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REFORMING
AMERICA'S FOOD RETAIL MARKETS



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Panel 1: Meat & Dairy

Danger in the Safety Zone: Information Sharing in the Meat Processing Industry

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The rising price of meat has become a kitchen table issue across America as high inflation plagues ordinary Americans. The inflation rate for the year ended in January 2022 is 7.5 percent, by far its highest level since the 1980s.⁹ A key component of this rise has been increases in the prices of meat, poultry, fish and eggs, which together outpaced headline inflation to grow by 12.2 percent over the same time period.¹⁰ The White House attributes some meat-related inflation to anticompetitive behavior in the meat processing industry.¹¹ Meat processing companies (MPCs) link producers, such as farms and ranches, to consumers. MPCs purchase meat from producers, and then process, package, and deliver meat to wholesalers or retailers at scale. MPCs constitute an extremely consolidated market and exert tremendous control over both ends of the supply chain. Since the start of the pandemic, MPC profits have gone through the roof as meat prices have skyrocketed even as input prices plummet.¹² The White House estimates that quarterly gross margins in the meat processing industry are up 50% and quarterly net margins are up 300% over pre-pandemic 2019 levels.¹³

Although the profit margin increases during the pandemic are striking, MPC profits have been rising quickly in the meat processing industry for years.¹⁴ Recent litigation directed at

⁹ U.S. Bureau of Labor Statistics, *Consumer Price Index for All Urban Consumers: All Items in U.S. City Average [CPIAUCSL]*, FRED, FED. RSRV. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/CPIAUCSL> (last visited Feb. 26, 2022).

¹⁰ *Consumer Price Index*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/cpi/> (last visited Feb. 26, 2022).

¹¹ Brian Deese, Sameera Fazili & Bharat Ramamurti, *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, White House Briefing Room Blog (Sept. 8, 2021) (“While factors like increased consumer demand have played a role, the price increases are also driven by a lack of competition at a key bottleneck point in the meat supply chain: meat processing.”); Brian Deese, Sameera Fazili & Bharat Ramamurti, *Recent Data Show Dominant Meat Processing Companies Are Taking Advantage of Market Power to Raise Prices and Grow Profit Margins*, White House Briefing Room Blog (Dec. 10, 2021) (stating that inflation in meat prices is a “good example” of “dominant corporations in competitive markets taking advantage of their market power to raise prices while increasing their own profit margins”).

¹² David Frum, *Where’s the Cheap Beef?*, THE ATLANTIC (Sept. 24, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/biden-beef-prices-plan/620187/> (describing retail beef prices increases even as ranchers are not receiving enough to break even); *Boxed Beef & Fed Cattle Price Spread Investigation Report*, U.S. DEP’T OF AGRIC., 1, 9 (July 22, 2020), <https://www.ams.usda.gov/sites/default/files/media/CattleandBeefPriceMarginReport.pdf> (reporting an eighteen percent decrease in cattle prices between April and May 2020); Julie Creswell, *Your Steak Is More Expensive, but Cattle Ranchers Are Missing Out*, N.Y. TIMES (June 23, 2021), <https://www.nytimes.com/2021/06/23/business/beef-prices.html> (finding that even as consumers experience higher prices, “ranchers say they are barely breaking even or, in some cases, losing money”).

¹³ Deese et. al., *Recent Data Show . . .*, *supra* note 4.

¹⁴ Christopher Leonard, *Is the Chicken Industry Rigged?*, Bloomberg Businessweek (Feb. 15, 2017), <https://www.bloomberg.com/news/features/2017-02-15/is-the-chicken-industry-rigged>.

pork,¹⁵ turkey,¹⁶ and chicken¹⁷ processing companies has exposed a number of potential anticompetitive explanations for these sustained price increases: namely, coordinated price increases made possible by the extreme consolidation of the meat processing industry, enforced by highly developed information sharing techniques that promote cartel behavior.¹⁸

These litigants do not claim that MPCs share data with one another directly, but rather employ the services of the private data service provider Agri Stats, Inc.¹⁹ By sharing highly detailed production data via Agri Stats benchmarking reports, MPCs are able to ensure that each participating company follows production decisions in lockstep.²⁰ This collusion is not just a Sherman Act problem, but also a policy problem.

In 2014, the Department of Justice and Federal Trade Commission (together, “the agencies”) issued information exchange “safety zone” guidelines that grant data service providers, like Agri Stats, an aura of legality.²¹ This paper finds that these guidelines were haphazardly formed in the first place and have been inappropriately stretched to cover industries and situations to which the guidelines are unsuited. We argue that the agencies should revisit and reform the safety zone guidelines in order to close the Agri Stats loophole, and suggest a new framework for broad application that should serve as a floor for future information exchange guidance. By renewing their focus on cartel facilitators, such as data service providers, the agencies can more effectively deter cartel formation, undermine cartel stability, and indirectly help end anticompetitive price increases.

This paper is organized as follows. Part 1 outlines a brief history of consolidation within the meat processing industry. Part 2 covers basic cartel theory, explaining how this consolidation could result in sustained increased prices at the expense of consumer welfare. Part 3 hones in on extreme information sharing as a cartel enforcement mechanism and focuses on Agri Stats, a private reporting service for the meat processing industry that is widely alleged to serve this function. Finally, Part 4 describes the history of the safety zone guidelines and Part 5 explains how to best reform them.

