

115TH CONGRESS
2D SESSION

S. 3404

To impose a moratorium on large agribusiness, food and beverage manufacturing, and grocery retail mergers, and to establish a commission to review large agriculture, food and beverage manufacturing, and grocery retail mergers, concentration, and market power.

IN THE SENATE OF THE UNITED STATES

AUGUST 28, 2018

Mr. BOOKER introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To impose a moratorium on large agribusiness, food and beverage manufacturing, and grocery retail mergers, and to establish a commission to review large agriculture, food and beverage manufacturing, and grocery retail mergers, concentration, and market power.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Food and Agribusiness
5 Merger Moratorium and Antitrust Review Act of 2018”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

1 (1) Concentration in the food and agricultural
2 economy, including mergers, acquisitions, and other
3 combinations and alliances among suppliers, pack-
4 ers, integrators, other food processors, distributors,
5 and retailers has been accelerating at a rapid pace
6 since the 1980s, and particularly since the 2007
7 through 2009 recession.

8 (2) The trend toward greater concentration in
9 food and agriculture has important and far reaching
10 implications not only for family farmers, but also for
11 the food we eat, the communities we live in, and the
12 integrity of the natural environment upon which we
13 all depend.

14 (3) In the past three decades, the top 4 largest
15 pork packers have seized control of 71 percent of the
16 market, up from 36 percent. Over the same period,
17 the top 4 beef packers have expanded their market
18 share from 32 percent to 85 percent. The top 4 flour
19 millers have increased their market share from 40
20 percent to 64 percent. The market share of the top
21 4 soybean crushers has jumped from 54 percent to
22 79 percent, and the top 4 wet corn processors con-
23 trol of the market has increased from 63 percent to
24 86 percent.

1 (4) Today the top 4 sheep, poultry, and fluid
2 milk processors now control 57 percent, 53 percent,
3 and 50 percent of the market, respectively.

4 (5) The top 4 grain companies today control
5 nearly 90 percent of the global grain trade.

6 (6) During the past 2 years there has been a
7 wave of consolidation among global seed and crop-
8 chemical firms, 3 companies now control nearly $\frac{2}{3}$
9 of the world's commodity crop seeds. Those same 3
10 companies now also control nearly 70 percent of all
11 agricultural chemicals and pesticides.

12 (7) In the United States, the 4 largest corn
13 seed sellers accounted for 85 percent of the market
14 in 2015, up from 60 percent in 2000. Over the past
15 20 years, the cost for an acre's worth of seeds for
16 an average corn farmer has nearly quadrupled, and
17 the cost of fertilizer has more than doubled. Yet
18 corn yields increased only 36 percent over that time,
19 and the price received for the sale of a bushel of
20 corn increased only 31 percent.

21 (8) A handful of firms dominate the processing
22 of every major commodity. Many of them are
23 vertically integrated, which means that they control
24 successive stages of the food chain, from inputs to
25 production to distribution. The growing number and

1 scale of cross-border agribusiness and food mergers
2 have put foreign firms, often with considerable gov-
3 ernment backing, into prominent and even dominant
4 positions in the United States beef, hog, poultry,
5 seed, fertilizer, and agrichemical sectors.

6 (9) Growing concentration of the agricultural
7 sector has restricted choices for farmers trying to
8 sell their products. As the bargaining power of agri-
9 business firms over farmers increases, concentrated
10 agricultural commodity markets are stacked against
11 the farmer, with buyers of agricultural commodities
12 often possessing regional dominance in the form of
13 oligopsony or monopsony relative to sellers of such
14 commodities.

15 (10) The high concentration and consolidation
16 of buyers in agricultural markets has resulted in the
17 thinning of both cash and futures markets, thereby
18 allowing dominant buyers to leverage their market
19 shares to move those markets to the detriment of
20 family farmers and ranchers.

21 (11) Buyers with oligopsonistic or
22 monopsonistic power have incentives to engage in
23 unfair and discriminatory acts that cause farmers to
24 receive less than a competitive price for their goods.
25 At the same time, some Federal courts have incor-

1 rectly required a plaintiff to show harm to competi-
2 tion generally, in addition to harm to the individual
3 farmer, when making a determination that an un-
4 fair, unjustly discriminatory, deceptive, or pref-
5 erential act exists under the Packers and Stockyards
6 Act of 1921.

