



March 13th, 2020

Submitted via regulations.gov

S. Brett Offutt
 Chief Legal Officer/Policy Advisor
 Packers and Stockyards Division, Fair Trade Practices Program
 Agricultural Marketing Service
 U.S. Department of Agriculture
 1400 Independence Avenue, SW
 Washington D.C. 20250

Re: Docket No. AMS-FTTP-18-0101, RIN 0581-AD81: Undue or Unreasonable Preferences or Advantages under the Packers and Stockyards Act
 Proposed Rule, Published January 13, 2020.

Dear Mr. Offutt:

On behalf of National Family Farm Coalition (NFFC), and our 24 member organizations¹, we appreciate the opportunity to provide comments on the proposed rule regarding the criteria to be used in determining when an undue or unreasonable preference or advantage has taken place in violation of the Packers and Stockyards Act (PSA). NFFC was founded at the height of the 1980s farm crisis as an alliance of grassroots farmer and advocate-led groups from across the country representing the rights and interests of independent family farmers, ranchers, and fishermen in Washington, DC. Today, NFFC's membership, spanning 42 states, is 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 and have equitable access to credit, land, seeds, water, markets, and other resources; and that our food system must support sustainable farming, ranching, and fishing practices. NFFC's membership

¹ NFFC member groups include: American Raw Milk Producers Pricing Association (WI) • Ashtabula, Geauga, Lake Counties Farmers' Union (OH) • California Dairy Campaign • Community Alliance for Global Justice (WA) • Community Farm Alliance (KY) • Dakota Resource Council (ND) • Dakota Rural Action (SD) • Family Farm Defenders (WI) • Farm and Ranch Freedom Alliance (TX) • Farms Not Arms (CA) • Federation of Southern Cooperatives/Land Assistance Fund (GA) • Food for Maine's Future • Iowa Citizens for Community Improvement • Land Loss Prevention Project (NC) • Midwest Organic Dairy Producers Association (WI) • Missouri Rural Crisis Center • National Hmong-American Farmers, Inc. (CA) • Northeast Organic Farming Association • Northern Plains Resource Council (MT) • Northwest Atlantic Marine Alliance (MA) • Powder River Basin Resource Council (WY) • Progressive Agriculture (PA) • RAFI-USA (Rural Advancement Foundation Int'l-USA, NC) • Rural Vermont

includes family-scale farmers, ranchers, and growers from across the livestock sector, and from across the country. Thus our members have a strong interest in this rule-making process as it will have fundamental impacts on their livelihoods.

The 2008 Farm Bill directed USDA to write criteria about how the undue or unreasonable preference or advantage section of the Packers and Stockyards Act [Section 202(b)] will be interpreted and enforced. The reason for this provision was to seek clarity about the vague prohibitions of this section of the Act in the face of on-going unfair and predatory practices in the livestock sector.

Unfortunately the proposed rule, as released on January 10th 2020, is vague and open to a wide variety of interpretations and fails to address key industry trends which necessitated the proposed rule in the first place. Our concerns are articulated in three sections below:

- **The proposed criteria are inadequate, vague, and fail to address significant and harmful practices in the livestock industry that are both anti-competitive and detrimental to farmer livelihoods.**

The proposed rule includes a list of four criteria for examining whether an action can be determined to be preferential or providing unfair advantage:

1. Cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers – proposed section 201.211(a);
2. Cannot be justified on the basis of meeting competitor’s prices – proposed section 201.211(b);
3. Cannot be justified on the basis of meeting other terms offered by a competitor – proposed section 201.211(c);
4. Cannot be justified as a reasonable business decision that would be customary in the industry – proposed section 201.211(d)

These criteria are individually and collectively inadequate and vague. Congress enacted PSA as a set of protections to prohibit unfair and deceptive trade practices in the livestock industry and address corporate consolidation in the sector, which together allow corporate meatpackers to hold extraordinary and unfair power over farmers. Today, corporate consolidation in the meatpacking industry has reached high levels, comparable to those in the early 20th Century, which have enabled anticompetitive and abusive behavior against farmers.² In rural economies where documented industry collusion has led to farmers (purposely) having access to only one integrator, meatpacker, and/or processor in an entire region, markets do not function competitively and farmers’ livelihoods are dependent on one service provider. This level of concentration in the livestock sector is rampant and has led to significant disparities of power between corporate meatpackers and individual farmers throughout the country. For decades

² MacDonald & Key 2012. Market Power in Poultry Production Contracting? Evidence from a Farm Survey. *Journal of Agriculture and Applied Economics* 44.4(Nov. 2012): 477-490. RAFI-USA 2019. *Issues in the Contract Poultry Industry*.

farmer organizations like NFFC, NFFC's member organizations, and allies have highlighted systemic unfair and predatory practices by these corporate meatpackers, integrators, and processors in this anticompetitive and abusive environment.³

Given these chronic problems in the sector, NFFC has repeatedly called on USDA to finalize a robust and comprehensive final rule that specifically and definitely protects livestock and poultry farmers and contributes to addressing unchecked corporate power and corporate concentration in the sector. The proposed rule, as written, is limited to narrow set of vague market-based criteria, which fail to acknowledge the wide range of social and economic factors that contribute to rampant discriminatory practices in the industry. These criteria are therefore inadequate and must be reformulated and expanded.