¹⁵ See, e.g., *In re Pork Antitrust Litig.*, 495 F. Supp. 3d 753 (D. Minn. 2020).

¹⁶ See, e.g., *Olean Wholesale Grocery Coop., Inc. v. Agri Stats, Inc.*, No. 19 C 8318, 2020 WL 6134982 (N.D. Ill. Oct. 19, 2020); *Sandee’s Catering v. Agri Stats, Inc.*, No. 20 C 2295, 2020 WL 6273477 (N.D. Ill. Oct. 26, 2020).

¹⁷ See, e.g., *In re Tyson Foods, Inc. Sec. Litig.*, 275 F. Supp. 3d 970 (W.D. Ark. 2017); *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772 (N.D. Ill. 2017); *Hogan v. Pilgrim’s Pride Corp.*, No. 16-cv-02611, 2018 WL 1316979 (D. Colo. Mar. 14, 2018); *Jien v. Perdue Farms, Inc.*, No. 19-CV-2521, 2020 WL 5544183 (D. Md. Sept. 16, 2020).

¹⁸ See *infra* Part 2.

¹⁹ See, e.g., *In re Tyson Foods*, 275 F. Supp. 3d at 977 (“Crucial to the broiler chicken industry’s alleged antitrust conspiracy . . . [is] Agri Stats, Inc, a company that . . . provided just the tool to facilitate this monitoring.”).

²⁰ *Id.*

²¹ Michael Bloom, *Information Exchange: Be Reasonable*, FTC: COMPETITION MATTERS BLOG (Dec. 11, 2014) (outlining the FTC/DOJ safety zone).

History of Consolidation in the Meat Industry

Price fixing in the meat industry has a long history in the United States. In 1919, the Federal Trade Commission published a study that found that “actual control of the nation’s food supply in the hands of the five packers – or three of them – is entirely probable” due to the “huge surpluses” of the meat packers.²² Following this report, the government moved to break up the five largest meatpackers (the “Beef Trust” or the “Big Five”) under Section 4 of the Sherman Act, alleging a conspiracy to suppress competition in the purchase of livestock and the sale of meat.²³ Eventually, the Big Five and the Attorney General signed a consent decree designed to end the Big Five’s monopoly power and prohibit Beef Trust expansion into adjacent industries.²⁴ The following year, Congress passed the Packers and Stockyards Act, meant to remedy anticompetitive behavior in the meat packing industry. It is notable that at the time of this government intervention, the Big Five controlled just half of the national market for beef – a far cry from the more than eighty percent of the market controlled by just four beef MPCs today.²⁵

This united congressional, executive, and judicial focus on the meat packing industry was highly successful. Cattle slaughter four-firm concentration ratios, which measure the total market share of an industry’s largest four firms, plummeted from 43.1 in 1940 to 23.5 in 1960, and to 19.1 in 1975; similar downward trends existed in the hog and sheep markets over the same period.²⁶ Even as the market power of the largest MPCs declined, and despite repeated petitions by the Beef Trust firms to significantly modify or vacate the consent decree,²⁷ courts refused to vacate the consent decree until 1983.²⁸

The Reagan administration brought forth an era of widespread deregulation.²⁹ In the meat processing industry, this was most visible in the form of unchecked horizontal integration.³⁰ The

²² William B. Colver, *The Federal Trade Commission and the Meat-Packing Industry*, 82 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 170, 171 (1919).

²³ U.S. v. Swift & Co., 286 U.S. 106, 109-10 (1932).

²⁴ Robert M. Aduddell & Louis P. Cain, *The Consent Decree in the Meatpacking Industry, 1920-1956*, 55 THE BUS. HIST. REV., 359, 359-60 (1981).

²⁵ *Challenging Concentration of Control in the American Meat Industry*, 117 HARV. L. REV. 2643, 2657 (2004) (stating that the Beef Trust controlled “about half of the market”); Tom Polansek, *Stung by Pandemic and JBS Cyberattack, U.S. Ranchers Build New Beef Plants*, REUTERS (June 17, 2021) <https://www.reuters.com/world/the-great-reboot/stung-by-pandemic-jbs-cyberattack-us-ranchers-build-new-beef-plants-2021-06-17/> (“Four industry behemoths . . . slaughter 85% of grain-fattened cattle . . .”); Emily Green, *Unpacking the Meat Industry*, FED. RSRV. BANK OF RICHMOND, ECON FOCUS MAG. 4, 6 (Q4 2020) https://www.richmondfed.org/-/media/RichmondFedOrg/publications/research/econ_focus/2020/q4/feature1.pdf (depicting four-firm concentration ratios in meatpacking and poultry processing).

²⁶ Robert M. Aduddell & Louis P. Cain, *A Strange Sense of Déjà Vu: The Packers and the Feds, 1915-82*, 11 BUS. & ECON. HIST., 49, 53 (1982).

