S. Brett Offutt
Chief Legal Officer/Policy Advisor
Packers and Stockyards Division
USDA AMS Fair Trade Practices Program
1400 Independence Ave. SW
Washington, DC 20250

September 11th, 2024

RE: Comments on Proposed Rule - Fair and Competitive Livestock and Poultry Markets
Packers and Stockyards Act
Docket No. AMS-FTPP-21-0046; RIN 0581-AE04
89 FR 68376 (August 26, 2024)

Dear Mr. Offutt:
The National Family Farm Coalition (NFFC) is grateful for the opportunity to comment on the 'Fair and Competitive Livestock and Poultry Markets' (Docket No. AMS-FTPP-21-0046-0001) proposed rule under the Packers and Stockyards Act. NFFC supports this proposed rule, while offering the following comments to further clarify and strengthen the rule. In addition to our Coalition's work on this issue, NFFC is also a member of the Campaign for Contract Agriculture Reform (CCAR) and NFFC supports CCAR's comments on the "Fair and Competitive Livestock and Poultry Markets" proposed rule.

NFFC is an alliance of grassroots farmer- and advocate-led groups across 42 states, representing the rights and interests of independent family farmers, ranchers, and fishermen in Washington, D.C. Today NFFC's 31 state, national, and regional farm and rural organizations are bound by a common belief that communities have the right to determine how their food is grown and harvested; that everyone in the food system should receive fair prices or wages; that all producers have equitable access to credit, land, seeds, water, markets, and other resources; and, that our food and agriculture policy must support sustainable farming, ranching, and fishing practices. Since NFFC's founding in 1986, we have been advocating for strong anti-trust and fair competition laws, and more effective implementation rules, to defend the rights and interests of farmers and consumers. For decades we have defended the Packers and Stockyard Act, and we believe this proposed rule is an important step towards realizing Congress' original intent of the law. For too long the Packers and Stockyards Act has been undermined by industry manipulation and misguided federal court opinions that have contorted the plain text of the law into a limited and ineffective protection by requiring ranchers, contract growers, and other producers to prove an integrator's abusive conduct also results in or is likely to result in a competitive harm in addition to harming the individual producer. NFFC and our allies in CCAR have long argued, in alignment with longstanding interpretation by USDA, that there is nothing in the statue that requires livestock and

poultry producers protected under the Packers and Stockyards Act to prove harm to competition broadly or likelihood of such harm to prove that the harms they have suffered individually are in violation of Sections 202(a) or 202(b) of the Packers and Stockyards Act. Thus we applaud USDA's efforts to codify this correct interpretation through this proposed rule, and provide farmers with the protections against unfair treatment that the Packers and Stockyards Act is meant to guarantee.

Meatpackers and poultry integrators have a long history of leveraging their often monopsony market power to underpay, marginalize, and intimidate independent family farmer and livestock producers, often under the false legitimization that they are passing those exploitative benefits on to consumers. In reality those false claims have led to both severe market concentration, and the loss of hundreds of thousands of independent farming businesses and rural livelihoods. Today, the four largest processors in each sector control 85% of the market for beef, 67% of the market for pork, and 60% for poultry. This has given these corporate actors unchecked market power and enabled them unfairly manipulate market conditions in their favor, effectively eliminating free market competition to the detriment of independent family farmers, consumers, and local economies.

Consolidation and vertical integration of the food system, and the livestock sector in particular, have also created a rash of other externalities and risk to public interests, including abuse and exploitation of workers, environmental pollution, animal cruelty, and supply chain instability. The historical failure by our public institutions to strengthen and enforce antitrust laws and rein in abusive practices in these consolidated markets has also created obstacles for innovative producers serving local markets, as well as beginning and socially disadvantaged producers, who cannot access open, fair and competitive markets that provide a fair price that would allow them to stay in business and grow their operations. Robust and meaningful rules, such as Fair and Competitive Livestock and Poultry Markets proposed rule, are long overdue. And, if properly enforced, will serve as an important and necessary complement to the USDA's ongoing investment in new and expanded meat and poultry processing infrastructure. If the USDA does not also prioritize robust enforcement of antitrust laws to level the playing field in these markets, these investments will not create processing capacity that is economically viable in the long-term.

