

CHAPTER I  
GOVERNMENT AGENCIES

The U.S. Department of Justice, U.S. Department of Agriculture, Federal Trade Commission, U.S. Food and Drug Administration, state attorneys general, and Congress together share responsibility for the creation and enforcement of laws and regulations that apply to the agriculture and food industries. The following chapter will discuss the role of each agency and how it fits within the overall regulatory framework.

**A. U.S. Department of Justice**

The DOJ's Antitrust Division enforces both the civil and criminal provisions of the Sherman Act and the Clayton Act. In this capacity, the DOJ may prosecute potential violations of the antitrust laws following investigation, participate in regulatory proceedings that deal with antitrust laws or competitive policies, and advocate for procompetitive policies within other branches of government.

The DOJ reviews mergers in the agriculture industry. The DOJ has authority under Section 7 of the Clayton Act to prohibit mergers that may lessen competition substantially or tend to create a monopoly.<sup>1</sup> One typical example of the DOJ's exercise of this power occurred when the DOJ challenged JBS's proposed acquisition of National Beef in 2008,<sup>2</sup> which would have combined the third and fourth largest beef processors in the United States, leaving three firms with over 80 percent of domestic-fed cattle processing capacity. The DOJ alleged the transaction would result in less competition among beef packers for the purchase of fed cattle and in the sale of boxed beef. In response to the DOJ's lawsuit, JBS and National Beef abandoned the proposed acquisition.

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1. 15 U.S.C. § 18.
  2. Complaint, *United States v. JBS S.A.*, No. 08-5992 (N.D. Ill. Oct. 20, 2008), *available at* <https://www.justice.gov/atr/case-document/complaint-137>.

The DOJ also enforces antitrust laws that proscribe mergers and other conduct aimed at reducing *buy-side* competition and the acquisition or maintenance of monopsony power.<sup>3</sup> For example, the DOJ challenged George's Foods' proposed acquisition of Tyson Foods' chicken processing plant in Harrisonburg, VA,<sup>4</sup> alleging that it would reduce the prices paid to Shenandoah Valley area chicken growers. The transaction would have left only two competitors in the region and given George's Foods roughly 40 percent of the market's processing capacity. Ultimately, George's Foods agreed to increase the poultry processing capacity of its plants in the affected region, thus, according to the DOJ, precluding it from forcing growers to accept lower prices and less favorable terms because of its monopsony power in a limited capacity market.<sup>5</sup> The Final Judgment further required Defendants to acquire, install, and modify their assets at the chicken processing complex and subjected George's Foods to compliance inspection "from time to time" by the DOJ.<sup>6</sup>

Several agriculture-specific immunities temper the DOJ's power to enforce generally applicable antitrust laws against agricultural producers. Section 6 of the Clayton Act allows formation of agricultural or horticultural mutual assistance organizations, so long as the organizations do not have capital stock or are not conducted for profit.<sup>7</sup> Similarly, the Capper-Volstead Act allows producers of agricultural products to act together by "collectively processing, preparing for market, handling and marketing" their products and allows agricultural producers and associations to share pricing, production, and marketing data without violating antitrust laws.<sup>8</sup> And where a valid marketing order or marketing agreement is issued under the Agricultural Marketing

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3. Monopsony power is market power on the buyer side of the market. *See* *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 312 (2007).
  4. Complaint, *United States v. George's Foods*, No. 5:11-cv-00043 (W.D. Va. May 10, 2011), *available at* <https://www.justice.gov/atr/case-document/file/497411/download>.
  5. Final Judgment, *United States v. George's Foods*, No. 5:11-cv-00043 (W.D. Va. Nov. 4, 2011), *available at* <https://www.justice.gov/atr/case-document/file/497386/download>.
  6. *Id.*
  7. 15 U.S.C. § 17.
  8. 7 U.S.C. §§ 291-292, 451-57.

Agreement Act, the DOJ cannot pursue litigation against producers even though the marketing order or agreement effectively controls the amount of an agricultural product that reaches the market.<sup>9</sup> Nevertheless, the DOJ may still enforce a cease-and-desist order issued by the Secretary of Agriculture when the USDA determines that the proceedings of an association fall outside this exemption.

