National Farmers Union

UNITED TO GROW FAMILY AGRICULTURE

March 13, 2020

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

Re: Document No. AMS-FTPP-18-0101, RIN 0581-AD81 for the Proposed Rule "Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act"; Published as Vol. 85, No. 8, Monday, January 13, 2020, 1771-1783.

Dear Mr. Offutt:

On behalf of the nearly 200,000 family farmer, rancher and rural members of National Farmers Union (NFU), I am writing regarding the proposed rule on "Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act." The proposed rule specifies criteria the Secretary of Agriculture would consider when determining whether an undue or unreasonable preference or advantage has occurred in violation of the Packers and Stockyards Act (hereafter, P&S Act).

We appreciate the USDA Agriculture Marketing Service's (AMS) efforts on the proposed rule. But we are deeply concerned that the criteria outlined in the rule will not safeguard farmers against unreasonable industry practices. The criteria are overly vague, and in some cases seemingly harmful to farmers and ranchers.

Background and NFU Policy

The 2008 Farm Bill included a directive to the Secretary of Agriculture to, among other things, "promulgate regulations with respect to the Packers and Stockyards Act… to establish criteria that the Secretary will consider in determining… whether an undue or unreasonable preference or advantage has occurred in violation of such Act."[1] This requirement was a result of the

[1] Food, Conservation, and Energy Act of 2008. Pub. L. 110–234; Approved May 22, 2008; 122 Stat. 936; As Amended Through P.L. 115–334, Enacted December 20, 2018; SEC. 11006.

recognition by lawmakers of the need for action to address unfair purchasing practices facing farmers and ranchers.

NFU continues to stand in support of the 2008 Farm Bill requirement. NFU's grassroots, member-driven policy states that "independent producers cannot succeed in the absence of protection from unfair, anti-competitive practices." Additionally, our policy specifically emphasizes that livestock producers should be protected "from unfair competition and monopolistic practices by strengthening… the Packers and Stockyards Act…" and that "All livestock producers should have equal access to markets that do not discriminate against family-farm livestock producers."[2]

NFU finds the proposed rule inconsistent with NFU's policy, the intent of the lawmakers who required the rule's promulgation, and the spirit of the P&S Act. Instead, the rule seems designed above all else to protect industry from legal challenges to practices that, while customary in the industry, nevertheless run contrary to the P&S Act.

The criteria offered in the proposed rule are inadequate

The proposed rule states that the "Secretary would consider one or more specific criteria when determining whether a packer, swine contractor, or poultry [dealer] has made or given any undue or unreasonable preference or advantage to any particular person or locality in any respect."[3] The proposed rule includes a list of four criteria, though it states the Secretary would not be limited to consideration of those four criteria and may consider other issues on a case by case basis.

The four criteria in the proposed rule include whether the preference or advantage under consideration:

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).[4]

These criteria are exceedingly ambiguous.

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[2] National Farmers Union, *Policy of the National Farmers Union*, March 2020.
[3] Agricultural Marketing Service, 9 CFR Part 201, Document Number AMS–FTTP–18–0101, RIN 0581–AD81, Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act; Federal Register. Vol. 85, No. 8. Monday, January 13, 2020. Pg. 1772. https://www.govinfo.gov/content/pkg/FR-2020-01-13/pdf/2020-00152.pdf.
[4] Ibid.

While the proposed rule offers some discussion of each of these criteria, terms are not defined. What constitutes legitimate "cost savings"? Might not there be cases where a preference or advantage is undue or unreasonable, while still resulting in cost savings?

Recommendations regarding the proposed criteria

By framing the justifications in negative terms, the proposed rule fails to articulate important instances, in the affirmative, that would constitute an undue or unreasonable preference or advantage. We urge USDA to develop criteria that are clear and specific, such that under certain scenarios a finding of a violation can be unequivocally made. If criteria are general in nature, different adjudicators may come to different conclusions when considering the same facts.

