

The Open Markets Institute’s Comments on “Competition in Food Retail and Distribution Markets and Access for Agricultural Producers and Small and Midsized Food Processors.”

5/16/2022

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

Docket ID: AMS-AMS-22-0026, Federal Register pages 15194-15198
Via Online Submission

Dear Ms. Nian:

The Open Markets Institute would like to thank the U.S. Department of Agriculture (USDA) for examining competition issues in food retail and distribution markets. Fair competition in food retail markets and distribution is essential to ensure that a greater diversity of food businesses operating at multiple scales in various business forms can access markets and reach consumers. At present, food retail and distribution markets are marked by consolidation, dominance, and exclusion. Food businesses and retailers are more likely to succeed based on their size, wealth, and bargaining clout than based on their service, positive innovation, or community benefit.

Reforming food retail and increasing market access for small- and medium-sized producers requires banning abuses of dominance in food retailing and manufacturing as well as economic discrimination. This includes improving merger enforcement to prevent firms from gaining undue market power to begin with, enforcing the Robinson-Patman Act to counteract existing buyer power, and banning unfair methods of competition such as exclusive dealing.

This comment provides further information to assist the USDA’s investigation into food retail practices and support the dire need for fair competition rules.

- **The USDA asked in 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?”*
- **And in 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?”*

Market power and market concentration create critical problems in food retail and distribution — harming producer diversity, consumer food access, regional resiliency, and economic development.

Take the example of America’s largest food retailer, Walmart.¹ One study found that Walmart’s expansion in the late 1980s through 1990s can take roughly half of the blame for small discount store closures in that period.² Another found that for every Walmart store entry, between 4 and 14 existing retailers closed within 15 months.³ By 2019, the retailer captured 50% or more of all grocery sales in 43 metropolitan areas and 160 “micropolitan” areas.⁴ Many argue that Walmart is successful because it is efficient and offers lower prices. However, one study found that local buying groups can offer similar prices compared to Walmart stores in regions where the chain has been around for 15 years or more.⁵ Walmart has been accused of selling goods below cost and losing money to drive out competitors.⁶ Large chains with more financial resources can afford to lose money to pursue this strategy, while even the most efficient independent business cannot, creating a potential advantage based on wealth, not business practice.

Walmart also leverages its consolidated buying power to squeeze farmers and workers along the supply chain, as well as workers in communities where it locates. Walmart’s lower prices are not entirely the result of superior operational efficiencies but the result of brute bargaining power and early data collection from its suppliers.⁷ As Walmart came to represent a significant portion of sales for major consumer brands and food businesses, the chain could demand better terms and prices because its suppliers couldn’t afford to say no. Today, Walmart can unilaterally demand better service terms or add new fees, and suppliers have no meaningful ability to push back.⁸ Smaller independent stores allege that brands go on to charge them higher prices or fulfill their orders later to make up the difference of concessions given to Walmart and other “power buyers,” such as Amazon, Kroger, or Target.⁹

This squeeze harms workers and farmers in supplying businesses. One study found that as businesses become more dependent on fewer buyers or clients for their revenue, workers’ wages at these businesses tend to decline more over time (and decline more the longer a business relies on one or two buyers).¹⁰ Altogether this wage suppressing buyer power can explain 10% of wage stagnation since the 1970s, according to the study.¹¹ Farmers’ share of the food dollar also

¹ <https://www.foodindustry.com/articles/top-10-grocers-in-the-united-states-2019/>

² Panle Jia, “What Happens When Wal-Mart Comes to Town: An Empirical Analysis of the Discount Retailing Industry,” *Econometrica* 76, no. 6 (2008): pp. 1263-1316, <https://doi.org/10.3982/ecta6649>.

³ Carlana Cochi Ficano, “Business Churn and the Retail Giant: Establishment Birth and Death from Wal-Mart’s Entry*,” *Social Science Quarterly* 94, no. 1 (2012): pp. 263-291, <https://doi.org/10.1111/j.1540-6237.2012.00857.x>.