7 (12) The farmer's share of every retail dollar
8 has plummeted from 41 percent in 1950, to approxi-
9 mately 15 percent today, while the profit share for
10 farm input, marketing, and processing companies
11 has risen.

12 (13) While agribusiness conglomerates are post-
13 ing record earnings, farmers are facing desperate
14 times. Since 2013, net farm income for United
15 States farmers has fallen by more than half and me-
16 dian on farm income was negative in 2017 and is ex-
17 pected to be negative in 2018.

18 (14) The benefits of low commodity prices are
19 not being passed on to American consumers. The
20 gap between what shoppers pay for food and what
21 farmers are paid is growing wider.

22 (15) Concentration, low prices, anticompetitive
23 practices, and other manipulations and abuses of the
24 agricultural economy are driving small family farm-
25 ers out of business. Farmers are going bankrupt or

1 giving up, and few are taking their places; more
2 farm families are having to rely on other jobs to stay
3 afloat. Eighty-two percent of farm household income
4 is expected to come from off farm work this year, up
5 from 53 percent in 1960.

6 (16) Seventy-five percent of America's farmed
7 cropland is now controlled by 12 percent of farms,
8 and the number of farmers leaving the land will con-
9 tinue to increase unless and until these trends are
10 reversed.

11 (17) The decline of small family farms under-
12 mines the economies of rural communities across
13 America; it has pushed Main Street businesses, from
14 equipment suppliers to small banks, out of business
15 or to the brink of insolvency.

16 (18) Increased concentration in the agribusiness
17 sector has a harmful effect on the environment; cor-
18 porate hog farming, for example, threatens the in-
19 tegrity of local water supplies and creates noxious
20 odors in neighboring communities. Concentration
21 also can increase the risks to food safety and limit
22 the biodiversity of plants and animals.

23 (19) The decline of family farming poses a di-
24 rect threat to American families and family values,
25 by subjecting farm families to turmoil and stress.

1 Farm advocates across the country are reporting an
2 increase in farmer suicides over the past several
3 years.

4 (20) The decline of family farming causes the
5 demise of rural communities, as stores lose cus-
6 tomers, churches lose congregations, schools and
7 clinics become under-used, career opportunities for
8 young people dry up, and local inequalities of wealth
9 and income grow wider.

10 (21) These developments are not the result of
11 inevitable market forces. Its problems arise rather
12 from policies made in Washington, including farm,
13 antitrust, and trade policies.

14 (22) Past congressional action to remediate
15 market failure, such as enacting country-of-origin la-
16 beling to provide transparency for domestic farmers,
17 ranchers, and consumers regarding agricultural com-
18 modity origins, have been overturned for key com-
19 modities by oligopolistic conglomerates that use un-
20 differentiated imports to reduce domestic farm
21 prices.

22 (23) To restore competition in the agricultural
23 economy, and to increase the bargaining power and
24 enhance economic prospects for family farmers, the
25 trend toward concentration must be reversed.

1 **SEC. 3. DEFINITIONS.**

2 In this Act:

3 (1) **AGRICULTURAL INPUT SUPPLIER.**—The
4 term “agricultural input supplier” means any person
5 (excluding agricultural cooperatives) engaged in the
6 business of selling, in interstate or foreign com-
7 merce, any product to be used as an input (including
8 seed, germ plasm, hormones, antibiotics, fertilizer,
9 and chemicals, but excluding farm machinery) for
10 the production of any agricultural commodity, except
11 that no person shall be considered an agricultural
12 input supplier if sales of such products are for a
13 value less than \$10,000,000 per year.

14 (2) **BROKER.**—The term “broker” means any
15 person engaged in the business of negotiating sales
16 and purchases of any agricultural commodity in
17 interstate or foreign commerce for or on behalf of
18 the vendor or the purchaser, except that no person
19 shall be considered a broker if the only sales of such
20 commodities are for a value less than \$10,000,000
21 per year.

