RURAL ADVANCEMENT FOUNDATION INTERNATIONAL - USA

ADDRESS
P.O. BOX 640
PITTSBORO, NC 27312

PHONE
919.542.1396

WEB
RAFIUSA.ORG

May 16, 2022
Docket Number: AMS-AMS-22-0026

Jaina Nian
Agricultural Marketing Service, USDA,
Room 2055-S, STOP 0201
1400 Independence Avenue SW
Washington, DC
20250-0201

RAFI-USA is a nonprofit organization which challenges the root causes of unjust food systems, supporting and advocating for economically, racially, and ecologically just farm communities. We envision a thriving, sustainable, and equitable food system: where farmers and farmworkers have dignity and agency; where they are supported by just agricultural policies; and where corporations and institutions are accountable to their community. We work directly with farmers: we help farmers find markets, advocate for and with farmers who are experiencing financial crisis, convene a Farmers of Color Network, work with farmers markets and rural faith communities to increase food access, provide infrastructure and emergency grants to farmers, and help coordinate a seed breeding cooperative. Our Challenging Corporate Power Program works with both contract and independent livestock and poultry producers to reverse the rampant negative effects of corporate concentration across the food system. We are grateful for this opportunity to provide these comments on badly needed improvements to fair competition and antitrust enforcement in today's food system.

A cluster of "big four" corporations dominate nearly every sector of our current national food economy, and the food retail market is no exception. As of 2019, the top four grocery corporations operating in the United States captured two thirds of national consumer food sales.[1] Taking this analysis one level deeper, Food and Water Watch estimates that 60% of grocery categories are "dominated by tight oligopolies or monopolies."[2] Walmart stands out as an especially egregious example, capturing a third of national grocery sales on their own,[3] while exerting even more extreme power regionally, controlling 50% or more of the food retail market in 43 US metropolitan areas and 160 smaller markets across the United States.[4]

---

[1] Food & Water Watch Issue Brief, "The Economic Cost of Food Monopolies: The Grocery Cartels," November 2021, 5. https://www.foodandwaterwatch.org/wpcontent/uploads/2021/11/IB_2111_FoodMonoSeries1-SUPERMARKETS.pdf
[2] Ibid.
[3] Ibid.
[4] Mitchell, Stacy, Walmart Grocery Monopoly Report, The Institute for Local Self-Reliance, 2019.

These giant corporations shape the structure and rules of our food system by design to secure the greatest possible profits for themselves, while treating people, land, and animals as disposable units of production in the name of efficiency. They have honed a business model which depresses prices and reaps huge profits by externalizing the costs and risks of its production onto farmers, workers, rural communities, and the environment. Unfortunately, this efficiency cuts two ways; while efficiently producing food, the industry also efficiently harms farmers and workers, hollows out their communities, and pollutes the land, air, and water we all rely on.

The antitrust lens that has been applied to our food economy over the past 40 years of antitrust enforcement has been woefully shallow in its narrow, national level focus on consumer prices, and the result has been massive downstream harms in the form of thousands upon thousands of lost farms, inequitable environmental harm, and the hollowing out of rural communities throughout the country. It is time that the USDA and FTC reverse course, invest in local and regional food systems, and aggressively enforce fair competition and antitrust laws in ways that protect the bedrock of our food system: our farmers, ranchers, and their communities.

We welcome many of the critical questions presented by the USDA and FTC in this Request for Information, specifically in your agencies' interest in monopsony power, predatory corporate practices, and their effects on small farmers, ranchers, processors, and independent and cooperative grocery retailers, and in the investments and support that might benefit these vital stakeholders. In response to your questions, we conducted a comprehensive campaign of in-depth interviews with 21 farmers, ranchers, food processors, and grocers to gather grassroots feedback from our network. What follows is a summary of their feedback regarding these critical issues, which has been anonymized so as not to jeopardize their businesses.

Thank you for the opportunity to share concerns and strategies regarding the state of competition in food retail and distribution markets and access for agricultural producers and small and mid-sized food processors. RAFI-USA is joined by the HEAL (Health, Environment, Agriculture, Labor) Food Alliance, of which RAFI-USA is a member, in submitting these comments for your consideration.

Fair Market Access Barriers for SME Producers and Processors

Question 1: Are market concentration and power, and lack of competition, problems in food retail and distribution markets? If so, where and in what ways? What practices in the food retail and distribution markets are most concerning from a competition standpoint? Are there particular practices that exclude or disadvantage new market participants or potential market participants, unfairly transfer risk, or otherwise abuse market power or make it harder to compete? Please describe specific experiences and challenges, if possible.

In our conversations with small and mid-sized producers and processors, two key themes emerged. First, producers described a variety of infrastructure and compliance barriers that point to the need for increased public investment in regional supply chain infrastructure, cooperative organizations, and supportive resources to provide scaling pathways for SME food enterprises. Second, we heard repeatedly that locally or regionally rooted food retail buyers are the cornerstones of retail market access for SME farmers, ranchers, and food processors, once they have invested in the capacity required for wholesale and regional marketing. Corporate concentration in food retail and wholesale markets has been and continues to be a key driver of the hollowing out of these vital community resources.

Access Barriers For New Producers and Processors to Retail and Wholesale Market Access

Question 2: How do concentration and size in the food retail and distribution markets affect the ability of agricultural producers and new, SME food processors to access the retail marketplace? Are agricultural producers and SME food processors that serve local and regional markets affected differently?
Question 7: How do [exclusive dealing arrangements] affect the development of new products and the growth, diversity, or resilience of the industry?

A robust and diverse landscape of locally, regionally, and nationally scaled food retail and wholesale enterprises is a vital prerequisite for resilient and inclusive food economies. Furthermore, it is important that all food purchasing players are strongly incentivized to invest in local and regional sourcing, because such activity is an integral component of healthy local and regional food economies. When weak antitrust enforcement and rural disinvestment allow predatory corporations to gobble up or bury community rooted farmers, ranchers, food processors, and independent and cooperative grocery stores, our food economies are hollowed out and become brittle and unhealthy. In such an environment, the barriers to market access for local producers and processors become steep.

Take, for example, the case of a cattle rancher who also operates a regional meat processing business in North Carolina, who spoke to us about the high upfront costs required for access to retail markets. Achieving market readiness required thousands of dollars of investment in retail quality packaging, labeling, and UPC coding equipment, third party shelf stability testing, and nutrition facts validation, without a guarantee of securing product placement. On top of that, they found that “when you start talking to any of these big guys, they want five million in product liability coverage, which adds about $5,000 a year in costs to get that policy.” In speaking to another food purchasing professional who leads several local sourcing initiatives nationwide, we learned that the cost of securing liability insurance is a widespread barrier to producers gaining market access. This professional told us that most retailers require anywhere from two to five million in insurance coverage before beginning a sourcing relationship, and this expense is often unsustainable at small and mid-sized production scale.