⁴ https://cdn.ilsr.org/wp-content/uploads/2019/06/Walmart_Grocery_Monopoly_Report_final_for_site.pdf

⁵ José Caraballo-Cueto, “Are Multinational Retailers Really Selling at Lower Prices than Domestic Chains? Evidence from Three Sectors,” *Margin: The Journal of Applied Economic Research* 13, no. 1 (June 2018): pp. 49-82, <https://doi.org/10.1177/0973801018800082>. **Error! Hyperlink reference not valid.**

⁶ <https://www.chicagotribune.com/news/ct-xpm-1995-01-10-9501100271-story.html>

⁷ <https://www.pbs.org/wgbh/pages/frontline/shows/walmart/secrets/pricing.html>

⁸ <https://progressivegrocer.com/walmart-tightens-squeeze-its-suppliers>; <https://www.reuters.com/article/us-walmart-suppliers-insight/wal-mart-puts-the-squeeze-on-suppliers-to-share-its-pain-as-earnings-sag-idUSKCN0SD0CZ20151019>

⁹ <https://www.nationalgrocers.org/wp-content/uploads/2021/03/NGA-Antitrust-White-Paper25618.pdf>

¹⁰ Wilmers, Nathan. “Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers’ Wages, 1978 to 2014,” *American Sociological Review* (March 27, 2018). <https://doi.org/10.1177/0003122418762441>

¹¹ *Id.*

decreased as Walmart and other grocers consolidated — for example, in 1990 ranchers received nearly 60 cents of every dollar spent on beef, while retailers received 33 cents. By 2009 ranchers' share of the beef dollar shrunk to 42 cents, while retailers' share grew to 49 cents.¹² As early as 2000, the USDA reported that growing concentration in grocery retail and wholesale created “fewer but larger buyers” for produce growers and shippers and argued that such big “buyers may enjoy an unfair advantage in bargaining with suppliers.”¹³

Several studies have also found that Walmart's entry reduces workers' wages at competing retail stores and even shrinks overall employment in communities over time, especially as Walmart becomes a dominant “monopsonist” employer.¹⁴

While Walmart is an extreme example, it represents many of the competitive dynamics in food retail today brought on by consolidation and lax enforcement of laws banning predatory pricing, economic discrimination, and excessive mergers. Small- and medium-sized food businesses, as well as cooperatively owned, or nonprofit food businesses are the first to be pushed out in a food retail system that rewards bargaining might and squeezing suppliers. For one, many large national retailers negotiate most of their purchases through centralized buying systems and nationwide contracts — contracts regional food producers simply cannot qualify for. While some regional buying infrastructure may exist depending on the chain, the largest national retailers often enter effective partially exclusive arrangements with large food companies, locking up substantial portions of the shelf for the biggest brands, as further sections of this comment will illustrate.

- **USDA also asks:** (3) *How does competition and concentration among distributors and other parts of the wholesale food market relate to food retail concentration and competition? 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?*
- **The agency also asks in question (11) for the public to** “Please comment on implications, negative or positive, of mergers in the food retail or distribution sectors.”

¹² Walmart's Rural Stranglehold (PDF); <https://dailyonder.com/examining-walmarts-rural-stranglehold/2010/12/07/>

¹³ Phil R. Kaufman et al., “Understanding the Dynamics of Produce Markets” (United States Department of Agriculture Economic Research Service, August 2000),

https://arefiles.ucdavis.edu/uploads/filer_public/2014/05/19/aib758.pdf. **Error! Hyperlink reference not valid.**

¹⁴ Justin C. Wiltshire, “Walmart Supercenters and Monopsony Power: How a Large, Low-Wage Employer Impacts Local Labor Markets,” *Washington Center for Equitable Growth - Working Paper Series*, January 2022, <https://equitablegrowth.org/working-papers/walmart-supercenters-and-monopsony-power-how-a-large-low-wage-employer-impacts-local-labor-markets/>; David Neumark, Junfu Zhang, and Stephen Ciccarella, “The Effects of Wal-Mart on Local Labor Markets,” *Journal of Urban Economics* 63, no. 2 (March 2008): pp. 405-430, <https://doi.org/10.1016/j.jue.2007.07.004>; Jared Bernstein and Josh Bivens, “Economic Policy Institute,” *Economic Policy Institute* (blog), June 14, 2006, <https://www.epi.org/publication/ib223/>.

Distributors are an essential market for food businesses to access retailers. But the distribution channel has either been vertically integrated, with many of the largest grocers running their own distribution, or it has consolidated into fewer distributors with gatekeeping power of their own.