While NFFC supports the proposed rule, we are concerned by some elements of USDA's proposed 3-part test to determine if a there has been a violation of the unfair practice prohibitions of the Act. We are particularly concerned in regard to § 201.308(a), and the lack of clarity regarding when an unfair practice by a regulated entity "cannot be justified by establishing countervailing benefits to the market participant or participants or to competition in the market that outweighs the substantial injury or likelihood of substantial injury." We urge AMS to remove this proposal to that would allow market actors to justify violations of the Packers and Stockyard Act by claiming any form of "countervailing benefits." There is no justification for undermining the rights, interests, and livelihoods of one group – such as family farmers – for the benefit of another group. Establishing regulatory loopholes for powerful corporate actors to justify market-based trade- offs that otherwise violate prohibited practices under the Packers and Stockyards Act, and in-turn value the livelihoods of one group over another, undermines a human

rights-based approach to governing our food system, and is antithetical to the important role of public institutions to uphold the principles of equality in our regulatory frameworks and fair competition in our economy. Thus we urge USDA to remove all references to "countervailing benefits" from the proposed rule and make it clear that AMS intends to fully enforce the PSA to ensure fair and competitive markets and not allow companies to claim that pitting producers and/or consumers in different regions, markets or segments of the industry against each other is justified.

In addition to the above key concern on the proposed rule, please find additional detailed feedback to the proposed rule, as requested by AMS below:

Question 1. Do the two tests described in this proposed rule appropriately guide enforcement of "unfair practices" under section 202(a) of the P&S Act?

- Yes, in general we agree that this proposed rule will be effective in guiding enforcement of "unfair practices" under Section 202(a) of the PSA. However, in response to some of the questions posed below, we recommend that aspects of the tests be clarified and adjusted.

Question 2. What modifications to the proposed rule would be appropriate to meet the goals of the P&S Act?

- In proposed § 201.308(a), the 3-part test holds that "an act by a regulated entity with respect to one or more market participants is an unfair practice for the purposes of section 202(a) of the Packers and Stockyards Act, 1921 as amended and supplemented (7 U.S.C. 192(a)) if the act causes or is likely to cause substantial injury to one or more market participants, which the participant or participants cannot reasonably avoid, and which the regulated entity that has engaged in the act cannot justify by establishing countervailing benefits to the market participant or participants or to competition in the market that outweighs the substantial injury or likelihood of substantial injury." We support this test in general, however, we recommend rephrasing this section to the following:

  "an act by a regulated entity with respect to one or more market participants is an unfair practice for the purposes of section 202(a) of the Packers and Stockyards Act, 1921 as amended and supplemented (7 U.S.C. 192(a)) if the act causes or is likely to cause substantial injury to one or more market participants."

Thus we recommend removing language that suggests a vaguely articulated "countervailing benefit" can be justified, and therefore legitimized under the Packers and Stockyards Act. We fear the current proposed language would undermine the very intent of this rule, by creating new loopholes and uncertainties that will further undermine USDA's ability to enforce Section 202(a) of the Act and cause even more confusion in the Courts and for the market participants. For example, as currently proposed, the rule suggests that a "countervailing benefit" can somehow be objectively quantified. But how can AMS possibly fairly and objectively analyze, and then balance, the perceived benefit of one group over another? How can such benefits and trade offs be guaranteed, confirmed, or enforced over time? How can the opportunity costs, for those who suffer from a "countervailing benefit" trade off, be fairly forecast to legitimize this approach? Thus we are concerned that the "... countervailing benefits to competition in the market" part of the 3-part test in proposed § 201.308(a) could be impossible to fairy articulate and enforce without creating new loopholes that would allow regulated entities to make false and vague claims about the necessity of using unfair practices in their dealings with farmers to enable alleged "efficiencies" in the marketplace – arguments we've heard from corporate actors to pad their profit margins, for decades.