22 (3) **COMMISSION MERCHANT.**—The term “com-
23 mission merchant” means any person engaged in the
24 business of receiving in interstate or foreign com-
25 merce any agricultural commodity for sale, on com-
26 mission, or for or on behalf of another, except that

1 no person shall be considered a commission mer-
2 chant if the only sales of such commodities are for
3 a value less than \$10,000,000 per year.

4 (4) DEALER.—The term “dealer” means any
5 person (excluding agricultural cooperatives) engaged
6 in the business of buying, selling, or marketing agri-
7 cultural commodities in interstate or foreign com-
8 merce, except that—

9 (A) no person shall be considered a dealer
10 with respect to sales or marketing of any agri-
11 cultural commodity of that person’s own rais-
12 ing; and

13 (B) no person shall be considered a dealer
14 if the only sales of such commodities are for a
15 value less than \$10,000,000 per year.

16 (5) INTEGRATOR.—The term “integrator”
17 means an entity that contracts with farmers for
18 grower services to raise chickens or hogs to slaugh-
19 ter size and weight. The integrator owns the chick-
20 ens or hogs, supplies the feed, slaughters, and fur-
21 ther processes the poultry or pork.

22 (6) PROCESSOR.—The term “processor” means
23 any person (excluding agricultural cooperatives) en-
24 gaged in the business of handling, preparing, or
25 manufacturing (including slaughtering and food and

1 beverage manufacturing) of an agricultural com-
 2 modity, or the products of such agricultural com-
 3 modity, for sale or marketing for human consump-
 4 tion, except that no person shall be considered a
 5 processor if the only sales of such products are for
 6 a value less than \$10,000,000 per year.

7 (7) RETAILER.—The term “retailer” means any
 8 person (excluding agricultural cooperatives) licensed
 9 as a retailer under the Perishable Agriculture Com-
 10 modities Act of 1930 (7 U.S.C. 499a(b)), except
 11 that no person shall be considered a retailer if the
 12 only sales of such products are for a value less than
 13 \$10,000 per year.

14 **TITLE I—MORATORIUM ON**
 15 **LARGE AGRIBUSINESS, FOOD**
 16 **AND BEVERAGE MANUFAC-**
 17 **TURING, AND GROCERY RE-**
 18 **TAIL MERGERS**

19 **SEC. 101. MORATORIUM ON LARGE AGRIBUSINESS, FOOD**
 20 **AND BEVERAGE MANUFACTURING, AND GRO-**
 21 **CERY RETAIL MERGERS.**

22 (a) IN GENERAL.—

23 (1) MORATORIUM.—Until the date referred to
 24 in paragraph (2) and except as provided in sub-
 25 section (b)—

1 (A) no dealer, processor, commission mer-
2 chant, agricultural input supplier, broker, or
3 operator of a warehouse of agricultural com-
4 modities or retailer with annual net sales or
5 total assets of more than \$160,000,000 shall
6 merge or acquire, directly or indirectly, any vot-
7 ing securities or assets of any other dealer,
8 processor, commission merchant, agricultural
9 input supplier, broker, or operator of a ware-
10 house of agricultural commodities or retailer
11 with annual net sales or total assets of more
12 than \$16,000,000; and

13 (B) no dealer, processor, commission mer-
14 chant, agricultural input supplier, broker, or
15 operator of a warehouse of agricultural com-
16 modities or retailer with annual net sales or
17 total assets of more than \$16,000,000 shall
18 merge or acquire, directly or indirectly, any vot-
19 ing securities or assets of any other dealer,
20 processor, commission merchant, agricultural
21 input supplier, broker, or operator of a ware-
22 house of agricultural commodities or retailer
23 with annual net sales or total assets of more
24 than \$160,000,000 if the acquiring person
25 would hold—

1 (i) 15 percent or more of the voting
2 securities or assets of the acquired person;

3 or

4 (ii) an aggregate total amount of the
5 voting securities and assets of the acquired
6 person in excess of \$15,000,000.