NFU also believes there are important differences between the marketing arrangements and structures of the cattle, swine, and poultry industries. Thus, where appropriate, separate criteria should be developed to account for these differences.

At a minimum, specific criteria should be developed that state, unequivocally, that the following practices are a violation of Section 202(b) of the P&S Act:

- Deals given by packers to some ranchers or feeders to the disadvantage of others;
- Retaliation against producers for participating in producer associations, lawfully communicating with government officials and the public about concerns with company practices, or discrimination based on race or other factors;
- Payment of growers, especially poultry growers, based on the tournament system, which reduces payments to some farmers based on factors outside of the control of the producer, but in the control of the company; and
- Providing inputs of substandard quality to contracted growers who are compensated based upon the quality of the livestock or poultry they produce.

NFU is also concerned with many aspects of the four criteria that have been proposed. The following sections outline those concerns.

Proposed Section 201.211(a)

Section 201.211(a) as proposed could be understood to allow that any instance of a "cost savings" for a packer, swine contractor or live poultry grower would serve as justification that an undue or unreasonable preference or advantage was not given to one producer or locality over another. NFU opposes this interpretation of the section and is concerned that this provision would serve to discriminate against smaller volume producers compared to larger volume producers. This section should be modified to outline clear instances where cost savings are, and are not, justified.

Proposed Sections 201.211(b) and 201.211(c)

The proposed criteria in Sections 201.211(b) and (c) appear to establish criteria that encourage collusion between competitors in the livestock and poultry sectors. These two sections allow for justifications on the basis of meeting competitors' prices and meeting other terms offered by a competitor, respectively. Collusive behavior incentivized by these criteria would serve to decrease competition in the livestock and poultry sectors, in direct conflict with key provisions in the P&S Act.

Thus, NFU believes that Section 201.211(b) should be removed from the proposed rule. Section 201.211(c) should be modified to require packers, swine contractors and live poultry dealers to provide verifiable proof that the decision to meet the terms of their competitors results in performance or efficiency gains. Additionally, the proposed rule should make clear that collusive behavior between competing firms is unacceptable.

Proposed Section 201.211(d)

Proposed Section 201.211(d) allows the Secretary to consider as exculpatory the use by industry of a "business practice that is customary in the industry." Thus, this section appears to protect the industry from scrutiny of practices that have become customary in the industry, but that may create undue or unreasonable preferences or advantages.

NFU is aware of several practices that are commonly used but should be open to scrutiny as undue or unreasonable preferences or advantages. These include the tournament system of performance assessment in the poultry sector whereby payment is based on factors outside the control of the grower; a variety of discriminatory and retaliatory practices in the poultry sector that have been documented; and deals given by packers to some ranchers and feeders, but not others.

Whether or not a practice is "customary" should not serve as a basis of justification about whether a practice is in violation of section 202(b) of the P&S Act. This proposed section would arbitrarily enshrine certain practices as acceptable and serve to maintain the status quo for packers, swine contractors, and live poultry dealers at the expense of farmers and ranchers.

Conduct or action that harms competition

NFU policy supports the "Clarification of the Packers and Stockyards Act to allow individual producers to seek recourse for abuse of market power without having to prove competitive injury to the entire marketplace."[5] We are deeply disappointed that the proposed rule does not make this essential clarification.

The cost-benefit analysis in the proposed rule states the following:

[5] National Farmers Union, *Policy of the National Farmers Union*, March 2020.

> *In past cases, courts have considered whether a specific preference or advantage would be a violation of the Act if the preference or advantage did not harm competition. However, AMS does not intend to create criteria that conflict with case precedent, so PSD expects that court precedents relating to competitive harm are likely to remain unchanged.*[6]

We find the following statement to be exceptionally unclear: "AMS does not intend to create criteria that conflict with case precedent, so PSD expects that court precedents relating to competitive harm are likely to remain unchanged." Case precedent is mixed on this issue. Some courts have ruled that producers must demonstrate harm to the entire industry, while others have ruled that producers need not. Thus, it seems false to state that AMS is making an effort to avoid standing in conflict with case precedent. Rather, AMS appears to be siding with the approach that requires demonstration of competitive harm to the entire industry.

