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Public Comments on the Proposed Rule: Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act

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Introduction

Since 1998, Organization for Competitive Markets (OCM) has worked to promote transparent, fair, and truly competitive agricultural and food markets. OCM is committed to the establishment of competitive markets for the exchange of goods and products used in agriculture, and produced by farmers and ranchers throughout the United States. OCM maintains that true competition reduces the need for economic regulations. The responsible role of government in the agricultural economy is to be a regulator and enforcer of those rules necessary to assure that markets are fair, honest, accessible, and competitive.

Since 1980, 90% of U.S. hog farmers and 41% of U.S. cattle producers have gone out of business, and over one million U.S. family farmers have been driven off the land. Today, 71% of America's poultry growers live below the federal poverty level. A huge contributor is the fact that an almost 100-year-old antitrust, anti-predatory market practices law is not being enforced, and farmers are not protected from abuses by the largest livestock and poultry packing and processing companies.

Heavy consolidation by the top four companies both in the processing/packing sector as well as the retail sector is a major contributor to the demise of America's family farm agriculture. The practical outcome of heavy consolidation is that even though independent family farmers and ranchers still exist and own their farms, they often have only one or two processors in their market area to sell their goods to, and these large companies have the power to dictate the terms and conditions of the deal – most importantly, price. Because contract farmers are responsible for the land, buildings, equipment, labor, and other production costs, the farmer takes on all the risk. If the terms of their contract from the big packer do not pay the mortgage and leave the farmer with a livable wage, there is not much they can do about it. Meat packing and processing companies are able to dictate unfair prices, pit farmers against each other, and retaliate against farmers if they speak out.

On January 13, 2020 the United States Department of Agriculture (USDA) Agricultural Marketing Service (AMS) released its proposed rule outlining the criteria that the Secretary of Agriculture would use to determine whether or not a practice violates the Packers and Stockyards Act (PSA). While instructive in illustrating the current administration's position relative to enforcement of the PSA, these criteria would do little to serve the intent and purpose of the PSA itself. Further, these criteria would subvert the USDA's

own long-standing interpretation regarding proof of competitive harm and strip producers of basic protections included in the prior version of the rule.

We question whether this proposed rule meets the Congressional mandate outlined in the 2008 Farm Bill, and it is a step backwards in the progress that has been made in the 12-year process since that mandate was passed. This document outlines our concerns with the proposed rules and presents our reasoning for the implementation of critical components that are necessary in order to have a functioning agricultural economy with an intact competitive marketplace.

Restore the Intent of the Packers and Stockyards Act

The PSA, in addition to being an antitrust law, is also a producer protection act, with “safeguarding farmers and ranchers” as a stated purpose.¹ The passage of the PSA in 1921 was a direct result of a report done by the Federal Trade Commission (FTC) on the meatpacking industry, which was published two years earlier. The FTC report described antitrust abuses in addition to outlining deceptive and unfair activities commonly practiced by the five largest meatpacking companies of that time.² Not surprisingly, the PSA, heavily influenced by the FTC report, similarly blends the terminology of antitrust activity with terminology of deceptive and unfair practices.³ Therefore, when read in light of its stated intent as well as its historical context, the PSA can and should be used in a broad variety of applications, including but not limited to producer protection.

Producers in agriculture not only refer to the farm businesses producing raw commodities but also to the laborers involved in planting, raising, harvesting, and processing those commodities. Agricultural producers are also consumers, relying heavily on purchased inputs such as feed, seed, fuel and equipment in order to function. A narrow focus on downstream consumer welfare has dominated most rulings on PSA violation complaints in the past 40 years; however, a focus on the upstream effects of deceptive and unfair practices is consistent not only with a consumer welfare philosophy, but also with the PSA’s intent of producer protection. The economic multiplier effect of agricultural producers *as consumers* should not be ignored. Protecting the economic interests and market security of producers, thereby preserving their purchasing power, should be considered as much of a priority as economic efficiency gains for packers and lower prices for consumers.

¹ United States Department of Agriculture, Agriculture Marketing Service. “The Packers and Stockyards Act.” April 2018. <https://www.ams.usda.gov/sites/default/files/media/PSActFactSheet.pdf>

² United States Federal Trade Commission. “Food Investigation: Summary of the Report of the Federal Trade Commission on the Meat-Packing Industry,” 3 July 1918. Accessed 10 March 2020. Available: <https://babel.hathitrust.org/cgi/pt?id=uc1.c099720396&view=1up&seq=1>.

³ Hovenkamp, Herbert. “Does the Packers and Stockyards Act Require Antitrust Harm?” January 2011, p.1. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737440.

