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Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Jonathan Kanter
Assistant Attorney General
Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

SUBMITTED VIA

Re: R-CALF USA's Supplemental Comments: Request for Information on Merger Enforcement Docket FTC-2022-0003/document

Dear Chair Khan and Mr. Kanter,

The Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA) appreciates this opportunity to submit supplemental comments on how the Federal Trade Commission and Antitrust Division of the Department of Justice ("the Agencies") can improve enforcement of our antitrust laws regarding mergers. R-CALF USA is included as a commenter on comments submitted by Food & Water Watch, et al., thus making the comments below supplemental comments.

R-CALF USA is the largest trade association whose membership is exclusively voluntary and whose voting members consist exclusively of live cattle producers within the multi-segmented beef supply chain. Its thousands of members reside in 43 states and include cow-calf operators, cattle backgrounders and stockers, and feedlot owners, as well as sheep producers.

A. New Merger Guidelines Should Require an Evaluation of the Preexisting Competitiveness of the Marketplace as Part of the Analytical Process to Determine Whether to Challenge a Merger

The current merger guidelines contemplate that the baseline for determining the potential competitive effects of a proposed merger is the preexisting market environment and market structure prior to the proposed merger. Thus, the inherent presumption created by the guidelines is that the preexisting marketplace is competitive and the acts and practices carried out by the marketplace participants therein are not in violation of antitrust laws. In today's cattle industry market, however, this presumption cannot be supported.

Experts warned decades ago that concentration levels in the U.S. meatpacking industry were already among the highest of any industry in the United States. Oklahoma State University Economist Clement Ward stated in 2001 that this concentration was “well above levels generally considered to elicit non-competitive behavior and result in adverse economic performance,”¹ and the U.S. Government Accountability Office stated with respect to this concentration in 2002 that “no other manufacturing industry showed as large an increase in concentration since the U.S. Bureau of Census began regularly publishing concentration data in 1947.”² Notwithstanding these warnings, however, additional mergers have occurred in the U.S. cattle market, presumably pursuant to an evaluation in conformity with the guidelines.³

To address the reality that the cattle industry's market has already succumbed to unprecedented concentration and to avoid basing competition-related decisions on the unsupported presumption that the current cattle market is void of antitrust concerns, new guidelines should specifically require an evaluation of the preexisting competitiveness of the marketplace as a part of the analytical process to determine whether to challenge a horizontal merger. In support of this recommendation, it is noteworthy that the U.S. Department of Agriculture (“USDA”) in 1996 was unable to conclude that the U.S. cattle industry is competitive in light of the ongoing structural changes that included concentration in the meatpacking industry and greater use of marketing agreements and forward contracts.⁴ Unless a determination is first made regarding the extent to which a marketplace is competitive, the assessment of a merger's potential to lessen competition would be perfunctory at best.

B. New Guidelines Should Require an Evaluation to Assess the Potential Competitive Effects Within Each of the Competing Segments of the Beef Supply Chain and the Identification of the Various Sources of Market Power that May Be Facilitated by a Particular Merger

The structural changes that have occurred in the U.S. cattle industry have significantly blurred the distinctions between the competing entities participating in the U.S. beef supply chain. For example, the beef supply chain is highly complex and consists of three basic components: raising and feeding live cattle, beef processing and packing, and domestic consumption through retail outlets and the hotel, restaurant, and institution sector.⁵ The live cattle segment of the beef supply chain is itself a distinct agricultural industry according to the North American Industry Classification System (“NAICS”),⁶ and annually generates about \$65 billion in cash receipts.⁷ In contrast, the beef processing

¹ A Review of Causes for and Consequences of Economic Concentration in the U.S. Meatpacking Industry, Clement E. Ward, Current Agriculture Food and Resource Issues, 2001, at 1.

² Economic Models of Cattle Prices, How USDA Can Act to Improve Models to Explain Cattle Prices, Government Accountability Office (formerly Government Accounting Office), GAO-02-0246, March 2002, at 51.

³ See, e.g., the merger between JBS S.A. and Smithfield Beef Group consummated in 2008.

⁴ Economic Models of Cattle Prices, How USDA Can Act to Improve Models to Explain Cattle Prices, Government Accountability Office (formerly Government Accounting Office), GAO-02-0246, March 2002, at 49, 50 (“This report also stated that while the body of evidence from the literature was insufficient to support a finding of noncompetitive behavior, GIPSA also could not conclude that the industry is competitive.”).

⁵ See Global Beef Trade: Effects of Animal Health, Sanitary, Food Safety, and Other Measures on U.S. Exports, U.S. International Trade Commission, USITC Publication No. 4033, September 2008, at 3-1.

