

February 21, 2017

Support of the Farmer Fair Practices Act; Unfair Practices and Undue Preferences in Violation of Packers and Stockyards Act. Docket No. GIPSA_FRDOC_0001-0316

The Organization for Competitive Markets (OCM) supports the Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA) Unfair Practices and Undue Preferences in Violation of Packers and Stockyards Act.

Our country was founded on ensuring that a fair and open market opportunity existed within the marketplace. While the public call to action of the first "tea party" (12/16/1773) was "taxation without representation," the root cause and motivation of [this event](#) was a protest against the lock the world's largest company had on agricultural products and the undue influence it had with the government. In 1773, the English government adopted the "Tea Act," granting the East India Company a monopoly over the U.S. colonies' tea market. In passing the Act, not only did the English government grant the East India Company a monopoly, but it also granted the company the ability to bypass local merchants and businesses developing what could be argued as the first vertically integrated marketing model in U.S. history. American subjects including John Hancock and Samuel Adams voiced protest and the Boston Tea Party is now part of American history.

The failure of the U.S. government to take action against the abuses of today's monopolies that control our food system through vertically integrated models is analogous of the English government and the East India Company's actions in the late 1700s.

This proposed rule, Unfair Practices and Undue Preferences in Violation of Packers and Stockyards Act, will help right our ship and provide for a fair, just and transparent market for U.S. farmers and the rural communities where they reside.

Today, the marketplace has dramatically changed from the marketplace of 30 or even 20 years ago. No longer is the majority of the U.S. livestock and poultry traded in open marketplaces with farmers delivering their animals to a ring of buyers at an open public auction. The marketplace is now dominated by vertical integration and vertical coordination through contracting. The market opportunity for most of America's family farmers is one of gaining a contract with one of the few packers, swine contractors, and live poultry dealers doing business in their area or region. Too often the number of companies offering a contract in any given region is only one or two. The rest of the America's family farmers are left with an open market that lacks the volume of sales and the transparency for the market to function fairly. This heavy concentration in the marketplace can lead and has often led to heavy-handed tactics by the packer, integrator, or processor, resulting in marketplace abuse of the family farmer and producer. It is for this very reason that OCM strongly supports this proposed rule.

The Organization for Competitive Markets accepts and acknowledges the facts, analysis, and rationale stated in the "Summary of Changes From the 2010 Proposed Rule" and the "Required Impact Analysis" for the proposed rule as set forth by USDA GIPSA as posted on December 20, 2016, at

https://www.regulations.gov/document?D=GIPSA_FRDOC_0001-0316 and by reference includes the facts, analysis, and findings as part of these submitted comments.

It is OCM's conclusion that GIPSA has set out in the proposed rule the right balance of marketplace safeguards between individual producers and the packers, swine contractors, and live poultry dealers for the marketplace to function more openly and fairly.

Section 201.210 (a) when coupled with Section 201.210 (c) provides the market safeguards necessary for a fair and transparent market while ensuring legitimate business decisions can still be made and implemented in the market. These sections are set out below:

§ 201.210

Unfair, unjustly discriminatory, or deceptive practices or devices by packers, swine contractors, or live poultry dealers.

Any packer, swine contractor, or live poultry dealer is prohibited from engaging in conduct or action that constitutes an unfair, unjustly discriminatory, or deceptive practice or device in violation of section 202(a) of the Act. Such conduct or action includes, but is not limited to:

(a) *Per se violation of section 202(a)*. Any conduct or action explicitly deemed to be an "unfair," "unjustly discriminatory," or "deceptive" practice or device by the Act is a violation of section 202(a) of the Act.

(c) *Conduct or action that harms competition*. Absent demonstration of a legitimate business justification, any conduct or action that harms or is likely to harm competition is an "unfair," "unjustly discriminatory," or "deceptive" practice or device and a violation of section 202(a) of the Act.

Likewise Section 201.210 provides for this balance between market safeguards and legitimate business decision-making.

Section 201.210 (b) *Violation of section 202(a) regardless of harm to competition*. Absent demonstration of a legitimate business justification, the following is an illustrative list of conduct or action that constitutes an "unfair," "unjustly discriminatory," or "deceptive" practice or device and a violation of section 202(a) of the Act regardless of whether the conduct or action harms or is likely to harm competition:

Section 201.210 (b) then sets out an illustrative list of conduct that would 'constitute(s) an "unfair," "unjustly discriminatory," or "deceptive" practice or device and a violation of section 202(a) of the Act regardless of whether the conduct or action harms or is likely to harm competition:

The proposed rule sets out nine illustrative actions. In an effort to ensure everyone who would review this comment can have easy access to the reasonable market safeguards contained in Section 201.210 (b), OCM has set out the entire rule below.