While this producer/processor was able to take advantage of state grant money to make some of these investments, the remainder continue to prevent their products from being considered by most grocery chains. When he attempted to secure placement for his beef products in a top five grocery chain, he found that even getting considered by the chain's sourcing department required connections to the chain's national corporate headquarters out of state. "We talked to the local store manager, but he didn't have the ability to help - the only way for them to get into the store was through the corporate office." By contrast, he is continuing to work towards achieving retail market access at a North Carolina based grocery chain, where he can more readily make a lasting and reliable business relationship. He noted,

> *It seems like the local and regional chains are a little bit more sensitive to maintaining relationships with farmers, and not just trying to leverage the lowest possible price. Other chains will ask you to guarantee them supply, without being willing to guarantee a purchase. It takes longer for me to make the beef you buy at the store than it takes Boeing to make a 747! What they're saying is, I want you to go back over two years ago and start the process, and I want first right of first refusal on it, but if I don't want it, you have to go find someone else to sell it…They probably don't want to make it easy to open an account, they only want to be dealing with vendors above a certain scale."*

Sadly, highly consolidated grocery retail firms under national level management often make poor partners for local and regional producers and processing enterprises. The local sourcing professional we spoke to (quoted above) told us about a local sourcing project she had attempted to cultivate with a top national grocery chain that cratered because "they never trained their produce managers on the difference between local product and California product," and the resultant education gap caused store level managers to continually "reject the produce and sink the program." This account illustrates the vital importance of food retailers and wholesalers that operate at local, state, or regional scales, and the need for infrastructure and incentives that would encourage and enable food buyers at all scales to robustly invest in local sourcing relationships. Other producers and processors we spoke to echoed this sentiment:

> *I deal with [a regionally based grocery chain] and their stores are owned by local people, and it gives me an opportunity to get to know those guys and they'll give me a chance. I can't afford to do business with big box stores. They may start out paying [a fair price], but down the line they're going to hit you with a requirement for an order you can't keep up with, or won't pay you on time. - Georgia Pork and Produce Farmer*

The overall consolidation of grocery [markets] is the problem. Smaller grocers, farm stores, independently owned chains, co-ops, and family owned [enterprises] are the businesses we see interest and support from. Bigger grocers are not accessible even though we comply with what is needed to be on their shelves. - Andrea Stanley, Owner/Operator of Valley Malt and Ground Up Grains, Massachusetts

In addition to the problem of initial retail market access, local processors and value-added food businesses are, in reality, squeezed from both flanks in the supply chain. A career cooperative grocer described this dynamic to us vividly:

Who controls the access to the raw materials for your new food business? The same business that controls the purchasing of your finished product! If you do manage to break through, you're in the bullseye for acquisition, because you've been watched throughout your entire journey in the food chain. Usually, your only option to survive is to cash out! I saw this with a startup granola maker in West North Carolina - they had to buy their inputs at wholesale list price, and were pricing out at over $10 a box - not price competitive. They can't scale solely on small independent retail. So whoever they go to is going to ask for an outsized pricing advantage to get on the shelf. We help develop brands knowing that we will then be disadvantaged later in their scaling story.

- *North Carolina Cooperative Grocer*

If it's true that resilient regional food systems are important to our national security, it is vital that we address this dynamic, because resilient regional food economies rely on innovation and dynamism of local food entrepreneurship. Rather than fostering this dynamism, the current highly concentrated landscape stifles it - and devours any market entrants that are lucky enough to sprout.

Regulatory Issues Related to Retail and Wholesale Market Access
Question 17: Are there any other aspects of the regulatory environment that affect retail market competition and access to retail for producers and SME processors? Are there specific elements of these requirements that could be more effectively tailored? What types of resources would be helpful to assist SMEs with compliance?

In addition to the barriers to market access outlined above, certain regulatory hurdles also present barriers to retail and wholesale market access for small and mid-sized producers and processors. USDA should focus, in particular, on lowering costs associated with regulatory compliance, and on improving the scale appropriate application of key regulatory frameworks, while in parallel providing enhanced compliance supports for small and mid-sized producers and processors.

For example, many of the highest volume retail markets require certifications like GAP as a starting point for considering new contracts with growers. This means that the certification process is an early, but crucial barrier for growers to overcome if they want to compete in the retail market. One relevant barrier is the cost of providing USDA GAP audits to wholesale and retail buyers with GAP requirements via third party systems, as we heard from one local sourcing professional:

> *When farmers have an audit, they typically have to send the audit to the customer through a 3rd party system. USDA charges $100 per audit to upload into 3rd party systems. Once the audit is uploaded into the system, those systems have internal fees to upload and per customer audit send fees.*

While this expense would barely register on the books for larger firms, it can feel daunting to small producers who are often struggling to break even. Each potential wholesale customer can be a meticulously considered gamble, as small producers would have to budget just to apply to each and there is no guarantee the potential customer will buy-in. One of the best chances small producers have of entering this larger retail market is to diversify their opportunities. Perhaps a farmer can only justify taking a financial risk on applying to three wholesale customers, but it was the fourth that would have scored them a huge contract which could have allowed them to compete and survive. In the current system, larger corporate firms have an unfair advantage of being able to cast wide nets of opportunity while smaller producers have to limit which negotiating tables they request a seat at. USDA should explore ways to eliminate or decrease these costs, especially for small scale and socially disadvantaged producers and producers newly obtaining GAP certification.

Unfortunately, many smaller producers also find that GAP certification enforcement procedures disadvantage them in comparison to larger scale producers. One North Carolina farmer told us:

> *Last year we went through our GAP audit. That guy stayed with us for 7 hours. We got through it and went to the Outer Banks the next morning. Out there we [visited a large-scale farm with] about 5,000 acres of different crops…There were about 300 seagulls in the back of a snap beans trailer. So my wife calls the GAP man up and sends pictures of it and says – now how safe is this, all the birds in the back of that trailer? The system isn't designed for small farmers, it's designed for corporations. If we can't set a bucket on the ground when we're picking squash because it's a safety violation - how can they pick all those snap beans and dump them in a trailer with hundreds of birds just flopping all in it and that isn't a violation of food safety?*

In the example above, the North Carolina farmer we interviewed gave up a majority of his best working sunlight hours to take part in the regulatory process. He left that experience feeling cheated, which was exasperated when he saw a neighboring farm of much larger scale being held to a different standard. The regulatory process exists to protect American consumers, so its integrity should be beyond reproach, but that shouldn't have to come at the expense of a collaborative and supportive relationship with small farmers. Regulatory agents are currently incentivized to find and report violations, which means when they arrive at a farm they have an objective interest in finding anything they can to galvanize their report. As one small meat processor in North Carolina told us, “we need inspectors to have the mindset of helping us get it right, instead of only having the mindset of trying to catch us doing something wrong.”

When small, independent farmers view the regulatory process as antagonistic, we are creating a barrier between producers and retailers instead of guiding them through the door. When working with small and mid-sized producers, it would be more productive to build performance evaluation metrics that incentivize and reward an educate-to-regulate approach, in which agents' first reaction is to collaborate with producers to ensure best practices are achieved. Helping a larger variety and quantity of producers access new markets creates a more equitable, competitive agricultural environment, and regulatory agents could have a pivotal role in facilitating these relationships. The role and position of the USDA should be to assist small, independent growers in meeting these standards to increase market access and diversify agricultural competition.

Label Claim Issues Related to Retail and Wholesale Market Access

Question 15: Are public or private resources sufficiently available for smaller agricultural producers seeking to develop or use labels? Do labels standards, verification, and enforcement appropriately support access to markets for agricultural producers and SME processors? Are there any instances when a larger supplier used, including potentially misused, a label to gain market access or advantage over smaller producers or SME processors?