⁶ See 2007 North American Industry Classification System Codes and Titles, U.S. Census Bureau, available at <http://www.census.gov/naics/2007/NAICOD07.HTM>. (The NAICS codes include: Cattle Feedlots (112112), Cattle Farming and Ranching (1121), Agriculture, Forestry, Fishing and Hunting (11).)

⁷ See U.S. Farm Sector Cash Receipts from Sales of Agriculture Commodities, 2004-2022F, U.S. Department of Agriculture, Economic Research Service, available at <https://data.ers.usda.gov/reports.aspx?ID=17832>.

and packing segment of the beef market is not an agricultural industry; but rather, is classified by NAICS as a distinct manufacturing industry.⁸ In today's cattle industry, the manufacturing sector (*i.e.*, beef processing and packing industry) has, gained leverage over the procurement of cattle through industry concentration and increased use of alternative marketing arrangements (AMAs) – in particular, unpriced formula contracts – that exert downward pressure on the prices paid to U.S. cattle producers for their cattle.⁹

A recent study focusing on multi-plant ownership of dominant beef packers suggests it is the beef packers' internal coordination of their multiple plants in combination with other factors, including AMAs, that explain the persistently wide spreads between beef prices and fed cattle prices observed over recent years at the aggregate level.¹⁰ The study explains that prior to 2005, (when the volume of cattle procured in the competitive cash market was over 60%), the largest beef packers that owned multiple packing plants nevertheless operated each plant as an independent profit center. But sometime after 2005, the largest beef packers began coordinating procurement and slaughter activities across their plants. The researchers explain that “it is as if more than 20 separate economic agents suddenly consolidated into four.” Their research shows that “beef packers employing multi-plant coordination leads to wider spreads between downstream beef prices and upstream fed cattle prices.”

To reflect a public policy goal of preserving competition for, and the competitiveness of, each of the three beef market components, new guidelines must ensure that an independent evaluation is conducted to assess the potential competitive effects of any merger on each of the competing segments of the beef supply chain and identify the various sources of market power currently exercised.

Another improvement needed in new guidelines is to evaluate the effects of mergers in which one merging firm has dominant control over product substitutes. For beef, those product substitutes include pork, chicken, and potentially lab-grown protein. Failure to address these substitutes invites internal anticompetitive practices such as varying the output and price of substitute proteins to manipulate the demand for live cattle.

C. New Guidelines Must Recognize and Incorporate Historical Indicators of Industry Competition and Competitiveness

To preserve competition for, and the competitiveness of, each of the three beef supply chain components, new guidelines must recognize the historical indicators that have evinced the presence of competition within the respective industry components, and the potential impact a merger likely would have upon those indicators must be weighed. For example, the bellwether indicator of competitiveness within the live cattle industry was the live cattle cycle. The cattle cycle has historically occurred every

(Though the sale of cattle and calves has historically been the leading sector in U.S. agriculture, generating approx. \$65 billion annually, a one-time anomaly occurred in 2008 when the corn sector surpassed the live cattle sector.).

⁸ See 2007 NAICS Codes and Titles, U.S. Census Bureau, available at <http://www.census.gov/naics/2007/NAICOD07.HTM>. (The NAICS codes for the listed industries are: Animal Food Manufacturing (3111), Food Manufacturing (311) and Manufacturing (31-33.).

⁹ See Buyer Power in the Beef Packing Industry: An Update on Research in Progress, Francisco Garrido, Nathan Miller et al., April 13, 2022, at 16, available at <http://www.nathanhmilller.org/cattlemarkets.pdf>.

¹⁰ See Multi-plant Coordination in the US Beef Packing Industry, Christopher Pudenz and Lee L. Schulz, Center for Agricultural and Rural Development, Iowa State University, available at <https://www.card.iastate.edu/products/publications/synopsis/?p=1343#:~:text=Abstract%20U.S.%20beef%20packers%20openly%20began%20employing%20multi-plant,downstream%20beef%20prices%20and%20upstream%20fed%20cattle%20prices.>

10-12 years.¹¹ In 2002 USDA acknowledged that “the last cycle was 9 years in duration; the present cycle is in its thirteenth year, with two more liquidations likely.”¹² However, in late 2007, the USDA began cautioning the industry, stating that “[s]ome analysts suggest the cattle cycle has gone the way of the hog and dairy cow cycles.”¹³ In February 2008 the USDA attributed a similar disruption that occurred in the U.S. hog industry cycle to the hog industry’s new structure. The USDA declared that the “New Hog Industry Structure Makes Hog Cycle Changes Difficult to Gauge,” and stated, “The structure of the U.S. hog production industry has changed dramatically in the past 25 years.”¹⁴ This “dramatically” changed structure includes the consolidation of the industry, where “fewer and larger operations account for an increasing share of total output.”¹⁵

The acknowledged disruption of the historical U.S. cattle cycle is a bellwether indicator that competition has lessened in the U.S. live cattle industry; and, as the USDA now concludes for the analogous hog industry cycle disruption, there is a relationship between this phenomenon and a changed industry structure that is marked by increased consolidation and vertical integration.