We offer a couple of key points:

Farmers who express their rights and opinions and associate with others who share their views should be protected from retaliatory marketplace actions by those who they express their views against, even if those views are expressed against those they do business with or are in business with. Who in America would disagree with this basic American right? This protection is clearly expressed in Section 201.210 (b) (1).

Because only a few monopolistic companies exist in each contract market area, contracts are too often offered on a take-it-or-leave-it basis. Farmers should not be coerced into having to give up basic rights to have their complaints heard. Section 201.220 (b)(2) balances the contractual rights by providing a market safeguard that preserves farmers' rights to have their issues redressed pursuant existing legal recourse.

While OCM has only highlighted these two paragraphs, it wants to expressly state its support for all of the paragraphs illustrated in the list and believes they require no additional comment further than those outlined by GIPSA in their analysis referenced above.

As it relates to the proposed Section 201.211, OCM believes it is important to note that today many independent farmers are able to be profitable and independent by marketing value-added agriculture commodities and products. Many OCM farm and ranch members' primary market is value-added and we are proud to speak for them in support of these proposed provisions. Both the ability to have basic market safeguards and to allow for legitimate business decisions are recognized in Section 201.211.

Section 201.211 (e) makes this clear.

§ 201.211

Undue or unreasonable preferences or advantages.

(e) Whether the packer, swine contractor, or live poultry dealer has demonstrated a legitimate business justification for conduct or action that may otherwise constitute an undue or unreasonable preference or advantage; and

OCM is very much aware that opponents of this proposed rule are using extreme fear tactics to undermine the support of these provisions by claiming value-added programs such as Certified Angus Beef would be outlawed by these provisions. In an effort to relieve their fears and to follow GIPSA's stated request in their "*Summary of Changes From the 2010 Rule*" "We do not intend for the current proposed provisions to affect value-added production and premiums, but those that comment are encouraged to explain any concerns about how the proposed text will affect value-added production and how we might alter our rule to correct that." While OCM has no concerns on this issue, but in an effort to resolve the issue, OCM would suggest additional language might be added highlighting a legitimate business interest includes recognition of a certified program or market differentiation so long as all producers like situated and participating and meeting the established standards or attributes of certified program or differentiated market are treated in a like manner.

For the market to function fairly and therefore sustainably; every seller who is like situated must be treated with the same opportunity; letting the market pick winners and losers not monopolistic corporations. Paragraphs (a) through (d) secure the markets right to choose.

Finally, language contained in 201.210 (b) “*Violation of section 202(a) regardless of harm to competition*” reinforces both the original intent of the Packers and Stockyard Act (P&S Act) and USDA’s longstanding interpretation that not all violations of the P&S Act requires a showing of harm or likely harm to competition. But rather, an individual family farmer can demonstrate under certain circumstances a violation of P&S Act by showing they have sustained the harm from certain actions or practices.

In conclusion, OCM strongly supports this proposed rule. The current state of the marketplace with the ongoing abusive market practices not only affects the farm family, but it also affects Rural America. Every dollar the abusive market practices unjustly take from the rural farm, is a dollar the local rural community will not see. This results in the wealth of the rural community being extracted and put in the hands of multinational corporations that are often foreign-owned. The failure of the U.S. government to take action amounts to passively allowing the largest multinational food companies to have a monopoly over the market, thus denying Americans the opportunity for a thriving, fair and open market.

List of Subjects in 9 CFR Part 201

Contracts, Poultry, Livestock, Trade Practices.

For the reasons set forth in the preamble, we propose to amend 9 CFR part 201 as follows:

Part 201 Regulations Under the Packers and Stockyards Act

1. The authority citation for Part 201 continues to read as follows:

Authority

7 U.S.C. 181-229c.

2. Section 201.210 is added to read as follows:

§ 201.210

Unfair, unjustly discriminatory, or deceptive practices or devices by packers, swine contractors, or live poultry dealers.