In addition to their role in hollowing out vital regional food supply chains, dominant corporate food retailers and wholesalers also co-opt consumer valued label claims with shameless impunity. As one rancher told us, “they all see value in having local product on the shelf. Some see the value but don't want to pay for it.” We spoke to the executive director of a third-party food label certifier, who told us that one of the biggest challenges to producers utilizing rigorous third-party verified label claims is the proliferation of unverified or untraceable product claims across the industry. Additionally, an executive at an organic meat processing company expressed concern about how unverified label claims have greenwashing effects that are harmful to the efforts of our nation’s agriculture system to mitigate climate change, saying “I’m concerned that retailers are becoming de-facto sustainability standard setters. Take, for example, Amazon and Walmart’s ‘climate friendly’ programs as examples, where they are basically approving seals and certifications with an eye on consumer trends more than actual analysis of materiality and impact.” Consequently, it is important that USDA FSIS conduct a thorough review of the verification requirements for food label and animal raising claims, and ideally require such claims to be third-party verified. One potential approach to supporting such a requirement could be to create a registry of USDA approved third-party label claim verifiers, whose standards could be transparently published for consumers online.

Predatory Corporate Practices in Concentrated Food Retail Markets

Runaway market concentration creates optimal conditions for the abuse of corporate power, and that abuse manifests as a variety of increasingly common practices within food retail and wholesale markets. USDA rightly poses a broad focus of inquiry in this request for information concerning the use of exclusive dealing arrangements, preferential discounts, and predatory pricing. We asked small producers, processors, and independent and cooperative grocers how these practices are impacting their businesses.

Impacts of Exclusive Dealing Arrangements and Preferential Discounts on Fair Wholesale Market Access for SME Producers and Processors

Question 3: How do distribution and wholesale food market competition and concentration affect access to markets for agricultural producers and SME food processors? Does buying power of some retailers at the wholesale level make it difficult for some producers or SME processors to access distribution within these channels?

Question 7: Do [exclusive dealing arrangements] facilitate, inhibit, or otherwise affect opportunities in the industry for SME processors? How do they affect the development of new products and the growth, diversity, or resilience of the industry? Are tribal businesses and enterprises and underserved communities affected differently? Does the size, scale, or market power generally of the companies involved in such an arrangement matter for how these arrangements affect competition?

Question 8: What effect do [preferential discounts] have on access to the retail marketplace? How are preferential relationships in the marketplace manifested, and do those relationships limit new market entrants from accessing the marketplace? Should any of these practices be limited or changed to support new market entrants, and if so, how?

We spoke to several producer cooperatives across the country that sell into wholesale and retail markets, and asked them about their experiences attempting to access and maintain business relationships with regional and national grocery chains, food service companies, and wholesale distributors.

One producer cooperative marketing career professional, who now leads wholesale market access initiatives for a BIPOC producer cooperative in the U.S. South, shed light on how the exclusive dealing and preferential discounting practices used by major wholesale distributors all but block access to institutional and retail buyers for local and regional producers, even when those producers attempt to cooperatively market their products. Her cooperative currently focuses on selling to institutional buyers, and is also working toward selling into one or more regional grocery chains, but has faced barrier after barrier to market access due to existing exclusive dealing arrangements. “Their exclusive deals with their primary distributors make a difference to getting your foot in the door. The first barrier you get from a local kitchen is [them telling you] 'you're not a vendor for us so we can't buy from you.'” To gain access to the institutional buyers that are vital to their scaling strategies, sellers like producer cooperatives are forced to expend outsized staff overhead, swimming upstream to build individual relationships with institutional kitchen operators. Once those initial relationships are secured, *Chefs or buyers that manage a specific kitchen at hospitals or schools tell us they have a small slush fund of money allocated by their food service company that they can use to buy outside of their exclusive contracts that their food service companies have with their broadliner, or large food wholesaler. For producer cooperatives like us, that discretionary fund is a hard ceiling on how much they can order from us. Functionally what that does is leave producer cooperatives like us on the margin all the time.*

The cooperative marketing professional we spoke to told us that she had faced similar scaling ceilings in a similar prior role, and in response had sought a vendor number with that region's dominant institutional food broadliner, so that products would not be dismissed out of hand or face hard sales caps at local institutional kitchens. "None of the food service companies will actually explain how to get a vendor number. They'll have an application form that you can fill out, but then it went out into the ether for a year and half…we eventually had to organize the chefs across our area's entire hospital system to appeal to their higher-ups to finally break through to get a vendor number." And while securing a vendor number did allow them to more readily establish institutional accounts, this was a marginal victory, because now they were in direct competition with a dominant food distributor "who can deliver same day, add in all kinds of extra products, and offer price points that you can't compete with." She's less optimistic about the possibility of securing a vendor number for the BIPOC producer cooperative she works for currently. "Local BIPOC producer co-ops like mine are never going to be able to get an approved vendor number. They don't want to approve vendors that only serve a single region."

Stepping back, it is absurd and unfair that local and regional producers must, in effect, orchestrate sophisticated community organizing campaigns to merely obtain a vendor number and the chance to compete on the margins with a still dominant distribution firm. This is illustrative of how profoundly skewed against regional resilience our food system currently is. In their recent research paper *Kickbacks and Corporate Concentration: How Exclusionary Discounts Limit Market Access for Community-Based Food Businesses*, Claire Kelloway and Matthew Jinoo Buck examine how these exclusionary sourcing contracts and preferential discounts, rebates, or other kickbacks severely restrict market access for regionally scaled producers and processors, saying that "by some accounts, exclusionary payments and agreements can leave less than 25% of a given food retail category open to competitors and new entrants.[5] These practices are particularly prevalent and impactful within institutional food service management. Public and private institutional food buyers can be vital customers for small and mid-sized producers and processing enterprises seeking to scale because of their ability to commit to higher volume purchasing. However the food service management sector is again highly concentrated, with "the top three companies, Compass Group, Sodexo, and Aramark, [controlling] 77.5% of the

[5] Kelloway, Claire and Matthew Jinoo Buck, *Kickbacks and Corporate Concentration: How Exclusionary Discounts Limit Market Access for Community-Based Food Businesses* [Paper presentation]. Reforming America's Food Retail Markets Yale Law School Conference, March 12th, 2022, 8

food service management industry" in 2019.[6] This level of concentration allows these dominant firms to leverage their outsized market power in drastic ways, as Kelloway and Buck's inquiry demonstrates:

> *All three leading food service management companies (FSMC) have internal policies requiring their thousands of locations to purchase 80% to 100% of their food from vendors approved by the management company. Typically approved vendors offer food service management companies rebates that range from 5% to 50% cash back on sales. One 2011 investigation estimated that the average rebate is around 14%. By one vendor's account, food businesses that offer higher rebates are more heavily promoted by the FSMCs' buying division…FSMCs theoretically could receive rebates from many competing vendors, but because FSMCs negotiate larger rebates by promising vendors high purchasing volumes the FSMCs have an incentive to limit the number of approved vendors.The fewer competing vendors an FSMC enrolls in any given category, the more de facto exclusive these purchasing policies are…According to an investigation by Carrol for the New York State Attorney General's office, income from vendor rebates has become an increasingly important revenue stream for food service management companies since the early 2000s….[with] estimated rebate revenue [accounting] for 40% to 50% of Aramark, Sodexo, and Compass Group's net profits for their North America operations.*[7]

