Chronically Besieged: The U.S. Live Cattle Industry

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In 2013, this author's paper, "*Under Siege: The U.S. Live Cattle Industry*" ("*Under Siege"*), was published in the *South Dakota Law Review* and described the precarious state of the fast-shrinking United States cattle industry through calendar year 2012.[1] It described this shrinkage in terms of, *inter alia*, industry participants, herd size, marketing outlets, share of the consumer's beef dollar, and supply-chain participant profitability. The paper cautioned that without rigorous antitrust enforcement and other legal actions to protect market competition, the cattle industry, as it was known at that time, would be lost for future generations.

In the years after 2013, the live cattle industry experienced significant gyrations, starting with record-high nominal cattle prices followed by, and continuing today, decade-long price lows. The cattle-price rally that brought prices to their highest nominal levels ended in late 2014. In 2015, the industry began a baffling, long-term cattle-price collapse while consumers continued paying record and near-record beef prices. Since 2017, beef prices trended further upward, reaching new historical highs, while cattle prices trended downward, hitting decade-long lows. This phenomenon evinces a complete disconnect between the value of the raw product (*i.e.*, cattle) and the value of retail beef. In 2019, the temporary shutdown of one slaughter plant caused another industry-wide price collapse. And, in 2020, for the first time in recent memory, consumers could not buy the meat they needed for their families because grocery store meat counters were bare. At the same time cattle prices remained inexplicably depressed.

Despite all this, the U.S. cattle industry remains the largest single segment of American agriculture, generating approximately $66 billion in annual cash receipts, more than any other single commodity such as hogs, poultry, dairy corn, soybeans or wheat.[2] About 43% of the nation's remaining 2.04 million total farms have cattle,[3] and cattle are raised in every state of the Union. These factors suggest that reform of the U.S. cattle industry is intrinsically tied to the goal of revitalizing Rural America.

Other factors also make the cattle industry uniquely suited for jumpstarting Rural America. First, it underproduces for the domestic market, meaning it has ample room to grow. Second, with a growing population here and abroad, demand for beef is strong and growing. Third, and as this paper demonstrates, the marketplace has unequivocally demonstrated its capacity to pay beef prices at levels that are more than adequate to provide profitability for every segment of the cattle supply chain. And fourth, the industry is capable of creating widely diverse products – from lean beef to marbled beef – using a diverse array of animal husbandry practices – from low input

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[1] Under Siege: The U.S. Live Cattle Industry, South Dakota Law Review, Vol. 58, No. 3, Fall, available at https://www.questia.com/library/p408765/south-dakota-law-review/i3478989/vol-58-no-3-fall.

[2] *See* U.S. Department of Agriculture (USDA) Economic Research Service (ERS), Cash Receipts by Commodity, available at https://data.ers.usda.gov/reports.aspx?ID=17845.

[3] Table 1 Historical Highlights: 2017 and Earlier Census Years, Census of Agriculture, U.S. Department of Agriculture (USDA) National Agricultural Statistics Service (NASS), 2017 Census Volume 1, Chapter 1: U.S. National Level Data, available at https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/.

practices (such as all-grass supply chains), to higher input practices (such as conventional, grain-fed supply chains).

Unfortunately, as described below, these inherently positive cattle industry attributes will not suffice to reverse the industry's negative trajectory without substantive intervention by policymakers, regulatory enforcers or, in their absence, private litigants.

I. ACCELERATED EROSION OF CRITICAL COMPETITIVE INFRASTRUCTURE

Under Siege characterized the U.S. cattle industry as the meatpackers' '*Last Frontier'* – the last major livestock sector to be vertically integrated from egg- or birth-to-plate. It described how, prior to 2013, the beef packing industry had gained considerable economic and political control over the entire live cattle industry through increased beef packer concentration, increased feedlot concentration,[4] and by eliminating economic opportunities for industry participants, including independent cattle farmers and ranchers. These business entities, along with their supporting businesses,[5] constitute the industry's critical competitive infrastructure – the brick and mortar and other physical infrastructure components necessary to facilitate competition and competitive market forces.

If the live cattle industry's critical competitive infrastructure is destroyed or further dismantled, causing the industry to lose the critical mass of infrastructure necessary to sustain competition, the live cattle industry as it is known today will be lost for future generations. Such a fate has already befallen the domestic hog and poultry industries, which are now skeletonized versions of their earlier selves, having lost hundreds of thousands of producers; and which are almost entirely controlled by packers from birth- or egg-to-plate, respectively; and, which lack any semblance of competition between farmer-sellers and packer-buyers.[6]

From 2013 to present, the erosion of the live cattle industry's critical competitive infrastructure has accelerated, but with one important caveat – the period 2013-2014 delivered long overdue, albeit fleeting prosperity to the entire U.S. live cattle industry. Beginning in mid-2013, two months after the U.S. Department of Agriculture ("USDA") finalized its rule to require beef sold at retail to be labeled as to where the animal from which it was derived was born, raised, and harvested,[7] retail beef prices and fed cattle[8] prices trended sharply upward in relative synchrony. Then, by

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[4] A feedlot is a business entity that purchases cattle weighing approx. 900 lbs. and typically feeds them a grain-based diet for several months until they reach a slaughter weight of about 1,300 lbs., at which time they are sold directly to a packer. Thus, the feedlot is the last segment of the domestic live cattle supply chain for grain-fed beef.

[5] Supporting businesses that likewise comprise the industry's critical competitive infrastructure include local and regional livestock auction yards where cattle farmers and ranchers can readily market their typically lighter-weight cattle and cull animals within a reasonable distance from their farming or ranching operation. Support industries also include ranch supply and feed stores, equipment manufacturers, and trucking firms that transport live cattle to markets.

[6] *See* Under Siege, *supra*, note 1, at 560.

[7] *See* Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, Final Rule, May 24, 2013, *Federal Register*, Vol. 78, at 31,367-385.

[8] Fed cattle are cattle reared specifically for beef production. They are the cattle fed grain-based diets in feedlots and subsequently sold directly to packers. Because slaughter-ready fed cattle sold by feedlots represent the last stage of

November 2014, both cattle prices and retail beef prices had surged to historically high nominal levels.[9]

For that reason, policymakers and industry observers may have considered *Under Siege* as premature. Consequently, no reforms were initiated to either restore competition or rebalance the market power disparity between the large beef packers and the hundreds of thousands of disaggregated, independent U.S. cattle producers. Hidden from plain sight, however, was an ominous crack in the very foundation of the entire U.S. cattle industry's competitive market structure. That crack soon became a crater, upon which the U.S. cattle industry, as it is known today, clings precariously to its rim.

A. Beef Packer Concentration

By 2012, the four-firm buyer concentration ratio in the fed cattle market was at the same 85% level as it is today (2018 latest available data), after having attained an 86% level in 2009.[10] These ratios are more than double the market power necessary to form an oligopoly, a structure that can confer market power to the concentrated firms.[11]

In 2019, approximately 92% of the 33.1 million total cattle (bulls, cows, steers, and heifers, including dairy animals) slaughtered in federally inspected packing plants were slaughtered in only 40 plants.[12]

To put this exceedingly high level of beef packer concentration into the context of the live cattle industry, there are about 883,000 remaining farms and ranches with cattle and calves interspersed across the United States.[13] Together, these cattle farms and ranches bred, reared, and sold their 33.1 million cattle, about 92% of which were sold to just 40 federally inspected slaughtering establishments. However, 26.1 million (71% of those 33.1 million) cattle were fed steers and heifers,[14] of which 85% were purchased by just four firms. This means that not only do the four largest firms slaughter 85% of the nation's fed steers and heifers; but also, these four firms control 67% of all cattle slaughtered in federally inspected plants (based on 2019 data). As noted above,

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the animal's life cycle, their market value translates to the base price of lighter cattle of all weights and ages. This is because the value of lighter-weight and younger cattle is the expected future value of those animals when they are later fed in feedlots and sold to packers.

[9] *See* Chart 1, *infra*, at 9.

[10] Packers and Stockyards Division Annual Report 2019, USDA-AMS Packers and Stockyards Division, at 9, available at https://www.ams.usda.gov/sites/default/files/media/PSDAnnualReport2019.pdf.

[11] Power, Food and Agriculture: Implications for Farmers, Consumers and Communities, Mary K. Hendrickson et al., University of Missouri College of Agriculture, Food & Natural Resources Division of Applied Social Sciences, Working Paper, at 14, available at https://www.academia.edu/35117557/Power_Food_and_Agriculture_Implications_for_Farmers_Consumers_and_Communities.

[12] *See* Livestock Slaughter 2019 Summary, USDA National Agricultural Statistics Service, April 2020, at 60, available at https://downloads.usda.library.cornell.edu/usda-esmis/files/r207tp32d/34850245n/5712mr72x/lsan0420.pdf.

[13] Table 12, Historical Highlights: 2017 and Earlier Census Years, Census of Agriculture, U.S. Department of Agriculture (USDA) National Agricultural Statistics Service (NASS), 2017 Census Volume 1, Chapter 1: U.S. National Level Data, available at https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/.

[14] *See* Livestock Slaughter 2019 Summary, *supra*, note 12, at 17.

this concentration level associated with all cattle types is likewise well above the level of market power necessary to form an oligopoly.

Despite this exceedingly high level of market power concentration, U.S. regulators remained disinclined to take any antitrust enforcement action to stop the ongoing consolidation of the beef packing sector:

In April 2013, JBS USA, LLC, was allowed to purchase two of XL Four Star Beef, Inc., packing plants in the United States, one in Omaha, Nebraska and the other in Nampa, Idaho, each with a capacity to process 1,100 head of cattle per day.[15]

In May 2019, Perdue Farms, which is among the four largest poultry integrators that control 51% of the broiler market[16] was allowed to acquire Panorama Meats, the largest U.S. producer of grass-fed certified organic beef.[17]

In June 2019, the nation's fourth largest packer, National Beef Packing Company, LLC, which is majority owned by the Brazilian company Marfrig Global Foods, was allowed to acquire an important regional beef packer in Iowa, Iowa Premium, LLC, which slaughters approximately 1,100 head of cattle daily.[18]

According to the USDA, the largest four beef packers earned record profits in 2018, with Tyson, JBS, Cargill, and National Beef all reporting record earnings and citing strong beef demand, export demand, and availability of cattle as factors in making the year profitable.[19] Indeed, 2018 was a banner year for beef demand as indicated by the National Beef Checkoff Program's announcement that beef demand increased 15% percent in 2018 compared to January 2012.[20] And it was also a banner year for exports as U.S. beef exports increased to the highest levels in history, both in terms of quantity and price.[21] Although these two factors should have increased earnings for U.S. cattle farmers and ranchers as well, they did not. Instead, 2018 cattle prices were $4.34 per hundredweight (cwt) lower than the previous year and moved lower yet in 2019.[22]

The question that should concern both regulators and policymakers alike is to what extent does beef packer concentration contribute to the dysfunctional marketplace manifested by the market's

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[15] 2013 Packers and Stockyards Annual Report, USDA Grain Inspection Packers and Stockyards Administration (GIPSA), at 33, available at https://www.ams.usda.gov/sites/default/files/media/2013_psp_annual_report.pdf..
[16] Power, Food and Agriculture: Implications for Farmers, Consumers and Communities, *supra*, note 11, at 25.
[17] Packers and Stockyards Division Annual Report 2019, *supra*, note 10, at 17.
[18] *See id*.
[19] Packers and Stockyards Division Annual Report 2018, USDA GIPSA, at 19, available at https://www.ams.usda.gov/sites/default/files/media/PSDAnnualReport2018.pdf.
[20] Beef Demand… It's Been a Very Good Year, Cattlemen's Beef Board and National Cattlemen's Beef Association (December 13, 2018), available at https://www.beefitswhatsfordinner.com/retail/sales-data-shopper-insights/beef-demand.
[21] 2018 Beef Exports Record-Large; Pork Export Volume Just Short of 2017 Record, U.S. Meat Export Federation (March 7, 2019), available at https://www.usmef.org/news-statistics/member-news-archive/2018-beef-exports-record-large-pork-export-volume-just-short-of-2017-record-2/.
[22] *See* Choice beef values and spreads and the all-fresh retail value, USDA Economic Research Service (reporting that the 5-market steer price fell from $121.60 per hundredweight (cwt) in 2017 to $117.26 per cwt in 2018, and further fell to $115.41 per cwt in 2019), available at https://www.ers.usda.gov/data-products/meat-price-spreads/.

inability to competitively allocate a fair and equitable share of beef profits upstream into the live cattle supply chain – to America's cattle farmers and ranchers?

B. Feedlot Concentration

There are three distinct segments within the live cattle industry, representing each segment of the cattle's life cycle: The first and largest (by participant volume) is the cow/calf segment that annually births the calves that are sent downstream in the supply chain after they are weaned from their mothers. The second is the backgrounding segment that grows the calves after they are weaned until they reach a weight suitable for the grain-based feeding. The last segment is the feedlot segment where lighter-weight, backgrounded calves are fed a high-concentration, grain-based diet for the last several months of their life cycle and then sold to the packer for harvest.

