconstitutional because it had a discriminatory purpose. (*South Dakota Farm Bureau*).

2. Increase bargaining rights. This approach attempts to increase the bargaining power of the party who traditionally has relatively little choice in the marketplace.

   a. Cooperative bargaining. The Capper Volsted Act provides producers of agricultural products the right to collectively bargain, and in essence, agree to prices among themselves, so long as the agreement does not "unduly enhance" prices. 7 U.S.C. § 291. The law provides limited immunity from the antitrust laws. The trade-off is that (1) the coop must operate in a democratic manner, i.e., one member-one vote, regardless of the amount of investment *or* (2) the return on investment is limited to 8% per year; and in any case, the majority of the coop's business must come from members. Beyond the antitrust exemption, another advantage enjoyed by coops is that the income for a coop is taxed on either the coop or producer level. 26 U.S.C. § 1382 (Internal Revenue Code, subchapter T). This differs from regular subchapter C corporations that pay tax on income at both levels. (Note that the most recent tax cuts somewhat limit this advantage because it reduced taxes on subchapter C dividends). Many feel that producers seriously underutilize the opportunities afforded under the Capper Volsted Act.

Nevertheless, critics of cooperatives complain that some coops are not responsive to producer's needs. Meanwhile coops point out that their viability is threatened by the burgeoning of such business organizations as limited liability companies because coops have trouble competing for capital.

b. Protecting producers' rights to form coops. Agricultural Fair Practices Act. Congress passed the Agricultural Fair Practices Act (AFPA) to protect a producer's right to join an association of producers. 7 U.S.C. §2301. The Act generally prohibits processors from discriminating against or intimidating producers who want to join or are members of an association. *Id.* at § 2303. A major limiting factor in the AFPA has become known as the "disclaimer clause." (Frederick). This clause states that (1) a processor can refuse to deal with a producer for any reason other than the producer's relationship to an association, and (2) a processor may refuse to deal with any particular association. (*Butz*). This provision has largely gutted the law because processors can usually point to some "legitimate" reason that it chooses not to deal with a producer. Legislative attempts have been made to address this problem. For instance, the Senate Chairman's mark of the 2002 farm bill included a rewrite of the AFPA that deleted the disclaimer clause and made it unlawful for processors to fail to bargain in good faith with an association of producers. (S. 1628, 107th Cong, title X, sec. 201(b)(8)). No major amendments, however, have been made to the Act since its inception in 1968.

3. Regulate the behavior of the participants. This approach does not affect the actual structure of the industry, but tries to limit the negative consequences of a consolidated structure by regulating the behavior of the participants. This approach addresses the problem of lack of bargaining equality because it regulates what can or cannot occur within the business relationship.

a. Contract regulation. In the late 1990's, a number of state Attorneys General created model legislation entitled the Producer Protection Act (PPA). State and federal policy makers have looked to the PPA for ideas on how to regulate agricultural contracting. The following lists some of the issues dealt with in the PPA.

