

## **PREPARED REMARKS**

### **“Economic Liberty in an Era of Consolidation”**

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**August 9, 2018  
20<sup>th</sup> Annual Food and Agriculture Conference  
Organization for Competitive Markets  
Kansas City, MO**

Thank you for that warm welcome. Let me begin by saying that this speech reflects my views and not necessarily those of the Commission.

I don't know much about agriculture, but you don't need to know much to see that the situation is bleak.

Before I say more, I want to acknowledge that most of you have heard this song and dance before from government officials, along with a lot of promises. And then nothing happened. In fact, from what I understand, a lot of you came forward during a series of hearings about unfair practices in the agriculture industry. And instead of seeing meaningful change, many people who came forward faced retaliation.

Today, for every dollar consumers spend on food in the supermarket, the farmer receives 14.8 cents – the lowest portion since we started measuring.<sup>1</sup> And when food prices go up for consumers, it doesn't necessarily translate into higher pay for farmers. But when food prices go down, producers say they're the first ones to see their pay cut – and they say it feels like the middlemen are taking everything. Rural poverty is up. Family farmers are disappearing. And suicides are far too high.

As I shared before, I don't know much about farming or ranching, but I do know how big companies work and think. In fact, I always knew since I was a kid that I wanted to be a businessman. And I can remember why: because I didn't want to be bossed around.

For me, this is how I think about being free. We all learn about freedom of speech, freedom of religion, and many other rights that let us live our lives. But, this is true in our work, too. Countless surveys show that we want to be our own boss. We know we have to work hard, but we want autonomy and freedom to make our own decisions.

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<sup>1</sup> Rick Barrett, *Farm income could be lowest in 12 years, falls by more than half*, USA TODAY (May 17, 2018), <https://www.usatoday.com/story/money/business/2018/05/17/farm-income-could-lowest-12-years-prices-fall/618204002/>

## Remarks of Commissioner Chopra

This is actually how I see running a farm, a ranch, or any other business. It's the prime example of self-reliance, independence, and liberty. There is great dignity to working hard on your own economic pursuits and being your own boss.

It's not that hard to figure out that, in America today, farming is no longer the path to economic liberty. Farmers may still own the land, but they are less in control of their business. Increasingly, they must follow orders from afar. In many ways, whether you succeed seems to depend less on how hard you work and more on the decisions of people you've never met. Not only are you no longer your own boss, you may not even have the freedom to speak out.

When I was preparing to come here, I paged through a report about your industry. It talked about how a small number of companies had "attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands."<sup>2</sup>

The report detailed the array of unfair practices that producers face when dealing with large meat companies. It described how these practices created a marketplace that was not free and fair. It was out of step with American values.

Based on what you've said today, it sounds like this report might have been written today, right? It wasn't. Investigators were working on this report 100 years ago, in the summer of 1918, at the Federal Trade Commission. The President had asked the FTC to investigate the meat packing industry, so the Commissioners went to work. The Commission's investigation found that the packers' practices were so egregious that large numbers of producers were closing shop altogether.<sup>3</sup>

The report led enforcers to crack down. The Big Five meat packers were broken up. Within a few years, Congress passed a law banning unfair, unjustly discriminatory, or deceptive acts or practices.<sup>4</sup> We then passed another law giving farmers new rights to negotiate with packers and processors through cooperatives.

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<sup>2</sup> The report described in great detail the various business and social ties among the meat packers. For example, a member of the Swift family married a member of the Morris family, establishing a relationship between the two families. U.S. Fed. Trade Comm'n, *Report of the Federal Trade Commission on the Meat-Packing Industry* 88 (1919) [hereinafter *Meat-Packing Report*]. The report concluded that the net effect of these business agreements and social ties meant that discussing their power in terms of the "Big Five" likely *overstated* the real degree of competition in the market. Some in the industry, the report noted, "speak not of the Big Five but of the 'Big Three' or the 'Big Two.' It is probably true that the Swifts and the Armours...have a much broader and more determinative influence among the Big Five than any of the others." *Meat-Packing Report*, at 89.

<sup>3</sup> The Commission wrote, "It is our opinion that the failure of American meat production to keep pace with population is in large measure due to the conditions created and maintained in the markets by the Big Five. Their conspiracies and unfair practices have disheartened producers of livestock by destroying their confidence in the fairness of the marketing system to such an extent that large numbers have abandoned or curtailed their operations." *Meat-Packing Report*, *supra* note 2, at 71.

