

March 18, 2017

Litigation and Economic Analysis Division
Packers & Stockyards Program
Grain Inspection, Packers and Stockyards Administration
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250-3601

Re: Scope of Sections 202(a) and (b) of the Packers and Stockyards Act; Interim Final Rule (RIN0580-AB25); Poultry Grower Ranking Systems; Proposed Rule (RIN 0580-AB26); Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act (RIN 0580-AB27)

Dear Sir or Madam:

National Farmers Union (NFU) appreciates the opportunity to comment on the Farmer Fair Practices Rules (Scope of Sections 202(a) and (b) of the Packers and Stockyards Act; Interim Final Rule; Poultry Grower Ranking Systems; Proposed Rule; and Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act) published by the U.S. Department of Agriculture (USDA) in the Federal Register on December 20, 2016. The Farmer Fair Practices Rules will update the Packers and Stockyards Act, 1921 with basic protections for farmers and ranchers.

NFU is a grassroots general farm organization with nearly 200,000 family farmer, rancher, and fishermen members nationwide. Since 1902, NFU has supported family agriculture and rural communities through advocacy, education, and cooperative development. Delegates to NFU's annual convention, through a vigorously debated and democratic process establish NFU's policies. NFU policy states support of "Clarification of the Packer 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 The interim final rule on the scope of 202(a) and (b) directly addresses NFU's concerns. Additionally, NFU policy supports, "Modifications to regulations under the Packers and Stockyards Act that govern integrator fair-trade practices and strengthen the enforcement mechanisms therein."²

I. Background

The Packers and Stockyards Act of 1921 was passed in response to the 1919 Report of the Federal Trade Commission on the Meat-Packing Industry, that stated, "The power of the Big Five in the United States has been and is being unfairly and illegally used to manipulate livestock markets; restrict interstate and international supplies of foods; control the prices of

¹ National Farmers Union, *Policy of the National Farmers Union*, (March, 2016), henceforth "NFU Policy".

² NFU Policy.

dressed meats and other foods; defraud both the producers of food and consumers; crush effective competition; secure special privileges from railroads, stockyard companies, and municipalities; and profiteer.” In 1916, the “Big Five’s” percentage of interstate slaughter was 82.2 percent for cattle and 61.2 percent for hogs. The passage of the Packers and Stockyards Act in 1921 followed the Sherman Antitrust Act of 1890, the Federal Trade Commission Act of 1914, and the Clayton Act of 1914. The basic premise of the core antitrust laws was to protect competition for the benefit of consumers.

The P&S Act was passed in order “to regulate the sale of livestock by farmers to the more economically powerful livestock buyers.”³ Congress passed the Act with recognition that the previous antitrust acts did not adequately protect farmers and consumers from the monopolistic practices of the meatpacking industry. The Act set out to regulate meatpackers engaging in unfair or deceptive practices that harm individual farmers.⁴ While the P&S Act has some typical antitrust components (Sections 202(c) through (f)), the law is broader than just antitrust in that it also establishes statutory trusts for the benefit of all unpaid cash sellers and delivery of full amount due, for example. These are not antitrust components of the P&S Act and were designed for the benefit of individual farmers and ranchers.

II. Consolidation of Power in the Industry

One hundred years after passage of the P&S Act, the concentration ratio among the top four meatpacking companies is 85 percent for beef, 74 percent for pork, and 54 percent for poultry.⁵ Farmers and ranchers are subject to both monopolistic practices in the agricultural inputs sector and monopsonistic practices in the agricultural production sector. Due to a lack of competition across the agricultural sector, farmers are subject to both the bargaining power of sellers of agricultural inputs and the bargaining power of buyers of the products farmers grow.

The development of contract farming as the model in the poultry and hog sector has institutionalized the “monopsony/monopoly relations between farm and agribusiness and the ability of the latter to capture value by the producer through price manipulation.”⁶ The two parties that negotiate the contract are not equal. This asymmetrical power results in undue influence over contract farmers.

Contract poultry growers are often required to invest hundreds of thousands of dollars for poultry houses and equipment that has a single purpose – raising birds. Farmers often invest with loans amortized over decades. Because of the lack of competition in the meatpacking sector, farmers may only have access to one to two processors in their immediate area. The

³ See *Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978).

⁴ Stumo, Michael J., and Douglas J. O'Brien. "Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships." *Antitrust Unfairness vs. Equitable Unfairness* (2003): n. pag. The National Agricultural Law Center.

⁵ Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92565, (December 20, 2016).