   i. Implied obligation of good faith. This obligation generally requires that the parties to the contract deal with each other honestly. For example, Minnesota state law implies a promise of good faith by all parties to an agricultural contract. Minn. Stat. § 17.94 (2002).
   ii. Disclosure of risks. This requires that the contract must be accompanied by a clear written disclosure statement setting forth certain contractual rights and obligations of the producer. For instance, the contract might need to make clear the factors to be used in determining payment or who bears responsibility for possible environmental liability. Minn. Stat. 17.91 (requiring agricultural contracts to be "accompanied by a clear written disclosure setting forth the nature of the material risks faced by the producer if the producer enters into the contract.").
   iii. Readability. This encourages the drafter of the contract to avoid overly complex language so that a person of average intelligence can understand the terms of the contract. The PPA includes a provision that would allow a state official, typically the state agriculture department or state attorney general's office, to review the contract for readability.
   iv. Right to review the contract. The producer will have at least three days to review and cancel the contract. This provides the producer protection from being pressured into a contract without the ability to seek counsel. This approach may work well for production contracts and longer-term marketing contracts, but it may not suit spot market sales, as the buyer may need to hedge at the same time as the purchase or may want to sell the product within the three day window. Minn. Stat. § 17.941 (2002).
   v. Confidentiality Provision Prohibited. This section prohibits the use of any type of confidentiality clause. The 2002 farm bill included a provision stating that parties to certain poultry and livestock contracts have the right to share their contract with family, close advisors, and federal and state agencies, no matter what the contract says about confidentiality. (codified at 7 U.S.C. § 229b). As an example of state law, Iowa law not only voids confidentiality clauses in production contracts, but actually makes it a criminal fraudulent practice for a contractor to execute a production contract that includes a confidentiality clause. Iowa Code ch. 202 (2001).
   vi. Production contract liens. This allows the producer to file a lien that will have a priority over other liens filed by the contractor's lendors, much like a veterinarian's or mechanic's lien, for example Iowa Code §579A (2001). As with most laws that provide lien protections, the key to this provision is that the farmer must take the affirmative step of filing the lien.
   vii. Investment requirements. If the producer makes a certain amount of investment in relation to the contract ($100,000), the firm may not terminate the contract without providing at least 90 days notice. If the

contractor does terminate the contract, it would need to reimburse the farmer for his or her lost investment. Minnesota law requires contractors to provide 180 days notice before termination and to reimburse the producer "for damages incurred by an investment in buildings or equipment that was made for the purpose of meeting minimum requirements of the contract" if no breach has occurred, and if the contractor does allege a breach, the contractor must provide 60 days for the producer to cure the breach. Minn. Stat. § 1792 (2002).

viii. Right to join associations. Producers may not be discriminated against for choosing to join a bargaining association. The main difference between this PPA provision and the Agricultural Fair Practices Act is that the PPA provision does not include the disclaimer clause discussed above.

ix. Federal and State policy makers have introduced a number of pieces of legislation that incorporate at least some of the PPA provisions.

1. Federal legislation. S. 20 (107th Cong.); S. 1628, title X (107th Cong.).
2. State legislation. Arkansas H.B. 2573 (2003); Georgia H.B. 1498 (2002) and S.B. 533 (2002); Illinois H.B. 264 (2003); Iowa H.F. 547 (2001) and S.F. 254 (2001); Kansas S.B. 355 (2001); Minnesota H.F. (2001) ; Mississippi S.B. 2987 (2002); Missouri H.B. 1967 (2002); Oklahoma S.B. 162 (2001).

b. Prohibit unfair practices. The most familiar example here is the Packers and Stockyards Act of 1921. (7 USC 181). Beyond providing financial protection for livestock sellers, this law generally prohibits packers, live poultry dealers, swine production contractors, livestock auction markets and livestock dealers from engaging in unfair, unjustly discriminatory or unduly preferential practices. The scope of this law has been narrowed by federal court application of the "rule of reason" to determine what is unfair. Essentially, this rule looks at a practices intent and the likelihood that the practice will cause competitive injury to decide whether a it violates the Act. (*Armour & Co.*) This rule assigns the plaintiff the daunting task of proving likelihood of injury, which can be rebutted by a case made by the packer that the practice is simply a legitimate business practice. For example, a smaller producer may argue that a packer unduly prefers another producer when it provides the other producer premiums based solely on volume. The packer would argue that the practice is justified because it wants a large, consistent supply for its plants. Courts have also limited the scope of the P&S Act by stating that the P&S Act was not intended to affect parties' freedom of contract. (*Jackson*). Nevertheless, critics of the USDA's Packers and Stockyard's Program point out that legislative history indicates that Congress intended the P&S Act to be used more aggressively than any other law in protecting producers and consumers. (Current Legislation). Some argue that USDA could more forcefully utilize the rulemaking process to make clear what practices are unfair. (Stumo). Federal policy makers could also amend the Act to make it more effective. The 2002 farm bill did make one significant change to the P&S Act by providing producers with hog production contracts P&S Act protections. P.L. 107-171 § 10502 (codified at throughout the P&S Act, 7 U.S.C. §§ 181).