In addition, we note the exclusion of any reference in the rule to Section 202(b) of the Packers and Stockyards Act. Specifically, there is no discussion in the rule text about whether a protected producer must demonstrate harm or likelihood of harm to competition broadly when alleging an undue preference in violation of Section 202(b). This seems a glaring omission, given the agency's longstanding legal interpretation that the Packers and Stockyards Act does not require producers to provide harm or likelihood of harm to competition when they are alleging that they have been harmed individually under 202(a) or 202(b) of the Act. The rule focuses exclusively on the unfairness provisions of 202(a), which begs the question about how the agency intends to address 202(b) violations vis-à-vis the harm to competition standard. We urge that the agency address this concern in the final rule.

Question 3. Are the factors described in the proposed rule to contextualize the two tests appropriate? If not, are certain factors more appropriate to one or the other test?

- The factors described in the proposed rule to contextualize the two tests are appropriate, but other factors and examples should be added.

Question 5. Should the Department add regulatory text to define legitimate business justifications? If so, who should bear the burden of proof and what constitutes a cognizable justification?

- The use of the term "legitimate business reason" in proposed § 201.308(d)(1) requires additional explanation in the final rule, particularly as to what can be considered "legitimate." The underlying issue that must be considered is that both multinational corporations and family farmers, including independent livestock producers that contract with those corporate actors, are both legitimate businesses, although with different (and sometimes conflicting) interests, power, and pathways to economic success. The inherent challenge is that exploitative, deceptive, and unfair practices – coupled with poor market regulation – enables more powerful market actors (such as corporations) to prevent contracted producers from realizing their best business interests, to the benefit of the corporate actor. A regulated entity clearly has self-interested business reasons to reduce producer pay, shift risks away from themselves and onto the producers, use deceptive practices to induce producers to make unwise investments that reduce costs to the regulated entity, or use market practices to unfairly gain market power. All these practices have the potential to increase profit to the regulated entity, yet none of these practices should be considered "legitimate." This is to say that this rule should in no way prioritize the "legitimate business reason" of some market actors over others, and we do not believe that legitimate business justifications should be added to the 3-part test laid out in proposed § 201.308(a).

Question 6. Should the rulemaking consider:

(a) whether the method of competition is so facially unfair that business justifications should not be entertained;

- Yes, to reiterate on the comment in response to question number 5 above, methods of competition that are "facially unfair" should not be considered "legitimate" business justifications.

(b) whether the party claiming a business justification must show that the asserted justification for the method of competition is legally cognizable, non-pretextual, and narrowly tailored to bring about a benefit while limiting the harm to the competitive process and to market participants; or

- We do not believe there is any legitimate business justification for a regulated entity to use an unfair practice with regard to markets that represents a "collusive, coercive, predatory, restrictive, deceitful or exclusionary method of competition that may negatively affect competitive conditions."

(c) whether the party claiming a justification must show that the claimed benefit occurs in the same market where harm is alleged?

- We do not believe there is any legitimate business justification for a regulated entity to use an unfair practice with regard to markets that represents a "collusive, coercive, predatory, restrictive, deceitful or exclusionary method of competition that may negatively affect competitive conditions."

Question 7. Does the proposed rule appropriately define what behavior is "reasonably avoidable"? Should this language be delineated more precisely or more broadly or in other ways, and if so, how?

- Yes, while the rule includes some good explanation of the appropriate application of the term "reasonably avoidable," further explanation is needed.

Question 8. Should AMS provide additional guidance around incipient harms to the market, and if so, should AMS draw from Clayton Act standards, such as whether the effect "may be substantially to lessen competition, or to tend to create a monopoly."