R-CALF USA would encourage the inclusion of such historical indicators of competition and competitiveness in new guidelines along with the requirement that an analysis of the likely impact a potential merger would have on those historical indicators be conducted.

D. The New Guidelines Should Include Measures to Address the Ongoing Consolidation and Vertical Integration Occurring in the United States Cattle Feeding Industry

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 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%,¹⁶ it is now evident that major concentration and vertical integration efforts are underway in 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 supply chain.

¹¹ See *The U.S. Beef Industry: Cattle Cycles, Price Spreads, and Packer Concentration*, Kenneth H. Mathews et al., U.S. Department of Agriculture, Economic Research Service, April, 1999, at 3.

¹² Interagency Agricultural Projections Committee, *USDA Agricultural Projections to 2011, Staff Report WAOB-2002-1, February 2002*, available at <http://www.ers.usda.gov/publications/waob021/waob20021.pdf>.

¹³ *Livestock, Dairy, & Poultry Outlook*, U.S. Department of Agriculture, Economic Research Service, December 19, 2007, at 5, available <http://www.ers.usda.gov/Publications/LDP/2007/12Dec/ldpm162.pdf>.

¹⁴ *Livestock, Dairy, & Poultry Outlook*, U.S. Department of Agriculture, Economic Research Service, February 15, 2008, at 14, available at <http://www.ers.usda.gov/Publications/LDP/2008/02Feb/ldpm164.pdf>.

¹⁵ *Hog Operations Increasingly Large, More Specialized*, Amber Waves, U.S. Department of Agriculture, Economic Research Service, February 2008, available at <http://www.ers.usda.gov/AmberWaves/February08/Findings/HogOperations.htm>.

¹⁶ *Packers and Stockyards Division Annual Report 2019*, *supra*, note 10, at 9.

According to USDA data, nearly 85,000 feedlots in operation in 1996 have exited the industry, representing a loss of over 75%.¹⁷ The largest feedlots, those with a one-time capacity of more than 50,000 cattle, increased in number from 45 feedlots in 1996 to 77 feedlots in 2021. Of particular concern is that those 77 large feedlots fed nearly 35% of all fed cattle marketed in 2021.¹⁸

The data also show there are 27,125 total feedlots remaining in the U.S. in 2021, of which 25,000 are smaller independent feedlots that have been exiting the industry at an alarming rate, but which feed only 13% of cattle marketed by all feedlots.¹⁹ This means there were 2,125 remaining feedlots that fed 87% of all cattle marketed in 2021, and the 77 largest of them fed nearly 35% of the cattle.

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 and R-CALF USA recommends the Agencies investigate to determine the degree of buyer power the concentrated beef packers exercise over those feedlots – in particular, the 77 largest feedlots.

E. To Protect the U.S. Cattle Industry from Antitrust Activities, Fundamental Reforms Must be Made to the Guidelines

Unfortunately, the current guidelines are ill-suited to evaluate and analyze the anticompetitive effects of mergers within the U.S. beef supply chain. During much of the period in which the current guidelines were in effect, the manufacturing segments reached unprecedented levels of concentration and literally hundreds of thousands of livestock production businesses exited the industry. For example, USDA data show that 90 percent of the U.S. hog farming operations in existence in 1980 are gone from the industry today. From 1980 to 2004, when the concentration by the top four hog slaughter firms increased from 33.6 percent to 61.3 percent, the number of U.S. hog operations declined from 667,000 in 1980 to only 67,000 in 2005.²⁰ During this same period, the four-firm concentration ratio for steer and heifer slaughter increased from 35.7 percent to 81.1 percent, and over 600,000 U.S. cattle operations exited the industry.²¹ These data provide no support for the assertion that the current guidelines helped, in any way, to protect U.S. livestock producers from antitrust activities and anticompetitive practices in the market.