c. Limit what types of contracts a firm may enter into. For instance, a law could provide that a firm cannot buy more than a certain percentage of their supplies in closed contracts, i.e., the firm must buy a certain amount on the cash (or spot) market. S. 325 (108th Cong.). This approach attempts to ensure a market for producers who choose not to use contracts. The legislation also addresses concerns that the spot market is becoming so thin that it is prone to manipulation and is no longer a reliable bell weather for supply and demand.

d. Provide more transparency in the marketplace. One of the essential elements in any competitive market is access to information. Given increasing consolidation and vertical integration, many producers fear that they no longer have access to critical market information. In the late 1990's a determined movement to improve price reporting in the states resulted in the federal Livestock Mandatory Price Reporting Act of 1999. (7 U.S.C. 1635). This law provides a fairly specific regime of reporting and public dissemination of price information for cattle, hogs, and sheep. Reception of the enforcement of the law has been mixed with some producers concerned that even less information about certain markets is now available. The law will sunset in October 2004, so federal policy makers will need to consider reauthorization over the next year. The Mandatory Price Reporting Act also included a provision requiring USDA to establish a swine contract library to provide producers information about contractual terms in swine marketing contracts. 7 U.S.C. 198 thru 198b. USDA recently announced the final rule to implement this program. (Swine Packer Marketing Contracts). The 2002 Farm Bill addressed the transparency of contract information by providing that no matter what the contract says, parties to a livestock or poultry contract have the right to share their contract with their advisors and family members. 7 U.S.C. § 229b.

4. Improve the enforcement mechanism. Many argue that strong laws already exist and that the most effective approach to improving competition policy is not to change the substantive law, but to improve the enforcement regime. Currently three different agencies in the federal government serve as the primary enforcers of competition and trade practice policy in agriculture. The Department of Justice enforces the Sherman Act and Clayton Act, the Federal Trade Commission enforces the FTC Act (designed primarily to protect consumers) and the USDA enforces the P&S Act, the Perishable Agricultural Commodities Act and the Agricultural Fair Practices Act.

   a. Possible changes in federal enforcement. Some have suggested that the enforcement of certain laws should be handed over to different agencies. For instance, in the past some have argued that the DoJ should enforce the P&S Act because of its expertise in antitrust litigation. Others, however, point out the fact that DoJ does not promulgate rules and that given the other sectors on which DoJ focuses, it may not spend the required resources for effective enforcement. The

Senate Chairman's Mark of the 2002 Farm Bill (S. 1628, title X, 107^{th} Cong.) included a provision that would have reorganized enforcement within the USDA by creating the Office of Special Counsel for Competition Matters. This office would have provided the Secretary the ability to consolidate the enforcement of competition and trade practice laws under one roof. Another suggestion is to allow USDA to seek outside counsel for large, complex competition cases.

b. Private enforcement. Some argue that as an alternative to government enforcement of the laws, policy could encourage private actors to enforce the law and serve as "private attorneys general." These parties point to the Sherman Act and state consumer protection laws that provide for attorney's fees or treble damages if the plaintiff is successful. These types of provisions would encourage the private bar to take cases that otherwise may not be economically viable. Currently the P&S Act does include a private right of action for direct damages, but does not include attorney's fees or any type of increased damages. For instance, if a farmer suffers $5,000 of injury caused by a practice prohibited by the P&S Act, but it would cost $6,000 in legal fees to litigate the matter, the farmer is likely to simply take the $5,000 loss. If, however, the award includes attorney fees, the farmer is much more likely to defend his statutory right against unfair practices.

