

March 13, 2020

Packers and Stockyards Division, Fair Trade Practices Program
Agricultural Marketing Service
U.S. Department of Agriculture
1400 Independence Avenue SW
Washington DC 20250

Re: Docket No. AMS-FTTP-18-0101, "Undue or Unreasonable Preferences or Advantages under the Packers and Stockyards Act, Proposed Rule"

To Whom It May Concern:

The Campaign for Family Farms and the Environment appreciates the opportunity to provide comments on the proposed rule establishing the criteria for an undue or unreasonable preference or advantage in violation of the Packers and Stockyards Act (Docket No. AMS-FTTP-18-0101). The Campaign for Family Farms and the Environment (CFFE) is a joint effort by Dakota Rural Action, Iowa Citizens for Community Improvement, Land Stewardship Project, Missouri Rural Crisis Center, Institute for Agriculture and Trade Policy and Food & Water Watch. Our organizations work together as CFFE to change policies that promote consolidation in animal agriculture at the expense of independent family farms.

The Packers and Stockyards Act (PSA) has the stated purpose of safeguarding farmers and ranchers. Unfortunately, after years of delay and inaction, this proposed rule would not achieve the goal of the PSA. There are key principles that should have served as the foundation of any rulemaking to define undue preferences.

- The structure of the livestock industry in general and the poultry industry in particular demand strong rules. An investigation of guaranteed loans to contract poultry growers by the Small Business Administration's Office of Inspector General found that the poultry industry is highly locally concentrated, and that large poultry companies exercise comprehensive control over the growers.
- Decades of failure to enact effective policy or enforce the PSA have allowed packers and poultry processors to develop common practices that should be considered violations of the undue preference provision of the PSA. Just because a practice has been happening widely in the industry, does not mean it is fair or appropriate.
- Criteria for determining undue preference that are too general will lead to inconsistent findings between different decisionmakers. At a minimum there will need to be criteria that address the production contracting relationships in the

poultry and hog sectors where the processor owns the animals during the production phase and a separate set of criteria that address the hog and cattle sectors in which independent producers own the livestock prior to slaughter.

Because the proposed rule fails to meet these foundational principles it cannot provide farmers with safeguards against the unreasonable practices used by livestock and poultry companies. The cost-benefit analysis for the proposed rule makes it clear that business as usual will continue under its provisions.

The proposed rule also appears to encourage collusion between competitors by allowing companies to justify their practices on the basis that their competitors are using similar pricing or contract terms. Promoting collusion in this way is in direct conflict with the overall intent of the statute.

In addition to these overarching concerns about the proposed rule, the criterion outlined in §201.211 is flawed for the following reasons.

Criterion (a) - Cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers;

Because of the vagueness of this criterion, it could be interpreted to mean that if a packer, swine contractor or live poultry dealer is using a business practice that saves money, it can be justified under Section 202(b), no matter the impact on producers, sellers or growers. We strongly oppose this interpretation. There are many cost-saving practices in the livestock and poultry sector that also provide clear undue or unreasonable preferences or advantages for some farmers at the expense of others, therefore violating the PSA.

Criterion (b) - Cannot be justified on the basis of meeting a competitor's prices;

In a fully functioning competitive market with transparent price discovery, this type of criterion about competitor's prices might be rational. But in the livestock and poultry sector, where price discovery and price transparency are broken at best, and in the case of poultry, completely nonexistent, criterion (b) is extremely dangerous to farmers. This criterion invites competitors to collude on pricing, because doing so under this criterion would insulate them from scrutiny under 202(b).

Criterion (c) - Cannot be justified on the basis of meeting other terms offered by a competitor;

Similar to criterion (b), criterion (c) also invites competitor firms to collude in setting contract terms in dealing with contract growers, as a way to insulate their contracting practices from scrutiny under 202(b).

Criterion (d) - Cannot be justified as a reasonable business decision that would be customary in the industry

Subsection 201.211(d) should be stricken from the proposed rule. Just because a business decision is “customary practice” in the industry does not mean it does not cause competitive injury. To equate “customary” practice with “reasonable business decision” allows historical bad actors to not only continue their bad behavior but enshrines it in regulation by lowering the bar in defining what is unfair.

For example, some of the “customary” industry practices that give unreasonable preferences or advantages to some farmers at the expense of others, include:

- Retaliatory practices are commonly used in the poultry sector to unreasonably disadvantage certain growers based on their membership in producer associations, their lawful communications with government officials and the public about their concerns regarding poultry company practices, or on the basis of race;
- The payment system commonly used by poultry companies unreasonably reduces payments to some growers, relative to others, based on factors and inputs controlled by the company itself, and out of control of the growers;
- In the beef sector, unreasonable “sweetheart” deals given by packers to some ranchers or feeders put others at great disadvantage. These and other common industry practices have led to the loss of family cattle operations and the rapid consolidation in the industry.

The farmer protections of the PSA have gone unenforced for decades, in part because of a lack of clear standards. As a result, many livestock and poultry industry practices that are in clear violation of the intent of the statute have become customary in the industry. Not only does the proposed rule fail to address many of those abusive and unreasonable industry practices, but criterion (d) would make those unfair practices permanent.

In addition to problems with the specific criteria just described, the proposed rule is also missing provisions to ensure that packers, live poultry dealers and swine contactors do not give undue or unreasonable preferences or advantages to any person or locality at the expense of other persons or localities. These new criteria should be added to the proposed rule to explicitly state that the following will be considered by the Secretary to be violation of Section 202(b):

- 1) retaliatory practices commonly used in the poultry sector to disadvantage certain farmers based on their participation in producer associations, their lawful communications with government officials and the public about concerns regarding poultry company practices, or even on the basis of race;

- 2) payment of poultry growers based on a tournament incentive system to unreasonably reduce payments to some farmers, relative to other farmers, based on factors and inputs controlled by the company itself, and out of control of the farmers;
- 3) providing some poultry growers lower quality inputs, such as feed and chicks, relative to the quality of inputs provided to other growers, when those inputs are a factor in the pay calculation for the farmers;
- 4) unreasonable “sweetheart” deals given by packers to some ranchers or feeders to the disadvantage of others.

In addition, the rule should clearly re-state the longstanding USDA interpretation of the PSA that a demonstration of harm to competition is not always necessary to bring a successful claim under Section 202(a) or 202(b). Confusion in the courts on this matter has resulted in the farmer protection mission of PSA not being achieved. Requiring farmers to prove that packer or live poultry dealer actions that have harmed them individually have also harmed the entire sector is not part of the PSA itself but has nevertheless been inappropriately used by some courts in recent decades.

Given the substantial changes needed to fix this proposed rule, we urge the agency to issue a new proposed rule for further stakeholder comment.

If you have questions or need more information, please contact Patty Lovera at pattylovera20@gmail.com. Thank you for your consideration.

Sincerely,

Campaign for Family Farms and the Environment