In 2010, the DOJ hosted a series of workshops to explore issues concerning competition in the agriculture sector. The DOJ received over 18,000 public comments from the agriculture industry, including farmers, consumers, trade associations, and academia.<sup>10</sup> Following the workshops, the DOJ report identified nine areas of competitive concern in the agriculture industry: (1) anticompetitive mergers, (2) market concentration, (3) monopsony power, (4) price levels, (5) lack of capital, (6) processor contracting, (7) market transparency and captive supply, (8) market manipulation, and (9) genetically modified seeds.<sup>11</sup> In general, these identified issues have guided the DOJ's subsequent enforcement focus.

## **B. U.S. Department of Agriculture**

The U.S. Department of Agriculture (USDA) supports the American agricultural economy, strengthens rural communities, protects and conserves natural resources, and helps provide a safe, sufficient, and nutritious food supply.<sup>12</sup> The USDA pursues these goals through several mission areas, including Farm and Foreign Agricultural Services; Food, Nutrition and Consumer Services; Food Safety; Natural Resource and

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9. 7 U.S.C. §§ 601-627.

10. See Workshop Information, AGRICULTURE AND ANTITRUST ENFORCEMENT ISSUES IN OUR 21ST CENTURY ECONOMY, *available at* <http://www.justice.gov/atr/public/workshops/ag2010/>.

11. See generally U.S. DEP'T OF JUSTICE, COMPETITION AND AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD (May 2012) *available at* <http://www.justice.gov/atr/public/reports/283291.pdf>.

12. U.S. DEP'T OF AGRIC., ABOUT USDA – A QUICK REFERENCE GUIDE (Mar. 2016), *available at* <https://www.usda.gov/documents/about-usda-quick-reference-guide.pdf>.

Environment; Research, Education and Economics; Rural Development; and Marketing and Regulatory Programs.<sup>13</sup>

The Marketing and Regulatory Programs mission area facilitates domestic and international marketing of U.S. agricultural products and ensures the health and care of animals and plants.<sup>14</sup> This mission area is further subdivided into the Agriculture Marketing Service (AMS), Animal and Plant Health Inspection Service (APHIS), and Grain Inspection, Packers, and Stockyards Administration (GIPSA).

As part of the Marketing and Regulatory Programs mission area, the Secretary of Agriculture—and by extension the USDA—is tasked with monitoring compliance with the Capper-Volstead exemption, and may initiate proceedings against associations that fall outside the exemption and that monopolize or restrain “trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced[.]”<sup>15</sup> The Secretary of Agriculture may issue a cease-and-desist order to remedy violations of the statute, after giving the respondent an opportunity to show why such an order should not be issued.<sup>16</sup> As noted above, the Secretary of Agriculture may request that the DOJ enforce the order in federal court.<sup>17</sup>

The Secretary of Agriculture has similar authority under the Packers and Stockyards Act (PSA).<sup>18</sup> The PSA regulates packers of livestock, meats, meat food products, and swine contractors, and prohibits certain unlawful practices in these industries. The Secretary of Agriculture has the power to investigate possible violations of the act through GIPSA (which filed 208 enforcement actions between 2012 and 2016) or it may direct the FTC to do so.<sup>19</sup> The Secretary of Agriculture also has the power to make necessary rules and cooperate with other agencies to

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13. *Mission Areas*, U.S. DEP’T OF AGRIC., available at <https://www.usda.gov/our-agency/about-usda/mission-areas>.

14. *Id.*

15. 7 U.S.C. § 292.

16. *Id.*

17. *Id.* (“The Department of Justice shall have charge of the enforcement of such order”).

18. 7 U.S.C. § 192.

19. 7 U.S.C. § 227; see also *Enforcement Action*, U.S. DEP’T OF AGRIC. (Nov. 21 2016), available at [https://www.gipsa.usda.gov/psp/enforce/enforc\\_2016.aspx](https://www.gipsa.usda.gov/psp/enforce/enforc_2016.aspx).

carry out the provisions of the PSA.<sup>20</sup> If the Secretary believes a violation of the PSA has been committed through unfair, discriminatory, or deceptive practices, the Secretary may give notice and issue a cease-and-desist order, and/or assess a penalty of up to \$28,061 for each violation.<sup>21</sup> If the respondent fails to pay the penalty, “the Secretary may refer the matter to the Attorney General, who may recover such penalty by an action in the appropriate district court of the United States.”<sup>22</sup>

GIPSA is responsible for the Federal Grain Inspection Service (FGIS) and the Packers and Stockyards Program (P&SP). The activities of the FGIS relate primarily to the Grain Standards Act (GSA)<sup>23</sup> and the Agricultural Marketing Act (AMA).<sup>24</sup> The activities of the P&SP relate primarily to the PSA.