c. Dispute resolution issues. State or federal policy can affect how a matter is resolved if a dispute arises. These policies attempt to address the possibility that agricultural contracts written by a more powerful party may make it difficult for the weaker party to enforce have any say in the dispute resolution mechanism. For instance, federal legislation has been introduced to prohibit the use of mandatory arbitration clauses in livestock and poultry contracts. S. 91, 108^{th} Cong. This responds to concerns that a producer may feel compelled to enter into contracts that take away the farmer's right to go to court and would force the parties into arbitration. Some have complained that some of the arbitration programs are skewed in favor of the writer of the contract. The chief criticism of this approach is that it takes away the parties' right to limit the risk of high litigation costs. Other proposals that ensure that producer dispute resolution rights are protected include (1) requiring that certain contracts are controlled by the producer's state law; or (2) requiring that if the dispute goes to court, the case must be held in the producer's state, as opposed to the processor's state which may be hundreds or thousands of miles away.

Conclusion

Policy makers who represent agricultural areas face the specter of a quickly changing industry structure with the dual forces of horizontal consolidation and vertical integration. Because these forces tend to increase the disparity of bargaining power, they may put certain market participants, especially producers, at risk of unfair. To address the resulting unequal bargaining power, policy makers may choose to enact policy that (1) reduces the power of the stronger party by affecting the structure of the industry; (2) increases the power of the weaker party by encouraging collective bargaining; (3) regulates the behavior of the participants, or (4) improves the enforcement of competition or trade practice laws.

Bibliography

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Donald A. Frederick, *Agricultural Bargaining Law: Policy in Flux*, 43 ARKANSAS LAW REVIEW 679, 685 (1990)

Jackson v. Swift Eckrich, Inc., 53 F.3d 1452 (8th Cir. 1995) (finding that the P&S Act did not provide turkey grower the right to obtain the same kind of contract offered other turkey growers). *See also IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (examining a particular contract term that provided the packer a right of first refusal, and finding that it did not violate the P&S Act because "there [was] no substantial evidence to support the notion that the right of first refusal actually suppressed or reduced competition").

Microsoft case documents, http://www.usdoj.gov/atr/cases/ms_index.htm provides an extended list of legal documents related to this case.

Producer Protection Act, www.flaginc.org/pubs/poultry/poultrypt5.pdf provides text of the PPA.

Amy Shafer, *Farmers Worry About Smithfield Purchase of Farmland Foods*, THE CINCINNATI ENQUIRER, Jul. 21, 2003.

South Dakota Farm Bureau v. Hazeltine, -- F.3d – (8th Cir. Aug 19, 2003); *see also Smithfield Foods, Inc. v. Miller*, 241 F.Supp.2d 978 (S.D. Iowa 2003) (holding that an Iowa law that prohibited certain pork processors from owning hogs violated the dormant commerce clause because it had a facially discriminatory purpose).

Michael C. Stumo & Douglas J. O'Brien, *Antitrust Fairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE JOURNAL OF AGRICULTURAL LAW 91 (2003) (concluding that the legislative history of the P&S Act provides USDA more discretion to define further the definition of "unfair").

Swine Packer Marketing Contracts; Contract Library, 68 Fed. Reg. 47,801 (to be codified at 9 C.F.R. 206); *see also* http://scl.gipsa.usda.gov/ (USDA website containing swine contract library links)

U.S. v. Swift & Co., 286 U.S. 106 (1932).

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Appendix A
Recently passed federal laws.

1. The 2002 Farm Bill included two provisions dealing with competition issues in agriculture.
   a. The bill brought hog production contractors (those who contract with a grower to raise the contractor's hogs) under the Packers and Stockyards Act. (codified throughout the P&S Act at 7 U.S.C. §§ 181 *et seq.*). Before this amendment, those who raised hogs owned by others had no statutory protections under the P&S Act.
   b. The bill also included a provision stating that parties to certain poultry and livestock contracts have the right to share their contract with family, close advisors, and federal and state agencies, no matter what the contract says about confidentiality. (codified at 7 U.S.C. § 229b).