7 (2) DATE.—The date referred to in this para-
8 graph is the earlier of—

9 (A) the effective date of comprehensive leg-
10 islation—

11 (i) addressing the problem of market
12 concentration in the food and agricultural
13 sector; and

14 (ii) containing a section stating that
15 the legislation is comprehensive legislation
16 as provided in section 101 of the Food and
17 Agribusiness Merger Moratorium and Anti-
18 trust Review Act of 2018; or

19 (B) the date that is 18 months after the
20 date of enactment of this Act.

21 (b) WAIVER AUTHORITY.—The Attorney General
22 shall have authority to waive the moratorium imposed by
23 subsection (a) only under extraordinary circumstances,
24 such as insolvency or similar financial distress of 1 of the
25 affected parties.

1 (c) EXEMPTIONS.—The classes of transactions de-
 2 scribed in section 7A(c) of the Clayton Act (15 U.S.C.
 3 18a(c)) are exempt from subsection (a).

4 (d) AVOIDANCE.—Any transaction or other device en-
 5 tered into or employed for the purpose of avoiding the
 6 moratorium contained in subsection (a) shall be dis-
 7 regarded, and the application of the moratorium shall be
 8 determined by applying subsection (a) to the substance of
 9 the transaction.

10 (e) RULEMAKING.—The Attorney General shall pro-
 11 mulgate regulations that the Attorney General determines
 12 are necessary to implement this section.

13 **TITLE II—AGRICULTURE CON-**
 14 **CENTRATION AND MARKET**
 15 **POWER REVIEW COMMISSION**

16 **SEC. 201. ESTABLISHMENT OF COMMISSION.**

17 (a) ESTABLISHMENT.—There is established a com-
 18 mission to be known as the Food and Agriculture Con-
 19 centration and Market Power Review Commission (here-
 20 after in this title referred to as the “Commission”).

21 (b) PURPOSES.—The purpose of the Commission is
 22 to—

23 (1) study the nature and consequences of con-
 24 centration in America’s food and agricultural econ-
 25 omy; and

1 (2) make recommendations on how to change
2 underlying antitrust laws and other Federal laws
3 and regulations to keep a fair and competitive agri-
4 culture marketplace for family farmers, other small-
5 and medium-sized agriculture producers, generally,
6 and the communities of which they are a part.

7 (c) MEMBERSHIP OF COMMISSION.—

8 (1) COMPOSITION.—The Commission shall be
9 composed of 12 members as follows:

10 (A) Three persons, one of whom shall be a
11 person currently engaged in farming or ranch-
12 ing, shall be appointed by the President pro
13 tempore of the Senate upon the recommenda-
14 tion of the Majority Leader of the Senate, after
15 consultation with the Chairs of the Committee
16 on Agriculture, Nutrition, and Forestry and of
17 the Committee on the Judiciary.

18 (B) Three persons, one of whom shall be
19 a person currently engaged in farming or
20 ranching, shall be appointed by the President
21 pro tempore of the Senate upon the rec-
22 ommendation of the Minority Leader of the
23 Senate, after consultation with the ranking mi-
24 nority member of the Committee on Agri-

1 culture, Nutrition, and Forestry and of the
2 Committee on the Judiciary.

3 (C) Three persons, one of whom shall be a
4 person currently engaged in farming or ranch-
5 ing, shall be appointed by the Speaker of the
6 House of Representatives, after consultation
7 with the Chairs of the Committee on Agri-
8 culture and of the Committee on the Judiciary.

9 (D) Three persons, one of whom shall be
10 a person currently engaged in farming or
11 ranching, shall be appointed by the Minority
12 Leader of the House of Representatives, after
13 consultation with the ranking minority member
14 of the Committee on Agriculture and of the
15 Committee on the Judiciary.

16 (2) QUALIFICATIONS OF MEMBERS.—

17 (A) APPOINTMENTS.—Persons who are ap-
18 pointed under paragraph (1) shall be persons
19 who—

20 (i) have experience in farming or
21 ranching, expertise in agricultural econom-
22 ics and antitrust, or have other pertinent
23 qualifications or experience relating to ag-
24 riculture and food and agriculture indus-
25 tries; and

1 (ii) are not officers or employees of
2 the United States.