<sup>4</sup> 7 U.S.C. §§ 181-229b (2006). . The failure to keep business records is a criminal offense under the Packers and Stockyards Act, punishable by fines and/or imprisonment. 7 U.S.C. § 221.

## What Happened?

First and foremost, corporate America has changed dramatically in the last hundred years.

Now, there are an endless number of things to admire about American business. The risk-taking. The creativity. The constant striving to find new ways to serve customers better. But over the last thirty years, American businesses have changed how they think and operate. More and more companies act with Wall Street on their mind.

Today's corporate executives are hyper-focused on pleasing Wall Street. Wall Street, in turn, rewards companies for constant increases in profitability—and not much else. So executives chase the numbers—they see that as the only way to pump up their stock price and stay on top.

Of course, we want companies to grow and profit. But too often, the focus is on generating quick cash and buying back stock—not investing in new equipment or hiring workers.<sup>5</sup> Shareholders capture all the gains and reward executives with eye-popping compensation.

This model sometimes rewards unfair business practices. Take as an example working capital, which is essentially the amount of inventories and assets you have on hand for the year, less any debts you owe that are coming due soon. In agriculture, many are taught to increase their working capital to make sure you have a cushion. In a big company, though, it's now the exact opposite. In 2013, the *Wall Street Journal* wrote a story titled “P&G, Big Companies Pinch Suppliers on Payments.”<sup>6</sup> A story in *Bloomberg* noted that “delaying payments to suppliers has become downright fashionable.”<sup>7</sup>

By holding out on paying up, companies reduce their working capital and the amount of cash that they have to tie up in their company.<sup>8</sup> But for small suppliers, this means getting stiffed for anywhere from a few weeks to months—a shortage that can make a small business' finances even more precarious. The problem is made worse by the fact that, in many markets, suppliers lack real choice: doing business with a big buyer may be the only way to stay afloat. This can lead to abuse. When a big buyer doesn't pay, a small seller may feel like they can't go to court, for fear of retaliation or of losing a major customer altogether.

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<sup>5</sup> Between 2015 and 2017, companies spent almost 60 percent of net profits on stock buybacks. Katy Milani & Irene Tung, *Curbing Stock Buybacks: A Crucial Step to Raising Worker Pay and Reducing Inequality*, NAT'L EMP. L. PROJECT & ROOSEVELT INST. (July 2018), [http://rooseveltinstitute.org/wp-content/uploads/2018/07/The-Big-Tradeoff-Report\\_072618.pdf](http://rooseveltinstitute.org/wp-content/uploads/2018/07/The-Big-Tradeoff-Report_072618.pdf)

<sup>6</sup> Serena Ng, *P&G, Big Companies, Pinch Suppliers on Payments*, WALL ST. J. (Apr. 16, 2013), <https://www.wsj.com/articles/SB10001424127887324010704578418361635041842>

<sup>7</sup> Justin Fox, *Big Companies Don't Pay Their Bills on Time*, BLOOMBERG (Sept. 30, 2015), <https://www.bloomberg.com/view/articles/2015-09-30/big-companies-don-t-pay-their-bills-on-time>

<sup>8</sup> One report estimated that Procter & Gamble's move to extend its payment terms to 75 days in 2013 added \$1 billion to its cash flow. Stephanie Strom, *Big Companies Pay Later, Squeezing Their Suppliers*, N.Y. TIMES (Apr. 6, 2015), <https://www.nytimes.com/2015/04/07/business/big-companies-pay-later-squeezing-their-suppliers.html>

Another practice driven by short-termism is offloading capital investments. Corporate financial executives typically don't like making big capital investments. They view investments as cash that gets locked up and doesn't pay off for a while. Instead, they prefer to shift capital costs onto others. Instead of investing in plant and equipment to produce goods, companies will shop around – often overseas – for a contract manufacturer, to avoid adding any assets to their own books. Investors like this. Why take on risk when you can use your clout to have others borrow and bear the investment risks instead?