This broader application of the PSA is not overreaching. For the record, the language of the PSA states that:

It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly;
or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article; or (3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.⁴

As pointed out in antitrust scholarship, the underlined portions of subsections (c), (d) and (e) of the statute include “restraint” and “monopoly” language, some of which resembles language contained in the Clayton Act; however, subsections (a) and (b) are tort-like provisions that are concerned with unfair practices and discrimination, but not with restraint of trade or monopoly. These provisions do not contain an explicit requirement of competitive harm or threat of monopoly.⁵ This lack of an explicit requirement of competitive harm in the language of the PSA itself illustrates the need for a return to the producer protection intent of the PSA. Nowhere in past enforcement of the PSA is the failure to protect producers more evident than in the repeated requirement of proof of industry-wide competitive harm.

⁴ 7 USC, Chapter 9: Packers and Stockyards, Subsection 192, Unlawful Practices Enumerated.
<https://uscode.house.gov/view.xhtml?path=/prelim@title7/chapter9&edition=prelim>

⁵ Hovenkamp, Herbert. “Does the Packers and Stockyards Act Require Antitrust Harm?” January 2011, p.3.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737440.

Clarify Competitive Harm

In the draft PSA rules, AMS fails to put forward its own long held position that not all violations of the PSA require a showing of harm or likely harm to competition.⁶ OCM believes that in order to have proper checks and balances as well as protection for producers, a producer who has been harmed by an abusive act by a packer should not have to show competitive harm across the industry, but only that they themselves were harmed. Having to show competitive harm to the entire industry is simply too heavy of a burden for producers, and therefore they lose protection under the PSA.

In the past, the PSA has been narrowly interpreted as solely an antitrust law, contrary to its own stated purpose of protecting producers. OCM has long argued against narrow antitrust interpretations of the PSA, which is a carefully structured law with multiple components and a broader purpose than simply antitrust. We agree with antitrust scholars who have demonstrated that antitrust violations were obviously included in the considerations of Congress when it passed the PSA in 1921. However, it is just as obvious that the PSA's concerns were not limited to antitrust violations, as the exclusion of an explicit competitive harm requirement in Sections (a) and (b) quoted above makes it clear.⁷

OCM is disappointed that the draft rules reveal that AMS will continue to incorrectly interpret the purpose of the PSA. In fact, AMS openly acknowledges that its new rule will not "create criteria that conflict with case precedent," and that, "court precedents relating to competitive harm are likely to remain unchanged." This outright dismissal of the possibility of reform is counterproductive, blatantly violates the purpose and intent of the PSA, and thwarts the USDA's own long-standing interpretation. In short, requiring a producer to prove competitive harm, in itself, is a form of competitive harm.

Senator Tom Harkin of Iowa established this argument in relation to a prior version of a proposed GIPSA rule clarifying the PSA in 2011. Harkin pointed to the producer protection intent of the PSA and the intent of the mandate to USDA in the 2008 Farm Bill when he stated that:

the proposed rule would clarify what many believe to be a misinterpretation of the act by some courts that have held that an individual grower or producer cannot succeed on a claim for harm suffered from a violation of the act without an additional showing of harm to competition in the broader market. The effect of these holdings is effectively to deny relief to independent producers and growers for harm caused by unjust, discriminatory, or unfair practices, which are clearly in violation of the act's protections, unless they can show the broader injury to competition. That showing of injury to competition in the broader market is usually very hard or impossible to make.⁸

⁶ United States Department of Agriculture, Grain Inspection, Packers and Stockyards Administration. "Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act." 20 December 2016. <https://www.federalregister.gov/d/2016-30430/p-15>

⁷ Hovenkamp, Herbert. "Does the Packers and Stockyards Act Require Antitrust Harm?" January 2011, p.7. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737440.

⁸ LIVESTOCK COMPETITION RULE; Congressional Record Vol. 157, No. 158

Senator Harkin made this statement as a past Chair of the Senate Agriculture Committee. Harkin's comments are particularly relevant given his role as Senate Ag Committee Chair during the drafting of the mandate to USDA contained in the 2008 Farm Bill, which provides the impetus for the current AMS proposed rule. Harkin's comments are a clear directive about how the USDA should interpret, implement and enforce the Packers and Stockyards Act. Harkin goes on to point out that:

*What is lost in these decisions is that the Packers and Stockyards Act was written and intended to provide protection to individual producers and growers against harm from unfair, unjustly discriminatory, or deceptive practices and similar actions by packers, processors, and dealers. The act was not written or intended to require that harm to competition in the broader market must be shown in order to establish a violation.*⁹

The above statement, with our underlined emphasis added, clearly lays out the basic concept of producer protection relative to competitive harm, which we believe is the singular most important underlying principle of the PSA.