3 (B) OTHER CONSIDERATION.—In appoint-
4 ing Commission members, every effort shall be
5 made to ensure that the members—

6 (i) are representative of a broad cross
7 sector of agriculture and antitrust perspec-
8 tives within the United States; and

9 (ii) provide fresh insights to analyzing
10 the causes and impacts of concentration in
11 agriculture industries and sectors.

12 (d) PERIOD OF APPOINTMENT; VACANCIES.—

13 (1) IN GENERAL.—Members shall be appointed
14 not later than 60 days after the date of enactment
15 of this Act and the appointment shall be for the life
16 of the Commission.

17 (2) VACANCIES.—Any vacancy in the Commis-
18 sion shall not affect its powers, but shall be filled in
19 the same manner as the original appointment.

20 (e) INITIAL MEETING.—Not later than 30 days after
21 the date on which all members of the Commission have
22 been appointed, the Commission shall hold its first meet-
23 ing.

24 (f) MEETINGS.—The Commission shall meet at the
25 call of the Chairperson.

1 (g) CHAIRPERSON AND VICE CHAIRPERSON.—The
2 members of the Commission shall elect a chairperson and
3 vice chairperson from among the members of the Commis-
4 sion.

5 (h) QUORUM.—A majority of the members of the
6 Commission shall constitute a quorum for the transaction
7 of business.

8 (i) VOTING.—Each member of the Commission shall
9 be entitled to 1 vote, which shall be equal to the vote of
10 every other member of the Commission.

11 **SEC. 202. DUTIES OF THE COMMISSION.**

12 (a) IN GENERAL.—The Commission shall be respon-
13 sible for examining the nature, the causes, and con-
14 sequences concentration in America’s agricultural econ-
15 omy in the broadest possible terms.

16 (b) ISSUES TO BE ADDRESSED.—The study shall in-
17 clude an examination of the following matters:

18 (1) The nature and extent of concentration in
19 the food and agricultural sector, including food pro-
20 duction, manufacturing, transportation, processing,
21 distribution, marketing, retailing, and farm inputs
22 such as machinery, fertilizer, and seeds.

23 (2) Current trends in concentration of the food
24 and agricultural sector and what this sector is likely
25 to look like in the near and longer term future.

1 (3) The effects of rising concentration on sup-
2 pliers and farmers, including independent and con-
3 tract farmers, with respect to—

4 (A) competition in markets for their prod-
5 ucts and services;

6 (B) income and benefit levels;

7 (C) income distribution;

8 (D) income volatility; and

9 (E) other material benefits.

10 (4) The impacts of this concentration upon
11 rural communities, rural economic development, and
12 the natural environment.

13 (5) The impacts of concentration in the seed in-
14 dustry on genetic diversity in farm fields and any re-
15 lated impacts on food security.

16 (6) The impacts of this concentration upon food
17 shoppers, including the reasons that low farm prices
18 have not resulted in corresponding drops in super-
19 market prices.

20 (7) Whether farming is approaching a scale
21 that is larger than necessary from the standpoint of
22 productivity.

23 (8) The effect of current laws and administra-
24 tive practices in supporting and encouraging this
25 concentration.

1 (9) Whether the existing antitrust laws provide
2 adequate safeguards against, and remedies for, the
3 impacts of concentration upon family farms, the
4 communities they comprise, and the food shoppers of
5 this Nation.

6 (10) Accurate and reliable data on the national
7 and international markets shares of multinational
8 agribusinesses, and the portion of their sales attrib-
9 utable to exports.

10 (11) Barriers that inhibit entry of new competi-
11 tors into markets for the processing of agricultural
12 commodities, such as the meat packing industry.

13 (12) The extent to which developments, such as
14 packer ownership of livestock, formula pricing, mar-
15 keting agreements, production contracting, forward
16 contracting, and vertical integration tend to give
17 processors, agribusinesses, integrators, and other
18 buyers of agricultural commodities additional market
19 power over farmers and suppliers in local markets.

20 (13) Such related matters as the Commission
21 determines to be important.