Through the 1970s, there were about 20 grocery wholesaler mergers per year; that rate nearly doubled through the 1980s and early 1990s.¹⁵ Between 1997 and 2000 alone, there were 105 grocery wholesaler mergers and acquisitions.¹⁶ In 10 years, the market share of the four largest independent grocery wholesalers jumped from 52% in 1997 to 87% in 2007.¹⁷

Today, the largest wholesale companies continue to buy up competitors. Top player C&S Wholesale Grocers purchased at least three wholesalers between 2014 and 2017, including Associated Wholesalers Inc, the ninth-largest wholesaler. Since 2000, specialty distributor, United Natural Foods (UNFI), has acquired 19 distributors, manufacturers, and private label suppliers of natural and organic foods, before branching out to take over the major traditional grocery wholesaler, SuperValu, in 2018.¹⁸ Before that acquisition, SuperValu had recently acquired three of its competitors.¹⁹

Acquisitions and consolidation also extend to foodservice distribution. The two largest foodservice distributors, Sysco and US Foods, have together acquired 23 companies in the past five years.²⁰ Between 2009 and 2013, 86 independent foodservice distributors were acquired by the five largest distributors in the industry.²¹ As USDA notes, Sysco and US Foods command more than 70% of all broadline foodservice distribution. Sysco and US Foods maintain their market share by offering their retail customers discounts or rebates if they buy a large portion of all their food (often more than 80%) from select Sysco- or US Foods-approved suppliers. Sysco and US Foods, in turn, have similar loyalty agreements with their suppliers, committing to sell large volumes of their products or exclusively carry their products in exchange for discounts. This limits retailers' purchasing options and excludes smaller or regional competitors from accessing essential distribution networks.

There are numerous examples of how these distribution acquisitions often result in the shutdown of distribution centers, diminishing critical food infrastructure and food access for entire towns

¹⁵ John M. Connor, "CONCENTRATION AND MERGERS IN U.S. WHOLESALE GROCERY MARKETS" (Purdue University Department of Agricultural Economics, June 1997), <https://core.ac.uk/download/pdf/7195545.pdf>.

¹⁶ *Supra* 12

¹⁷ <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/consumer-business/us-retail-ma-wd-pov-012914.pdf>

¹⁸ <https://www.startribune.com/buyer-of-supervalu-is-a-key-player-in-fast-growing-organic-foods-industry/489244171/>; <https://www.cnbc.com/2018/07/26/whole-foods-supplier-united-natural-foods-to-buy-supervalu.html>.

¹⁹ <https://www.supermarketnews.com/retail-financial/supervalu-acquire-ag-florida>; <https://www.businesswire.com/news/home/20170623005719/en/SUPERVALU-Completes-Acquisition-Unified-Grocers>; <https://www.wsj.com/articles/grocery-stores-feel-the-squeeze-1502542800>

²⁰ <https://mergr.com/sysco-acquisitions>.

²¹ <https://www.thestreet.com/markets/mergers-and-acquisitions/antitrust-watchdog-wary-of-sysco-us-foods-deal-12456984>.

and local communities.²² Consolidated wholesale distributors have also sought to increase profits through reducing capacity and increasing transportation fees to retailers.²³ In the natural and organic channel, suppliers also report rising fees as the industry has consolidated. Open Markets spoke with five people who either work for food startups or consult for food startups, and across the board, they shared stories of poor service, high marketing fees, erroneous fees, and overall predatory behavior by leading natural food distributor UNFI. Brands expressed having no negotiating power with consolidated natural foods distributors, and with intense competition for distribution slots, brands felt they had no choice but to pay high fees or buy into advertising programs they didn't want.

Consolidation in grocery and foodservice distribution has downstream impacts on the larger food system, as it leaves fewer entry points into retail markets for producers.²⁴ Smaller independent farms, food processors, and manufacturers are left without major wholesalers to take their products to market, as wholesalers prioritize larger manufacturers.²⁵ As such, small and midsize farmers are inadequately equipped to compete with larger competitors preferred by large supermarket chains. This reduces the diversity of sources within the food supply chain, with much of the produce in grocery stores coming from sole producers.²⁶

- **USDA asked in question (7)** *Please describe the role that exclusive dealing arrangements play in the food retail and distribution marketplaces. Do they 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?*
- **And in question (8)** *Please describe the role that slotting fees, category captains, and other preferential access or discounts play in retail food markets, including but not limited to meat and poultry. Are certain segments, such as organic or value-added products like grass-fed meats, affected differently? What affect do such behaviors 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? Do those relationships improve risk management or otherwise enhance market access in certain circumstances? Should any of these practices be limited or changed to support new market entrants, and if so, how?*

²² <https://apnews.com/article/41bb73db51d042b1b514be80fbab3df1>; https://www.oleantimesherald.com/news/c-s-planning-to-shutter-former-olean-wholesale-site/article_84d616b9-77f9-5042-9b17-140bf520d826.html; <https://www.ledger-enquirer.com/news/business/article29239912.html>; <https://www.supermarketnews.com/retail-financial/save-lot-pulling-out-west-coast>; <https://www.pressconnects.com/story/news/local/2020/06/10/maines-paper-food-conklin-bankruptcy/5335874002/>

²³ D&G Inc. and Robert Warren Wentworth Jr. Inc v. Supervalu Inc. and C&S Wholesale Grocers, Inc., 09cv983, 93, (D. Minn 2009).; <https://topclassactions.com/lawsuit-settlements/closed-settlements/825780-supervalu-wholesale-grocery-antitrust-class-action-settlement/>.