While beef packer concentration appears to have somewhat plateaued since 2009 at the four-firm concentration ratio of between 83% and 86%,[23] it is now evident that major concentration efforts are focused on the feedlot sector of the live cattle industry. In other words, the oligopolistic structure of the beef packing industry is now being pushed upstream into the live cattle industry itself.

Under Siege reported a loss of 36,000 smaller feedlots (feedlots with a capacity of less than 1,000 head) since 1980, representing a 32% decline in feedlot numbers.[24] It also reported that the industry's largest feedlots (those 66 feedlots with capacities of more than 50,000 head) had sold 32% of all cattle marketed from feedlots in 2011.[25]

The loss of smaller feedlots and expansion of the largest feedlots has accelerated significantly since 2011. Data from USDA reveal there were 49,000 fewer smaller feedlots in 2019 than in 2011, representing an additional loss of 65% of the industry's smaller feedlots in just the past eight years.[26] The largest feedlots increased in number from 66 feedlots to 75 feedlots during the same period, and those 75 large feedlots fed over one-third of all fed cattle marketed in 2019.[27]

The USDA reports there are 28,180 total feedlots remaining in the U.S. in 2019, of which 26,000 are the group of smaller independent feedlots that have been exiting the industry at an alarming rate, but which feed only 13% of cattle marketed by all feedlots.[28] This means there were 2,180 remaining feedlots that fed 87% of all cattle marketed in 2019, and only 75 of them fed 34% of the cattle.

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[23] Packers and Stockyards Division Annual Report 2019, *supra*, note 10, at 9.
[24] Under Siege, *supra*, note 1, at 564.
[25] *Id*.
[26] *Compare* 2011 Cattle on Feed, USDA National Agricultural Statistics Service (NASS) (Feb. 2012), at 16, available at https://downloads.usda.library.cornell.edu/usda-esmis/files/m326m174z/s1784n301/bg257g64v/CattOnFe-02-24-2012.pdf *with* 2019 Cattle on Feed, USDA NASS (Feb. 2020), at 15, available at https://downloads.usda.library.cornell.edu/usda-esmis/files/m326m174z/m900pb97v/4f16ck62c/cofd0220.pdf.
[27] *Id*.
[28] *See* Cattle on Feed (Feb. 2020), *supra*, note 26.

Thus, the feedlot sector that represents the marketing outlets for hundreds of thousands of cattle farmers and ranchers who sell backgrounded cattle to feedlots is consolidating rapidly.

C. Eliminating Opportunities for Cattle Industry Participants

As discussed above, about 75% of smaller, independent feedlots have exited the U.S. cattle industry in just the past 25 years, leaving the nation's independent cattle farmers and ranchers with fewer marketing outlets for their lighter weight cattle. *Under Siege* explained that hundreds of thousands of independent cattle farmers and ranchers have exited the industry since the 1980s, with more than four of every ten U.S. beef cattle operations in business in 1980 gone by 2012.[29]

A comparison of 2012 and 2017 census data reveals that the total number of U.S. beef cattle operations increased by 1,140 farm/ranch operations during the five-year period, with those with a herd size smaller than 100 cows reduced by 8,260 operations, while operations with 100 cows or larger increased by 9,400 operations.[30]

Before discussing this recently occurring modest increase in the number of beef cattle operations, it is important to note that 25 years ago there were 833,160 operations with less than 100 cows and 75,970 with more than 100 cows, for a total of 909,130 beef cattle operations.[31]

In 2017, there were 657,146 smaller operations and 71,900 larger operations, for a total of 729,046 beef cattle operations.[32] This reveals that the number of smaller operations shrank 21% during this period and the number of larger operations shrank 5 percent.

It remains to be seen if the modest increase in beef cattle operations with more than 100 cows realized between 2012 and 2017 was sustained beyond 2017 given the continuation of the cattle price slide that began in 2015.

The ongoing reduction of smaller beef cattle operations suggests a limited response to the temporary cattle price rally that occurred during the earlier part of the 2012 through 2017 period. This may indicate that there continue to be fewer new entrants, particularly younger new entrants, into the cattle industry. Census data that show the average age of the American farmer increased from 58.3 years of age in 2012 to 58.6 years of age by 2017 provides support for this theory.[33]

Charts 3 and 4 in Appendix I, respectively, show that both the number of farms and ranches with beef cows, as well as the total number of beef cows in the U.S. cattle herd, have been systematically contracting for decades. Chart 5 in Appendix I reveals that market outlets available for the

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[29] Under Siege, *supra*, note 1, at 565.
[30] *See* Table 12 Historical Highlights: 2017 and Earlier Census Years, Census of Agriculture, U.S. Department of Agriculture (USDA) National Agricultural Statistics Service (NASS), 2017 Census Volume 1, Chapter 1: U.S. National Level Data, available at https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/.
[31] Cattle, NASS, February 2, 1996, at 19, available at https://usda.library.cornell.edu/concern/publications/h702q636h?locale=en&page=6#release-items.
[32] *See* Table 12 Historical Highlights: 2017 and Earlier Census Years, *supra*, note 30.
[33] *See* Table 52, Historical Highlights: 2017 and Earlier Census Years, Census of Agriculture, U.S. Department of Agriculture (USDA) National Agricultural Statistics Service (NASS), 2017 Census Volume 1, Chapter 1: U.S. National Level Data, available at https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/.

shrinking number of cows and cattle farmers and ranchers generally is likewise in a decades-long downward trajectory. Together, these data demonstrate there are fewer and fewer opportunities for cattle industry participants with each passing year.

II. ONGOING EXPLOITATION OF MARKET POWER

As shown below in Chart 1, fed cattle prices and retail beef prices began a modest and relatively synchronized upward trend beginning in 2009; but in the second quarter of 2013 they began rising sharply and swiftly, again in relative synchrony. The Government Accountability Office ("GAO") attributed the multi-year surge in cattle prices in part to the prolonged drought from 2010 through early 2013, which reduced available cattle supplies.[34] The GAO reported that inflation-adjusted live weight fed cattle prices rose from about $125 per cwt in July 2013 to a historical high of about $173 per cwt in November 2014.[35]

In February 2015, the USDA Economic Research Service ("ERS"), an agency with decades of cattle-price forecasting experience, projected that the 2014 average fed steer price of $154.41 per cwt would steadily increase over the ensuing three years to $159.50 per cwt in 2015, $163.70 per cwt in 2016, and $165.03 per cwt in 2017.[36] Then, by 2018, the ERS predicted steer prices would begin a gradual decline, with year-to-year price reductions averaging a modest $2.51 per cwt during the anticipated five-year decline.[37]

Other prominent industry analysts widely agreed with the ERS' predictions. In January 2015, Kansas State University agricultural economist, Glynn Tonsor, predicted that cattle prices in 2015 would likely be just as promising as they were in 2014 and that such stronger prices are expected to remain for a couple of years.[38] In February 2015, CattleFax predicted that fed cattle prices would remain strong in 2015, ranging from near $140 per cwt at the lows to near $170 per cwt at the highs.[39] What the analysts could not know at the time, but which should have substantively contributed to the materialization of their favorable projections, was that U.S. beef consumption increased over 10% since their projections were made, increasing from 24.7 billion pounds in 2014 to 27.3 billion pounds in 2019.[40]

The underlying basis for those favorable price forecasts by both government and private analysts is the long production cycle of cattle, which from birth to slaughter generally ranges from 15

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[34] *See* Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market, Government Accountability Office, GAO-18-296 (April 2018), at 12, available at https://www.gao.gov/assets/700/691178.pdf.
[35] *See id*., at 7-8.
[36] USDA Agricultural Projections to 2024, Interagency Agricultural Projections Committee, U.S. Department of Agriculture (USDA), Economic Research Service (ERS), Long-term Projections Report, OCE-2015-1 (February 2015), at 81, available at http://www.ers.usda.gov/media/1776036/oce151.pdf.
[37] *See id*.
[38] Optimistic for Strong Cattle Prices in 2015, Glynn Tonsor, Farms.com (January 20, 2015), available at http://www.farms.com/news/glynn-tonsor-optimistic-for-strong-cattle-prices-in-2015-86870.aspx.
[39] CattleFax Predicts Strong Prices to Remain in 2015, Drovers Cattle Network (February 6, 2015), available at http://www.cattlenetwork.com/advice-and-tips/cowcalf-producer/cattlefax-predicts-strong-prices-remain-2015.
[40] Beef: Supply and disappearance (carcass weight, million pounds) and per capita disappearance (pounds), USDA ERS, available at https://www.ers.usda.gov/data-products/livestock-meat-domestic-data/.

months to 24 months.[41] Added to that lengthy production cycle is a nine-month gestation period.[42] Therefore, presuming the cattle price surge lasting through 2014 was fueled by the tight supplies evidenced by the historically low cattle inventory of 88.5 million in 2014,[43] it would take the industry between 24 months and 33 months to replenish supplies by breeding and rearing more slaughter-ready cattle. Hence, the tight supply situation would persist for two to four years beyond 2014, due to the biological constraints inherent to the domestic cattle industry.

In the month after ERS's favorable forecast, the marketplace trumped two sciences: the economic science of the law of supply and demand and the biological science underlying the production cycle of cattle. Beginning in March 2015, the marketplace initiated an inexplicable cattle-price collapse. Though there were some minor corrections in the prolonged, 19-month cattle-price collapse, it settled at a low of about $100 per cwt in October 2016, representing an overall drop of about 40% from November 2014[44] and a low price not experienced by the industry for the previous six years.

To put this into perspective, the average 2014 fed steer price of $2,007.33 per head for a 1,300-pound animal was reduced by about $700 per head by October 2016. To casual observers, particularly those who believe the cattle market continues to function according to the economic law of supply and demand, this reduction in cattle prices would be welcomed under a theory that lower cattle prices mean beef input supplies have increased, which would be expected to lower the price of beef at the retail counter.

But not so. The average Choice retail beef price according to the USDA was $5.97 per pound in 2014. In 2015, it increased to $6.29 per pound, and in 2016, it remained at the near-record level of $5.96 per pound (a mere 5% decline).[45] Thus, cattle prices fell drastically while consumer beef prices remained at historically high levels. This strongly suggests that both cattle producers at one end of the beef supply chain and consumers at the other end are being exploited, with entities in the middle reaping windfall profits.

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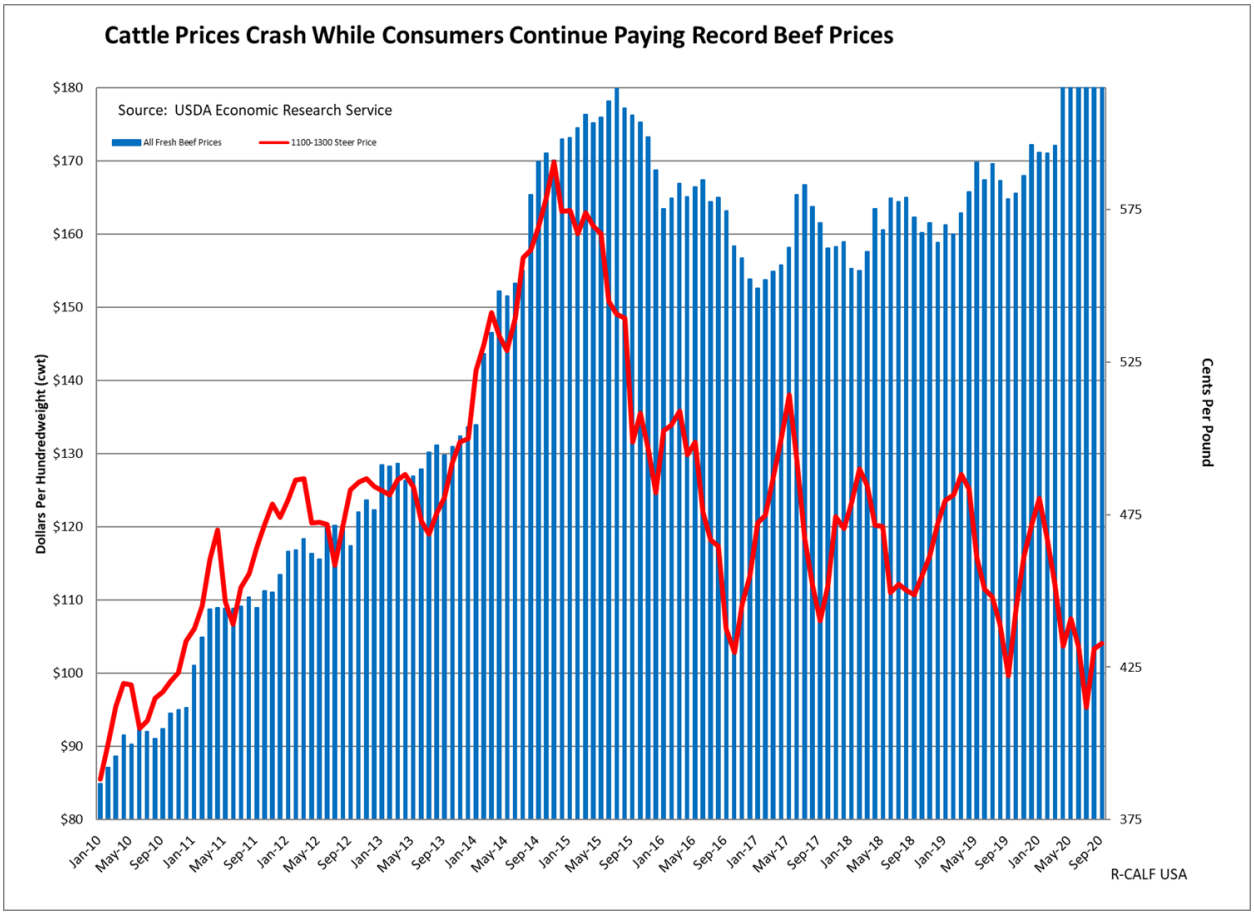
[41] Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market, *supra*, note 34, at 5.
[42] *Id*., at 6.
[43] *Id*., at 12.
[44] *Id*., at 8.
[45] *See* Choice beef values and spreads and the all-fresh retail value, *supra*, note 22.