²⁷ See, e.g., Swift & Co. v. U.S., 276 U.S. 311 (1928); U.S. v. Cal. Co-op. Canneries, 279 U.S. 553 (1929), U.S. v. Swift & Co., 286 U.S. 106 (1932); Aduddell & Cain, *The Consent Decree . . .*, *supra* note 17 at 369 (“When the Supreme Court [in 1956] refused to hear the packers’ appeal from the District Court ruling, the decree in its entirety was reaffirmed”).

²⁸ Aduddell & Cain, *A Strange Sense of Déjà Vu . . .*, *supra* note 19 at 49.

²⁹ See generally Martin Tolchin & Susan J. Tolchin, *The Rush to Deregulate*, N.Y. TIMES MAG. (Aug. 21, 1983), <https://www.nytimes.com/1983/08/21/magazine/the-rush-to-deregulate.html>.

³⁰ See *Challenging Concentration of Control . . .*, *supra* note 18 at 2645-46.

DOJ abandoned a strong approach to antitrust enforcement, favoring instead one rooted in “Chicago school” notions of valuable efficiencies and market self-correction;³¹ as a result, the agency approved most MPC acquisitions and joint ventures.³² This spate of MPC mergers was coupled with advancements in technology that yielded dramatic increases in economies of scale, leading to the widespread decimation of small-scale slaughterhouses and meat processing plants in favor of fewer and much larger processing plants.³³ Today, just over 100 cattle and 100 hog processing plants exist nationwide, down from 700 and 500 respectively in 1980.³⁴ This new industry reality promoted consolidation: four-firm concentration ratios nearly doubled in the meatpacking and poultry slaughter and processing industries between 1972 and 1992.³⁵

The consolidation of this era has persisted. In 2017, the four-firm concentration ratio increased to 67% for the entire meat and poultry processing industry, and, as stated above, was well over 80% in the beef processing industry.³⁶ The immense resource demands of modern meat processing mega-plants has also encouraged vertically integrated supply chains, dominated by strict ownership agreements (in the case of the poultry and hog industries) or price-obfuscating private deals with feedlot operators (in the case of the beef industry).³⁷ For example, nearly all “broiler” chickens, which constitute 98% of chicken meat sold in the U.S., move through supply chains strictly controlled or owned by MPCs: from laying eggs, to hatching chicks, to raising chicks, to slaughtering chickens, to processing and distributing the meat.³⁸

This extreme consolidation and reliance on a small number of mega-plants leaves the industry vulnerable. Small disruptions can have massive knock-on effects: in 2019, a fire shuttered a Tyson facility that handled roughly eight percent of the nation’s beef processing, leading to severe capacity constraints across the country.³⁹ The next year, several plants temporarily closed due to the spread of the coronavirus, causing the price of beef to skyrocket due to retail shortage as the prices of cattle tumbled due to lack of available production capacity.⁴⁰ Consolidation has also created a more pernicious vulnerability: cartel formation. In

³¹ See Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449, 460 (1999).

³² *Challenging Concentration of Control . . .*, *supra* note 18 at 2650. For example, Smithfield was permitted to acquire over forty firms between 1981 and 2006, going from on the verge of bankruptcy in the 1970s to becoming the largest pork processor in the world. See Green *supra* note 18 at 6.

³³ Green *supra* note 18 at 6 (“[M]eatpacking plant size doubled and output per meatpacking worker increased 45 percent from 1972-1992. ‘Both the introduction of scale economies from technology and the reduction in union wages among workers in large plants in the 1980s meant that larger plants now had a significant cost advantage over smaller plants.’” (quoting James MacDonald, formerly the acting chief of the Structure, Technology, and Productivity branch at the USDA’s Economic Research Service)).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *Challenging Concentration of Control . . .*, *supra* note 18 at 2649 (describing ownership agreements in the poultry and hog industries); Creswell, *supra* note 5 (describing private deals in the beef industry).

³⁸ *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 779-80 (N.D. Ill. 2017).

³⁹ Creswell, *supra* note 5 (stating that the Tyson factory slaughtered “more than 6,000 cattle per day” and that in late 2019 the nation was slaughtering “500,000 cattle per week”).

⁴⁰ *Id.*

the next Part, we discuss the theoretical underpinnings for why and how consolidation of this kind can result in sustained higher prices, at the expense of both consumer and total surplus.

The Modern Meat Processing Industry Is Well Suited to Cartel Formation

Firms are profit-seeking. This fundamental truth has led many firms in varied industries to attempt to trade competition for cooperation,⁴¹ despite the illegality of this behavior.⁴² Cooperating firms seek to reduce output and charge supra-competitive prices, leading to both a shift of surplus from consumer to cartel and a general loss of market efficiency.⁴³ Additionally, a successful cartel reaps long-run profits above its marginal cost and no longer needs to compete on quality of good sold, leading to a decrease in innovation in the market.⁴⁴

Although cartel behavior may be attractive to profit-maximizing firms, nascent cartels face significant challenges that tend to inhibit long-term collusion, making cartels “inherently unstable.”⁴⁵ Generally, the key challenges that cartels must overcome are initial coordination, the threat of new entrants, and subsequent monitoring to prevent cheating.⁴⁶ The modern meat processing industry is well-structured to minimize threats stemming from all three of these challenges.

