September 11, 2024

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

RE: Document Number 2024-14042; June 28, 2024; FR Pages 53886-53911;
Docket Number AMS-FTPP-21-0046; RIN: 0581-AE04;
"Fair and Competitive Livestock and Poultry Markets"

Dear Mr. Offutt:

On behalf of the more than 230,000 family farm and ranch members of National Farmers Union (NFU), I am pleased to comment on the "Fair and Competitive Livestock and Poultry Markets" proposed rule.

NFU appreciates USDA promulgating this proposed rule and we ask the Department to finalize it as quickly as possible. We urge USDA to ensure the final rule delivers robust and durable protections and recourse for family livestock producers when they are injured by meatpackers, poultry integrators, or other entities regulated by the P&S Act.

NFU strongly supports the proposed rule. We also commend the legal analysis and historical context outlined in the preamble that supports the rule. Nevertheless, we urge USDA to make clearer in its final rule that a market participant, such as a farmer, who brings an unfair practice claim under Section 202(a) of the P&S Act does not need to demonstrate harm to competition to prove injury or likelihood of injury. We recommend the final rule clarifies and strengthens provisions in the proposed rule with respect to justifications based on countervailing benefits, while prohibiting cross-market balancing. Additionally, we are concerned that the proposed rule provides a framework for Section 202(a) of the P&S Act but fails to include an appropriate standard with respect to Section 202(b) of the Act.

Section 202 of the P&S Act does not require demonstration of harm to competition

NFU's grassroots, member-driven 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."[1] NFU has long argued that livestock and poultry producers protected by the P&S Act do not need to prove harm to competition or likelihood of such harm to establish a violation of Sections 202(a) and (b) of the P&S Act. The inconsistent judicial interpretations of Sections 202(a) and (b) of the Act, which in some cases run counter to the plain language of statute, demonstrate the strong need for this proposed rule.

NFU's position is consistent with USDA's longstanding interpretation of Section 202 of the P&S Act. As USDA sets forth in its proposed rule, it is USDA's well-established interpretation that nothing in the statute requires protected farmers or USDA on behalf of farmers to demonstrate harm or likelihood of harm to competition to prove a violation of Sections 202(a) and (b) of the P&S Act.

As USDA outlines in the proposed rule:

> *From the plain language of the text, section 202 of the Act is broader than the antitrust laws and does not necessarily require harm to competition as that term is understood under the antitrust laws… USDA recognizes that some courts have recently required proof of competitive injury before finding that conduct is unfair… A competitive injury requirement cannot be imposed in a way that abrogates part of a statute. To the degree requiring a "competitive injury" precludes finding conduct is unfair when it satisfies criteria in the proposed rule, such a requirement would unduly limit the reach of section 202(a) and is improper. Moreover, the statute and P&S Act case law make plain that competitive injury under the P&S Act is broader than harm to competition under the antitrust laws…*

The proposed rule is needed to address the inconsistent judicial interpretation of the P&S Act statute that has hampered adequate enforcement of the Act. NFU is pleased that the proposed rule addresses this issue with respect to Section 202(a) of the Act.

Requested clarifications and adjustments to the proposed rule

While NFU supports the proposed rule, there are key areas of the proposed rule that should be strengthened or amended. The final rule should clarify that the use of the term "competition in the market" in Section 201.308(a) of the proposed rule does not suggest the need to prove competitive injury; the final rule should clarify that the burden of proof with respect to countervailing benefits should rest with regulated entities, and that cross-market balancing should be prohibited; and the final rule should also adopt a regulatory framework for Section 202(b).

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[1] National Farmers Union, *Policy of the National Farmers Union*, March 2024, https://nfu.org/policy/.

Clarify "Competition in the market" from Section 201.308(a)

USDA is proposing the addition of Section 201.308(a) and (b) as a comprehensive rule or test for unfair practices with respect to *market participants*, and Section 201.308(c) and (d) as a comprehensive rule or test for unfair practices with respect to *markets*. NFU believes, based on the reading of the proposed rule's preamble, that USDA intends for neither the market participants test, nor the markets test, to require proof of market wide harm to competition for the finding of a violation of the Act.

Nevertheless, because of inconsistent court interpretations of the Act with respect to the issue of "competitive injury," the inclusion of language regarding "competition in the market" in Section 201.308(a) gives us pause. We suggest USDA clarify in its final rule that the inclusion of this terminology does not imply the need for market participant(s) to prove competitive injury for there to be a violation of the Act.

Clarify and strengthen the burden of proof on the regulated entity regarding "countervailing benefits" and disallow a cross-market balancing justification

The "test" outlined in Section 201.308(a) of the proposed rule, which guides whether an act by a regulated entity with respect to one or more market participants is an unfair practice under Section 202(a) of the P&S Act, has three key components, or burdens of proof. The market participant would need to demonstrate the first two: that an act by a regulated entity causes or is likely to cause substantial injury to a market participant, and that the act is one that the market participant(s) cannot reasonably avoid. The third burden of proof pertains to countervailing benefits to the market participant(s) or to competition in the market that outweighs the injury.

NFU appreciates that with respect to countervailing benefits, USDA appears to require that the burden of proof rests with the regulated entity, not the market participant(s). USDA should clarify in its final rule that this is, indeed, what USDA intends. It would be unreasonable to expect any individual market participant or participants to establish or provide analysis with respect to countervailing benefits, and the burden of proof for countervailing benefits, if retained in the final rule, should rest with the regulated entity.

Additionally, we ask USDA to categorically exclude cross-market balancing as justification of a countervailing benefit in the final rule, which could allow for many harmful and unfair practices. For example, we believe that if a regulated entity cut payments to a group of producers in one region where they have monopsony power and attempted to justify this practice by providing higher payments to producers in another region (where, for example, they may be attempting to increase their market share), that this should be deemed an unfair practice. We are concerned

that allowing cross-market balancing as justification could allow for a harmful practice like this to stand.

To the extent countervailing benefit justifications ought to be considered, they should only be considered with respect to the market participant(s) claiming injury, or the potential for injury, rather than benefits to anyone else in the market under consideration.

Address the omission of an updated regulatory framework with respect to Section 202(b) of the P&S Act

NFU is disappointed that USDA also did not seek to provide a framework for addressing Section 202(b) of the P&S Act with respect to undue preferences and advantages. USDA provides an explanation in the preamble to this proposed rule outlining its previous efforts to issue regulations with respect to both 202(a) and (b), which would have established that claims of violations under both sections can, in some cases, be proven without demonstrating competitive injury.[2]

While NFU appreciates USDA creating a framework for enforcement of Section 202(a) of the Act, we ask that USDA also creates a framework for enforcement of Section 202(b). We appreciate that the preamble of the proposed rule reiterates USDA's longstanding position with respect to both Section 202(a) *and* (b) of the Act that proof of competitive injury is not required in all cases to demonstrate a violation of the Act, but we believe this should be more clearly incorporated into the proposed new regulatory language.

Conclusion

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

Sincerely,

Rob Larew
President

[2] See https://www.federalregister.gov/d/2024-14042/p-48 and https://www.federalregister.gov/d/2024-14042/p-58