²⁴ Rebecca Dunning et al., “The Local Food Movement, Public-Private Partnerships, and Food System Resiliency,” *Journal of Environmental Studies* 5, (2015): 661-670, doi: 10.1007/s13412-015-0295-z

²⁵ <https://www.policylink.org/food-systems/equitable-food-systems-resource-guide/distribution>.

²⁶ *Supra* 23; Portions of this comment lifted from Open Markets' comment on docket AMS-TM-21-0034

Exclusive dealing agreements between dominant food manufacturers, distributors, or retailers serve to unfairly abuse corporate dominance to maintain access to markets and exclude competitors, especially small- to medium-sized firms or community-based, cooperatively owned, and nonprofit food businesses. These arrangements, unfortunately, exist across the food retail and distribution market in many forms, including in the form of some (though not all) slotting fees and category captain arrangements.

USDA can find more information and answers to its questions in the comment authored by Open Markets' food program manager, Claire Kelloway, and the American Economic Liberties Project's senior fellow, Matthew S.J. Buck, submitted as a part of the compendium produced for Yale Law School's "Reforming America's Food Retail Markets" conference.

- **Finally, when it comes to finding solutions to these challenges, the USDA asks in 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? Should Federal and state antitrust enforcers place greater emphasis on adverse consequences of buyer power? Should greater attention be paid to information asymmetries and preferential access to data? How could USDA utilize its regulatory and enforcement authorities more effectively?*
- **And in question (19):** *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? Please explain.*
- **And in question (20):** *How could other USDA programs, services, and authorities be further deployed to enhance access to retail markets for agricultural producers and SME food processors?*

Laws prohibiting discriminatory pricing have an important role to play in promoting market access for agricultural producers and small- to medium-sized food businesses. The Robinson-Patman Act (RPA) protects retailers and upstream suppliers from the unfair competition of larger retailers using sheer buyer power to extract price discounts not available to other retailers. Since the Department of Justice (DOJ) and Federal Trade Commission (FTC) largely stopped enforcing the RPA three decades ago, powerful buyers — such as Amazon, Walmart, and Kroger — have felt increasingly free to use their purchasing clout to extract concessions from suppliers that their smaller rivals do not receive. Buyer power is on the rise across the U.S. economy: While horizontal concentration has increased,²⁷ vertical integration has declined,²⁸ meaning firms are becoming more dependent on larger buyers. The effects of such buyer power include not just lower profits at upstream suppliers, but lower wages as well.²⁹

²⁷ <https://www.nber.org/papers/w23583>; <https://academic.oup.com/qje/article/135/2/645/5721266?login=true>

²⁸ [https://www.emerald.com/insight/content/doi/10.1108/S0733-558X\(2010\)0000028006/full/html?utm_source=TrendMD&utm_medium=cpc&utm_campaign=Research_in_the_Sociology_of_Organizations_TrendMD_1](https://www.emerald.com/insight/content/doi/10.1108/S0733-558X(2010)0000028006/full/html?utm_source=TrendMD&utm_medium=cpc&utm_campaign=Research_in_the_Sociology_of_Organizations_TrendMD_1); <https://www.hup.harvard.edu/catalog.php?isbn=9780674975446>

²⁹ <https://journals.sagepub.com/doi/full/10.1177/0003122418762441>

The RPA built on and expanded the Clayton Act’s restrictions on price discrimination to prevent large buyers from leveraging raw market power to extract lower prices from suppliers, while allowing the benefits of lower prices when they are the result of genuine efficiencies, such as bulk orders enabling suppliers to reach economies of scale. Importantly, the prohibition on price discrimination is not a blanket one. For example, price discrimination is permissible when there are justifiably lower costs to serve the preferred purchaser. The RPA thus aims to strike a careful balance: ensuring that consumers can obtain the benefits of operational efficiencies and economies of scale of a firm’s operations, while preventing retailers from using their raw power and ability to exploit their suppliers to win market share.