First, the costs of initial coordination tend to decrease with market consolidation.⁴⁷ It is easier to reach an agreement when fewer parties need come to the table to coordinate behavior. Furthermore, when gains from collusion are split among fewer parties, per-conspirator profits are higher.⁴⁸ The consolidation of the meat market over the last hundred years has led to a dramatic reduction in the number of MPCs, with just four firms controlling the clear majority of the market across all meat and poultry subindustries.⁴⁹ This means that coordination costs are relatively low in the meat processing industry.

Second, an effective cartel must manage the threat of new entrants. Fierce competition from non-cartel firms may break the cartel hold over prices, resulting in price wars. Cartels are thus

⁴¹ See Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. OF ECON. LITERATURE 43, 43-44 (2006); Darren Filson, Edward Keen, Eric Fruits & Thomas Borchering, *Market Power and Cartel Formation: Theory and an Empirical Test*, 44 THE J. OF L. & ECON., 465, 466 (2001).

⁴² The Sherman Antitrust Act of 1890, 15 U.S.C. § 1.

⁴³ This typically is achieved through direct price-fixing, output restriction, market division, or bid-rigging. *Hard Core Cartels – Harm and Effective Sanctions*, OECD OBSERVER: POL’Y BRIEF, 1, 1 (2002); see also Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 517 (2004) (“Cartels cause allocative inefficiency by reducing production in order to raise market price.”).

⁴⁴ *Hard Core Cartels . . .*, *supra* note 36.

⁴⁵ See, e.g., J. D. Jaspers, *Managing Cartels: How Cartel Participants Create Stability in the Absence of Law*, 23 EUR. J. CRIM. POL’Y RSCH., 319, 320 (2017); Leslie *supra* note 35 at 518; Levenstein & Suslow, *supra* note 34 at 44.

⁴⁶ Levenstein & Suslow, *supra* note 34 at 44.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See *supra* text accompanying note 29.

more stable in industries with high barriers to entry.⁵⁰ In the meat processing industry, the trend towards fewer, larger, highly specialized factories has effectively disallowed new entrants.⁵¹ In the broiler chicken industry, for example, “no company has created a new poultry company from scratch in decades,” as cost of entry is estimated at over \$100 million.⁵²

The third – and often most challenging – problem is monitoring. In a cartel, every firm has an incentive to cheat by slightly lowering prices to capture more profit.⁵³ A cartel can generally only sustain itself by monitoring each other’s compliance.⁵⁴ Recognizing this, the antitrust enforcement agencies have released guidelines that govern information exchange between rivals.⁵⁵ However, MPCs have exploited a loophole in these guidelines through their use of Agri Stats, Inc., a private reporting service in the meat processing industry that facilitates the exchange of thinly-veiled pricing and production data between MPC competitors.⁵⁶ The next Part describes in more detail how Agri Stats operates and what role it allegedly serves in cartel enforcement.

Agri Stats Exploits DOJ/FTC Information Exchange Loopholes

Agri Stats is a private information reporting service that serves the chicken, hog, turkey, and commercial egg industries.⁵⁷ The company compiles and distributes “benchmarking” reports spanning these sub-industries using a give-to-get model. Roughly 95% of all U.S. poultry producers and 80% of all turkey producers participate.⁵⁸ These benchmarking reports are highly detailed, non-public, and generally not of the kind freely shared between competitors. In the chicken market, for example, data exchanged included “where Broiler producers buy their breeder stock and feed, the size of production facilities[,] . . . production capacity, including numbers of eggs, the size of breeder flocks, and other inventory numbers, as well as financial information about each company.”⁵⁹ While data is provided at the individual plant level, Agri Stats claims the data is anonymized.⁶⁰ However, it is relatively easy for industry insiders to match production levels to specific plants or firms.⁶¹ Agri Stats’ method of “anonymization” is to

⁵⁰ Levenstein & Suslow, *supra* note 34 at 49.

⁵¹ See *supra* text accompanying notes 26-27.

⁵² *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 780 (N.D. Ill. 2017).

⁵³ Filson et. al., *supra* note 34 at 466; Levenstein & Suslow, *supra* note 34 at 44.

⁵⁴ Filson et. al., *supra* note 34 at 466; Levenstein & Suslow, *supra* note 34 at 44.

⁵⁵ See FTC & U.S. DOJ, *Antitrust Guidelines for Collaborations Among Competitors*, FTC, 15-16 (Apr., 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

⁵⁶ Leonard, *supra* note 7.

⁵⁷ Agri Stats, Inc., *Partnership and Services*, <https://www.agristats.com/partnership> (last visited Feb. 27, 2022).

⁵⁸ *Jien v. Perdue Farms, Inc.*, No. 19-CV-2521, 2020 WL 5544183, at *2 (D. Md. Sept. 16, 2020) (describing the chicken industry); *Sandee’s Catering v. Agri Stats, Inc.*, No. 20 C 2295, 2020 WL 6273477, at *1 (N.D. Ill. Oct. 26, 2020) (describing the turkey industry).

⁵⁹ *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 781 (N.D. Ill. 2017).