These exclusive dealing arrangements have a profound effect on the incentives under which food service chefs and institutional food purchasing professionals operate. Kelloway and Buck found that,

> *Food service management companies enforce this exclusionary purchasing by rewarding or penalizing employees based on how much they purchase from "on-contract" or approved vendors. All of the chefs and dining managers we spoke to, each of whom had worked for a different one of the three top FSMCs, said that their performance reviews, promotions, and bonuses were based in part on their levels of compliant purchasing. "My incentive structure was tied specifically to compliance," Cox said. Cox compared requirements to "hit your compliance numbers" to "handcuffs."*[8]

We were able to independently confirm this dynamic in our own interviews for this comment, with one food sourcing professional telling us specifically about how performance evaluation structures of this nature are replicated in grocery sourcing departments as well. "Most grocery retailers have buyers that are incentivized to buy direct from their own warehouse," which primarily is stocked via the large scale exclusionary contracts incorporating preferential discounts and rebates described above. In sourcing directly from regional or local producers or distributors, grocery buyers are consequently "buying less from their central distribution" which they are disincentivized from doing because those "buyers get their bonuses from their fill rate from their own distribution centers." Taken cumulatively, both our research and our

---

[6] Ibid.
[7] Ibid.
[8] Ibid., 9.

direct engagement with food system stakeholders has led us to conclude that exclusive dealing arrangements and preferential discounts and rebates are currently presenting steep barriers to local and regional producers and processors' ability to gain market access amongst grocery retail, institutional, and wholesale buyers.

Impacts of Market Concentration, Predatory Pricing, and Exclusive Dealing Arrangements on Independent and Cooperative Grocery Stores

Question 4: How are SME grocery retailers specifically affected by concentration and potentially anticompetitive practices in food retail markets?

Question 7: Describe the role that exclusive dealing arrangements play in the food retail and distribution marketplaces. Does the size, scale, or market power generally of the companies involved in such an arrangement matter for how these arrangements affect competition?

Question 10: Please share any concerns relating to predatory pricing or other practices designed to exclude competitors from the marketplace.

Independent and cooperative grocery stores are similarly restricted and harmed by the predatory pricing practices and exclusive dealing arrangements of dominant retailers and wholesalers in the food economy. The market power of dominant wholesale suppliers allows them to squeeze their local and regional competition from multiple vectors: they either coerce locally and regionally owned grocery retailers to commit to onerous exclusive sourcing contracts, or use their predatory pricing power to corner them into serving a niche clientele, while also suppressing the growth of—or poaching—the local producers, processors, and value-added food startups that local food retailers rely on to differentiate themselves.

We spoke to the owner of an independent grocery store in the Southeast, who expounded on the impediments to independence and viability that are foisted upon independent grocers by dominant distributors. The first barrier, he told us, was a barrier to new entrants - "the amount of money they want you to have just to buy from them. For someone wanting to do 8 million a year, you need to have $750,000 liquid assets. This makes it nearly impossible to break into the grocery business." Once past that hurdle, he told us, major distributors will seek to require independent grocery stores to buy the vast majority of their products exclusively from them, including trying to sneak in contract provisions that obligate you to spend a large percentage of your revenue on their products. He fought back against this contract provision, and was able to secure a contract with a sourcing commitment based on cost of goods, rather than revenue, but even this commitment was onerous, especially for a grocery business that wants to build local sourcing relationships as a business strategy. "One distributor we worked with required us to exclusively source 68% [of our cost of goods from them.] When your distributor wants you to buy 68% from them, you can't viably source from local producers, there isn't any margin left."

Once your distribution contract is secured, the intrusions upon your independence aren't over. This grocer told us that their distributor will exert control aisle by aisle throughout your store, because they "already have most of your shelf space spoken for. They've already got exclusive deals. Ideally, they've already got it figured out at the warehouse level, and they want you to take as much as possible from their warehouse." On top of that, most independent grocers are pigeonholed into dealing with such dominant distributors because those distributors also control access to the sophisticated POS systems required to effectively manage a viable grocery business. The grocer we spoke to attempts to match price with a regional corporate grocery chain that uses the same distributor he does, but this requires him to operate on a significantly slimmer margin for most of his categories, because the larger chain he's competing with gets lower prices from his distributor. Furthermore, "if there's a limited amount of certain products, the largest chains are going to get priority on sourcing those products, and when there's a shortage, the large chains will try to buy up extra product so that there isn't any left.

We also spoke to several cooperative grocers about the challenges they face within concentrated markets. Because the cooperative grocery model is so different from the traditional grocery model, cooperative grocery stores are often barred from accessing the products they need to scale and appeal to a wider range of customers. One cooperative grocer told us,

> *The price on the catalog has never been the price. Even if they were to show you their invoices, that's not showing end of year rebates, exclusive deals, etc. The pricing is inherently complex, it's built on a lack of visibility and clarity. And when we ask for access for a wider range of products [from our distributor], that never comes. We should not be disadvantaged when we ask for access to products.*

To be able to offer preferential discounts to major grocery chains, dominant distributors must pass on those costs to independent and cooperative grocery stores who lack the market power to object - and in the process, they drive a wedge between independent or cooperative grocers and the local brands they seek to support. Generally, this is obscured behind the veil of higher prices, but the cooperative grocer we spoke to has encountered this dynamic explicitly:

> *The collaborative relationship between small retailers and small brands gets eroded in this environment. We see it anecdotally in the lack of power in the relationship. Big retailers were selling a "natural foods" cereal product below the cost I had to pay to even source it from the distributor. It took months of negotiations with our distributor, and we were still told that "We have limited contract opportunities to pass on cost increases to our mass market partners." Eventually they relented and gave price concessions in several categories. These distributors have to pass on more than a fair share of their costs to independent and smaller scale retailers to compensate for the discounts they're offering to the dominant retailers.*

Additionally, cooperative grocery stores must constantly contend with larger corporate buyers poaching the local brands they help to foster. Another cooperative grocery manager told us,

> *Big corporations get preferential treatment and better access to products customers want…we have seen top selling product even disappear from our buying access, while Amazon and Whole Foods has the same product on their shelves and online. My store can no longer get those top*

> *selling items because Amazon made an exclusive deal with the company. This relationship pulls customers from us to shop online for that product. Of course, they end up buying more from them and less from us. This is extremely unfair.*

Another grocery manager expounded on how this dynamic curbs innovation and product quality in the name of scaling efficiency, saying,

> *Delicious quality products rise to the top and then most eventually get bought out by the big corporations. Then they start taking shortcuts in quality to drive down the price. Next thing you know, the product or its producers are hurting in some capacity. That directly and adversely affects the smaller producer's ability to have a place on the shelves. The small producers have to charge double and have a fraction of the shelf life because that is the cost of high quality and small batches. It makes competition impossible. Your product has to come with a story that catches the attention or a tasting of the difference. That is more labor and cost to the small business.*

All of these dynamics allow dominant consolidated retail firms to leverage their market power to shape an asymmetric pricing environment for themselves and their competitors, driving their own sourcing costs down while simultaneously driving prices up for local and regional scale competitors. This further allows dominant firms to undercut local and regional competitors on consumer sale price in a predatory manner. As the North Carolina cattle rancher we quoted earlier told us, "I walk through Costco and see what they're selling ground beef for, and I couldn't steal it for that cost."