This, too, can lead to serious trouble when you have a big buyer up against a small seller.<sup>9</sup>

In poultry, for example, processors have required growers to make steep capital investments. At the agriculture hearings in 2010, producers explained what this can look like. One grower described having to invest \$10,000 in upgrades or the processor wouldn't play ball.<sup>10</sup> Others reported having invested anywhere from \$80,000 to half a million dollars—without any guarantee of long-term business, nor stability of pay. And one grower described how processors change requirements year-by-year, trapping farmers in cycles of debt.<sup>11</sup>

In some instances, processors can shut down operations overnight—leaving growers saddled with heavy debt. As one farmer recalled after such a shut down, “All the equity each farm has worked so hard to build overnight with our house has turned into huge liabilities. Paying insurance, taxes, no birds.”<sup>12</sup>

At the 2010 workshops, many farmers and ranchers worried that if they complained, they'd face retribution. Some even faced explicit threats that if they spoke up, they'd suffer.<sup>13</sup>

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<sup>9</sup> Indeed, in certain markets, we know farmers are afraid to demand not just prompt pay but full and fair pay to keep them afloat. As the 2010 US Department of Agriculture and Department of Justice hearings documented, poultry producers are some of the most vulnerable in today's agriculture markets. Not only must they do business on contract, but processors subject them to the “tournament system”—a payment scheme that ranks each producer based on his or her performance against other farmers. Unlike traditional markets, where every pound of chicken of the same grade fetches the same price, the tournament system enables firms to discriminate in their pay. Of course, the most perverse part is that farmers have no control over the inputs and no way to verify the numbers used to calculate their pay. In short, no matter how hard you work, your pay can be totally arbitrary. One farmer at the Alabama hearing reported that his pay can vary anywhere from \$11,000 to \$22,000—for the exact same amount of chickens. Another noted, “[T]here is no such thing as a level playing field. There's just too many variables....But when they want to compensate us, they pretend we've got a level playing field.”<sup>9</sup> Dep't. of Justice & Dep't. of Agric., Public Workshops Exploring Competition in Agriculture, Poultry Workshop (May 21, 2010) 159, <https://www.justice.gov/sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf> [hereinafter “Poultry Workshop”]. As farmers reported at the hearing, the tournament system has wrecked not just livelihoods but also lives, leading at least one grower who was penalized by a processor to end his life. *Id.* at 118.

<sup>10</sup> Poultry Workshop, *supra* note 9, at 114.

<sup>11</sup> *Id.* at 140.

<sup>12</sup> *Id.* at 224.

<sup>13</sup> *Id.* at 165. A hundred years ago, too, fear of the meatpackers kept farmers from speaking up. The 1919 report stated, “The Commission also has reason to believe that some of the smaller packers did not feel

There are many other examples of how corporate America's orthodoxy may be eroding liberty. In theory, it is all motivated by efficiency and everybody wins. But in reality, it can lead to unfair market practices exacerbated by an uneven playing field.

It's no wonder that when you're a small seller up against one big buyer, it can feel like you've already lost the deal even before the handshake.<sup>14</sup>

### Winners and Losers

Many people feel the system is working well for foreign companies and investors. There seems to be some truth to this. According to the Midwest Center for Investigative Reporting, foreign ownership of US farmland doubled from 2004 to 2014, increasing by nearly 14 million acres, and, if anything, that number may be a major underestimate.<sup>15</sup>

Well what about the efficiency argument? Doesn't lower pay for farmers and global economies of scale mean lower prices for consumers? The data doesn't necessarily take into account the full costs.<sup>16</sup> Many suspect that this efficiency is really extraction and exploitation.

The long-term health and sustainability of a market requires fair terms and fair prices for both buyers *and* sellers. Congress recognized this, which is why the antitrust laws prohibit anticompetitive practices on both sides of the market.

But at the moment, it's clear that farmers and ranchers are being squeezed.

Here's the situation in Missouri. Between 1997 and 2012, the number of farms in Missouri declined by 20,000. According to the state's Department of Health and Senior Services, the rural poverty rate is actually 25% higher than the urban poverty rate.<sup>17</sup>

In 1920, about 14 percent of all farms in the United States were black-owned; whereas today, African Americans own less than 2 percent of the nation's farms.<sup>18</sup> In 1900 Missouri actually

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free to set down all they knew or felt but were in a measure constrained by fear of the Big Five." *Meat-Packing Report*, *supra* note 2, at 89.