⁶⁰ See, e.g., *Jien*, 2020 WIL 5544183 at *2; *Sandee’s Catering*, 2020 WIL 6273477 at *2.

⁶¹ Eli Hoff, *‘Is This Legal?’: Why an Obscure Data Service has been Sued Nearly 100 Times for Facilitating Anti-Competitive Behavior*, INVESTIGATE MIDWEST: THE MIDWEST CENTER FOR INVESTIGATIVE REPORTING (July 29,

simply assign a single number to each participating plant; a plant's number *never* changes, ensuring that after a firm identifies an "anonymous" plant, the plant's identity is always known.⁶²

Agri Stats appears to serve as a hub for a hub-and-spoke conspiracy between MPCs. Traditionally, "such a conspiracy involves a hub, generally the dominant purchaser or supplier in the relevant market, and the spokes, made up of the distributors involved in the conspiracy."⁶³ The rim of the wheel, connecting the spokes, constitutes the series of anti-competitive agreements that the hub facilitates.⁶⁴ The only difference between a traditional hub-and-spoke conspiracy and the one described here is that the hub, Agri Stats, is a third party who does not directly participate in the price and output restrictions of the spokes, the MPCs. As the next part shows, however, the third-party distinction is one without an effective difference.

Agri Stats could thus serve as an effective tool for an MPC cartel to both coordinate and monitor rival firm behavior. The speech of some MPC executives seems to confirm the important role that Agri Stats plays in MPC production monitoring: in 2009, Sanderson Farms' CEO told analysts on a routine earning call that he "[saw] a lot of information from Agri Stats that tells me nobody's going to ramp up."⁶⁵ Additionally, in an investor presentation, a Tyson executive stated that "[i]t's very profitable right now. And we will not hit the top of the top We can tell that through Agri Stats."⁶⁶

Although the facilitated exchange of this non-public information by Agri Stats to MPCs enables allegedly anti-competitive behavior, the company operates within an established agency safety zone. The agencies expressly permit "reasonable" information exchanges, defined as those that are "not likely to harm competition."⁶⁷ To that end, the agencies defined a "safety zone" in a 2014 FTC blog post, which stated that "data exchanges are highly unlikely to raise substantial concerns," and it can be presumed that "[i]n general, the agencies will not challenge a data exchange" if:

1. the exchange is managed by a third-party, like a trade association;
2. the information provided by participants is more than three months old; *and*
3. at least five participants provide the data underlying each statistic shared, no single provider's data contributes more than 25% of the "weight" of any statistic shared, and the shared statistics are sufficiently aggregated that no participant can discern the data of any other participant.⁶⁸

2021), <https://investigatamidwest.org/2021/07/29/is-this-legal-why-an-obscure-data-service-has-been-sued-nearly-100-times-for-facilitating-anti-competitive-behavior/>.

⁶² *Id.*

⁶³ *Howard Hess Dental v. Dentsply Intern.*, 602 F.3d 237, 255 (3rd Cir. 2010).

⁶⁴ *Id.*

⁶⁵ Leonard, *supra* note 7.

⁶⁶ *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 781 (N.D. Ill. 2017).

⁶⁷ Bloom, *supra* note 14.

⁶⁸ *Id.*

Agri Stats nominally fulfills all three categories of the safety zone criteria. First, it is a third-party entity. Second, although the precise information included in benchmarking reports is shrouded in secrecy, Agri Stats maintains that only historical data is distributed to firms.⁶⁹ Finally, it claims to anonymize data to effectively mask participant identity.⁷⁰ And yet, although Agri Stats may comply with the text of the safety zone guidance, it is still able to facilitate anticompetitive behavior. Even if all data provided is historical, Agri Stats has confirmed that it provides data intimately tied to *future production*: for example, Sanderson Farms CEO Joe Sanderson referred to learning the number of egg-laying hens in competitor firms from an Agri Stats report, a data point that is directly proportional to future Broiler chicken output.⁷¹ Furthermore, several courts have dismissed Agri Stats' anonymization practices as insufficient.⁷²

It is important to note that the three safety zone criteria work together conjunctively; a data service provider must meet all three conditions to qualify for a presumption of legality. But it is as if Agri Stats was tailor-made to fall within the guidelines. To close the safety zone loophole, it is imperative to update guidance to reflect modern business realities. Attorneys regularly refer to safety zone guidelines when advising private companies on how to shape their own industry information exchange practices. Indeed, Agri Stats CEO Jim Cox founded the company on an antitrust lawyer's advice that "[a]s long as you talk about history, you're OK."⁷³ Safety zone guidance should clearly signal both the methods of information exchange and the values underlying permitted exchange, in hopes of strengthening the agency's *ex post* enforcement abilities as well as shaping private behavior *ex ante*. The next Part outlines the history and development of the current safety zone guidance.

The Development of Safety Zone Guidance Was Haphazard

The Agri Stats information exchange regime would not have always been immunized by the enforcement agencies. Historically, the DOJ and FTC have pursued a number of high-profile cases against information-sharing cartels.⁷⁴ The agencies also frequently issued business review letters to firms seeking guidance on their information-exchange activities.⁷⁵ In 2000, the agencies issued "Guidance for Competitor Collaboration" that discouraged sharing information related to "price, output, costs, or strategic planning"; "current operating and future business plans"; and "individual company data."⁷⁶

⁶⁹ Leonard, *supra* note 7.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *supra* text accompanying notes 53-55.