Thus, fundamental reforms to the current guidelines are needed to restore a competitive livestock market for independent livestock producers. The first step in the review process for new guidelines must be to evaluate the unique characteristics of the livestock industry and determine the unique susceptibility of livestock to various forms of adverse market power, particularly monopsony power. The unique characteristics of cattle and the characteristics of the U.S. live cattle market make the U.S. live cattle industry uniquely susceptible to monopsony power. These characteristics include for cattle:

¹⁷ See Various Cattle on Feed reports, USDA National Agricultural Statistics Service (NASS), for example, Cattle on Feed (Feb. 2022), at 15, available at <https://downloads.usda.library.cornell.edu/usda-esmis/files/m326m174z/rj431797d/697003960/cofd0222.pdf>.

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See Federal Register, Vol. 72, No. 152, Wednesday, August 8, 2007, at 44,681, col. 2.

²¹ See *id.*

1. The longest biological cycle of any farmed animal, making it difficult for the industry to react to changes in demand.²²
2. Slaughter-ready cattle are highly perishable products that must be marketed within a narrow window of time, otherwise the animals would degrade in quality and value.²³
3. Feasibility of transporting cattle long distances decreases as cattle approach slaughter weight. Research has found that the cost of transporting cattle long distances creates a limited procurement area for meat packing plants, resulting in higher packer concentration within certain states than nationally.²⁴

For cattle markets:

1. As confirmed by the United States International Trade Commission (“USITC”), the U.S. cattle market is highly sensitive to even slight changes in cattle supplies. The USITC found that the farm level elasticity of demand for slaughter cattle is such that “each 1 percent increase in fed cattle numbers would be expected to decrease fed cattle prices by 2 percent.”²⁵
2. As confirmed by a recent study, the cash price for cattle is extremely sensitive to shifts in cattle procurement methods. The study by Francisco Garrido, Nathan Miller et al., found that a one percent increase in the fraction of cattle purchased under AMAs is associated with a 5.9% reduction in the cash market price.²⁶
3. The packer demand for live cattle is bounded on a weekly basis by available slaughter capacity, which is a limiting factor on demand for cattle, *i.e.*, slaughter capacity sets the weekly slaughter cattle-marketing limit.²⁷
4. The combination of the perishable nature of slaughter-ready cattle and limited weekly slaughter capacity creates market access risk for U.S. cattle producers within the U.S. cattle market. The USDA Grain Inspection Packers and Stockyards Administration (GIPSA) Livestock and Meat Marketing Study defines market access risk as “the availability of a timely and appropriate market outlet”²⁸ and proffered that the results of the study may

²² Economic Models of Cattle Prices, How USDA Can Act to Improve Models to Explain Cattle Prices, U.S. Government Accountability Office (formally the General Accounting Office), (GAO-020246, March 2002), at 30.

²³ GIPSA Livestock and Meat Marketing Study, January 2007, Volume 3, at 5-4, available at http://archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS_Vol_3.pdf.

²⁴ Examining Packer Choice of Slaughter Cattle Procurement and Pricing Methods, Oral Capps, Jr., et al., *Agricultural and Resource Economics Review*, April 1999, at 16.

²⁵ U.S.-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects, United States International Trade Commission (Publication 3697; May 2004) at 44, fn 26, available at <http://hotdocs.usitc.gov/docs/pubs/2104f/pub3697.pdf>.

²⁶ See Buyer Power in the Beef Packing Industry: An Update on Research in Progress, Francisco Garrido, Nathan Miller et al., April 13, 2022, at 13, available at <http://www.nathanhmilller.org/cattlemarkets.pdf>.

²⁷ See Beef Pricing and Other Contentious Industry Issues, Special Report, Kevin Grier and Larry Martin, George Morris Centre, March 16, 2004 (an analysis of the live versus beef price disparity in Canada).

²⁸ GIPSA Livestock and Meat Marketing Study, January 2007, Volume 3, at 5-4, available at http://archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS_Vol_3.pdf.