Chart 1



A. Regulatory Reviews: Round 1

Under Siege reported that the former USDA Grain Inspection Packers and Stockyards Administration ("GIPSA")[46] had agreed in July 2009 to initiate an investigation requested by the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF USA)[47] to determine if beef packers were engaged in anticompetitive cattle procurement practices.[48] The investigation report was undergoing an internal agency clearance process at the time of publication.

[46] The former stand-alone USDA Grain Inspection Packers and Stockyards Administration ("GIPSA") agency is now the Packers and Stockyards Division ("PSD") of the USDA Agricultural Marketing Service ("AMS") following a reorganization by Agriculture Secretary, Sonny Perdue.

[47] R-CALF USA is the largest U.S. cattle trade association that exclusively represents U.S. independent cattle farmers and ranchers. As shown in the timeline in Appendix II, at 35, it has made multiple requests for investigations to multiple federal agencies during the past decade in an effort to convince them to address the cattle industry's disappearing competitive marketplace.

[48] Under Siege, *supra*, note 1, at 589.

1. GIPSA's 2014 Investigation Report

In July 2014, a full five years after initiating the investigation discussed above, GIPSA internally issued its report, titled *Investigation of Beef Packers' Use of Alternative Marketing Arrangements*.[49] The investigation found that the packers' use of alternative marketing arrangements ("AMAs"), which the agency defines as committed procurement methods and all other non-cash based cattle procurement methods, including formula-priced methods,[50] is generally associated with lower negotiated fed cattle prices, with negative effects from the use of AMAs during the 2009-2010 study period ranging from a high of -$3.11 per cwt in the Kansas region to a low of -$0.24 per cwt in the Iowa, and an overall national effect of -$2.29 per cwt.[51] Based on the 1,275 lb. live cattle weight used in the study, this represents a per head loss to cattle feeders in Kansas of $39.66 per head.

The study further found that the value producers receive for fed cattle marketed by most AMAs is linked to, and therefore influenced by, changes in the price of negotiated fed cattle. In other words, it found a reduction in the negotiated fed cattle price will result in a reduction in the price of most all other cattle procured by packers.[52]

Despite its finding indicating that Kansas cattle producers are potentially losing approximately $396,600 for each 10,000 head of cattle sold in the negotiated cash market (not including the indirect losses to all Kansas producers because the lower cash prices translate to lower prices for most all other cattle sold under an AMA), the GIPSA concluded that packers' procurement practices did not violate the Packers and Stockyards Act.[53]

The agency's rationale for its conclusion was that the economic harm to cattle producers was offset by AMA-created efficiencies for every segment of the supply chain, though it found that 90% of those efficiencies were increases in revenue to the beef packers and beef marketing industry.[54] An important, albeit transitory aside acknowledged by the agency was that individual cattle producers who suffer direct losses because they only sell their cattle in the negotiated fed cattle cash market would not be expected to receive any of the offsetting benefits.[55]

Further, and although it appears investigators did not conduct any analysis of each of the packers' cost and price data,[56] the agency also concluded that it did not find evidence of conspiracy, coordination, deception, or predatory intent by packers to support allegations that packers' use of AMAs violates the Packers and Stockyards Act.[57]

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[49] Investigation of Beef Packers' Use of Alternative Marketing Arrangements, USDA GIPSA (July 2014), available at https://www.r-calfusa.com/the-issues/competition-issues/.
[50] *Id.*, at i. fn.1.
[51] *Id.*, at 28.
[52] *See id*., at 60.
[53] *See id*., at 61.
[54] *See id*, at 61, 35.
[55] *See id*., at 61.
[56] *See id*., at 75.
[57] *See id*., at 61.

The agency is clearly conflicted as evidenced by its acknowledgment that, on the one hand, the negative price effects may be explained by the packers' exploitation of oligopsony market power; while on the other hand, the agency presumes such a negative price effect "may" nevertheless be offset by pro-competitive benefits certain feedlots that market cattle through AMAs might receive.[58]

The agency grounds its reliance on offsetting efficiencies to avoid enforcement actions to protect affected cattle producers in two apparent legal constraints. First, that lacking a showing of competitive injury or likelihood of competitive injury or, alternatively, absent a showing of sufficient offsetting efficiencies, the Packers and Stockyards Act's protections for producers against unfair packer conduct, for example, are unenforceable.[59] Second, that packers are entitled to a legitimate business justification as a defense to purchasing behavior that results in harm to producers.[60]

This study reveals important implications for policymakers. If the Secretary of Agriculture is unable to protect some or all of the nation's cattle producers (many, if not most of whom comprise the nation's family farm system of agriculture) from oligopolistic market power exercised by the highly concentrated beef packers, then the Secretary is likewise unable to fulfill Congress' mandate to "strengthen the family farm system" of agriculture, including to develop solutions to problems faced by "small- and moderate-sized family farming operations."[61]

2. GAO's 2018 Investigative Report

In January 2016, approximately midway through the above described 19-month cattle price collapse that defied both the government and industry analysts' projections, R-CALF USA submitted an investigation request to the U.S. Senate Committee on the Judiciary for an investigation to determine the concentrated beef packers' role in the anomalous cattle price collapse.[62] Responding immediately to that request, certain analysts and beef industry lobbyists alike attempted to deflect attention away from beef packer conduct by asserting the collapse was merely a market correction readily explained by conventional market forces. Goldman Sachs Group Inc., Cobank, U.S. Commodities, and Steiner Consulting Group offered insights in a *Bloomberg* article that suggested the cattle market was simply catching up with other agriculture commodities and cited herd rebuilding, increased supplies of poultry and pork, mounting cold storage inventories, increased animal weights, stronger dollar, decreased exports, and increase imports as justifications for the decline.[63] In addition, the nation's largest and oldest cattle and beef trade association, the National Cattlemen's Beef Association ("NCBA"), which represents the interests of the beef packers as well as producers, publicly denounced the call for investigation

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[58] *See id*., at 60.
[59] *See id*., at 79, 81.
[60] *See id*., at 82, 86.
[61] 7 U.S.C. 2204 et seq.
[62] Judiciary Committee Senators Call for Investigation of the U.S. Cattle Market, U.S. Senator Mike Lee (April 20, 2016), available at https://www.lee.senate.gov/public/index.cfm/press-releases?ID=ED9203F0-56AD-439C-B64C-9BD9FF784529.
[63] Longest cattle rally since 1960s burger boom ends as herd grows, Megan Durisin and Lydia Mulvany, Bloomburg News (January 13, 2016), available at https://www.bloomberg.com/news/articles/2016-01-14/longest-cattle-rally-since-1960s-burger-boom-ends-as-herd-grows.

stating that the NCBA is continually looking at the market to ensure it is working for its stakeholders and it sees no merit in the investigation request.[64] Media reports quoted the NCBA's communication director as stating that R-CALF USA's request was "only another misguided attempt to gain relevance."[65]

Despite the beef packing industry's resistance, the U.S. Senate Committee on the Judiciary formally requested the U.S. Government Accountability Office ("GAO") to "conduct an assessment of the cause of the 2015 price drop."[66]

Completed in April 2018, the GAO's investigative report, bearing the innocuous title, *Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market*, was uncannily similar to the earlier 2014 GIPSA report. The GAO report suggested that monopsony or oligopsony power may be influencing the U.S. cattle markets, noting that "some packers may have been able to exercise market power in areas with less competition."[67] This finding was consistent with the agency's econometric modeling that revealed when packers are more concentrated, they will be able to purchase fed cattle at lower prices from feeders.[68] The GAO accompanied this acknowledgement with the qualifier that evidence of such market power alone does not imply that packers engaged in anticompetitive or improper behavior.[69]

Referenced in the GAO report was a non-public investigation into the 2015 price collapse by the Packers and Stockyards Administration ("PSA"). The report reportedly noted that packers were not able to maintain the large spread between fed cattle prices and boxed beef prices that initially opened in response to the collapse of cattle prices in the summer of 2015.[70] As discussed below, the PSA's marginalization of the spread between fed cattle prices to boxed beef prices was wrong -- seriously wrong -- as unfolding events would soon exacerbate the spread to unprecedented levels. According to the GAO, the PSA concluded that the sharp decline in cattle prices was likely due to a number of market factors that affected both supply and demand, such as increased cattle supplies and lower relative prices for competing proteins, pork and chicken.[71]

The GAO also pointed to a variety of supply and demand factors in discussing the decline in cattle prices. The GAO emphatically stated it did not quantify or rank the impact of those various factors.[72] However, similar to the 2014 GIPSA report that did not review each of the packers' cost and price data, the GAO investigation also did not review internal packer documents, and it

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[64] Cattle Price Collapse Questioned, Todd Neeley, DTN (January 12, 2016), available at https://www.dtnpf.com/agriculture/web/ag/news/article/2016/01/12/industry-pressing-senate-judiciary.
[65] *Id*.
[66] Judiciary Committee Senators Call For Investigation Of The U.S. Cattle Market, *supra*, note 62 (included in Senator Lee's announcement is a copy of the letter to the Comptroller General dated April 20, 2016).
[67] Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market, Government Accountability Office (GAO), GAO-18-296 (April 10, 2018), at 16, available at https://www.gao.gov/products/GAO-18-296.
[68] *Id*., at 47.
[69] *Id*., at 16.
[70] *Id*., at 14.
[71] *Id*., at 14, 15.
[72] *See Id*., at 3.

expressly stated that the scope of its analysis "did not include a review of whether packers engaged in anticompetitive behavior."[73]

What the GAO listed as unranked and unquantifiable factors that contributed to the 2015 price collapse was the late 2010 to early 2013 drought that caused cattle numbers to fall and rise;[74] less competition among packers in some areas of the country that caused lower cattle prices;[75] the long production cycle for cattle; changes to the supply and cost of feed grains, which prompted feeders to allegedly feed their cattle too long;[76] higher wholesale beef prices and concurrently lower relative prices of pork and chicken; an increase in the amount of beef in cold storage; fluctuations in the strength of the U.S. dollar; international trade; and, reduction in packing capacity that occurred when packers closed several plants.[77]

Prominent among the contemporaneous circumstances that R-CALF USA highlighted in its request for an investigation into the 2015 price collapse was the ever-widening spread between the price that cattle producers received for their cattle and the price that consumers paid for the beef from those cattle. R-CALF USA stated:

> The continuation of record-setting beef prices in 2015 while cattle prices plummet indicates that one or more participants along the multi-faceted beef supply chain are realizing a huge windfall. The benefactor cannot be the cattle producers who are experiencing hundreds of dollars in losses per animal sold. It also cannot be the consumer that is paying record-high beef prices.[78]

The letter went on to state that within just 12 months, the share of the consumer beef dollar allocated to U.S. cattle producers was reduced by nearly 13 percentage points, falling from 58.2 percent in November 2014 to 45.3 percent in November 2015.[79]

The manner in which the GAO addressed this key circumstance reveals its and the USDA's overall reluctance to reform the cattle market's contemporaneous dynamics. The GAO explained that several factors can drive changes in the cattle producer's share of the consumer's beef dollar:

> For example, a report from USDA's Economic Research Service found that much of the decline in the proportion of the beef dollar paid to producers can be driven by technology changes that help increase productivity; and, as producers have become more productive, they have been willing and able to supply more animals to packers at lower prices.[80]

As shown in Charts 6 and 7 in the Appendix I, the agency's explanation is detached from the reality that producers – particularly cow/calf producers and feeders, have been suffering from a prolonged

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[73] *Id*., at 29.
[74] *Id*., at cover page.
[75] *Id*.
[76] *Id*., at 14.
[77] *Id*.
[78] R-CALF USA letter to U.S. Senate Committee on the Judiciary (Jan. 5, 2016), available from author.
[79] *Id*.
[80] Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market, *supra*, note 34, at 42, 43.

lack of profitability. And, rather than being "willing and able to supply more animals to packers at lower prices" as suggested above by the ERS and GAO, they have been driven out of the U.S. cattle industry in droves during each of the past several decades, which is inarguably demonstrated in Charts 3 and 5 in Appendix I.