Reinforcing USDA's own interpretation of competitive harm would provide producers with legal standing against a packer and protect producers from undue preference. Without this protection, producers are placed into a disadvantaged position, subject to undue harm, if they choose to speak out about violations. Clearly, the proposed rule has no intention of protecting producers from undue preference, and in fact relegates those producers to a disadvantaged position by not addressing competitive harm.

The PSA is not intended to protect harmful industry practices, which is exactly what the AMS's current version of the rule would do. Once again, we state, for emphasis: *requiring a producer to prove competitive harm, in itself, is a form of competitive harm.*

Revise Inadequate Criteria

The proposed rule further fails to protect producers by establishing its four main criteria for determining what constitutes an action that is not "honest competition," which is when the action:

- (a) Cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers;
- (b) Cannot be justified on the basis of meeting a competitor's prices;
- (c) Cannot be justified on the basis of meeting other terms offered by a competitor; and
- (d) Cannot be justified as a reasonable business decision that would be customary in the industry.

(Senate - October 20, 2011). Accessed 10 March 2020. <https://www.congress.gov/congressional-record/2011/10/20/senate-section/article/S6856-1>

⁹ *IBID*

All four criteria illustrated in the proposed rule are mainly functions of prices and payment, and mostly fall into the categories of consumer welfare and efficiency standards of antitrust enforcement. By focusing solely on cost and price analysis and not taking into account specific actions that could constitute an undue or unreasonable preference or advantage, these criteria once again fail to fulfill the purpose and intent of the PSA. However, perhaps the most potentially harmful criteria above is item (d).

Due to its vague wording and subjective nature, the language in subsection 201.211(d) should be stricken from the rules. Just because a business decision is "customary practice" in the industry does not mean it does not cause competitive injury. The repeated, commonplace occurrence of any questionable practice in any industry is not acceptable de facto, but must be reviewed, if challenged, on its own merits and by evaluating its effects. For AMS to take a position that equates "customary" practice with "reasonable business decision" clearly shows undue preference to historical bad actors at the expense of anyone who would challenge such repeated bad behavior.

Restore Definitions of Violations

Aside from the inadequate provisions the proposed rule contains, what is particularly noticeable is the absence of several key elements of the prior (2016) version, namely those outlining violations to section 202(a) of the PSA.¹⁰ Omission of these components, removed without any substantive justification or explanation, again show that the goal of this proposed rule is to minimally meet the Congressional mandate to the USDA outlined in the 2008 Farm Bill. Such omission gives enough leeway to allow the PSA to be twisted to serve purposes other than that for which it was intended. For the record, we include this missing list of violations, which appeared in the 2016 version as items (2) and (3), added Sections 201.210 and 201.211:

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:

¹⁰ United States Department of Agriculture, Grain Inspection, Packers and Stockyards Administration. "Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act." 20 December 2016. <https://www.federalregister.gov/d/2016-30430/p-233>

(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;

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(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.*

Prohibit Retaliatory Action

Perhaps the most glaring omission from the rule is any discussion of the threat of retaliatory action.¹¹ OCM has clearly stated in the past that any retaliatory action or threat of retaliatory action by any packer, swine contractor, or live poultry dealer is conduct or action that is unfair, unjustly discriminatory or deceptive and should be deemed a violation of section 202(a) of the PSA, regardless of whether the conduct harms or is likely to harm competition. By not specifically addressing retaliatory action in this version of the rules, AMS is clearly abandoning producers to be at the mercy of unfair and vindictive treatment at the hands of the packers, contractors, and dealers.

We call for the reinstatement of the language in Section 201.210,(b),(1), of the 2016 rule, which reads as follows:

(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;

The above language should be listed as a violation prohibited by the rules, in keeping with the intent of the PSA to protect producers from undue harm.

Conclusion

OCM strongly supports the 2016 version of the rule, which was the result of a thorough and thoughtful 10-year process during which over 60,000 public comments were taken into consideration. The current proposed rule is nothing more than a reinforcement of the same vague implementation of the PSA that has allowed abuses in the industry to go on for decades. It does nothing to offer real protections for real farmers and ranchers who are suffering from the very real abuses perpetrated by very powerful corporations.

OCM opposes this version of the rule. We disagree with its inadequate criteria, and we demand the reimplemention of protections for producers that were included in the 2016 version of the rules, particularly those regarding the USDA's own interpretation of competitive harm. We urge AMS to heed the purpose and intent of the Packers and Stockyards Act and comply with the mandate to the USDA contained in the 2008 Farm Bill. AMS must close loopholes in the law that have allowed anti-competitive practices to become customary in the industry.

¹¹ United States Department of Agriculture, Grain Inspection, Packers and Stockyards Administration. "Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act." 20 December 2016. <https://www.federalregister.gov/d/2016-30430/p-18>