Antitrust Policy Responses

Grocery stores, institutional, and other wholesale distributors have, at their best, a vital role to play in the health and scaling potential of resilient, diverse, and cooperative regional food economies. In their absence, farms, cooperatives, processors, and value-added food brands are left to compete for a slice of the food market too slim to viably support the resilient food economies we need. Food distribution firms with outsized market dominance are able to leverage exclusive dealing arrangements, predatory pricing, preferential discounts and rebates, and their monopsony power to narrowly restrict the market slice of food purchasing dollars available to their locally and regionally scaled competition, functionally placing a low ceiling on their ability to scale and thrive. As such, it is our belief that aggressive and comprehensive government antitrust and fair competition enforcement is needed to restore the economic preconditions necessary for the growth of resilient regional food economies.

Antitrust Enforcement With Regards to Mergers

Question 18: How can antitrust and market regulation and enforcement, including relating to mergers, unfair practices, and price discrimination, do more to address competition concerns in food retail and distribution markets?

The FTC has been given a clear mandate by the Sherman Act, Clayton Act, Robinson-Patman Act, and Federal Trade Commission Act, as has the USDA by the Packers and Stockyards Act, to block the formation of and deconstruct existing political and economic oligarchies in pursuit of protecting the public from corporations that abuse their power to stifle fair markets, rig the rules in their favor, and subvert the functionality of our democracy. For nearly half a century, the dominance of the narrow consumer welfare standard[9] prevalent in federal antitrust enforcement has created a permissive environment for corporations to amass an unacceptable degree of economic and political power. This permissive environment has given the dominant corporations in the food system free reign to horizontally concentrate their industries into oligopolies and oligopsonies, vertically integrate, consolidate, and hollow out their supply chains, suppress the wages available to workers and the prices available to farmers, ranchers, and local food businesses, redirect productivity gains into their own corporate profit coffers, and retaliate against anyone who seeks to organize against them. In allowing this, the federal government has harmed the public broadly, and farmers and ranchers and their rural communities specifically, by allowing these corporations to drive catastrophic farm losses and leave our food supply chains so brittle through underinvestment that our food system is left without the resilience to withstand crisis.

It is time for a fundamental course correction. For years, regulators have attempted to analyze proposed mergers and acquisitions in the food system with a lens that was too nationally shallow and technically granular to prevent the real harms they were commissioned to guard against: an oligarchic food system that holds farmers and ranchers captive within highly

---

[9] As described by the Supreme of the United States in Reiter v. Sonotone Corp., 442 U.S. 330 (1979)

effective regionalized monopsonies and exploits the public through national and implicitly coordinated oligopoly. There is no doubt that the FTC and USDA have, over the years, attempted to assess, with the data then available to them, the competitive effects of many of the mergers that have led us to this point. However, the stated purpose of the Clayton Act is to render illegal mergers whose effects "may be substantially to lessen competition, or to tend to create a monopoly." The words "may'' and "tend" should be considered heavily meaningful here. The FTC has unnecessarily required regulators to attain a higher degree of certainty about the specific predicted effects of proposed mergers than the Clayton act requires in its text. Rather than attempting to apply a narrow analysis of efficiency and national consumer price effects to proposed food system mergers on a case-by-case basis, antitrust enforcement should acknowledge that our food economies are already unacceptably concentrated, adopt clear and holistic goals for deconcentrating food economies to an acceptable level of competitive fairness, and presume any proposed mergers to be illegally anti-competitive until fair competition is restored.

Antitrust Enforcement With Regards to Regionalized Monopsony
Question 18: Should Federal and state antitrust enforcers place greater emphasis on adverse consequences of buyer power?

It is vital that 21st century antitrust enforcement carefully attend to the unique sensitivity of food economies to the effects of regional monopsony and oligopsony. Farmers and ranchers face unique regional constraints because they depend on long-term investment in land and built infrastructure to produce perishable commodities and cannot simply relocate to access new buyers when facing monopsonistic conditions. Regional food processing and value-added product enterprises face similar constraints by extension due to their reliance on proximate producers. And as we have seen through the interviews outlined above, regionally scaled grocery store chains, as well as independent cooperative grocery stores, play a vital role as buyers with the regional capacity and expertise to invest in sourcing relationships with small and mid-sized food producers, processors, and value-added food product enterprises. As such, all of these food system stakeholders are particularly vulnerable to regionalized monopoly and monopsony power.

The permissive nature of merger enforcement policy over the past 40 years has allowed regional monopoly and monopsony power to become commonplace in food economies, resulting in a wide range of economic, social, and environmental harms. Antitrust regulators must not neglect to conduct a region by region analysis of the potential anti-competitive vulnerabilities and impacts upon regionally constrained farmers, ranchers, and food processing businesses, and the grocery and wholesale buying environment of any given region. Proposed agribusiness or food retail or wholesale business merger should be evaluated with attention to how they may affect producers and processors that face hard regional constraints to remaining competitive in the face of market concentration, and how they may reduce or eliminate the ability of regionally scaled grocery chains and/or independent and cooperative grocery stores to compete in the food retail marketplace. Therefore, the FTC should oppose mergers that may cause a food system market's HHI to rise above their stated threshold of 2,500[10] *within the relevant region*, and not just nationally. Furthermore, when it is assessed that a proposed merger may, even in its incipiency, generate or contribute to a trend toward the emergence of oligopsonies or oligopolies in any impacted region, it should be presumed to be anticompetitive and opposed, regardless of whether it may lessen competition in output markets.

Antitrust Enforcement With Regards to Exclusionary Contracts and Preferential Discounts
Question 18: How can antitrust and market regulation and enforcement, including relating to mergers, unfair practices, and price discrimination, do more to address competition concerns in food retail and distribution markets?
Question 19: How can predatory pricing by entrenched market participants be better identified and acted upon by relevant enforcement authorities?

After speaking with stakeholders across the food supply chain, from producers and processors to wholesale buyers and grocery managers, it is our belief that aggressive action on the part of the FTC and USDA to ban the usage of exclusive dealing arrangements used by dominant firms could have a profoundly positive effect within regional food economies when it comes to market access for small and mid-sized producers, processors and grocers. The Open Markets Institute has contended in a recent and still active petition[11] to the FTC that the agency has the rulemaking authority, under Section 5 of the FTC Act, to enact such a ban as an unfair method of competition in its incipiency. Kelloway and Buck elaborate, saying " the FTC could issue a new rule to ban formal and de facto exclusive dealing by dominant firms as per se illegal.[12] The FTC should act in accordance with Open Markets Institute's petition and "hold that exclusive arrangements that result in substantial foreclosure[13] of customers, distributors, or suppliers are per se illegal under the FTC Act."[14]

Additionally, Kelloway and Buck contend that USDA has the authority to rule that meatpackers' usage of preferential discounts or rebates to secure exclusivity is both the extension of undue preference, and "a 'course of business…with the effect of manipulating or controlling prices, or of creating a monopoly in the…selling' of meat." We agree, and would urge the USDA to clearly rule that exclusive marketing practices, loyalty rebates, and exclusionary kickbacks are in violation of the Packers and Stockyards Act.