<sup>14</sup> Again, farmers a hundred years ago would be able to relate. As the Commission's report observed, many producers "regard the stockyard markets as gambling places in which the packers owners not only take an exorbitant 'percentage' but rig and control the game itself." *Meat-Packing Report*, *supra* note 2, at 71.

<sup>15</sup> Johnathan Hettinger, *USDA fails to monitor foreign ownership of farmland*, New Food Economy (Sept. 27, 2017), <https://newfoodeconomy.org/usda-foreign-farmland-monitoring/>

<sup>16</sup> Studies suggest that the consolidation of the U.S. food system comes at the expense of resilience, and that our food system may be more vulnerable to supply shocks caused by pandemics and other forms of disruption. *See, e.g.,* Andrew Huff, et al., *How resilient is the United States food system to pandemics*, J. OF ENV. STUDIES & SCIENCES 5(3): 337-47 (2015); Mary Hendrickson, *Resilience in a concentrated and consolidated food system*, J. OF ENV. STUDIES & SCIENCES 5(3): 418-31 (2015).

<sup>17</sup> Missouri Dep't. Health & Senior Serv., Health in Rural Missouri Biennial Report 201-2017 <https://competitivemarkets.com/wp-content/uploads/2018/01/OCM-Policy-Brief-State-Series-Consolidation-and-the-American-Family-Farm-Missouri.pdf>

had the most black farmers outside the south—nearly 5,000—but, according to the USDA, by 2012 Missouri had only 239 black farmers remaining.<sup>19</sup>

We can see similar struggles for young farmers, many of whom have studied hard to make their farms productive and invested in their education. Young farmers carry roughly the same amount of student debt as most new graduates, even as the average salary for a farmer is significantly lower.<sup>20</sup> The National Young Farmers Coalition describes student loan debt as one of the “greatest barriers to young farmer success.”<sup>21</sup>

There are several factors at play. But it’s clear that our current system is facilitating the demise of America’s rural communities.

In many cases, the decisions driving these results are made by the leaders and investors of globally consolidated businesses—people who don’t live in America’s rural communities, people whose children don’t go to the same schools, people who don’t see the same shuttered shops.

So if unfair business practices are now squeezing America’s farmers and hollowing out rural communities, why won’t the government do anything about it?

### **Regulatory Capture**

During the hearings hosted by the Department of Justice and the USDA several years ago, farmers and producers came forward with a slew of allegations about anticompetitive practices. But as we’ve been hearing repeatedly at this conference, it feels to many like little is being done to enforce the law.

According to public surveys, most Americans believe that our government isn’t working. But for some, our government is actually working great. If you have money and clout, you can influence what laws get passed, how they get enforced, and even how the courts will interpret them.

We should all be concerned about regulatory capture, which is when government entities work not in the interests of the public, but in the interests of those who are supposed to be watched over. When government is hijacked, it simply doesn’t work for the vast majority of people it is supposed to represent.

The Federal Trade Commission has also been concerned about regulatory capture. In 2015 the Supreme Court upheld a finding by the FTC that the North Carolina State Board of Dental

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<sup>18</sup> Leah Douglas, *African Americans Have Lost Untold Acres of Land Over the Last Century*, NATION (June 26, 2017), <https://www.thenation.com/article/african-americans-have-lost-acres/>

<sup>19</sup> Dep’t. of Agric., Census of Agric. (2012), [https://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/Congressional\\_District\\_Profiles/index.php#](https://www.agcensus.usda.gov/Publications/2012/Online_Resources/Congressional_District_Profiles/index.php#)

<sup>20</sup> Ryan Lane, *Growing Movement Seeks Student Loan Forgiveness for Farmers*, US NEWS (June 7, 2017), <https://www.usnews.com/education/blogs/student-loan-ranger/articles/2017-06-07/growing-movement-seeks-student-loan-forgiveness-for-farmers>

<sup>21</sup> *Young Farmer Success Act Reintroduced in Congress*, Nat’l Young Farmers Coalition (Feb. 15, 2017), <https://www.youngfarmers.org/2017/02/young-farmer-success-act-reintroduced-in-congress/>

Examiners had engaged in anticompetitive conduct when it restricted non-dentists from offering teeth whitening services. The North Carolina board, which supposedly sought to protect public health and safety, was dominated by dentists looking to set rules for dentistry. In other words, the regulated entities were playing the role of the regulator.