2. The 2003 omnibus appropriations bill (H.J. Res. 2, Division A, Title I, 108th Cong.) provided USDA $4.5 million to conduct studies on packer ownership and captive supplies. The Report Language accompanying this appropriation stated that the results of the study must be reported within 24 months of enactment. USDA, Grain Inspection, Packers and Stockyards Administration (GIPSA) published a notice and request for comments on the framework of the study on May 30, 2003. Livestock and Meat Marketing Study, 68 Fed. Reg. 32455 (2003).

Appendix B
Legislation introduced in the 107th (2001 to 2002) and 108th (2003 to 2004) Congresses to address problems arising from agricultural consolidation and vertical integration.

108th Congress

1. S. 27; H.R. 719. Ban on packer ownership. Amends the P&S Act to make it unlawful for a packer to own, feed, or control livestock prior to seven days before slaughter; exempts smaller packers as well as cooperatives that are majority owned by active cooperative members that own and raise livestock.

2. S. 91. Prohibition on forced arbitration in agricultural contracts. Provides that if a livestock or poultry contract provides for the use of arbitration to resolve a controversy under the contract, arbitration may be used to settle the controversy only if, after the controversy arises, both parties consent in writing to use arbitration to settle the controversy.

3. S. 325. Require use of spot market. Requires packers to purchase 25% of their slaughter on the spot market, on a per day, per plant basis; requires packers owned by cooperatives to purchase 12% of their supply on the spot market; exempts packers that own only one plant.

4. S. 1044. Captive Supply Reform Act. Prohibits use of livestock marketing agreements unless the contract contains a firm base price, is offered for bid in a public manner, and provides for contracts with a maximum of 40 cattle or 30 swine; allows for the use of futures contracts and premiums based on carcass quality.

5. H.R. 582. Packers and Stockyards Administrative Enforcement in Poultry. Amends P&S Act to provide USDA administrative enforcement authority over live poultry dealers (integrators); provides growers of breeding hens protections under P&S Act.

107th Congress

1. S.20. Securing the Future for Independent Agriculture Act.
    a. Prohibits unfair, unjustly discriminatory, or deceptive practices in the marketing, receiving, purchasing, sale, or contracting for the production of any agricultural commodity; provides whistleblower protections to those who report unlawful conduct by a contractor; prohibits the use of the right of first refusal in agricultural commodity contracts; expressly prohibits price discrimination in agricultural commodity transactions; establishes a Farmer and Rancher Claims Commission to consider claims made under the Act;
    b. Provides that before a merger or acquisition with another agribusiness, a large agribusiness must file merger documents with the Secretary of Agriculture, and the Secretary must report the possible impacts and remedies to address negative consequences of the proposed merger DoJ and FTC;
    c. Requires large agribusinesses to file annually a report with USDA that describes the strategic alliances, ownership in other agribusiness firms or agribusiness-related

firms, joint ventures, subsidiaries, brand names, and interlocking boards of directors with other corporations, representatives, and agents that lobby Congress on behalf of the covered person;

   d. Includes a number of contract regulations for agricultural contracts, such as a requirement of good faith, disclosure and readability standards, a producer's 3-day right to review and cancel the contract, prohibition of confidentiality clauses, provision for producer contract liens, and the ability to recoup damages from large investments required by production contracts;
   e. Amends the Agricultural Fair Practices Act to require bargaining in good faith, deletes the disclaimer clause, provides for the accreditation of producer associations, and provides for the assignment of association dues.