- suggest that “farmers who choose forward contracts are willing to give up some revenue in order to secure market access. . .”²⁹
5. The Regional Herfindahl-Hirschman Indices (“RHHI”) are already exceedingly high in all nine cattle procurement regions. In studying regional differences in procurement and pricing methods (resulting in part from transportation constraints) researchers calculated the RHHI for nine regional procurement areas for meatpacking plants.³⁰ Values for RHHI in the nine regions ranged from a low of 2,610 to a high of 4,451, though the RHHI values in three regions were deleted to avoid disclosure.³¹ The researchers found that a 1 percent increase in regional firm concentration as measured by the RHHI raises the probability that packers would use packer fed arrangements by 3.18 percent.³² Based on this research, any additional concentration in the cattle industry, which would necessarily increase the RHHI in one or more of the nine procurement regions, would be expected to shift more cattle into packer feeding arrangements, which are known to facilitate market power and decrease fed cattle prices.
 6. Transparency in the U.S. live cattle market is already limited as was reported by the Government Accountability Office (GAO) in 2005. The GAO reported on a number of deficiencies in the government’s Livestock Mandatory Reporting system with regard to the transparency of the reporting system and accuracy of the data reported.³³ Included among the deficiencies found was the exclusion of a large percentage of cattle transaction data.³⁴
 7. Researchers have found that individual producers within the U.S. cattle industry will agree to sign captive supply contracts even while knowing that the aggregate effect of captive supply contracts is to depress the cash market price and make all producers, including him/herself, worse off.³⁵ The researchers explained that it is the producer’s inability to coordinate action that enables a packer to obtain acceptance for exclusionary contracts, and “as long as the producer is offered at least as much as could be received in the spot market in the equilibrium with captive supplies, the producer’s equilibrium strategy is to ACCEPT the contract.”³⁶ Based on this finding, U.S. live cattle producers would likely be defenseless against any increased monopsony power that would likely arise if any additional mergers take place in the excessively concentrated cattle industry.
 8. Given the long-run lack of profitability in the U.S. live cattle industry, very small changes in cattle prices would likely accelerate the already shrinking number of independent U.S. cattle producers. Oklahoma State University economist Clement E. Ward found that

²⁹ *Id.* at 2-36.

³⁰ Examining Packer Choice of Slaughter Cattle Procurement and Pricing Methods, Oral Capps, Jr., et al., *Agricultural and Resource Economics Review*, April 1999, at 16.

³¹ *Ibid.*

³² Examining Packer Choice of Slaughter Cattle Procurement and Pricing Methods, Oral Capps, Jr., et al., *Agricultural and Resource Economics Review*, April 1999, at 21.

³³ U.S. Government Accountability Office, *Livestock Market Reporting: USDA Has Taken Some Steps to Ensure Quality, but Additional Efforts Are Needed*, GAO-06-202 (Dec. 2005).

³⁴ *Id.*, at 10.

³⁵ *Captive Supplies and the Cash Market Price: A Spatial Markets Approach*, Mingxia Zhang and Richard J. Sexton, *Journal of Agricultural and Resource Economics*, 25(1): 88-108, at 98.

³⁶ *Ibid.*

“[r]esearch to date suggests price impacts from packer concentration have been negative in general, but small.”³⁷ He found that most studies found price distortions of 3 percent or less, though he explained that “even seemingly small impacts on a \$/cwt. basis may make substantial difference to livestock producers and rival meatpacking firms operating at the margin of remaining viable or being forced to exit an industry.”³⁸

F. New Guidelines Must Scale the SSNIP Test to Address Differing Sensitivities to Monopsony Power Among Different Industry Segments

The current merger guidelines typically apply the SSNIP test (Small but Significant Non-transitory Increase in Price). The test seeks to identify the smallest relevant market within which a hypothetical monopolist or cartel could impose a profitable significant increase in price, typically defined to be 5 percent. Applied to buyer power the SSNIP test would consider a small but significant decrease in price. We maintain that the 5 percent threshold is far too high in agriculture monopsony cases. Though seemingly small the 5% threshold is the difference between a very modest profit and substantial losses for cattle feeders and is, therefore, too high for a monopsony power threshold.³⁹

For example, Iowa State University data show that the net returns (in current dollars) from feeding steers averaged only \$16 per head over the 1994-2007 period. For a \$1,000 per head fed steer, the 5 percent SSNIP test would allow a merger that would decrease price by about \$50 per head, which would mean that cattle producers would be losing \$34/head compared to the historical average. A price decrease of only 1.6 percent would completely eliminate the modest profits realized by cattle feeders over 1994-2007.⁴⁰ Therefore, the current criteria used by the Agencies to define markets and to define an acceptable level of market power in their merger approval process are inappropriate to agricultural markets such as the U.S. cattle market.

G. Conclusion

R-CALF USA appreciates the opportunity to submit these comments and would look forward to any future opportunity to provide additional information to the Agencies regarding the U.S. cattle industry.

Sincerely,



Bill Bullard, CEO

³⁷ Packer Concentration and Packer Supplies, Clement E. Ward, Oklahoma Cooperative Extension Service, AGEC-554, at 554-5.

³⁸ A Review of Causes for and Consequences of Economic Concentration in the U.S. Meatpacking Industry, Clement E. Ward, Current Agriculture Food and Resource Issues, 2001, at 2.

³⁹ See The Debilitating Effects of Concentration In Markets Affecting Agriculture, David Domina and C. Robert Taylor, Organization for Competitive Markets, Oct. 5, 2019, at 8.

⁴⁰ See *id.*, at 8-9.