- **The proposed rules are failing incorporate Congressional recommendations, supported by family farmers and farmer advocate organizations.**

On July 30, 2019, seventeen Members of Congress wrote to Under Secretary Ibach with recommendations about issues that should be addressed in the proposed rule (see uploaded supporting documentation). In particular, the Members urged (in-part) USDA to incorporate the following in this rule-making process:

- “Protect the rights of farmers to join together in producer associations to advocate for themselves, free from retribution.”
- “Your rulemaking should clarify the long-standing USDA position, that the Packers and Stockyards Act does not require a demonstration of harm to competition across the entire sector.”
- “USDA should ensure packers are not providing such preferential marketing arrangement to only a select group of large livestock feeders while excluding opportunities for smaller, independent feeders to remain profitable.”
- “Grower payment systems should be objective and transparent and reward growers for their management skills, not penalize them for factors outside of their control.”

We are disappointed to see that USDA did not incorporate any of the specific recommendations made by these Congressional leaders and we call on USDA to use these recommendations as the starting-point of a new robust proposed final rule that addresses these critical issues.

- **The proposed rules will entrench unfair customary practices in the livestock industry**

Finalization of strong farmer protections under the Packers and Stockyards Act has been delayed for decades, to the detriment of farmer livelihoods throughout the livestock industry. As a result, many livestock and poultry industry practices that we consider to be in clear violation of the statute have gone unchecked and have become common-place in the industry. These abusive “customary” practices include, but are not limited to:

³ RAFI-USA 2019. Issues in the Contract Poultry Industry; NFFC GIPSA comments: <https://nffc.net/gipsa/>

- Explicit provision of false information to farmers by integrators on projected income and profits for farmers to persuade them into signing predatory contracts.
- Refusal of farmers' right to consult attorneys before signing a contract.
- Retaliation against farmers who question abusive meatpacker contracts or practices.
- Retaliation against farmers for speaking to the media, other farmers, or elected officials about predatory industry practices.
- Docking farmer pay for factors outside of the control of the farmer.
- Use of the tournament incentive system when calculating farmer pay, resulting in extreme pay variability, low prices below farmers' cost of production unrelated to production quality, and an inability for farmers to recoup operating costs.
- Racial discrimination resulting in unequal access to services, inputs, treatment, and farmer pay.
- Disadvantaging farmers who participate in a membership or producer association.
- Provision of poor quality or insufficient inputs, resulting in lower farmer pay.
- Failure of meatpackers to honor contract renewal agreements with farmers.
- Forced requirements by meatpackers for farmers to make costly infrastructure investments without justification related to production quality.

Not only does the proposed rule fail to address many of those abusive and unreasonable industry practices, as written, the current proposed rule section 201.211(d) will further entrench these unfair practices. The criterion under section 201.211(d) suggests that if a "customary practice" is common-place in the industry then it is permissible behavior. This only encourages meatpackers to universally adopt discriminatory or unfair practices so that they become "customary in the industry," and completely fails to acknowledge the long history of increasingly desperate conditions farmers are facing in relation to meatpackers.

NFFC calls on USDA to fully acknowledge and address these exploitative practices through this rule-making process, particularly in-regard to farmer retaliation and racial discrimination.

Conclusion

Based on these comments and concerns, and the systemic challenges farmers are facing due to the lack of clear standards under the Packers and Stockyards Act, NFFC calls on USDA to significantly revise and reissue this proposed rule, with further stakeholder input. Implementation of these rules as written, and without significant revision in accordance with the issues raised here, will further undermine family farmer and rancher livelihoods in the livestock

sector. We look forward to working with USDA and our farmers and ranchers to reform and strengthen these Undue or Unreasonable Preferences or Advantages rules under the Packers and Stockyards Act.

Sincerely,

Jordan Treakle

A handwritten signature in black ink, appearing to read "Jordan Treakle". The signature is fluid and cursive, with a prominent initial "J" and a long, sweeping underline.

Policy Director
National Family Farm Coalition
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