2. S.142; H.R. 3803. Prohibition of Packer Ownership of Livestock. *See supra* S. 27 (108th Cong.).

3. S. 1076. Agricultural Competition Enhancement Act.
   a. Establishes within USDA a Special Counsel for Competition Matters to analyze agribusiness mergers and bring civil actions under the Act; provides Special Counsel the authority to review agribusiness mergers with respect to its effects on producers and family farmers and to file suit to block or change the provisions of the merger;
   b. Prohibits unfair, unjustly discriminatory, or deceptive practices in the marketing, receiving, purchasing, sale, or contracting for the production of any agricultural commodity;
   c. Requires large agribusinesses to file annually a report with USDA that describes the strategic alliances, ownership in other agribusiness firms or agribusiness-related firms, joint ventures, subsidiaries, brand names, and interlocking boards of directors with other corporations, representatives, and agents that lobby Congress on behalf of the covered person;
   d. Prohibits confidentiality clauses in livestock and grain production contracts;
   e. Amends P&S Act to provide USDA administrative enforcement authority over live poultry dealers (integrators); provides growers of breeding hens protections under P&S Act;
   f. Establishes within the Antitrust Division of DoJ an Assistant Attorney General for Agricultural Antitrust Matters.

4. S. 1628, title X. Competition Title of the Senate Chairman's Mark of the 2002 farm bill.
   a. Establishes an Office of Special Counsel for Competition Matters in USDA to investigate and prosecute violations of this Act and any other Act that the Secretary determines to be appropriate and serve as a liaison between USDA and the Department of Justice and the Federal Trade Commission with respect to competition and trade practices in the food and agricultural sector;
   b. Requires large agribusiness to file reports annually with USDA $100,000,000 shall annually file with the Secretary that describes the strategic alliances, ownership in other agribusinesses, joint ventures, subsidiaries, brand names, and interlocking boards of directors with other covered persons

c. Rewrites the Agricultural Fair Practices Act to prohibit any unfair, unjustly discriminatory, or deceptive practice in the marketing or contracting for production of agricultural commodities; deletes the "disclaimer clause"; makes it an unfair practice to fail to disclose certain terms in an agricultural contract;
d. Provides certain regulations of production contracts, including: the 3-day right to review and cancel; creation of production contract liens; ability for a contract grower to recoup investment required by production contract;
e. Provides for a private right of action and attorney's fees for those injured by violations of the Act; provides that venue and choice of law will be the state in which the producer resides; gives USDA the authority to appoint outside counsel for litigation;
f. Allows for a producer to assign proceeds from sales or production contracts to an association of producers, and;
g. Amends P&S Act to provide USDA administrative enforcement authority over live poultry dealers (integrators); provides growers of breeding hens protections under P&S Act.

5. S.2021. Captive Supply Reform Act. *See supra* S. 1044 (108th Cong.).

6. S. 2867; H.R. 5247. Require Use of Spot Market. *See supra* S. 325 (108th Cong.).

7. H.R. 231. Packers and Stockyards Administrative Enforcement in Poultry. *See supra* H.R. 582 (108th Cong.).

8. H.R. 1526. Agriculture Competition Enhancement Act of 2001. Requires that before a large agribusiness may acquire or merge with another agribusiness, the agribusiness must file notice with USDA; prohibits agribusiness mergers if it will negatively affect the price received by producers; establishes an Office of Special of Special Counsel for Agriculture within DoJ.

9. H.R. 3810. Livestock Ownership Fairness Act of 2002. Prohibits packers from owning livestock; requires large packers to file notice with USDA before merging with other agribusinesses.

10. H.R. 5357. Agricultural Competition Enhancement Act. Includes most provisions of S. 1076 (107th Cong.).

Appendix C

Bibliography of law review articles dealing with issues surrounding agricultural consolidation and integration.

1. Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 WIS. L. REV. 531 (2000).

2. Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 DRAKE L. REV. 361 (1997).

3. Neil D. Hamilton, *Broiler Contracting in the United States – A Current Contract Analysis Addressing Legal Issues and Grower Concerns*, 7 DRAKE J. AGRIC. L. 43 (2002).

4. Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. L. REV. 1051 (1995).

5. Christopher R. Kelley, *Notes on an Agricultural Production Contract, with a Model Contract Attached,* 2001 ARK. L. NOTES 11 (2001).

6. Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449 (1999).

7. Edward P. Lord, *Fairness for Modern Farmers: Reconsidering the Need for Legislation Governing Production Contracts*, 33 WAKE FOREST L. REV. 1125, (1998).

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