Despite media reports that the U.S. cattle feeding sector lost a cumulative unhedged $4.7 billion during the 2015 cattle price collapse,[81] the GAO offered only two recommendations for the Secretary of Agriculture, neither of which required any marketplace reform:

- Review the extent to which, under the Livestock Mandatory Reporting Act of 1999, the price reporting group can share daily transaction data with P&SP [Packers and Stockyards Program] to allow P&SP to strengthen the effectiveness of its oversight.[82]
- Direct the AMS administrator to ensure that P&SP routinely conducts in-depth analysis of the transaction data that it collects. Such analysis could include, but not be limited to, examining competition levels in different areas of the country.[83]

3. 2018 Commodity Futures Trading Commission "Look-Into" Anomalous Cattle Futures Movements

After cattle prices bottomed in October 2016, producers were able to claw back some lost ground, and prices rose about $35 per cwt by May 2017. At the same time, retail beef prices also increased, reaching a 12-month high in July 2017. But, from May 2017 onward, the trajectory of fed cattle prices was markedly downward, with each subsequent price peak lower than the previous peak, much like a downward inclining roller coaster ride. Remarkably, however, the onward trajectory of retail beef prices was opposite. While cattle prices trended downward since 2017, retail beef prices trended upward, creating a prolonged inverse relationship between what cattle producers receive for their cattle and what consumers must pay for beef.[84]

This disconnect in the relationship between cattle prices and beef prices was likewise manifest in the cattle futures market. In September 2018, R-CALF USA requested that the Commodity Futures Trading Commission ("CFTC) initiate an investigation into the anomalous breaks in the cattle futures market that occurred contemporaneously with the fundamental disconnect between live cattle prices, and wholesale and retail beef prices.[85] In late 2018 this author received word from the CFTC that it would look into the matters identified in R-CALF USA's request.

B. Commencement of Private Enforcement Action

In early 2019, there were two undeniable truths associated with the manifestly dysfunctional cattle market in which the relationship between the price of cattle and the wholesale and retail price of beef was fundamentally fractured. First, something was interfering with the competitive forces in

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[81] Profit Tracker: Packer margins near $200, Greg Henderson, AgWeb (Jan. 19, 2016), available at https://www.drovers.com/markets-markets/profit-tracker/profit-tracker-packer-margins-near-200.
[82] Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market, *supra*, note 34, at 25.
[83] *Id*.
[84] *See* Chart 1, *supra*, at 9.
[85] *See* R-CALF USA's Request to the U.S. Commodity Futures Trading Commission for Investigations into Specific Cattle Futures Market Transactions (Sept. 10, 2018), available from author.

the marketplace that did not exist prior to the cattle price collapse that began at least as early as 2015. Second, government regulators had, at that point, failed to conduct a meaningful probe into the cause of that fundamental fracture.

Thus, in April 2019 R-CALF USA and four U.S. cattle ranchers, through their attorneys Scott+Scott Attorneys at Law LLP (Scott+Scott), and Cafferty, Clobes, Meriwether and Sprengel, LLP (Cafferty Clobes), filed a national class action lawsuit alleging that beef packers Tyson, JBS, Cargill, and National Beef (together the Big 4) colluded since at least January 1, 2015 to drive down cattle prices paid to U.S. cattle farmers and ranchers.[86] The lawsuit alleges the Big 4 employed several anticompetitive practices including coordinated reductions in slaughter volumes, to ensure the demand for fed cattle did not exceed available supply; and coordinated reductions of cash cattle purchases during periods of their slaughter restraint, to "back up" slaughter-ready cattle.[87]

According to the suit, the depression of fed cattle prices that began in 2015 was achieved by the Big 4 packers through their various anticompetitive buying practices and this had an adverse effect on live cattle and fed cattle futures prices and options.

The economic analysis underpinning R-CALF USA's and the ranchers' suit indicates fed cattle prices were unlawfully depressed by an average of 7.9% during the three years post-January 1, 2015.

The Minnesota federal court consolidated the R-CALF USA action with various other class action claims against the Big 4 and was designated as the lead case file. The court also appointed R-CALF USA's counsel, Scott+Scott, along with Cafferty Clobes, as interim lead counsel for the proposed classes of fed cattle producers and CME live cattle contract users. The consolidated case was then captioned *In re Cattle Antitrust Litigation*.

In re Cattle Antitrust Litigation was dismissed by the court without prejudice on September 28, 2020, with the court granting plaintiffs 90 days to file amended complaints. The plaintiffs filed an amended complaint on December 28, 2020.

C. Regulatory Reviews: Round 2

By the end of 2018, all, or nearly all, the factors the PSA and GAO had attributed to the 2015 collapse in cattle prices had been dispelled by continuing exceptionally strong beef demand,[88] record-high beef exports,[89] reductions in beef imports (when compared to 2014-2015 levels),[90] and ever-rising retail beef prices as shown above in Chart 1. And yet, the ever-widening spread

[86] In re Cattle Antitrust Litigation, No. 19-cv-01222 (D. Minn).
[87] *See id*.
[88] Beef Demand… It's Been a Very Good Year, *supra*, note 20.
[89] 2018 Beef Exports Record-Large; Pork Export Volume Just Short of 2017 Record, *supra*, note 21.
[90] *See* Beef and veal: Annual and cumulative year-to-date U.S. trade (carcass weight, 1,000 pounds), USDA Economic Research Service ("ERS") (Beef import volumes increased from 2.9 billion pounds in 2014 to a near record 3.4 billion pounds in 2015, and then declined to a relatively steady volume of about 3.0 billion pounds from 2016 through 2018), available at https://www.ers.usda.gov/data-products/livestock-and-meat-international-trade-data/.

between fed cattle prices and retail beef prices persisted. Despite this, there were still no remedial measures or actions proposed by policymakers or regulators.

By early 2019, the fed cattle market had begun another significant downturn while beef prices continued their upward climb. By July 2019, fed cattle prices had already hit the lows experienced the year before. Then, on Friday, August 9, 2019, a fire broke out at a Tyson packing plant in Holcomb, Kansas. The single plant accounted for approximately 5% to 6% of the entire nation's beef processing capacity.[91] The fire caused the plant to close for an indefinite period.

During the three weeks post-closure, the number of cattle slaughtered in the U.S. did not decline; in fact, 5,000 head more cattle were slaughtered during the three post-closure weeks than were slaughtered during the three weeks prior to closure.[92] The wholesale price (Choice boxed beef cutout value) of the resulting beef from those slaughtered cattle increased to $234.35 per cwt during the third post-closure week, up from $216.04 per cwt during the week of the fire.[93] Yet, the ranch-gate price of cattle fell from $110.48 per cwt during the week of the fire to $103.51 per cwt during the third post closure week.[94] These market changes evince the negative correlation between changes in beef prices and cattle prices manifested since 2017. The USDA described the post-closure spread between the price of fed cattle and the price of boxed beef as the then-largest spread since 2001, the year that such prices were first required to be publicly reported under the Mandatory Price Reporting Act of 1999.[95]

On August 28, 2019, nearly three weeks after the Tyson plant fire, the Secretary of Agriculture announced that he had "directed USDA's Packers and Stockyards Division to launch an investigation into recent beef pricing margins to determine if there is any evidence of price manipulation, collusion, restrictions of competition or other unfair practices."[96]

In October 2019, cattle prices regained some traction, peaking in January 2020, but at a lower value than any of the prior price peaks in recent years. The Tyson Holcomb plant had already reopened in December 2019. After January, the volatile cattle market began another decline. Meanwhile, consumer retail beef prices began reaching new, all-time record highs.

Then, in March 2020, the COVID-19 pandemic struck. Supply disruptions soon followed as plants experienced closures and production declines due to worker illnesses.[97] For the first time in memory, and even while some stores rationed beef purchases, beef cases in grocery stores across

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[91] Boxed Beef & Fed Cattle Price Spread Investigation Report, USDA Agricultural Marketing Service (AMS) (July 22, 2020), at 2, available at https://www.ams.usda.gov/sites/default/files/media/CattleandBeefPriceMarginReport.pdf..

[92] *Id*., at 4.

[93] Data from (LM_XB459) National Weekly Boxed Beef Cutout and Boxed Beef Cuts - Negotiated Sales. Choice 600-900 lbs., USDA Market News.

[94] Data from (LM_CT150) 5 Area Weekly Weighted Average Direct Slaughter Cattle. 65-80% Choice, Live FOB, USDA Market News.

[95] *See* Boxed Beef & Fed Cattle Price Spread Investigation Report, *supra*, note 91, at 6.

[96] Secretary Perdue Statement on Beef Processing Facility in Holcomb, Kansas, USDA, Release No. 0130.19 (August 28, 2019), available at https://www.usda.gov/media/press-releases/2019/08/28/secretary-perdue-statement-beef-processing-facility-holcomb-kansas.

[97] *See* Boxed Beef & Fed Cattle Price Spread Investigation Report, *supra*, note 90, at 7.

America ran empty.[98] The USDA reported that the spread between fed cattle prices and boxed beef prices was larger in April and May than at any time since the inception of Mandatory Price Reporting in 2001.[99]

Retail beef prices jumped to the highest nominal levels in history in July through September 2020, while cattle prices plummeted in July to the lowest level in 10 years. Domestic cattle feeders, with perishable, slaughter-ready cattle that needed to be marketed, could not get a bid for their cattle from beef packers for as long as seven weeks.[100] And, while domestic cattle producers were denied access to their own domestic market, domestic beef packers continued importing thousands of head of slaughter-ready cattle from Canada,[101] prompting R-CALF USA to issue the warning that imports are displacing U.S. cattle producers' access to their own domestic markets.[102]

In May 2020, the President of the United States called for an investigation by the U.S. Department of Justice into the cattle and beef markets,[103] as did numerous state attorneys general that specifically requested the Department of Justice to "investigate the state of competition in [the cattle][] industry and the dynamics that are depriving cattle ranchers and American consumers of the benefits of a competitive cattle industry."[104] Members of Congress have also made similar requests, including 19 Senators who wrote, "The precarious market situation for feeders and producers could lead to a widespread collapse of this entire industry, making it susceptible to the forces of vertical integration, which may beset the industry far more quickly than once anticipated."[105]

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[98] America's meat crisis laid bare: Shelves across the country sit empty after processing plants were forced to shut due to COVID-19 with 900 workers - or 40% of its workforce - testing positive at one facility, Chris Pleasance, MailOnline (May 1, 2020), available at https://www.dailymail.co.uk/news/article-8277063/Americas-meat-crisis-laid-bare-shelves-sit-country.html.

[99] *See* Boxed Beef & Fed Cattle Price Spread Investigation Report, *supra*, note 90, at 9.

[100] *See* We're fighting for a way of life: Pandemic causes Iowa cattle farmers to lose money while consumers pay more, Donnelle Eller, Des Moines Register (November 12, 2020), available at https://www.desmoinesregister.com/story/money/business/2020/11/12/covid-19-exposes-dysfunction-cattle-industry-why-cattle-producers-losing-money-when-consumers-paying/6076820002/.

[101] Canadian cattle imported into the U.S. for immediate slaughter at U.S. beef packing plants after the March 2020 onset of COVID-19 included 41.9 thousand in April, 47.7 thousand in May, 46.5 thousand in June, 36 thousand in July, 32.3 thousand in August, 41.8 thousand in September, and 47.4 thousand in October (latest available data). *See* Cattle: Monthly U.S. trade (head), Data Set, USDA ERS, available at https://www.ers.usda.gov/data-products/livestock-and-meat-international-trade-data/livestock-and-meat-international-trade-data/#Monthly%20U.S.%20Livestock%20and%20Meat%20Trade%20by%20Country.

[102] R-CALF USA: Imports Are Displacing U.S. Cattle Producers' Access to American Markets, R-CALF USA, Tri-State Livestock News (April 25, 2020), available at https://www.tsln.com/news/r-calf-usa-imports-are-displacing-u-s-cattle-producers-access-to-american-markets/#:~:text=While%20widespread%20reports%20abound%20of%20American%20cattle%20producers,cattle%20producers%E2%80%99%20access%20to%20their%20own%20domestic%20market.

[103] Trump asks DOJ to investigate cattle and beef markets, Voice of Muscatine (May 7, 2020), available at https://voiceofmuscatine.com/2020/05/07/trump-asks-doj-to-investigate-cattle-and-beef-markets/.

[104] *See* Letter from Attorneys General Stenehjem (ND), Weiser (CO), Schmitt (MO), Fox (MT), Brnovich (AZ), Wasden (ID), Miller (IA), Ellison (MN), Peterson (NE), Ravnsborg (SD), and Hill (WY) to U.S. Attorney General Barr (May 5, 2020), available at https://media.dojmt.gov/wp-content/uploads/2020-05-05-Barr-AG-William.pdf.