Reviving and strengthening RPA, particularly through increased enforcement and obtaining favorable rulings, can help rebalance power in agricultural supply chains and tame the exploitation of agricultural producers and small processors by dominant buyers. Reinvigorated enforcement of RPA would ensure that Walmart could not acquire products at a lower wholesale price than smaller grocery chains by dint of its sheer buyer power. This is not to say that RPA in its current form is perfect. Critics are right that the text is awkward and vague, and the law places the burden of compliance on the suppliers being squeezed into offering discriminatory discounts instead of on the powerful buyers demanding the discounts. Still, with some changes, the RPA could serve as a pillar of antitrust policy protecting supply chains from domination and control by larger buyers.

RPA is just one example of fair competition regulation. The FTC has untapped authority to define terms of fair competition by clearly outlawing abuses of dominance, coercion, financial might, and general lawbreaking. This includes passing a rule that would ban exclusive dealing by dominant firms as *per se* illegal, as outlined in the Open Markets Institute’s petition before the agency.³⁰ The USDA also can issue fair competition rules as it pertains to meat producers’ marketing practices under the Packers & Stockyards Act (PSA). Exclusionary rebates and payments could be seen as a “course of business ... with the effect of manipulating or controlling prices, or of creating a monopoly in the ... selling” of meat.³¹ The USDA could issue rules making clear that exclusive marketing practices, such as loyalty rebates and exclusionary kickbacks, violate the PSA.

The FTC and DOJ can also prevent retailers and manufacturers from accumulating market power by improving merger enforcement. In addition to harmful buyer power, unchecked mergers between food retailers, distributors, and food processors have resulted in reductions in capacity, brittle supply chains, and fewer avenues to market for small- and medium-sized businesses. New merger guidelines should have clear bright-line rules that safeguard against consolidated market structures and prevent monopolists in their incipiency.³²

³⁰ <https://www.openmarketsinstitute.org/publications/petition-federal-communications-commission-ban-exclusionary-contracting>**Error! Hyperlink reference not valid.**

³¹ 7 U.S.C. § 192(e).

³² For further detail, see Open Markets’ April 21, 2022, response to the request for information on merger enforcement by the FTC and the Antitrust Division of the DOJ.

Beyond antitrust enforcement, the USDA can commit to investing in more diverse, community-based, and regional food systems through its food procurement programs. In any federal food procurement program, agencies should:

- emphasize fair prices to farmers by removing low-bid priorities;
- provide longer contracts to reduce administrative costs and uncertainty;
- allow flexibility for regionally appropriate variation;
- and provide adequate administrative resources to relevant agencies for implementation to encourage timely communication, a greater number of smaller contracts, and quality monitoring.

Federal food procurement programs should also prioritize buying food from businesses that are cooperatively owned, worker-owned, and committed to paying fair prices to farmers and workers, as well as businesses owned by beginning, socially disadvantaged, and limited-resource food business owners. USDA should also terminate any federal purchasing contracts the agency has with harmful businesses that are undermining resiliency — namely, businesses that have violated labor or environmental regulations.

Finally, to promote more democratically operated businesses in food retail organized around serving their member-owners rather than serving the short-term profit interests of investors, the USDA should expand its support of cooperatives. Staffing and funding for USDA cooperative services have declined significantly since their peak in the late 1960s.³³ Cooperative supports at the USDA need to be restored to an independent division, as they were up until 1994, with significantly more resources to support critical cooperative research, education, and technical assistance. These resources are especially important to help smaller co-ops and their members develop strong managerial and governance structures and to develop new co-ops. Where possible, the USDA should also work with Congress to appropriate more public financing opportunities to provide capital for the creation of new co-ops and help established co-ops looking to expand or stay afloat in economic crisis.³⁴

³³ At its peak in the late 1960s, the USDA program dedicated to supporting cooperatives, then called the Farmer Cooperative Service, had slightly more than 100 employees. Today, federal cooperative support is housed within the Rural Business-Cooperative Service, an agency under USDA's broader Rural Development agency. According to the U.S. Office of Personnel Management, the Rural Business-Cooperative Service had fewer than 100 employees in 2018 and covered a far wider span of work than just cooperatives, such as rural business grant-making and renewable energy. In early 2020, the Rural Business-Cooperative Service directory listed only five staff members. A 2018 letter from former Secretary Sonny Perdue proposed transfers that would further shrink the branch. Among other things, this division produced a bimonthly magazine on cooperatives that the USDA abruptly canceled in 2018. While the Cooperative Marketing Act requires the USDA to support co-ops, the program does not have a line-item budget, allowing for such dramatic attrition.

³⁴ Portions of this comment are lifted from Open Markets' comment on docket AMS-TM-21-0034 and Open Markets' report, "Redeeming the Democratic Promise of Agriculture Cooperatives."