22 **SEC. 203. FINAL REPORT.**

23 (a) IN GENERAL.—Not later than 12 months after
24 the date of the initial meeting of the Commission, the

1 Commission shall submit to the President and Congress
2 a final report which contains—

3 (1) the findings and conclusions of the Commis-
4 sion described in section 202; and

5 (2) recommendations for addressing the prob-
6 lems identified as part of the Commission’s analysis.

7 (b) SEPARATE VIEWS.—Any member of the Commis-
8 sion may submit additional findings and recommendations
9 as part of the final report.

10 **SEC. 204. POWERS OF COMMISSION.**

11 (a) HEARINGS.—The Commission may hold such
12 hearings, sit and act at such times and places, take such
13 testimony, and receive such evidence as the Commission
14 may find advisable to fulfill the requirements of this title.
15 The Commission shall hold at least 1 or more hearings
16 in Washington, DC, and 4 in different agriculture regions
17 of the United States.

18 (b) INFORMATION FROM FEDERAL AGENCIES.—The
19 Commission may secure directly from any Federal depart-
20 ment or agency such information as the Commission con-
21 siders necessary to carry out the provisions of this title.
22 Upon request of the Chairperson of the Commission, the
23 head of such department or agency shall furnish such in-
24 formation to the Commission.

1 (c) **POSTAL SERVICES.**—The Commission may use
2 the United States mails in the same manner and under
3 the same conditions as other departments and agencies of
4 the Federal Government.

5 **SEC. 205. COMMISSION PERSONNEL MATTERS.**

6 (a) **COMPENSATION OF MEMBERS.**—Each member of
7 the Commission shall be compensated at a rate equal to
8 the daily equivalent of the annual rate of basic pay pre-
9 scribed for level IV of the Executive Schedule under sec-
10 tion 5315 of title 5, United States Code, for each day (in-
11 cluding travel time) during which such member is engaged
12 in the performance of the duties of the Commission.

13 (b) **TRAVEL EXPENSES.**—The members of the Com-
14 mission shall be allowed travel expenses, including per
15 diem in lieu of subsistence, at rates authorized for employ-
16 ees of agencies under subchapter I of chapter 57 of title
17 5, United States Code, while away from their homes or
18 regular places of business in the performance of services
19 for the Commission.

20 (c) **STAFF.**—

21 (1) **IN GENERAL.**—The Chairperson of the
22 Commission may, without regard to the civil service
23 laws and regulations, appoint and terminate an execu-
24 tive director and such other additional personnel as
25 may be necessary to enable the Commission to per-

1 form its duties. The employment of an executive di-
2 rector shall be subject to confirmation by the Com-
3 mission.

4 (2) COMPENSATION.—The Chairperson of the
5 Commission may fix the compensation of the execu-
6 tive director and other personnel without regard to
7 the provisions of chapter 51 and subchapter III of
8 chapter 53 of title 5, United States Code, relating
9 to classification of positions and General Schedule
10 pay rates, except that the rate of pay for the execu-
11 tive director and other personnel may not exceed the
12 rate payable for level V of the Executive Schedule
13 under section 5316 of such title.

14 (d) DETAIL OF GOVERNMENT EMPLOYEES.—Any
15 Federal Government employee shall be detailed to the
16 Commission without reimbursement, and such detail shall
17 be without interruption or loss of civil service status or
18 privilege.

19 (e) PROCUREMENT OF TEMPORARY AND INTERMIT-
20 TENT SERVICES.—The Chairperson of the Commission
21 may procure temporary and intermittent services under
22 section 3109(b) of title 5, United States Code, at rates
23 for individuals which do not exceed the daily equivalent
24 of the annual rate of basic pay prescribed for level V of
25 the Executive Schedule under section 5316 of such title.

1 **SEC. 206. SUPPORT SERVICES.**

2 The Administrator of the General Services Adminis-
3 tration shall provide to the Commission on a reimbursable
4 basis such administrative support services as the Commis-
5 sion may request.

6 **SEC. 207. AUTHORIZATION OF APPROPRIATIONS.**

7 There are authorized to be appropriated
8 **[\$2,000,000]** to the Commission as required by this title
9 to carry out the provisions of this title.

○