This can certainly be seen as an example of regulatory capture, but small business owners and independent professionals usually aren't the source of the most serious forms of capture. The worst capture stems from powerful incumbents looking to protect or expand their dominance.

Joe Maxwell and the team at the Organization for Competitive Markets, along with other groups, have looked closely at beef checkoff programs. Although checkoff programs were conceived as a way to help struggling ranchers, reporting suggests that today, these programs effectively tax small and independent farmers to serve the lobbying interests of large conglomerates.<sup>22</sup>

### **Embracing Rules That Level the Playing Field**

Many of us want to see government enforce laws protecting fair competition with more energy and vigor. But I've had a front row seat to government turning a blind eye.

When I served in the Obama Administration at the Department of Education, I saw how key officials bent over backwards to protect the student loan companies that were caught breaking the law. And in the wake of the most severe financial crisis since the Great Depression, many Americans feel that no one was really held accountable.

Since I joined the Federal Trade Commission, I'm hoping we will buck these trends. But for your industry, the FTC has limited tools. The reality is that it doesn't make business sense for you to simply hope that the government will enforce the law. That's why we need more rights and rules – at the state and federal level – that arm individuals to protect themselves and the constitutional rights our Founders fought for.

I'm not talking about rules that create red tape. I'm talking about rules and protections that create competition and that arm citizens to ensure the game is played fairly.

Rules can structure markets to be fair, without requiring continuous government involvement. There's lots of examples of these rules.

Take the Federal Communications Commission's "number portability" rule. Through the 1990s, telecom carriers effectively owned your mobile phone number. So if you wanted to switch your carrier, you'd have to surrender your telephone number. I'm sure many of you remember this. It was a huge pain. They knew this had the practical effect of keeping users locked-in to their carriers, making it tougher for other carriers offering better service at a better price to compete for your business. So the FCC created the "number portability" rules—namely, rules that would mean consumers could switch carriers and still keep their original number. In short, it meant that you—not your telecom company—owned your number.

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<sup>22</sup> Sid Mahanta, *Big Beef*, WASH. MONTHLY (Jan/Feb 2014), <https://washingtonmonthly.com/magazine/janfeb-2014/big-beef/>.

Studies estimate that the rule has saved consumers billions of dollars.<sup>23</sup> And just as importantly, it has meant that users can choose between carriers more freely. The “number portability” rule has armed us with choices and options, so we don’t have to be beholden to lousy service.

Another set of rules that could spur competition were the Farmer Fair Practices Rules. As you all know very well, these rules sought to ensure that the Packers & Stockyards Act’s prohibitions on unfair, unjustly discriminatory, and deceptive practices were still effective. Specifically, the rules would arm farmers and ranchers with the right to meaningfully enforce the law against processors and packers, without having to meet insurmountable thresholds and without giving up the right to go to court. The rules outlined explicit practices that would violate the law, be it retaliatory actions or refusals to let farmers see the data used to calculate their pay.

These rights and rules are especially important in markets where there is an extreme imbalance of market power, as there is when consumers deal with telecom carriers, or when farmers and ranchers deal with poultry processors and meat packers. Of course, not all rules are pro-competitive. The key question is always: are rules giving individuals more leverage when negotiating to enforce fair play, or are they enabling incumbents to concentrate even more power and become more dominant?

### **Conclusion**

In the summer of 1918, as the FTC Commissioners shared their findings with President Wilson, they knew they wanted to promote an America that worked for Americans. Not for Wall Street or foreign investors, but for everyone.

Sometimes history repeats itself. Our antitrust laws are supposed to serve as a “comprehensive charter of economic liberty.”<sup>24</sup> We all need to make sure that these laws are actively enforced. And because we know that counting on government isn’t foolproof, we also need rights and rules that protect us from being silenced and that arm us with the ability to compete fairly and prosper and truly be free.

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<sup>23</sup> *New Report Finds Efficient Number Portability Saved U.S. Consumers Billions of Dollars*, NEUSTAR (Mar. 8, 2013), <https://www.neustar.biz/about-us/news-room/press-releases/2013/report-finds-efficient-number-portability-saved-usconsumers-billions>, citing Hal J. Singer, *The Consumer Benefits of Efficient Mobile-Number Portability Administration* (Feb. 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2397292](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397292)

<sup>24</sup> *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).