Though seemingly distinct, the roles of FGIS and P&SP are substantively similar. Both divisions regulate the transfer of physical commodities between market participants.<sup>25</sup> In the movement of grains from field to fork, FGIS ensures quality and standards, conducts inspections, ensures scale accuracy, and prohibits fraudulent and deceptive practices.<sup>26</sup> Similarly, in the movement of livestock through the production and slaughter process, P&SP conducts inspections, ensures scale accuracy, and prohibits fraudulent and deceptive practices by market participants.<sup>27</sup> Through both divisions, GIPSA acts as the primary regulator in the physical agricultural-commodity trading marketplace.

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20. 7 U.S.C. § 228(a).

21. 7 U.S.C. §§ 193(a), (b); 7 U.S.C. § 213; 7 C.F.R. § 3.91(b)(1)(lvi) (adjustment for inflation).

22. *Id.*

23. 7 U.S.C. §§ 71-87. The Grain Standards Act establishes marketing standards for grain and oilseeds and also establishes standards for grain and oilseed inspection.

24. 7 U.S.C. §§ 1621-32.

25. In contrast to physical commodity transactions, the Commodity Exchange Act, 7 U.S.C. §§ 1-27, relates primarily to futures transactions with respect to agricultural commodities.

26. *See* 9 C.F.R. § 800.1.

27. U.S. DEP’T OF AGRIC., 2016 EXPLANATORY NOTES GRAIN INSPECTION, PACKERS AND STOCKYARDS ADMINISTRATION, *available at* <http://www.obpa.usda.gov/22gipsa2016notes.pdf>.

Both divisions work closely with other divisions of the USDA, including its Office of General Counsel (OGC) and the Office of Inspector General, both headquartered in Washington, D.C. With respect to enforcement actions, both divisions may also initiate court actions with the DOJ.

### **1. Packers and Stockyards Program**

P&SP implements and oversees the enforcement of the PSA. PSA-related investigations are carried out by GIPSA personnel with the support of the USDA OGC. GIPSA has broad regulatory powers under the PSA and its implementing regulations.

GIPSA imposes record keeping obligations upon respondents,<sup>28</sup> which require that each “packer, swine contractor, live poultry dealer, stockyard owner, market agency, and dealer, upon proper request, shall give [GIPSA] in writing or otherwise, and under oath or affirmation if requested . . . any information concerning the business of the [respondent] which may be required in order to carry out the provisions of the [PSA] . . . .”<sup>29</sup> In addition, each “[respondent], upon proper request, shall permit [GIPSA] to enter its place of business during normal business hours and to examine records pertaining to its business subject to the [PSA], to make copies thereof and to inspect the facilities of such persons subject to the [PSA].”<sup>30</sup>

At the conclusion of a GIPSA investigation, GIPSA personnel generate an investigative report. GIPSA personnel may conduct an exit interview with the respondent before completing the investigative report.

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28. P&SP reports annually with respect to its investigation and enforcement activities. In fiscal year 2013, the last year for which data is available, P&SP “opened” 2,2481 cases, of which 2,272 were alleged violations for financial or trade practice behaviors. *See* U.S. DEP’T OF AGRIC., 2013 ANNUAL REPORT, PACKER & STOCKYARDS PROGRAM, 20 (Mar. 2014), *available at* [https://www.gipsa.usda.gov/psp/publication/ar/2013\\_psp\\_annual\\_report.pdf](https://www.gipsa.usda.gov/psp/publication/ar/2013_psp_annual_report.pdf). During fiscal year 2013, P&SP “closed” 2,272 cases without referring them to OGC. *Id.* An additional 133 cases were closed after referral to OGC, including 12 that OGC referred to DoJ. *Id.* at 21. Many of the cases referred to OGC and that subset referred to DOJ were closed without formal action. *Id.*

29. 9 C.F.R. § 201.94.

30. 9 C.F.R. § 201.95.