[105] Letter from Senators Fischer (NE), Crapo (ID), Daines (MT), Jones (AL), Enzi (WY), Rounds (SD), Hoeven (ND), Tina Smith (MN), Cramer (ND), Cindy Hyde-Smith (MS), Barrasso (WY), Sasse (NE), Blackburn (TN), Hawley (MO), Ernst (IA), Thune (SD), and Baldwin (WI) to U.S. Attorney General Barr (May 12, 2020), available

III. THE STRUCTURALLY DYSFUNCTIONAL CATTLE MARKET

As discussed above, the value of domestic fed cattle is now not entirely driven by the demand for, or price of, retail beef – an anathematic fact. And, as *Under Siege* explained, there is a demarcation line between the live cattle industry and the beef industry,[106] with demand for fed cattle not entirely driven by beef demand; but also by the availability of weekly slaughter capacity, also known as shackle space.[107]

Another reason for the lack of congruence between retail beef demand and demand for domestic cattle is the availability of imported cattle and imported beef to the domestic beef industry (*i.e.*, to packers, wholesalers, and retailers). And, under the current legal framework, which does not require beef to be labeled as to its origin(s), these imports may act as direct and undifferentiated substitutes for beef derived exclusively from cattle born and raised by United States cattle farmers and ranchers.[108] The USDA Food Safety and Inspection Service ("FSIS") recently acknowledged that if foreign beef "products are repackaged or otherwise reprocessed in a federally inspected facility, they are deemed and treated as domestic product for voluntary "Product of USA" labeling purposes."[109]

Demand for domestic fed cattle is driven by the packers' collective decisions regarding the allocation and utilization of their respective shackle space. Consequently, the price that packers pay for domestic fed cattle is intrinsically tied to the level of competition among and between the packers who wish to fill their weekly capacities allotted for domestic cattle. A 2011 regime switching study by Xiaowei Cai, *et al*., University of Wisconsin, found that oligopolistic packers switch between cooperating and competing depending on whether short-term cattle supplies are tight (competition phase) or plentiful (cooperation phase).[110]

Thus, if short-term domestic cattle supplies are tight, which would be expected to increase competition among packers, the packers could decide nevertheless to reduce shackle space for domestic cattle and increase shackle space for imported cattle, effectively nullifying the positive competitive effects normally associated with tight domestic cattle supplies.

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at https://www.fischer.senate.gov/public/_cache/files/bf8cd596-d4f3-4903-b39b-9a8008d72881/5.12.20-senate-letter-to-doj-packers-investigation-request-final-w-all-signatures.pdf.

[106] Under Siege, *supra*, note 1, at 561.

[107] *Id*., at 576.

[108] In fact, beef produced from imported cattle exclusively born and raised in a foreign country, as well as beef from cattle born, raised, and slaughtered in a foreign country is eligible to bear a "Product of U.S.A." label even if it is only minimally processed in a U.S. packing plant, such as being repackaged.

[109] Letter from Rachel A. Edelstein, Acting Assistant Administrator, Office of Policy & Program Development, Food Safety & Inspection Service, USDA, to Elizabeth Drake, Schagrin Assocs. (Mar. 26, 2020), available at https://www.fsis.usda.gov/wps/wcm/connect/dba58453-e931-4c1d-9b4e-fb36417049ce/19-05-fsis-final-response-032620.pdf?MOD=AJPERES.

[110] Regime switching and oligopsony power: the case of U.S. beef processing, Xiaowei Cai, Kyle Stiegert and Stephen Koontz, Agricultural Economics 42 (2011) 99–109, available at https://onlinelibrary.wiley.com/doi/10.1111/j.1574-0862.2010.00503.x.

A. The Market's Structure Limits Industrywide Competition

That the Big 4 domestic beef packers control of 85% of the nation's fed cattle market inherently limits competition for fed cattle, particularly when they collectively decide to allocate less shackle space than is needed to process the available supply of slaughter-ready fed cattle, is clear. Further, the geographic locations of the limited number of physical packing plants operated by the Big 4 are geospatial impediments to competition due to the typical geographical distance constraints imposed on cattle sellers.[111]

B. Subdivision of the Fed Cattle-to-Packer Market Threatens Industrywide Price Discovery

As discussed above, the value of all younger, lighter-weight cattle entering feedlots is based on the expected future value of those cattle after they are fed for several months in the feedlot and sold to the packer. Thus, the fed cattle-to-packer market is the industry's most important price discovery market – meaning the market wherein "buyers and sellers arriv[e] at a transaction price for a given quality and quantity of [cattle][] at a given time and place."[112]

This critical fed cattle-to-packer market has been subdivided according to packer procurement methods. They include: 1) the negotiated cash market in which, at least theoretically, the packer and feedlot interact to negotiate the price of cattle for delivery typically within 14 days; 2) the negotiated grid market in which the base price is typically a dollar above or below the negotiated cash price subject to a premium and discount schedule and delivery typically occurs the following week; 3) the forward contracting market in which the base price is typically tied to live cattle futures prices; 4) the formula market in which the base price is typically tied to the previous week's negotiated cash market price; and, 5) the packer-owned market in which the cattle are owned by the packer for more than 14 days before slaughter.[113]

Among these various cattle procurement methods is a hierarchy, with the negotiated cash market positioned clearly at the top. This is because all, or virtually all other procurement methods incorporate the price determined in the negotiated cash market into their formulation of the actual value of the fed animal.[114]

The common term used to describe the cattle procured outside the negotiated cash (and grid) market is "captive supply," denoting that these cattle do not contribute to price discovery but are nevertheless committed to the beef packers before slaughter – in some instances long before slaughter; and, therefore, they substantively impact the weekly demand for fed cattle.[115]

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[111] *See* Under Siege, *supra*, note 1, at 575.
[112] Price Determination versus Price Discovery, Clement E. Ward, Oklahoma State University Ted C. Schroeder, Kansas State University, available at https://www.uwagec.org/marketing/MngTCMkt/PricDetr.pdf.
[113] *See* Boxed Beef & Fed Cattle Price Spread Investigation Report, *supra*, note 90, at 19; *see also* Investigation of Beef Packers' Use of Alternative Marketing Arrangements, *supra*, note 49, at 9-10.
[114] Because the cattle futures price typically used in forward contracts is informed by the cash market price, the forward contracting market is also dependent on the negotiated cash market.
[115] For further information regarding the effects of captive supplies, *see* Under Siege, *supra*, note 1, at 573, 576, 578-582.

This division of fed cattle procurement methods, with only negotiated sales contributing meaningfully to price discovery, combined with largest beef packers' ability to decide the volume of cattle slaughtered each week, threatens the competitiveness of the industry's critical price discovery market.

C. The Price Discovery Function of the Fed Cattle-to-Packer Market Is Destroyed

For over two decades, the largest beef packers have systematically reduced the volume of cattle procured in the negotiated cash market – the only meaningful price discovery market in the fed cattle market. In 1995 only 18.1% of fed cattle procurement was "outside" the negotiated cash market, meaning 81.9% of fed cattle procured by packers contributed directly to price discovery.[116]

As shown below in Chart 2, just 10 years later, in 2005, the packers shifted all but 52.1% of procured cattle out of the price discovery market, meaning that 52.1% of the cattle trade was then determining prices for virtually all cattle procured by packers. The chart further shows that year-on-year following 2005 (with the exception of 2013 and 2014 which remained unchanged), the packers appreciably and systematically reduced the volume in the price discovery market until 2015, at which time the price discovery market hit an all-time low of 21.3%. Then, in 2019, the packers surpassed that ominous record by shifting all but 20.9% of fed cattle out of the price-discovering negotiated cash market and into the packers' captive supply hordes.

Chart 2

LMR Purchase Type Breakdown by Region

NATIONAL	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Cash	52.1%	49.4%	47.3%	42.6%	38.8%	37.4%	32.6%	26.0%	23.1%	23.1%	21.3%	25.6%	25.7%	25.5%	20.9%
Formula	33.2%	34.3%	37.4%	39.1%	43.7%	43.1%	47.4%	54.8%	59.8%	56.8%	57.0%	57.6%	57.2%	61.1%	64.8%
Forward Contract	4.8%	7.2%	6.8%	11.2%	9.5%	11.9%	13.2%	12.0%	10.8%	15.8%	17.5%	12.7%	13.0%	9.6%	11.0%
Negotiated Grid	9.9%	9.0%	8.5%	7.1%	8.0%	7.6%	6.7%	7.2%	6.3%	4.3%	4.2%	4.1%	4.1%	3.8%	3.3%

Source: USDA AMS Livestock, Poultry & Grain Market News

That the industry's most critical price discovery market has now been thinned below the point of functionality is irrefutably evidenced by the actions of the beef packers themselves and their stalwart industry allies.

For example, the unprecedented price spread between wholesale beef prices and fed cattle prices in the wake of the COVID-19 pandemic was so publicly abhorrent even the packers accepted that cattle feeders had been underpaid for their cattle sold in the so-called competitive marketplace. In one week in March, two of the Big 4 beef packers voluntarily paid cattle feeders up to $5 per cwt more for the cattle the packers had previously purchased from those feeders in the supposedly

[116] *See* 2006 Annual Report Grain Inspection, Packers and Stockyards Administration, USDA Grain Inspection, Packers and Stockyards Administration, at 54, available at https://www.gipsa.usda.gov/gipsa/ar/06ar.pdf; *see also* Investigation of Beef Packers' Use of Alternative Marketing Arrangements, *supra*, note 49, at 15 (packer-owned cattle are not priced in market transactions and, therefore, are not included in this calculation).

competitive marketplace.[117] And, opponents to legislative reform of the cattle market nevertheless acknowledged that the problem exists and is serious. As noted by Colorado State University Economist Stephen Koontz, who works closely with the National Cattlemen's Beef Association ("NCBA"), and has long opposed legislative efforts: "Addressing the issue of thinning cash fed cattle markets ***require*** action by the industry. The problem – as in all public good problems – will not solve itself" (emphasis added).[118] More recently, several additional economists who likewise oppose legislative reform and who also have professional ties with the NCBA stated, "[n]egotiated transactions and the price discovery they support benefit everyone in the market and sensible efforts to increase the volume of negotiated transactions in the fed cattle market are well-founded and worth supporting."[119]

The first step in solving a serious problem is acknowledging the problem exists. In this context, the acknowledgment by the concentrated beef industry and its allies who have long advocated for industry concentration and consolidation and resist legislative reform efforts,[120] that a serious problem exists "require[ing] action" is an important first step in building public policy-maker support for a meaningful solution.

IV. PRIORITIES FOR REFORMING THE STRUCTURALLY DYSFUNCTIONAL CATTLE MARKET

That there is now clear recognition of the serious problem with the structure of the cattle market is a foregone conclusion for groups like R-CALF USA, which argued the cattle market was chronically dysfunctional long before it became acutely dysfunctional. The question today is whether policymakers can overcome the intense pressure by the politically powerful beef industry and its allies (collectively, "beef packing lobby") described above that seek only marginal, non-

[117] Tyson to add $5 per hundredweight for live cattle, Norfolk Daily News, March 22, 2020, available at https://norfolkdailynews.com/news/tyson-to-add-5-per-hundredweight-for-live-cattle/article_49612324-6c7e-11ea-97ff-5f357e090041.html; *see also* U.S. Beef Packers Ante Up Amid COVID-19 Crisis, Greg Henderson, Farm Journal AgWeb, March 26, 2020 (stating, "Last Friday (Mar. 20) Tyson Foods told cattle feeders it would add $5 per cwt. to all cattle it purchases during the week of March 23[]" and "National Beef told its cattle feeder suppliers it would pay $113 for all cattle it procured the week of March 16 – 20. Some cattle sold Monday at $105, with more at $110 on Wednesday, before closing the week at $113."), available at https://www.agweb.com/article/us-beef-packers-ante-amid-covid-19-crisis.

[118] Price Discovery Research Project – Policy Recommendations Summary, Stephen R. Koontz, Colorado State University (February 1, 2015), at 15, available at http://www.canfax.ca/report/downloads/special/Koontz%20Price%20Discovery%20Policy%20Recommendations%20Report%202015-02-01.pdf.

[119] Fed Cattle Price Discovery Issues and Considerations, Derrell S. Peel, et al., Oklahoma State University Extension, E-1053, at Executive Summary, available at http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-12077/E-1053%20Fed%20Cattle.pdf.

[120] *See, e.g., id*., at 17 (stating, "The current cattle and beef industry structure has evolved for reasons similar to the evolution of most industries, driven largely by size economies and the need to capture cost efficiencies to remain competitive. Research shows market power in fed cattle markets has small negative impacts on prices, which are offset by substantially larger cost efficiencies to the benefit of cattle producers and beef consumers."); *see also id*., at 18 (stating, "Prescriptive solutions, such as mandates of fixed behavior, reduce market efficiency; will impose significantly higher costs on the industry; and will have negative impacts on market price levels.")

prescriptive, remedies; in particular, some form of voluntary accords between feedlots and packers.[121]

As explained more fully below, policymakers should consider the beef packing lobby's recommendations for what they are – far too little and far too late.

A. The Beef Packing Lobby Has Steadfastly Resisted Marketplace Reforms for Years

Responding to the year-on-year decline in the volume of cattle procured in the price discovery market[122] Iowa Senator Charles Grassley and co-sponsor then-Wisconsin Senator Russell Feingold introduced bipartisan legislation in the 107th Congress (*i.e.*, 2001-2002) to protect competition in the U.S. cattle market by preserving the integrity of the negotiated cash market.[123] The bill introduced in August 2002 required the largest packers – those required to report under the Livestock Mandatory Reporting Act, and which operate more than one packing plant – to purchase a minimum percentage of cattle each reporting day from the competitive price discovery market. The measure languished in the U.S. Senate Committee on Agriculture, Nutrition, and Forestry due largely to opposition from the beef packing lobby.[124]

Undeterred, Senators Grassley and Feingold reintroduced their bill in the 108th, 110th, and 111th congressional sessions, all succumbing to the same fate as occurred in the 107th Congress.[125] Despite these repeated legislative attempts to address the ever-shrinking price discovery market spanning nearly two decades, the beef packing lobby did not initiate any alternative remedial actions, either by prescriptive or voluntary means until well after the onset of the COVID-19 pandemic of 2020. This is also true of the NCBA-commissioned recommendation, which was made five years ago by economist, Stephen Koontz, who insisted the problem "require[d] action" as early as February 2015,[126] which was early in the year when the unprecedented cattle price collapse occurred and when the volume of fed cattle sold in the negotiated cash market reached its first all-time low.