⁷³ Leonard, *supra* note 7.

⁷⁴ See, e.g., *American Column & Lumber*, 257 U.S. 377 (1921); *U.S. v. American Linseed Oil Company*, 262 U.S. 371 (1923); *Maple Flooring Mfrs. Assn. v. U.S.*, 268 U.S. 563 (1925); *U.S. v. Container Corp. of America*, 393 U.S. 333 (1969).

⁷⁵ The Department of Justice issued 32 business review letters related to information exchange in the 1970s, 43 in the 1980s, 36 in the 1990s, and merely 8 in the 2000s. U.S. DOJ, *Digest of Business Reviews Topical Index 1968-2015*, U.S. DOJ, <https://www.justice.gov/atr/digest-business-reviews-topical-index-1968-2015> (last visited Feb. 26, 2022).

⁷⁶ FTC & U.S. DOJ, *Antitrust Guidelines for Collaborations . . .*, *supra* note 48.

Currently, the agencies take a comparatively lax stance towards information exchange with the advent of the safety zone criteria. This approach is misguided. The safety zone criteria were drafted with a narrow and particular focus to address a particular industry problem. In 1996, the agencies advised healthcare providers specifically about exchanging data on employee wages and consumer prices, carving out a safety zone within which behavior was presumed to be legal.⁷⁷ The agencies transposed the criteria word-for-word from this earlier statement into the general safety zone guidance in the FTC’s 2014 blog post.⁷⁸ But the conditions present in the healthcare industry – such as ongoing antitrust scrutiny⁷⁹ and limited little price transparency⁸⁰ – are not present in other industries.

It could be that the FTC’s blog post may not have been intended as a broad policy statement. It is not listed in the FTC or DOJ’s lengthy databases of guidance documents,⁸¹ nor is it a substantive agency rule that would have been subject to public notice and comment. Yet private firms—and the agencies themselves—now treat the 2014 post as a manifest statement of government policy. Attorneys regularly rely on the post when advising clients on how to avoid antitrust scrutiny when exchanging information with rivals.⁸² The DOJ followed the language of the blog post near verbatim when proposing a final judgment against a firm that allegedly participated in an illegal data exchange.⁸³ And at the start of the pandemic, the agencies released

⁷⁷ U.S. DOJ & FTC, *Statements of Antitrust Enforcement Policy in Health Care*, U.S. DOJ ANTITRUST DIV., 50 (Aug., 1996), <https://www.justice.gov/atr/page/file/1197731/download>.

⁷⁸ Bloom, *supra* note 14.

⁷⁹ The agencies regularly publish guidance documents related to healthcare, which signals to industry participants that they are being closely monitored by regulators. *See* FTC & U.S. DOJ, *supra* note 70.

⁸⁰ For a discussion on price obscurity in the healthcare market, *see* Garry Gabison & Zaakir Tameez, *Reverse Payment: A Comparative Study*, 19 IND. HEALTH L. REV. 21, 24-27 (2022).

⁸¹ FTC Guidance Documents, <https://www.ftc.gov/enforcement/guidance> (last visited Feb. 23, 2022); U.S. DOJ Antitrust Division Guidelines and Policy Statements, <https://www.justice.gov/atr/guidelines-and-policy-statements-0> (last visited Feb. 23, 2022).

⁸² *See, e.g.*, Christopher Wood, *Antitrust Compliance – Proceed Cautiously when Sharing Information*, LEWIS BRISBOIS (Jan. 3, 2019), <https://lewisbrisbois.com/newsroom/legal-alerts/antitrust-compliance-proceed-cautiously-when-sharing-information>; John Miles, *Collaboration and Information Sharing in the Coronavirus Era*, AM. COUNCIL ON EDUC. (May, 2020), <https://www.acenet.edu/Documents/Collaboration-and-Information-Sharing-in-the-Coronavirus-Era.pdf>; Hill Wellford, Darren Tucker & Evan Miller, *Antitrust Issues in Renewable Energy*, VINSON & ELKINS (June 22, 2020), <https://www.velaw.com/insights/antitrust-issues-in-renewable-energy/#Information>.

⁸³ The defendant in the case was not prohibited from exchanging “Competitively Sensitive Information for the purpose of aggregation if (a) Competitively Sensitive Information is sent to or received from, and the aggregation is managed by, a third party not owned or operated by any Station; (b) the information disseminated by the aggregator is limited to historical total broadcast television station revenue or other geographic or characteristic categorization (e.g., national, local, or political sales revenue); and (c) any information disseminated is sufficiently aggregated such that it would not allow a recipient to identify, deduce, or estimate the prices or pacing of any individual broadcast television station not owned or operated by that recipient.” Proposed Final Judgment at 8-9, *United States v. Sinclair Broadcast Group*, No. 1:18-cv-02609 (D.D.C. Nov. 13, 2018), ECF No. 25-2.

joint guidelines – citing the blog post – on how private companies can legally exchange information while collaborating in response to the public health emergency.⁸⁴

It is no wonder that the agencies' safety zone guidelines are outdated. They are based verbatim on industry-specific guidance that is more than 25 years old. They have never been subject to any kind of real scrutiny by either the agencies or in the academic literature.⁸⁵ And they have allowed cartel-enabling companies, such as Agri Stats, to facilitate widespread collusion under the radar. The next Part discusses possible reforms to each step of the safety zone.