- Yes, the final rule should be clear that unfairness in its incipiency can and should be considered. As noted in the preamble, the Sherman Act, Clayton Act, FTC Act, and PSA all allow for consideration of incipiency. It is far better to stop an unfair practice before it causes harm or injury to a producer or to the market, than to have to address the practice after the harm has already occurred. Providing clarity about what practices are and are not allowed will minimize confusion in the marketplace and reduce litigation seeking to achieve clarity via the Courts. The final rule should make it clear what constitutes a fully articulated harmful practice in order to avoid disparate interpretations and conjecture regarding incipient harm. Examples of such harmful practices include making exclusive deals that consolidate market structure.

Question 9. What benefits would this proposed rule provide for producers or other persons?

- Currently, the confusing array of Court rulings regarding the legal requirements for proving a violation of Section 202(a) and (b) of the Packers and Stockyards Act has greatly limited USDA's ability to enforce the Packers and Stockyards Act. This lack of enforcement has resulted in a lack of confidence by protected producers in the ability of USDA to provide the protections envisioned by the Act. This proposed rule, if finalized, will provide greater clarity to all market participants, and to the Courts, in a manner that will enable more robust enforcement of the Act by USDA.

Question 10. What burdens would this proposed rule create for regulated entities?

- As it stands, packers and swine contractors are already under scrutiny for practices that operate in bad faith. Refusal to honor contracts, stifling competition, modifying contract terms after delivery, or arbitrarily delaying payment to sellers all create conditions that cannot be reasonably avoided by market participants. This is an opportunity for regulated entities to demonstrate how they are an asset to a fair and competitive market. Regulated entities only stand to benefit from adhering to rules that allow for fair and competitive conditions, as an equitable market is a robust market with ample competition.

Question 11. What is your preferred way to measure countervailing benefits?

- As stated previously, we do not believe there is a practicable, objective, or morally legitimate method for public institutions like AMS to measure, track (over time), and justify countervailing benefits claims, and therefore this part of the proposed rule should be removed.

Question 12. Should some things be categorically excluded from consideration as countervailing benefits, such as cross-market balancing?

- Yes. See our response to Question 11.

Question 13. How would you describe conduct that is oppressive?

- Conduct that is collusive, coercive, predatory, restrictive, discriminatory, exploitative, deceitful or uses exclusionary competition methods that intend, or in practice (regardless of intention), negatively impact the rights, interests, and/or livelihoods of an individual or group.

Question 14. How would this proposed rule affect competitive conditions in the livestock and poultry industries?

- Due to severe market consolidation and concentration in the livestock and poultry sectors of our economy, the dominant firms in these markets have been able to use their market power to impose many forms of unfair practices on the farmers providing services and products for those firms. While this rule is not likely to reduce the concentration of those markets, it will likely reduce the ability of those firms to exercise their market power to use unfair and deceptive practices in their dealings with farmers in those markets. In addition, by establishing clear tests for enforcing section 202(a) of the PSA, this rule will likely result in more robust enforcement of the Act by USDA.

Question 15. Should the proposed rule treat private causes of action differently from violations of section 202(a) of the Act when enforced by the Federal Government, and if so, how?

- The legal standards that apply to USDA regarding the Packers and Stockyards Act cases should also be the same ones that apply to private causes of action (i.e. private lawsuits on behalf of producers). There is no clear justification for the legal burden to be higher for farmers bringing Packers and Stockyards Act section 202(a) cases privately versus those cases brought by USDA directly.

Question 16. Would this proposed rule have any other effects on the market or market participants? If so, in what ways should they be addressed?

- Ultimately, if a clear legal standard is laid out in the final rule that makes it easier for USDA to enforce the Packers and Stockyards Act to prohibit unfair practices by regulated entities against protected producers, it will have the effect of deterring regulated entities from using unfair practices that negatively affect market participants or the market more broadly. Having clear rules of the road and an effective cop on the beat will be beneficial to all, including the regulated entities themselves who will have clarity about what business practices are prohibited.

Conclusion

Thank you for the opportunity to comment and for your consideration of our views. Should you have any questions about this comment, please feel free to contact Jordan Treakle (Jordan@nffc.net).

Sincerely,

Jordan Treakle
National Programs and Policy Coordinator
National Family Farm Coalition