Now, in the face of this systemic problem, the beef packing lobby has lined up to resist meaningful congressional reform. For example, the largest general farm organization in the United States, the American Farm Bureau Federation ("AFBF"), argues that: "[w]hile more negotiated trade would further bolster price discovery, a minimum negotiated trade threshold would require the federal government to monitor and maintain the minimum, inviting further government intrusion into the industry." [127] The AFBF also issued the classic non-descript "unintended consequences" defense

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[121] *See, e.g., id*., at 17 (stating, "The most promising route to a higher level of negotiated fed cattle trade is through voluntary industry initiative.").
[122] Packers and Stockyards Division Annual Report 2019, *supra*, note 10, at 9.
[123] S.2867 — 107th Congress (2001-2002) (August 2, 2002).
[124] *See id*.
[125] The bills introduced in each congressional session are available at the government search site Congress.gov, accessed January 2, 2021.
[126] Price Discovery Research Project, *supra*, note 118, at Policy Recommendations Summary.
[127] American Farm Bureau Federation Cattle Market Working Group, at 12, available at https://www.arfb.com/uploads/resources/documents/afbf_cattle_market_working_group_final_report_1.pdf.

used by lobbyists intending to maintain the status quo: "Additional regulation may not solve the problems as intended and could potentially result in negative consequences."[128]

The NCBA, has also resisted legislative reform by calling for a protracted voluntary plan that expressly sets key competitive thresholds at only 75% of the level Koontz – the group's commissioned economist – determined necessary to achieve "robust" competition and effective price discovery.[129]

So now that real-life circumstances have forced the hand of the nation's powerful beef packing lobby to engage with an acute problem of their own making,[130] the beef packing lobby is working to convince policymakers that only marginal, principally voluntary remedies are needed.

B. The Cattle Market Is in Immediate Need of Triage

It is apparent that the magnitude of the damage caused by the dysfunctional cattle market has not yet registered with policymakers. But the manifest negative trajectories associated with six fundamental indices of the cattle industry's past and current wellbeing suggest they cannot continue to ignore the problem. Those six indices are: 1) the annual change in the number of U.S. beef cattle operations since 1990; 2) the annual change in the size of the U.S. beef cow herd since 1975; 3) the exodus of U.S. cattle feedlots since 1996; 4) the monthly change in economic returns to U.S. cattle feeders since January 2000; 5) the annual change in economic returns to U.S. cow/calf producers (the most populous segment of the live cattle industry that maintains a mother-cow herd and raises new calves each year) since 1996; and, 6) the monthly change in the share of the consumer's beef dollar allocated to live cattle producers since 1980.[131]

Collectively, the foregoing indices evince a chronically besieged industry, one that has not been and is not today capable of self-correction. Economist Stephen Koontz's above-mentioned conclusion regarding the thinning cash market, that "The problem – as in all public good problems – will not solve itself", is equally applicable here. Restoring the wellbeing of America's largest segment of agriculture is inarguably a substantive public good concern.

Thus, it is paramount that policymakers take immediate action to first halt and then reverse the decline of the cattle industry's wellbeing. This will be no small task as decades of denial, inattention and neglect have fundamentally, structurally, and systemically broken the U.S. cattle industry.

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[128] *Id*.

[129] A Voluntary Framework to Achieve Robust Price Discovery in the Fed Cattle Market, NCBA Live Cattle Marketing Working Group – Regional Triggers Subgroup, NCBA (October 1, 2020), available at https://policy.ncba.org/Media/Policy/Docs/ncba-regional-triggers-subgroup-report-overview-presentation_10-16-2020-53.pdf.

[130] *See, e.g.*, Letter to then-U.S. Senate Committee on Agriculture, Nutrition, and Forestry Committee Chairman Tom Harkin from the National Cattlemen's Beef Association, *et al*., October 18, 2007 (stating opposition to provisions that would regulate 'captive supplies' and packer-owned or controlled cattle: "In order to meet customer requirements, packers must own some or all of their livestock to ensure a steady, adequate supply of the particular type of livestock they need for their product mix . . .").

[131] *See* Appendix II for Charts 3-7.

Where to start is clear. The first casualty of the beef packers' rapid concentration and consolidation of the U.S. cattle industry's marketing outlets ***was*** competition. And it was the political supplantation of competition with inapposite "market efficiency" justifications that spurred policymakers to look the other way, empowering beef packers to systematically and systemically substitute their corporate control for competitive market forces.

Therefore, the overarching guiding principle with which to halt and then reverse the cattle industry's negative trajectories is to reinsert competition within the industry's market structure wherever it is found to have been compromised by substitution with corporate control, and then falsely justified under the misguided theory of market efficiency.

Triage is now needed due to the severity and scope of the problem. The two most prominent competitive wounds pervading the U.S. cattle industry's market structure today, and which are leading contributors to the industry's ongoing contraction, are the lack of competition for domestic-born and -raised cattle, and the erosion of competition in the industry's negotiated cash market (*i.e.*, the industry's critical price discovery market).

It is these two most urgent problems that policymakers should immediately and decisively address.

C. The Strategy for Administering Triage to U.S. Cattle Markets

That Senator Grassley and former Senator Feingold's concerns beginning in 2002 portending the destruction of the cattle industry's price discovery market if Congress failed to require packers to make minimal negotiated cash purchases were correct is now a forgone conclusion. Congress did fail to impose any requirements and the beef packers did thin the cash market beyond any semblance of competitiveness. Additionally, the industry demonstrated abject powerlessness to initiate any remedial action on its own, though it has had more than ample time to do so.

Also, that Congress has already recognized the need to distinguish beef sold in the domestic retail market as to where the animal from which it was derived was born, raised, and harvested – so as to promote increased competition for domestic cattle exclusively born and raised by United States cattle farmers and ranchers – is inarguable. Indeed, Congress passed into law mandatory country of origin labeling ("m-COOL") for beef in the 2002 Farm Bill.[132] Though Congress subsequently repealed the m-COOL's provisions for beef in the 2016 Consolidated Appropriations Act, it did so only in response to an international tribunal's (the World Trade Organization's) criticisms of the beef provision's specific regulatory architecture, and the attendant threat of retaliatory tariffs, not because m-COOL was not achieving an important public good.[133]

[132] *See* 7 U.S.C. §1638, *et seq*.
[133] *See, e.g.*, Costa Applauds the USDA for Final Rule Repealing COOL, U.S. Congressman Jim Costa (March 2, 2016), available at https://costa.house.gov/media-center/press-releases/costa-applauds-usda-final-rule-repealing-cool.

1. Reinserting Competitive Forces in the Price Discovery Market

Imposing an immediate requirement that beef packers begin purchasing minimum volumes of their fed cattle needs from the negotiated cash market is the only viable means of reinserting competitive forces into the cattle industry's price discovery market.

In the wake of additional cattle market dysfunction following the onset of the COVID-19 pandemic, Senator Grassley and Montana Senator Jon Tester, *et al*., introduced S.3693, a bipartisan bill to require the largest packers to purchase at least 50% of each of their plant's daily procurement needs from the negotiated market.

The beef packing lobby has responded with a "the sky is falling" argument, opposing this bill based on their contention that restoration of the negotiated cash market to the 50% volume level nationally will prevent the industry from rewarding and promoting high-quality cattle and enjoying efficiencies created by formula contracts and other captive supply arrangements.[134] But this is nonsense. The proposed S.3693 appears to allow packers to include negotiated grid pricing arrangements (which purport to reward and promote high quality cattle through a premium and discount schedule) in their 50% purchase requirement so long as the agreed-upon base price is a firm price that may be equated with fixed dollar amount on the date of the agreement.[135]

Thus, the packers can continue rewarding and promoting high quality cattle while also contributing to price discovery. Moreover, the 50% negotiated purchases requirement in S.3693 restores the volume of negotiated purchases ***below*** the level occurring during the period studied by Koontz, *et al*. in the congressionally commissioned 2007 Grain Inspection Packers and Stockyards Administration Livestock and Meat Marketing Study.[136] The study found that the industry had enjoyed market efficiencies through the use of captive supply arrangements during the period October 2002 through March 2005 – the period when the volume of negotiated cash sales was 61.7% and captive supply volumes at 38.3%.[137] Thus, the study found that packers could, in fact, realize efficiencies without thinning the negotiated cash market below the 50% volume level.

Further, the study found that smaller producers, defined as all feedlots and all cow-calf operations not among the nation's 25 largest feedlots or 25 largest cow-calf operations,[138] were substantively more dependent on the negotiated cash market than were the largest of feedlots and cow-calf

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[134] *See e.g*., Fed Cattle Price Discovery Issues and Considerations, *supra*, note 119 ("Prescriptive solutions, such as mandates of fixed behavior, compromise market efficiency . . ."); *see also* Packers, NCBA Oppose Cattle Bill, Chris Clayton, Progressive Farmer/DTN (May 13, 2020) (quoting the North American Meat Institute as stating captive supply arrangements "help provide consumers with affordable, reliable, and consistent meat products . . ."), available at https://www.dtnpf.com/agriculture/web/ag/news/world-policy/article/2020/05/13/north-american-meat-institute-argues.

[135] *See* S.3693, 116th Congress, available at https://www.congress.gov/bill/116th-congress/senate-bill/3693.

[136] GIPSA Livestock and Meat Marketing Study, Volume 3: Fed Cattle and Beef Industries, Grain Inspection, Packers and Stockyard Administration (January 2007), available at https://www.gipsa.usda.gov/psp/publication/livemarketstudy/LMMS_Vol_3.pdf.

[137] *See id*., at ES-3, ES-4.

[138] *Id.*, at 2.2, fn. 1.

operations (those among the largest 25, respectively), with an estimated 85% of smaller producers using only the negotiated cash market.[139]

Thus, S.3693 is itself a modest restoration to the industry's ailing price discovery market that will not affect the "efficiencies" touted in the GIPSA study but will restore and preserve a more competitive marketplace for the vastly larger numbers of U.S. feedlots and cow/calf producers who disproportionately depend on their access to a competitive negotiated cash market for their survival.

2. Recreating Competition for Cattle Exclusively Produced by U.S. Cattle Farmers and Ranchers

Contrary to the opinions expressed by the beef packing lobby that "beef is beef, whether the cattle were born in Montana, Manitoba, or Mazatlán[],"[140] the consumers' desire both to purchase exclusively domestic beef and to know from which country or countries their beef originated is well documented by academic research and national surveys.

For example, a 2003 peer-reviewed study demonstrates consumers are willing to pay a premium for steak that was "guaranteed" to originate from an animal born and raised in the United States.[141] A 2013 nationwide survey by the Consumer Federation of America revealed that 90% of consumers wanted to know the origins of their meat.[142] A 2016 survey by Consumer Reports revealed similar findings – that 93% of consumers wanted to know if their meat comes from outside the United States.[143]

In 2018, a district court substantively affirmed m-COOL's ability to create demand for U.S.-produced cattle by concluding that U.S. cattle farmers and ranchers are harmed when imported meat can be portrayed as domestic, because importers can hold down "the demand for and therefore sales of [domestic cattle producers'] goods and services" that would be otherwise present for true domestic products.[144]

Further reinforcing the relationship between m-COOL and demand for cattle exclusively born and raised in the United States is the NCBA's brief before the U.S. International Trade Commission in which it explained that while m-COOL was in effect it had "discouraged the importation of

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[139] *Id*., at 2.2

[140] First Amended Complaint, ¶ 34, *Am. Meat Inst. v. U.S. Dep't of Ag*., No. 13-1033, 2013 WL 4786371 (D.D.C. July 23, 2013); *see also* The Fallacy of COOL, Scott George, NCBA President, May 30, 2013, available at https://www.ncba.org/ourviews2.aspx?NewsID=2942 (NCBA arguing that consumers should not regard "feeder cattle from Canada or Mexico . . . any different than we do a steer born, raised and slaughtered right here at home").

[141] *See* Wendy J. Umberger, *et al*., Country-of-Origin Labeling of Beef Products: U.S. Consumers' Perceptions, 34 J. Food Distribution Res. 103, 113-14 (2003).

[142] Consumer Federation of America, Large Majority of Americans Strongly Support Requiring More Information on Origin of Fresh Meat (May 15, 2013), available at https://consumerfed.org/pdfs/CFA-COOL-poll-press-release-May-2013.pdf.

[143] Consumer Reports Nat'l Res. Ctr., Food Labels Survey 3, 9 (Apr. 6, 2016), available at https://www.ftc.gov/system/files/documents/public_events/975753/cr_intro_and_2016_food_survey.pdf.