Reforming the Safety Zone

The DOJ and FTC should reform safety zone guidelines to ensure that loopholing behavior, such as that of Agri Stats, is minimized. We propose three recommendations. First, the agencies should eliminate the third-party exception. Second, the agencies should constrain the historical data exception to data that is not competitively sensitive. Finally, the agencies should clarify the anonymization exception.

While any one of these proposals would help to narrow the Agri Stats loophole, we believe that each offers clear benefits designed to better shape public enforcement and private action. Additionally, we suggest generally that any industry-neutral generalized safety zone guidance should, as a best practice, be revisited at least once every five years to ensure continued relevance to given new business realities.

a. Abandon the Third-Party Exception

⁸⁴ **U.S. DOJ & FTC, *Joint Antitrust Statement Regarding Covid-19*, U.S. DOJ ANTITRUST DIV. (Mar., 2020), <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.**

⁸⁵ To the Authors' knowledge, there is no literature on the safety zones themselves. Moreover, the academic literature on American antitrust enforcement for information-sharing cartels in general is extremely limited. *But see* David J. Teece, *Information Sharing, Innovation, and Antitrust*, 62 ANTITRUST L.J. 465 (1994); Corby C. Anderson & Ted P. Peace, *The Antitrust Risks of Information Sharing*, 23 FRANCHISE L.J. 17 (2003); Spencer Weber Waller, *Trade Associations, Information Exchange, and Cartels*, 30 LOY. CONSUMER L. REV. 203 (2018); Mason Malone, Note, *Sharing Is Not Always Caring: Reevaluating the Insurance Industry's Antitrust Exemption and Information Sharing in the Machine-Learning Era*, 58 HOUS. L. REV. 987 (2021). The literature appears more robust in international law journals. *See, e.g.*, Peter Whelan, *Trading Negotiations between Retailers and Suppliers: A Fertile Ground for Anti-Competitive Horizontal Information Exchange*, 5 EUR. COMPETITION. J. 823 (2009); Thandi Lamprecht, *Bananas and Public Announcements: Defining the Boundaries of Anti-Competitive Information Exchanges*, 26 S. AFR. MERCANTILE L.J. 450 (2014); Sinsun (Sean) Yun et al., *Information Exchange as a Type of Agreement*, 15 J. KOREAN L. 33 (2015); Brian N. Hartnett & Will Sparks, *The Service Provider as Cartel Facilitator: Assessing 'Third Party' Liability Under Article 101 TFEU*, 1 COMPETITION L. & POL'Y DEBATE 54 (2015); Gonenc Gurkaynak et al., *Shady Contours of Cartel Liability of Service Providers*, 13 COMPETITION L. INT'L 79 (2017).

First, the antitrust agencies should remove the third-party caveat from the safety zone guidance. Third-parties, such as Agri Stats, often have a sufficient financial motive to facilitate collusion. Although Agri Stats does not directly participate in a meat processing industry cartel by actually dealing in meat, the company still has the incentive to distribute information that facilitates collusion through its role as a third-party administrator, or what some scholars refer to as a “cartel secretary.”⁸⁶

Unfortunately, the antitrust agencies have neglected the role that third-party information exchanges can play in facilitating collusion. Other competition authorities often prosecute third-parties. For example, the European Commission has brought several cartel cases against data service providers that facilitate collusion among industry participants.⁸⁷ Brazil’s competition authority has also brought several cases and issued numerous consent decrees against non-profit trade associations for exchanging competitively sensitive information.⁸⁸ Notably, some of these cases lacked any evidence that the associations explicitly helped coordinate or directly profited from the alleged price-fixing of the industry participants.⁸⁹

The lesson for the U.S. antitrust agencies is not that they should treat third-party information exchange in the same way as is done by agencies in Europe, Brazil, or any other jurisdiction. Instead, the key takeaway is that third-parties have been tried and convicted in other countries of facilitating collusion via information exchange. If it can happen there, it can happen here. Thus, the antitrust agency’s safety zone for third-parties who exchange information has little grounding in reality.

b. Constrain the Historical Data Exception to Data that is not Competitively Sensitive

Second, the agencies should remove the blanket exemption on historical data that is three months old. As is shown by Agri Stats’ provision of historical data that can accurately and precisely predict future output or prices, a three-month data block does not adequately address competitive concerns.⁹⁰

As data analytics becomes increasingly advanced, bad actors are well-equipped to share historical data that rivals can use to predict future prices. While big data and machine learning

⁸⁶ Jaspers, *supra* note 38.