Any packer, swine contractor, or live poultry dealer is prohibited from engaging in conduct or action that constitutes an unfair, unjustly discriminatory, or deceptive practice or device in violation of section 202(a) of the Act. Such conduct or action includes, but is not limited to:

(a) *Per se violation of section 202(a)*. Any conduct or action explicitly deemed to be an “unfair,” “unjustly discriminatory,” or “deceptive” practice or device by the Act is a violation of section 202(a) of the Act.

(b) *Violation of section 202(a) regardless of harm to competition*. Absent demonstration of a legitimate business justification, the following is an illustrative list of conduct or action that constitutes an “unfair,” “unjustly discriminatory,” or “deceptive” practice or device and a violation of section 202(a) of the Act regardless of whether the conduct or action harms or is likely to harm competition:

(1) A retaliatory action or the threat of retaliatory action in response to lawful communication, association, or assertion of rights by a livestock producer, swine production contract grower, or poultry grower. A retaliatory action or the threat of retaliatory action against any livestock producer, swine production contract grower, or poultry grower includes, but is not limited to, coercion, intimidation, or unjust discrimination;

(2) Conduct or action that limits or attempts to limit by contract the legal rights and remedies afforded by law of a livestock producer, swine production contract grower, or poultry grower:

(i) The right to a trial by jury except when the livestock producer, swine production contract grower, or poultry grower has agreed to be bound by arbitration provisions in a contract that complies with § 201.218(a) and that provides a meaningful opportunity to participate fully in the arbitration process after applying the criteria in § 201.218(b);

- (ii) The right, pursuant to section 209(a) of the Act, to resolve any dispute among the parties to a poultry growing arrangement, or swine production or marketing contract, in the Federal judicial district in which the principal part of the performance took place under the arrangement or contract;
- (iii) The right to pursue all damages available under applicable law; or
- (iv) The right to seek an award of attorney fees available under applicable law;
- (3) Failing to comply with the requirements of § 201.100;
- (4) Failing to provide reasonable notice to a poultry grower before suspending the delivery of birds after applying the criteria in § 201.215;
- (5) Requiring unreasonable additional capital investments from a poultry grower or swine production contract grower after applying the criteria in § 201.216;
- (6) Failing to provide a reasonable period of time to remedy a breach of contract before termination of the contract after applying the criteria in § 201.217;
- (7) Failing to provide a meaningful opportunity to participate fully in the arbitration process after applying the criteria in § 201.218;
- (8) Failing to ensure accurate scales and weighing of livestock, livestock carcasses, live poultry, or feed for the purposes of purchase, sale, acquisition, payment, or settlement as required by the regulations under the Act; or
- (9) Failing to ensure the accuracy of livestock, meat, and poultry electronic evaluation systems and devices for the purposes of purchase, sale, acquisition, payment, or settlement as required by the regulations under the Act.
- (c) *Conduct or action that harms competition.* Absent demonstration of a legitimate business justification, any conduct or action that harms or is likely to harm competition is an “unfair,” “unjustly discriminatory,” or “deceptive” practice or device and a violation of section 202(a) of the Act.

3. Section 201.211 is added to read as follows:

§ 201.211

Undue or unreasonable preferences or advantages.

The Secretary will consider the following criteria when determining whether a packer, swine contractor, or live poultry dealer has engaged in conduct or action that constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the Act. These criteria include, but are not limited to:

- (a) Whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to one or more similarly situated livestock producers, swine production contract growers, or poultry growers who have engaged in lawful communication, association, or assertion of their rights;
- (b) Whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to one or more similarly situated livestock producers, swine production contract growers, or poultry growers who the packer, swine contractor, or live poultry dealer contends have taken an action or engaged in conduct that violates any applicable law, rule, or regulation related to the livestock or poultry operation without a reasonable basis to determine that the livestock producer, swine production contract grower, or poultry grower committed the violation;
- (c) Whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to one or more similarly situated livestock producers, swine production contract growers, or poultry growers for an arbitrary reason unrelated to the livestock or poultry operation;

(d) Whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to one or more similarly situated livestock producers, swine production contract growers, or poultry growers on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status;

(e) Whether the packer, swine contractor, or live poultry dealer has demonstrated a legitimate business justification for conduct or action that may otherwise constitute an undue or unreasonable preference or advantage; and

(f) Whether the conduct or action by a packer, swine contractor, or live poultry dealer harms or is likely to harm competition.

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