[144] *R-CALF USA v. United States Dep't of Agric*., No. 2:17-CV-223-RMP, 2018 WL 2708747, at *4 (E.D. Wash. June 5, 2018).

livestock and created a shortage in the feedyard and packing sectors . . ."[145] Hence, m-COOL created opportunities for U.S. cattle farmers and ranchers to strengthen their U.S. cattle industry by growing their U.S. herd to meet the new demand for U.S. cattle resulting from labels that informed consumers as to the country from which the beef they purchased originated.

However, upon the 2016 Consolidated Appropriations Act's repeal of m-COOL for beef, the domestic marketplace reverted to the pre-mandatory COOL era. During that time (2000-2010) USDA researchers explained that an increasing number of cattle from which their beef is produced in domestic packing plants are born and raised in Canada and Mexico but are considered to be part of domestic beef production[146] Today, because of m-COOL's repeal, the beef produced from these foreign cattle may again be labeled as a "Product of U.S.A." under current law.[147]

Congress could reinvigorate demand for cattle exclusively born and raised in the United States by reinstating a mandatory country of origin labeling regime for beef. And Congress can readily do so by introducing new legislation that avoids the specific regulatory provisions previously criticized by the World Trade Organization.

R-CALF USA recently crafted such a proposed bill and has circulated a draft to several members of Congress. As explained in the proposal's summary document, it is an entirely new proposal markedly different from the previous m-COOL regime for beef and therefore not subject to the to the WTO's previous criticisms. The differences include: 1) requiring packers and importers to label all beef that enters U.S. commerce and further requiring all subsequent purchasers to maintain those labels; 2) eliminating the recordkeeping burdens for live cattle presented to packers for harvest; 3) expanding the scope of beef sellers responsible for maintaining labels; 4) requiring conveyance of labeled beef to all beef sellers regardless of whether they are required to communicate such labels to consumers; 5) establishing voluntary requirements for labeling beef from cattle raised in more than one country; and, 6) eliminating many of the previous regime's exclusions for certain beef products.[148]

V. NEXT STEPS FOR REFORMING THE STRUCTURALLY DYSFUNCTIONAL CATTLE MARKET

While the above steps may address the cattle market's most glaring wounds, more may need to be done. For example, academic research shows that requiring a 50% volume level in the negotiated market is likely insufficient to address the full scope of oligopolistic market power pervading the U.S. cattle industry. A 2011 study by economists, Andrew Lee and Man-Keun Kim, found that beginning with only about 20% of procurement outside the negotiated cash market (meaning when

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[145] NCBA Post-Hearing Brief for U.S. International Trade Commission (USITC) Investigation No. TPA-105-001 (January 20, 2016).

[146] *See* Michael J. McConnell et al., USDA ERS, US red meat production from foreign-born animals, 3 Agric. Sci. 201, 207 (2012), available at https://www.scirp.org/pdf/AS20120200006_23587394.pdf.

[147] USDA, Food Standards and Labeling Policy Book, 147(Aug. 2005) (authorizing 'Product of U.S.A.' labels on meat products if they are processed in the U.S.), available at https://www.fsis.usda.gov/wps/wcm/connect/7c48be3e-e516-4ccf-a2d5-b95a128f04ae/Labeling-Policy-Book.pdf?MOD=AJPERES.

[148] Summary of Proposed Beef Labeling Act of 2020, R-CALF USA (May 23, 2020), available from author.

the negotiated cash market volume is as high as 80%), fed cattle prices are nevertheless shown to be negatively impacted.[149] This study reinforced work by Tian Xia and Richard Sexton,[150] which in 2009 was cited by economist, Stephen Koontz, and described as a finding that if packers secure 50% or more of their needed cattle supplies through means other than the negotiated cash market, then the fed cattle market price can be depressed to the monopsony level and maximum market power exerted.[151]

A. Strategies for Rebalancing Disparate Market Power

To effectively tackle the residual imbalance between the bargaining power of disaggregated cattle producers and concentrated packers, policymakers should study whether certain cattle procurement devices that appear to confer attendant oligopsony power to concentrated beef packers require further regulation. Those known procurement devices include, but are not limited to: 1) cost-plus contracts that are not tied to prevailing market conditions; 2) formula-type contracts that are not tied to a firm base that can be equated to a fixed dollar amount upon execution; and, 3) outright ownership of cattle and contractual arrangements that confer control of cattle to the packer more than 14 days before slaughter.

Importantly, policymakers should consider whether these procurement contracts result in packers granting certain feedlots preferential deals unavailable to independent cattle feeders, or whether they otherwise distort the price discovery market. Policymakers should also consider whether they presently have appropriate regulations to address these issues and protect the independent producers that are the backbone of America's rural economies.

B. Strategies to Eliminate the Bastions of Abusive Market Power

Policymakers should also ensure that the USDA Packers and Stockyards Division and the Department of Justice, utilize all available resources to conduct thorough, probing investigations into all U.S. cattle markets and to take rigorous enforcement action against any entities found to be in violation of U.S. antitrust laws and other laws intended to protect, preserve, and foster competition. Those investigations should identify the conditions and practices in the U.S. cattle market that impede the United States' ability to strengthen its family farm and ranch system of agriculture. This will inform Congress and the Administration as to the need to institute statutory and regulatory reforms to eliminate such impediments.

Any further mergers and acquisition activity amongst beef packers must also be closely scrutinized. Such reviews should consider the uniqueness of the live cattle supply chain. Unlike other manufacturing supply chains, the live cattle industry is comprised of hundreds of thousands of family-scale businesses that function as cornerstones for America's rural communities.

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[149] *See* Captive Supply Impact on the U.S. Fed Cattle Price: An Application of Nonparametric Analysis, Andrew C. Lee and Man-Keun Kim, Journal of Rural Development 34(4): 103-115, available at https://ideas.repec.org/a/ags/jordng/174502.html.

[150] The Competitive Implications of Top-of-the-Market and Related Contract-Pricing Clauses, Tian Xia and Richard J. Sexton, Amer. J. Agr. Econ. 86(1) (February 2004), at 124-138.

[151] *See* A Synthesis of Market Power Research on the Cattle and Beef Industry, Stephen R. Koontz, Colorado State University (December 30, 2009), at 9 (citing the work of Xia and Sexton).

Moreover, they should also take account of the fact that unlike manufacturing inputs, or even most agricultural products, live cattle are highly perishable live organisms. Thus, cattle producers cannot simply hold out for higher prices when packers exercise monopsony power.

C. Strategies to Enhance Marketplace Monitoring and Compliance with Market Rules

Once reforms are implemented, the challenge of future monitoring and compliance enforcement should be addressed by instituting measures that empower disaggregated cattle farmers and ranchers to play a larger role in both monitoring market transactions and self-initiating enforcement actions. Such an expanded role would necessitate reforms to: 1) ensure the timely reporting of all prices and volumes of all cattle procured in all cattle procurement regions, regardless of the number of packer-buyers in any of those regions; 2) clarify that individual cattle producers need not demonstrate injury to competition or a likelihood of injury to competition to seek protections under the Packers and Stockyards Act; 3) clarify that packers engaged in unfair or deceptive conduct, or other conduct prohibited under the Packers and Stockyards Act, cannot claim a business justification for their actions; and 4) allow individuals filing successful lawsuits pursuant to the Packers and Stockyards Act to recover attorneys' fees.

D. Strategies to Generally Enhance Competition and Live Cattle Demand

Promoting and encouraging the development of more local and regional beef packing capacity will likely also enhance competition in the U.S. cattle market while also serving the public good. And, once beef is again distinguished as to where the animal from which it is derived was born, raised, and harvested, allowing U.S. cattle farmers and ranchers to use their mandatory beef checkoff assessments to promote U.S. beef would aid in building demand for their domestic products.

In December 2020, R-CALF USA issued the industry's first-ever Cattle Industry Long Range Plan.[152] The plan sets forth a five-year roadmap for U.S. cattle producers, and provides the means to measure the industry's success as the plan unfolds. For example, the group's measurable goal for carrying out the strategy to "Strengthen the U.S. cattle industry's role in achieving lasting food security for the United States" is that by 2025, the consumption of beef from cattle born, raised, and harvested in the United States will constitute at least 90% of domestic beef consumption." The plan is replete with strategies that promote profitability and prosperity for family-owned and family-operated cattle farms and ranches, and America's rural communities they support. It also emphasizes the preservation and protection of cattle producers' freedoms and liberties by ensuring they remain free to make their own production and marketing decisions based on their personal assessments of competitive forces in the marketplace.

VI. CONCLUSION AND RECOMMENDATIONS

Decades of inattention, denial, and neglect have relegated United States cattle farmers and ranchers to operate in a systemically dysfunctional marketplace that is, today, incapable of allocating to them their competitive share of the dollars consumers spend on beef. Instead, the marketplace is

[152] Cattle Industry Long Range Plan 2021-2025, R-CALF USA, available at https://www.r-calfusa.com/wp-content/uploads/2020/12/Cattle-Industry-Long-Range-Plan-and-Goals.pdf.

marked by consumers paying all-time record prices for beef (when it was even available at their grocery stores); concentrated beef packers earning all-time record margins; and United States cattle farmers and ranchers receiving decade-low prices for cattle (when they could sell them).

While the cattle industry has dealt with a myriad of extraneous factors throughout its history, such as drought, currency fluctuations, competing proteins, and supply and demand changes, government regulators and industry analysts alike have attempted to attribute today's unprecedented market distortions to such perennial and common factors. Contemporaneously, the beef packers and their allied trade associations, academicians, and government regulators attempt to explain away the industry's vanquished competition with their ceaseless mantra that sacrificing competition is justified in the name of achieving market efficiency.

Something had to change, and it did. Empty grocery store beef cases proved too much for status quo defenders. Never during the past century has there been such an intense government-led focus as there is today regarding how U.S. cattle markets are functioning, or whether they are functioning at all. Never during the past century has an organization of domestic cattle farmers and ranchers brought forth a national, class-action lawsuit alleging the four dominant beef packers conspired to depress cattle prices to increase their own profits and margins.

Never during the past century have conditions in the U.S. cattle industry gotten as bad as they are today.

And, never during the past century are policymakers better able than they are today to both halt and then reverse the cattle industry's decades-long negative trajectory. And doing so is essential to preserving the industry's disappearing critical competitive infrastructure - the competition-facilitating backbone of the U.S. cattle industry as it is known today, and the backbone that must be strengthened if today's U.S. cattle industry is to be preserved for future generations.

The challenge is monumental, but the guiding principle is clear. Competitive market forces, long supplanted in the fed cattle market with hollow promises of market efficiencies, must be reignited. Doing so requires triage – remediating the ultra-thin, competition-deficient negotiated cash market to restore industrywide price discovery and recreating a more robust mandatory country of origin labeling regime for beef so U.S. cattle producers can capitalize on demand for their domestic-born and-raised cattle, are the first critical steps.

Once these initial gaping wounds to competition are addressed, policymakers can consider how best to rebalance the disparate bargaining power between cattle producers and packers, eliminate any remaining bastions of abusive market power, enhance compliance monitoring and enforcement of marketplace rules, and enhance the general competitiveness of the industry and competition-based demand for domestic live cattle.

For further guidance, both policymakers and industry participants now have at their disposal the first-ever Cattle Industry Long Range Plan to assist them in contextualizing the immediate and longer-term reforms needed to restore prosperity for family-owned and -operated U.S. cattle farms and ranches and the rural communities they support.