⁸⁷ *See, e.g.*, Case T-99/04, AC-Treunhand v. Comm’n, ECLI:EU:T:2008:256 (July 8, 2008) (involving a consultant firm that facilitated a cartel between organic peroxide producers). For a good discussion on other European Union cases regarding third-party cartel facilitators, *see* Hartnett & Sparks, *supra* note 78.

⁸⁸ Ana Paula Martinez & Mariana Tavares de Araujo, *Information Exchange among Competitors: The Lay of the Land of Enforcement in Brazil*, COMPETITION POL’Y INT’L (Mar. 10, 2020), <https://www.competitionpolicyinternational.com/information-exchange-among-competitors-the-lay-of-the-land-of-enforcement-in-brazil/>.

⁸⁹ *Id.*

⁹⁰ *See supra* part 3.

make this easier,⁹¹ these practices are certainly not new. As early as 1921, the Supreme Court has noted that “genuine competitors do not make daily, weekly, and monthly reports of the minutest details of their business to their rivals.”⁹² This principle holds whether the data is three days old or three months old.

Instead of a total exemption on historical data, the agencies should eliminate safety zone protections for information that poses a risk to genuine competition. To do so, the agencies need only reaffirm the “competitively sensitive information” standard from the 2000 Competitor Collaboration Guidelines.⁹³ The agencies ought to make clear that data containing prices, input costs, output levels, product mixes, and information about future production or planning is highly suspect, even when historical. Expanding the scope of objectionable information exchange from nonhistorical data to any competitively sensitive information better addresses the underlying normative goal of the safety zone – to allow only procompetitive information exchanges – and expands the remit of public enforcement.

c. Clarify the Anonymization Exception

Finally, the agencies should amend the safety zone to clarify that rendering data unidentifiable requires more than merely aggregating or pseudonymizing it. Instead, firms seeking protection within the safety zone should be required to *anonymize* the data such that it cannot be reasonably re-identifiable.

Agri Stats pseudonymizes its data. Pseudonymization alters data so that it “can no longer be attributed to a specific data subject without the use of additional information.”⁹⁴ Rivals easily match the Agri Stats plant-level information with publicly available information, and then match non-public information to specific plants and MPCs.⁹⁵ A clear line must be drawn between this pseudonymization and true anonymization, where competitors would be *unable* to reasonably identify source firms.⁹⁶

Regulators in other jurisdictions, such as the European Union, have issued guidance to industries on how to properly anonymize data so that it cannot be reasonably re-identified.⁹⁷ These anonymization tools fundamentally change the data, by altering data in a consistent manner such that no data point is re-identifiable, while the underlying trends remain the same.

⁹¹ For an excellent review on the literature on pricing algorithms, see Zach Y. Brown & Alexander MacKay, *Competition in Pricing Algorithms*, NAT’L BUREAU OF ECON. RSCH., 1, 4-6 (2021).

⁹² *American Column & Lumber v. United States*, 257 U.S. 377, 410 (1921).

⁹³ FTC & U.S. DOJ, *Antitrust Guidelines for Collaborations . . .*, *supra* note 48.

⁹⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L. 119) 1,88 art. 4(5).

⁹⁵ *Jien v. Perdue Farms, Inc.*, No. 19-CV-2521, 2020 WL 5544183, at *2 (D. Md. Sept. 16, 2020)

⁹⁶ Importantly, if information at this level of specificity cannot be sufficiently anonymized—even if the current aggregation requirement is met—then this information should not be permitted to be exchanged between rivals.

⁹⁷ Article 29 Data Protection Working Party, Opinion 05/2014 on Anonymisation Techniques, 0829/14/EN WP 216 (Apr. 10, 2014).

Anonymization may be achievable via classic techniques from computer science, such as noise addition (where data is randomly altered within a range, e.g., ± 10), or permutation (where certain attributes of data are randomly shuffled across data points).⁹⁸

Rather than relying on an ill-conceived data “aggregation” requirement, the agencies should specify that firms must take all steps to ensure data cannot be reasonably re-identifiable. The agencies should then consider issuing similar guidance as other jurisdictions on how to properly anonymize.

Conclusion

The modern meat processing industry is highly consolidated and prone to cartel formation. Agri Stats, a private company that facilitates information exchange between rival meat processing companies, helps to stabilize cartel arrangements by sharing rival data that companies interpret to monitor price and output decisions. Current DOJ and FTC guidelines on information exchange practically exempt Agri Stats from enforcement action and bestow its actions with an aura of legality.

The safety zone was developed in a haphazard fashion, and perhaps was not intended to have such a broad effect. Safety zone loopholes must be closed. We propose three simple, actionable steps that the antitrust agencies can take to address the issue: abandon the third-party exception, constrain the historical data exception, and clarify the anonymization exception.

Reforming the safety zone will have two effects. First, it would strengthen the government’s hand in enforcement proceedings against data service providers that facilitate collusion. Second, it may influence market behavior by altering the advice that antitrust counsels provide clients. Currently, attorneys regularly reassure clients not to worry about exchanging data that is historical, aggregated, and/or administered by third parties. The agencies should send a much stronger signal to industries that consider exchanging competitively sensitive information in this manner: don’t risk it for the brisket.

⁹⁸ *Id.* at 12-14.