Ultimately, the apparent decision by AMS to inadequately address the issue of "competitive harm" in this proposed rule is unprecedented.

The P&S Act statute clearly sets out to protect individual farmers from harm caused by unfair or deceptive practices. While the P&S Act contains antitrust components in Sections 202(c) through (f), it also contains components that are quite clearly not related to antitrust law in Sections 202(a) and 202(b).

Additionally, both the 2010 and 2016 Farmer Fair Practices proposed rules explicitly addressed this issue of competitive harm, affirmatively stating that for Sections 202(a) and (b) there is not a requirement to show harm to the entire industry.

The previous Interim Final Rule on the Scope of Sections 202(a) and (b) of the P&S Act made clear that "The appropriate application of sections 202(a) and (b) of the Act depends on the nature and circumstances of the challenged conduct or action. A finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases. Certain conduct or action can be found to violate sections 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition."[7] NFU supports this position, which is a long-held position of USDA itself that harm to competition is not required for finding of harm under the P&S Act in all cases.

USDA stated, even as it withdrew the interim final rule on the Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, the following:

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[6] Agricultural Marketing Service, 9 CFR Part 201, Document Number AMS–FTTP–18–0101, RIN 0581–AD81, Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act; Federal Register. Vol. 85, No. 8. Monday, January 13, 2020. Pg. 1774. https://www.govinfo.gov/content/pkg/FR-2020-01-13/pdf/2020-00152.pdf.

[7] Grain Inspection, Packers and Stockyards Administration, 9 CFR Part 201, RIN 0580–AB25, Scope of Sections 202(a) and (b) of the Packers and Stockyards Act; Federal Register, Vol. 81, No. 244, Pg. 92594, Tuesday, December 20, 2016. https://www.govinfo.gov/content/pkg/FR-2016-12-20/pdf/2016-30424.pdf.

> *Contrary to comments that GIPSA failed to show that USDA's interpretation was longstanding, USDA has adhered to this interpretation of the P&S Act for decades. DOJ has filed amicus briefs with several federal appellate courts arguing against the need to show the likelihood of competitive harm for all violations of 7 U.S.C. 192(a) and (b).*[8]

NFU contends that when some courts have ruled that claims under 202(a) and/or 202(b) of the Act required a demonstration of harm to competition or likely harm to competition, this has been a misapplication of the P&S Act. Besides being a misinterpretation of the statute, the requirement to demonstrate harm to the entire marketplace is an incredibly high hurdle and simply unreasonable. We are deeply disappointed by the approach to this issue in the current proposed rule.

Conclusion

NFU is concerned both by the criteria outlined in, and the issues omitted from, the proposed rule. We respectfully request AMS to re-draft the proposed rule and reissue a new proposed rule for additional stakeholder review and comment.

If you have any questions or would like to further discuss NFU's position, please contact Aaron Shier, NFU Government Relations Representative, via e-mail at ashier@nfudc.org or by phone at 202-554-1600.

Sincerely,

Rob Larew
President

CC: Bruce Summers, Administrator, Agricultural Marketing Service; Stuart Frank, Director, Packers and Stockyards Division, USDA AMS Fair Trade Practices Program

[8] Grain Inspection, Packers and Stockyards Administration, 9 CFR Part 201, RIN 0580–AB28, Scope of Sections 202(a) and (b) of the Packers and Stockyards Act; Federal Register, Vol. 82, No. 200, Pg. 48596, Wednesday, October 18, 2017. https://www.govinfo.gov/content/pkg/FR-2017-10-18/pdf/2017-22593.pdf