APPENDIX I – Charts 3-8 Depicting Downward Trajectories of Critical Industry Indices

Chart 3 - Annual change in the number of U.S. beef cattle operations since 1990

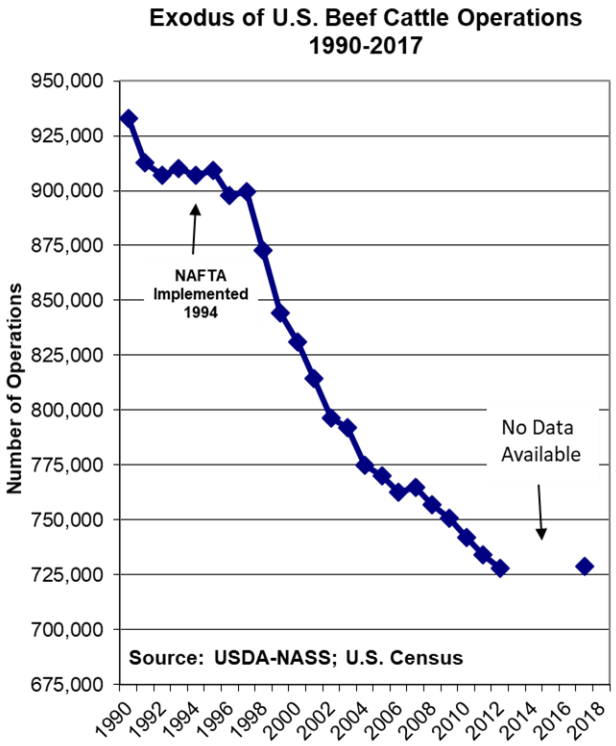


Chart 4 – Annual change in the size of the U.S. beef cow herd since 1975

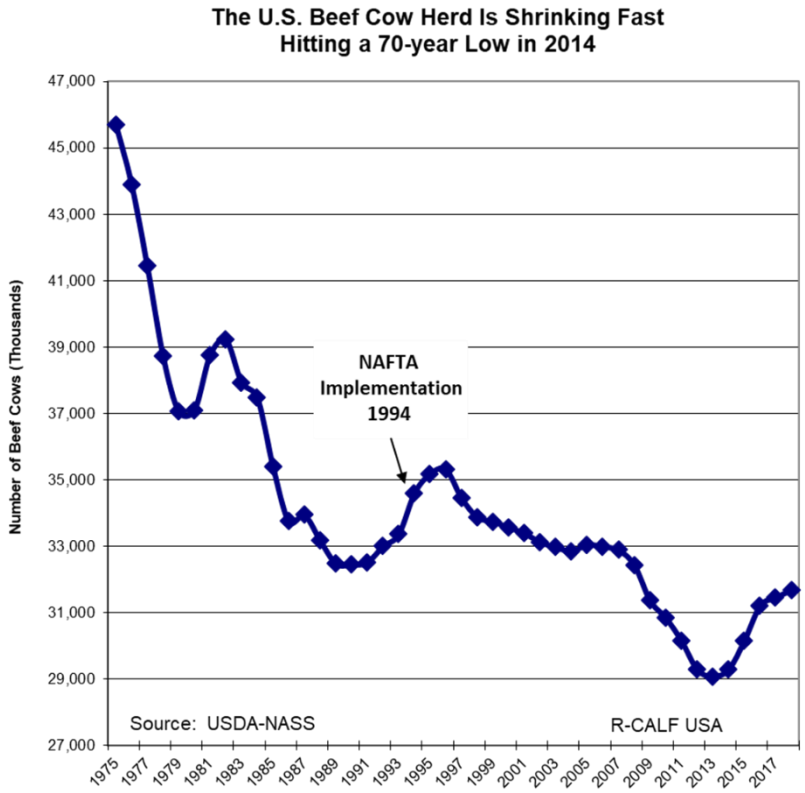


Chart 5 – Exodus of U.S. cattle feedlots since 1996

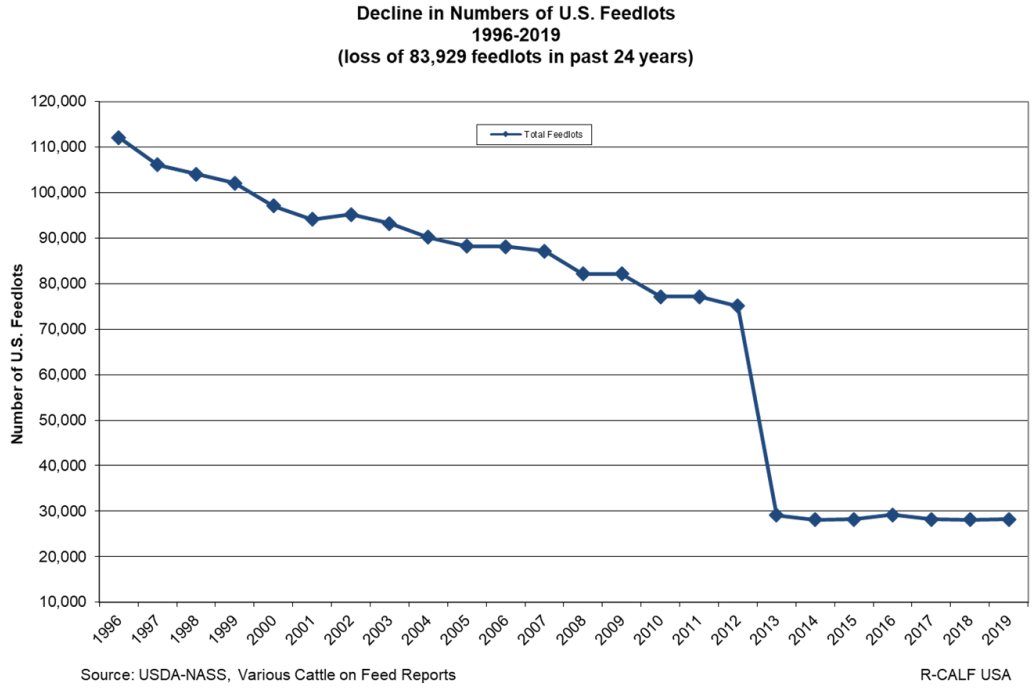


Chart 6 – Monthly change in returns to cattle feeders since January 2000 (with trendline)

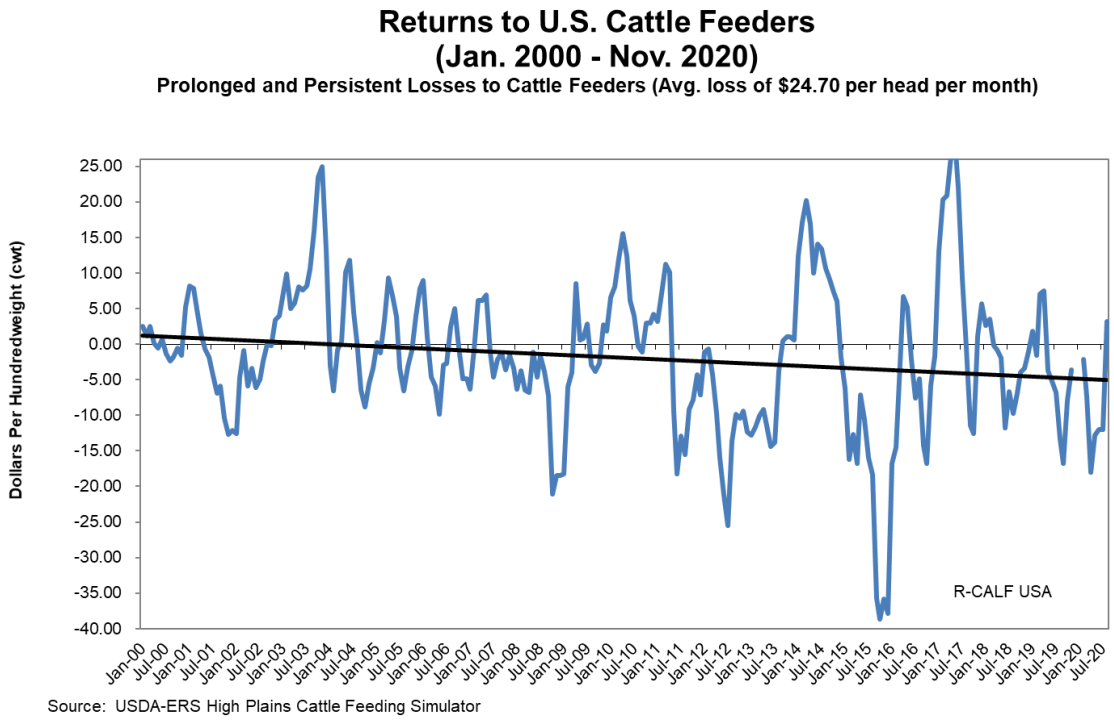


Chart 7 - Annual change in returns to U.S. cow/calf producers since 1996 (with trendline)

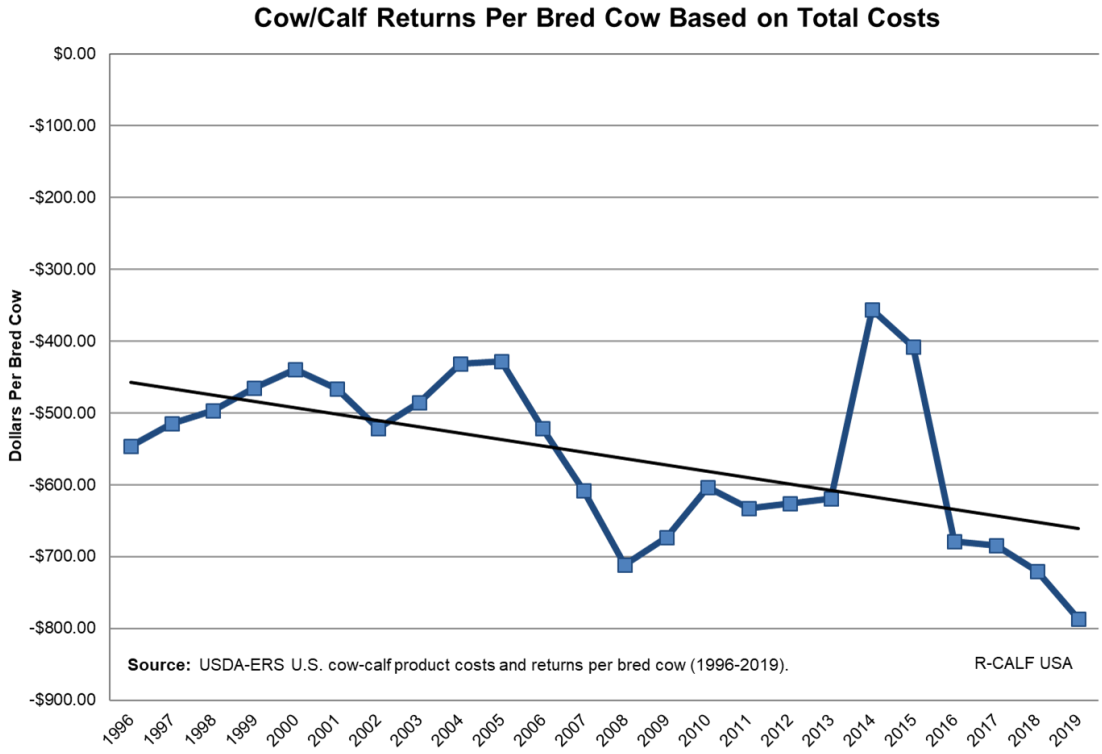
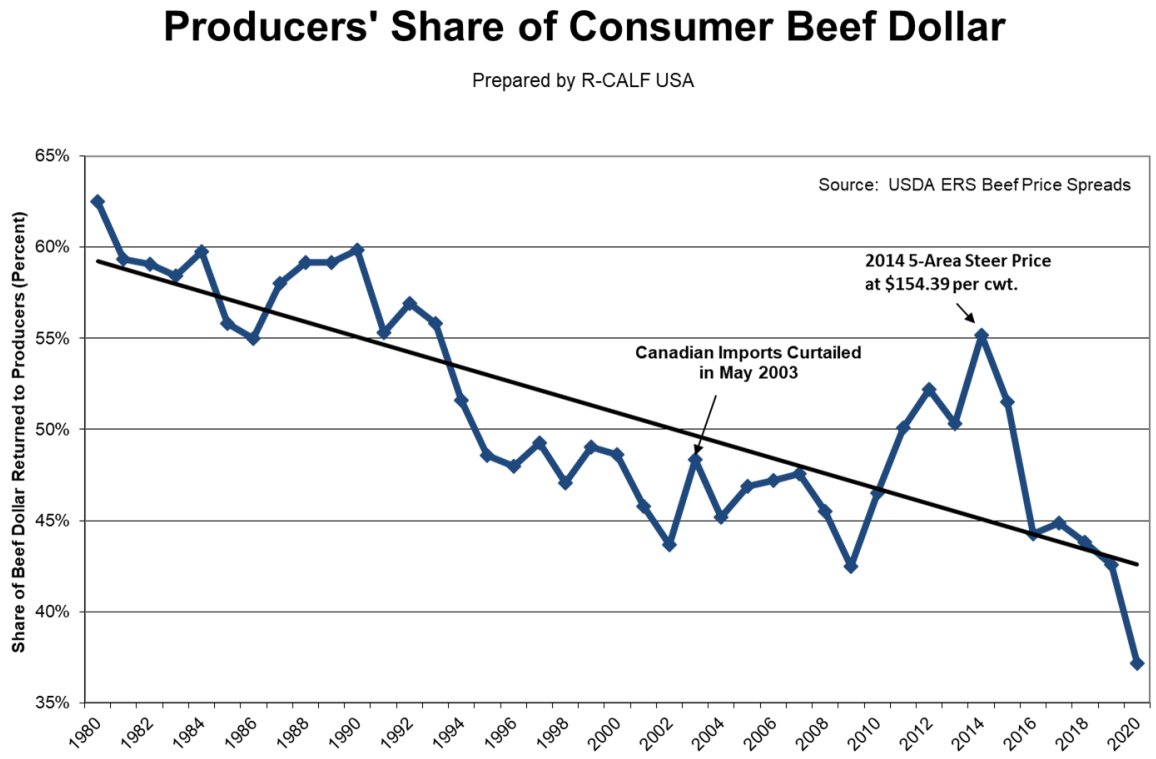


Chart 8 - Monthly change in the share of the consumer's beef dollar allocated to live cattle producers since 1980 (with trendline)



There are no known government price supports, nor any other known regulatory requirements affecting the allocation of the share of the consumers' beef dollar passed upstream in the beef supply chain to live cattle producers. The presumption, therefore, is that the allocation is made by the invisible hand of market competition. Consequently, a long-term decrease of the producers' allocation, as is occurring here, is presumed to be the result of inadequate market competition, *i.e.*, a lessening of market competition or the application of competition inhibitors.

APPENDIX II – Timeline of R-CALF USA's Investigation Requests to Multiple Federal Agencies