---

[10] Antitrust Division. 2015. Price Fixing, Bid Rigging and Market Allocation Schemes. Washington, DC: Department of Justice. https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes.
[11] See Exclusive Dealing Petition, 71-81 (articulating three tests for illegality centering on market shares and numbers of significant competitors).
[12] Kelloway, Claire and Matthew Jinoo Buck, *Kickbacks and Corporate Concentration: How Exclusionary Discounts Limit Market Access for Community-Based Food Businesses* [Paper presentation]. Reforming America's Food Retail Markets Yale Law School Conference, March 12th, 2022, 10
[13] Defined in 75-76 of Exclusive Dealing Petition,
[14] See Exclusive Dealing Petition, 74

Antitrust Enforcement With Regards to Predatory Pricing Power

Question 19: How can predatory pricing by entrenched market participants be better identified and acted upon by relevant enforcement authorities? Can laws that prohibit discriminatory or preferential pricing, such as the Packers and Stockyards Act and the Robinson-Patman Act, play a greater role in preventing predatory pricing schemes, or otherwise promote greater food market access for agricultural producers and SME processors?

Alongside comprehensive action against anti-competitive exclusive dealing arrangements within food supply chains, antitrust enforcers should also aggressively re-embrace enforcement of the Robinson Patman Act. This law bars firms from offering different prices to different buyers for "commodities of like grade and quality" when "the effect of such price discrimination is to 'substantially lessen competition' or to harm competition with rivals or suppliers," while still allowing price differentials based on commodity quality differences, "lower costs of serving…preferred purchaser[s]."[15] Enforced up until the 1960's, this act, along with aggressive enforcement of our other antitrust laws, preserved a healthy, decentralized food retail sector in which retail chains competed on innovation and quality of service while serving the common good. At the time, enforcement of the Robinson Patman Act also had important positive racial equity effects, as Sandeep Vaheesan and Brian Callaci elaborate, saying,

> Laws like Robinson-Patman helped Black-owned businesses — which started at a smaller size, given white capital's 300-year head start in wealth accumulation — compete on more equal terms. Throughout the postwar period white-owned banks continued to deny Black entrepreneurs access to credit, while white landlords refused to lease favorable business locations. Nonetheless, Robinson-Patman at least leveled the playing field in some respects, allowing independent Black-owned retailers to compete with chain stores, and Black-owned suppliers to protect their margins from unfair price squeezes initiated by large buyers. It was during the heyday of Robinson-Patman enforcement that J. Bruce Llewellyn built FEDCO Foods, the nation's largest minority-owned retail business, from the Bronx, and Henry J. Parks, Jr. made his Baltimore sausage manufacturer the first Black-owned business on the New York Stock Exchange. Both independent businesses were forced to sell to larger competitors in the 1990s — FEDCO to Target, and Parks to Dietz & Watson.[16]

Enforcement of this law has in past decades fallen out of favor, and this has not been without consequence in our food economy. In a recent study, sociologist Nathan Wilmers found that dominant firms' ability to engage in predatory buying power strategies that were previously prohibited is responsible for ten percent of wage stagnation in our economy.[17] Furthermore,

---

[15] Callaci, Brian and Sandeep Vaheesan, *How an Old U.S. Antitrust Law Could Foster a Fairer Retail Sector*, https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector

[16] Ibid.

[17] Wilmers, Nathan, *The links between stagnating wages and buyer power in U.S. supply chains*, Washington Center for Equitable Growth, 2018 https://equitablegrowth.org/the-links-between-stagnating-wages-and-buyer-power-in-u-s-supply-chains/

FTC's neglect to enforce Robinson Patman has particularly deleterious effects in food retail markets; by using their buying power to extract special lower prices from their suppliers, dominant grocery firms cut their own costs, raise the costs of everyone else their suppliers sell to, and thereby use their dominance to create an artificial price environment in which they can always undercut their regional independent and cooperative grocery competitors.

Throughout our conversations with regionally scaled producers and processors, one common theme that emerged was the vital importance of regionally scaled grocery firms, especially independently and cooperatively owned grocery stores, as linchpin buyers that provide scaling opportunities for up-and-coming producers and processors. The resilience and innovation potential of our food systems depends on our government enforcing existing law to protect these vital institutions. Therefore, the FTC and DOJ should publicly re-embrace and prioritize the enforcement of the Robinson Patman Act to restore a truly fair and competitive price environment to the food retail sector.

Antitrust Enforcement With Regards to Information Asymmetry
Question 18: Should greater attention be paid to information asymmetries and preferential access to data? How could USDA utilize its regulatory and enforcement authorities more effectively?
Question 20: What additional information or transparency could USDA's Market News Service provide on retail, wholesale, or distribution markets, through the Livestock Mandatory Reporting Act of 1999 or otherwise? Are there information or educational tools, services, or access to data that could be helpful? What additional market analysis or advocacy could USDA do with respect to local and regional food systems, transportation, or otherwise that could support fair and competitive food retail and distribution markets?

The highly regionalized nature of food system concentration, wherein multiple total monopsonies may border one another within a given state, make food system markets highly susceptible to coordinated oligopsonistic effects. The proliferation of algorithmic business intelligence programs within agribusiness industries only compounds and exacerbates this potential. This potential for moat building, tacit coordination, and parallel exclusionary conduct is all well documented and highly prevalent in concentrated agribusiness markets and their potentiality should be centrally considered as potential anticompetitive effects when analyzing proposed mergers in relation to the standards set forth in the Clayton Act. Any evidence of conscious parallelism in a proposed food system merger's market should be sufficient cause to establish that the proposed merger will likely further diminish competition by facilitating oligopolistic post-merger coordination.

Aside from FTC and DOJ antitrust enforcement against tacit coordination, it is also vital for the USDA to recover a more active role in reducing information asymmetry for regionally scaled producers and processors through public oriented supply chain research, analysis, and management. In her excellent paper on public food supply chain management for resilience in the face information asymmetry, University of Wisconsin - Madison scholar Michelle Miller elaborates on the toxicity of information asymmetry in food systems, and the vital role that the USDA could play in the coming years:

> *Information asymmetry hobbles the ability of governments and other actors to manage systemic risks holistically, further shifts power to capital, and leaves independent businesses especially vulnerable. Asymmetry creates an unhealthy power dynamic within supply chains where independent businesses are dominated by the larger and more vertically integrated operations that have greater ability to garner and manipulate systemwide information to maintain their market dominance. Such an approach to supply chain information created vulnerabilities that led to whole sector meltdowns in 2020…To serve the public interest in more resilient and equitable food supply chains, our government must have access to the necessary data and models to make sense of supply chains as they are currently configured, as well as a vision for resilience and benchmarks toward realizing that vision.*[18]

Miller correctly argues that a democratization of supply chain data and models, through a "reinvestment in public data collection and analysis" is needed "so that policy-makers have the information they need to make markets competitive again" and the monitoring capacity to keep them that way.[19] "Markets are now shaped by big data analytics," she notes, "so we need our governments to move to the front, take hold of these new technologies, and shape food markets for the 21st century."[20] USDA should take Miller's recommendations to heart and invest in the "information infrastructure" it needs to reduce "information asymmetry in order to improve supply chain transparency, protect data, ensure affordable access to data and digital tools, and require data portability…all businesses in a supply chain need access to the information in that chain, not only those able to pay for it."[21]

---

[18] Miller, Michelle, "View Of Big Data, Information Asymmetry, And Food Supply Chain Management For Resilience". Journal of Agriculture, Food Systems, and Community Development, 2022, 172.
[19] Ibid., 179.
[20] Ibid.
[21] Ibid.

Investment and Regulatory Policy Responses

In addition to a resurgence in antitrust enforcement, there is much the USDA can do to proactively invest in and build the resilient regional food supply chains and food economies that we need in this century. Such efforts will be made markedly more effective if the USDA invests in the supply chain data collection and analysis necessary to inform "targeted investments in structural improvements" for our food supply chains.[22] The investments and regulatory modifications outlined below are a few proposals that were raised by multiple stakeholders we interviewed as potentially impactful or transformational investments to make our food system more equitable and resilient.

Publicly Funded Supply Chain Infrastructure[23]

Question 20: How might grants, loans, and other support from USDA enhance access to retail markets by local and regional food enterprises? How might USDA marketing programs enhance access to retail markets for agricultural producers and SME food processors, including programs which facilitate access to a variety of markets, support value-added production and product diversification; increase diversification in distribution channels and market development, such as food hubs, nonprofit and cooperative distribution models?

Over the first two years of this administration, the USDA has embraced a strategy of enthusiastic investment into new small to mid-sized food supply chain enterprises, primarily in the meat processing sector, through its Food Supply Chain Guaranteed Loan program, Meat and Poultry Processing Expansion program, and others. While these efforts to increase capital access for regional food supply chain entrepreneurs are welcome, the long-term health of our food economies would benefit from additional investments in publicly funded, publicly owned (or co-owned) and administered (or co-administered) food supply chain infrastructure that has the capacity and persistence to undergird vibrant regional food economies both during normal operation and during times of crisis response. The existence of this sort of skeletal system within our food supply chains could have "muted the disruption and avoided [the] cascading systems failures" that occurred during COVID-19 disruptions. In its absence, loose networks of nonprofit and government entities gamely led responses that, despite best efforts, were unfortunately often piecemeal.[24] Michelle Miller provides an instructive example, saying

> *Much of the food donated for hunger relief also required refrigeration. The need for refrigeration made it difficult for many food banks and their food pantry clients to accept the donations. This need was present before COVID19 and was much more pressing as supply chains were disrupted and the need for food aid increased.Yet simply adding refrigeration capacity to charitable food outlets is not a transformational food system change, because it contributes to system lock-in and*

---

[22] Miller, Michelle, "View Of Big Data, Information Asymmetry, And Food Supply Chain Management For Resilience". Journal of Agriculture, Food Systems, and Community Development, 2022, *179*

[23] Relevant to Question 20

[24] Ibid., 177

dependence on charitable food efforts that rely on volunteer labor and philanthropic support. They do not build wealth.[25]

A more intentional and permanent infrastructure is needed for food system resilience. Miller points to the common existence[26] and positive effects of multi-tenant cold storage infrastructure in other countries. She notes that "public-private partnerships are the most common governance arrangement, and they share the primary objective of organizing the movement of fresh products to market to reduce waste and realize energy savings by organizing truck movements."[27] Miller has also worked on a detailed proposal for public terminal market and crossdock for the city of Madison, Wisconsin, which provides an excellent example of the type of public logistics hub that regional producers need to direct flows of their goods to buyers.[28] In our own conversations with food supply chain stakeholders, we heard that this type of investment could be a "game changer." As one put it, "I dream of having food safe regional logistics. There's no entity out there that's trying to make that happen…It's not viable for everyone to be running their own trucks and paying their own drivers."

As the USDA considers its strategy for establishing Regional Food Business Centers and deploying its recently announced supply chain investments, it should establish a goal of identifying critical regional gaps in regional distribution logistics—in collaboration with existing regional food supply chain stakeholders—and plugging those gaps with public investment into publicly administered, cooperative, or public/private partnered supply chain nodes that can become a persistent anchor to regional food systems' ability to viably move product to regional wholesale and retail buyers at scale.

In summary, USDA should, either with its own resources or in partnership with Congress or other agencies:

- Establish regional or municipal public terminal markets and cross docks to facilitate regional food system logistics.
- Establish key coolchain transportation routes in partnership with the United States Postal Service.
- Establish regional food supply chain analytics departments within Regional Food Business Centers to better coordinate public food system investments and food system public/private partnerships
- Make substantial investments in existing community food hubs to boost their capacity as regional food supply chain and value-added processing nodes, and then establish persistent operating funding for these institutions within a public/private partnership framework.

---

[25] Ibid.
[26] Miller points out that the "World Union of Wholesale Markets has 217 members in over 40 countries and five continents." (Miller, 177).
[27] Ibid.
[28] Madison Terminal Market Final Report (wisc.edu), https://cias.wisc.edu/wp-content/uploads/sites/194/2022/04/MTM-Final-Report_082020.pdf

Public Markets and Publicly Supported Cooperative Grocery[29]

Question 20: How might grants, loans, and other support from USDA enhance access to retail markets by local and regional food enterprises? How might USDA marketing programs enhance access to retail markets for agricultural producers and SME food processors, including programs which facilitate access to a variety of markets, support value-added production and product diversification; increase diversification in distribution channels and market development, such as food hubs, nonprofit and cooperative distribution models?

In addition to making targeted investments in food supply chain distribution infrastructure, USDA should provide direct support and investment into cooperative grocery. Cooperative grocery stores are critical nexus points in resilient food systems that foster food access and food sovereignty, small producer and processor viability, and the emergence of new local food products. However, as described above, they currently face a range of disadvantages with regards to sourcing costs and price competition in relation to firms with market dominance. In addition to addressing these disadvantages through enhanced antitrust enforcement and supply chain investments, direct investments should be made into the ability of cooperative grocery stores to open and expand, especially in localities that face food apartheid.

In addition to investing in cooperative grocery, the USDA could also consider fostering the creation of municipal, county, or regional public markets and public food utilities.[30] Such an idea is not new or radical in our country -

> *Throughout the 19th century, municipalities made substantial investments in public markets, including grand sites such as Seattle's Pike Place Market and Boston's Faneuil Hall. Some larger cities also invested in wholesale terminal markets along railways, to centralize food collection, inspection, and storage. Farmers, producers, and food sellers could rent stalls at public markets to reach consumers. Public officials also argued that connecting producers and consumers at the public market helped bring down food costs."*[31]

Public market investments could establish public market spaces within public/private partnership frameworks within built infrastructure shared with cooperative grocery stores, food hubs, or public terminal models, or could be deployed to transform the capacity of already established farmers markets. In any case, persistent public funding and partnership could lend new levels of stability to these food supply chain and retail access nodes, and help these nodes coordinate and find new regional synergies. If USDA's proposed Regional Food Business Centers are empowered to conduct regional level supply chain analysis and coordination, they

---

[29] Relevant to Question 20

[30] Schweizer, Errol. *Why We Need A Public Food Sector*. Center for Good Food Purchasing, https://goodfoodpurchasing.org/why-we-need-a-public-food-sector/

[31] Kelloway, Claire. *The Tradition of Public Food Markets Reemerges in Trump Country*. Food and Power, December 5, 2019. https://www.foodandpower.net/latest/2019/12/05/the-tradition-of-public-food-markets-reemerges-in-trump-country

could also serve a helpful role in identifying key capacity gaps that federal investments could address.

In summary, USDA should, either with its own resources or in partnership with Congress or other agencies:

- Create new debt relief and equipment upgrade grants and operating capital loans for existing cooperative grocery stores to solidify their viability, scale their ability to produce value-added food products, and reinforce their position as keystone buyers for small and mid-sized producers and processors.
- Deploying additional multi-year investments in new cooperative grocery stores, especially in areas facing food apartheid.
- Provide sufficient funding for double-bucks style SNAP nutrition incentive benefits to be available in cooperative grocery stores nationwide as a game-changing demand-side policy for increasing cooperative grocery store market competitiveness and thereby both food access and food system resiliency.
- Partner with municipalities and counties, especially in disaster prone regions, to create public sector emergency food utilities.

Public Procurement Reform[32]

Question 20: How might government procurement processes further support agricultural producers and SME processors effectively access institutional customers, such as schools and hospitals?

President Biden's Executive Order on Promoting Competition in the American Economy orders, among other things, a whole-of-government adoption of "pro-competitive regulations and approaches to procurement and spending" and the suspension of "regulations that create unnecessary barriers to entry that stifle competition."[33] With the government purchasing hundreds of millions of dollars worth of food in every major agricultural sector, there is tremendous power for change in choosing how these dollars are spent. All too often, public institutions allocate their food procurement dollars via bidding processes that are too easily captured by food wholesalers and food service providers with outsized market power. Public food procurement reform could transform public institutions from net drivers of corporate concentration into keystone buyers and net drivers of resilience within regional food economies.

Having reliable high volume procurement contracts lined up in advance is often a requirement for small producers to justify scaling their production or getting cleared for credit access for a business expansion. Unfortunately, there are many small producers in the areas public programs serve that have the capacity and will to feed their communities, but they are overlooked in favor of large corporate firms. As one North Carolina producer told us, "USDA

[32] Relevant to Question 20
[33] Executive Order on Promoting Competition in the American Economy, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

ought to start buying food from me! Set up a hub, and buy from farmers! Nobody has called me about buying my meat or produce for these COVID food boxes." The USDA should leverage all of its policy and procurement resources to create access to consistent volume contracts for small and mid-sized producers, producer cooperatives, and processors.

USDA should utilize all of the resources and authority at its disposal to adopt or incentivize the adoption of standards-based, resilience oriented food procurement. As Kelloway and Buck note:

> *Government procurement officials could enact purchasing policies that discourage exclusionary payments. As purchasers of goods and services, public officials have significant power to mandate disclosures and changes to business practices and could use this leverage to structure markets for fair goals. Municipal food purchasing standards could also include provisions requiring institutions to negotiate contracts with food service management companies that privilege community-based vendors above those that FSMCs have national purchasing contracts with.*[34]

RAFI-USA recommends the Good Food Purchasing Program by the Center for Good Food Purchasing (CGFP) as a worthy framework for USDA to champion. The Good Food Purchasing Program serves as a framework for orienting food procurement to value local economies, environmental sustainability, workers rights, animal welfare, and nutrition in partnership with trusted third party verifiers. This framework has already been adopted by major metropolitan authorities in New York, Los Angeles, San Francisco, Chicago, Boston, Washington D.C., Cincinnati, and Austin. The value this could create for those farmers and their families is immeasurable, and could be further improved upon by building in purchasing standards for socially disadvantaged producers.

In summary, USDA should, either with its own resources or in partnership with Congress or other agencies:

- Adopt the standards of the Good Food Purchasing Program across all USDA controlled food procurement initiatives, and incentivize or require the adoption of Good Food Purchasing Program standards in all partnerships USDA engages in that involve or impact food procurement.
- Voice support for the Fresh Produce Procurement Reform Act, and apply Good Food Purchasing Program standards to its implementation if passed.
- Create stable, multi-year, scalable food procurement contract frameworks to pair with food supply chain grants and loans to small and mid-sized producers and processors, including small meat processors, to serve as a stable procurement base that facilitates long-term viability.

---

[34] Kelloway, Claire and Matthew Jinoo Buck, *Kickbacks and Corporate Concentration: How Exclusionary Discounts Limit Market Access for Community-Based Food Businesses* [Paper presentation]. Reforming America's Food Retail Markets Yale Law School Conference, March 12th, 2022, 10-11.

Regulatory Compliance Assistance

Question 20: How might USDA marketing programs enhance access to retail markets for agricultural producers and SME food processors…[by providing] technical assistance to producers that helps access USDA programs and improve market readiness? Are there ways to facilitate easier access to food safety compliance resources, and other ways to level the playing field for SME processors?

The regulatory process is a powerful and necessary tool for consumer safety, but without reform it can be an unnecessarily challenging barrier for smaller producers to overcome. Furthermore, many smaller producers have felt that the current regulatory process favors corporations and reduces or even prevents their ability to compete in retail and wholesale markets. While food safety standards should not be relaxed, the USDA can adopt a scale appropriate approach that promotes competition and facilitates collaborative relationships with small and mid-sized producers and processors. USDA should enact internal reforms to the performance incentives that motivate its regulatory agents in the field. With the current blanket incentive for reporting violations, smaller firms are giving up invaluable time and resources only to be blocked from entering the market on the grounds of often trivial infractions that undermine the intent of the regulatory process. With a paradigm shift towards assisting smaller producers in meeting regulatory criteria, rather than penalizing them for not yet meeting it, the USDA can turn an avoidable barrier into a positive tool to promote agricultural competition.

We also recommend the USDA continue to invest further in technical assistance cooperative agreements with nonprofits, food hubs, cooperative grocery stores, and other regionally rooted organizations that already have trusting relationships with producers and processors, especially those who qualify as socially disadvantaged. Facilitating connections between local producers and distributors creates not just both economic stability for small producers and new marketing avenues for small distributors stimulating local economies, but also provides better access to healthy food options for underserved communities. It is not uncommon for areas that are designated food deserts to also be paradoxically where large amounts of food is produced. Creative investments in cold-chain storage, transportation, prepared meal kitchens and technical assistance for retail readiness can dramatically improve the economic agricultural ecosystem for farmers in their communities and promote local food sovereignty.

In summary, USDA should, either with its own resources or in partnership with Congress or other agencies:

- Restructure regulatory agent performance review processes to incentivize scale-appropriate application of regulations and move agents away from a “catch-and-report”model and towards an “educate-to-regulate” model.
- Remove fees associated with uploading GAP audit results on third party platforms for sharing with retail and wholesale buyers for small producers and processors.

- Continue and increase investment in technical assistance cooperative agreements and community infrastructure for small and mid-sized producers and processors, especially those who are socially disadvantaged.

We appreciate the opportunity to provide comments on these critical issues.

Sincerely,

Aaron Johnson
Challenging Corporate Power Program Manager, RAFI-USA
aaron@rafiusa.org

Navina Khanna
Executive Director, HEAL Food Alliance
navina@healfoodalliance.org

Federal Register URL:
https://www.regulations.gov/search/comment?filter=l4g-18zp-h7u4