⁶ Jyotishi, Amalendu. "Monopsonistic Exploitation in Contract Farming: Articulating a Strategy for Grower Cooperation." *Journal of International Development*. N.p., n.d. Web. 18 Mar. 2017.

poultry houses and equipment are sunk costs, which puts farmers at a tremendous disadvantage when negotiating contracts. As one farmer stated at the U.S. Department of Justice and USDA Public Workshops Exploring Competition in Agriculture: Poultry Workshop, “And when you have that kind of debt load over you, of course you’re going to choose to sign the contract. You feel that there’s no other option when you owe, you know, half a million dollars or a million dollars.”⁷

For years, USDA has attempted to address the anticompetitive behaviors of the meatpacking industry by promulgating rules that would help clarify the P&S Act and its scope. Blocked by congressional riders fueled by outrage from the meatpacking companies, USDA has, thus far, been unable to promulgate rules. The status quo system of indentured servitude by contract growers who are subject to increasingly offensive demands by integrators is simply unacceptable. NFU strongly supports the interim final rule on Scope of Sections 202(a) and (b) of the Packers and Stockyards Act and the proposed rules on Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act and Poultry Grower Ranking Systems.

III. Competitive Injury

Section 202(a) and (b) of the P&S Act state, “It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food productions or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to: (a) Engage in the use of 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.”⁸

The Interim Final Rule on the Scope of Sections 202(a) and (b) of the P&S Act states, “§201.3 Applicability of regulations in this part. (a) *Scope of sections 202(a) and (b) of the Act.* 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.”

This language clarifies the long-held position of USDA that harm to competition is not required for a finding of harm under the P&S Act. In accordance with congressional intent, USDA has filed amici curiae contending that it is not necessary to prove competitive injury or likelihood of injury to prove that a practice is “unfair”. For decades after passage of the P&S Act, this clarification would have been superfluous. However, in *London vs. Fieldale Farms*, *Wheeler v. Pilgrim’s Pride Corp.*, and *Been v. O.K. Indus., Inc.*, the courts found that claims under 202(a) and/or (b) required a demonstration of harm to competition or likely harm to competition, typical of an antitrust law but a misapplication of the P&S Act. In *London*, the U.S.

⁷ USDOJ & USDA Public Workshops Exploring Competition in Agriculture (2010), Normal, Alabama. Print.

⁸ 7 U.S.C. 181

Court of Appeals, Eleventh Circuit found that “elimination of a competitive impact requirement would subvert the policy justifications for the PSA’s adoption.” This finding is counter to the intent and plain language of the P&S Act.

In *London*, contract growers Harold and Christine London filed suit under the P&S Act asserting that their poultry contract was wrongfully terminated. The Londons faced retaliation from the poultry company, Fieldale for Harold’s testimony in a discrimination case against the company. The decision quotes an interpretation of the P&S Act from *United States v. Perdue Farms, Inc.*, “Section 202 of the original Act made it unlawful for any ‘packer’ to engage in any anticompetitive, monopolistic, discriminatory, or deceptive practices.”⁹ This is not a correct interpretation of the act. While Section 202 (c) through (e) clearly contain antitrust language regarding restraining commerce or creating a monopoly, Sections (a) and (b) do not contain such antitrust language. Therefore the competitive injury test is not required for these two sections. If Congress had wanted an application of this test to Sections (a) and (b), it would have included it in the plain language like what was included in Sections (c) through (e).

As the Interim Final rule notes, more than 95 percent of all broilers in the U.S. are raised and delivered under production contracts.¹⁰ The system of vertical integration where poultry growers receive birds from “company-owned hatcheries” and feed.¹¹ Poultry growers do not one, raise or sell a domestic animal. The company owns the birds and the poultry grower raise and care for the birds. Because of this vertical integration, the law and the regulations related to the owning, raising, and selling of a domestic animal are limited.

In *London*, *Been*, and *Wheeler*, the courts inaccurately convey the authority of the Secretary granted by the P&S Act. Section 410, however, outlines the parameters for timeliness of payments to growers, but also states, “(b) Delay or attempt to delay collection of funds as “unfair practice”. Any delay or attempt to delay, by a live poultry dealer which is a party to any such transaction, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for poultry obtained by poultry growing arrangement or purchase in a cash sale, shall be considered an “unfair practice” in violation of this Act. Nothing in this section shall be deemed to limit the meaning of the term “unfair practice” as used in this Act.”¹²

While the Secretary does not have exhaustive administrative authority over live poultry dealers, he does have particular authority over enforcement of live poultry dealers that includes “unfair practices” dealing with improper payment and/or late payment for the grower services. Section 410 outlines both the parameters for timeliness of payment to growers, but also that any attempt to delay collection of funds is an “unfair practice”. Section 411 states in plain language the Secretary has administrative authority over section 410 and 207.

⁹ *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1304-05 (11th Cir. 2005)

¹⁰ Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92566, 92594 (December 20, 2016).

¹¹ “Vertical Integration.” The National Chicken Council. N.p., n.d. Web. 18 Mar. 2017.
<http://www.nationalchickencouncil.org/industry-issues/vertical-integration/>

¹² 7 U.S.C. 181

Once in effect, NFU urges the courts to give deference to Section 201.3. The secretary of agriculture is an expert in agriculture and has administrative authority over the P&S Act, and therefore, the courts should defer to this plain language clarification of the P&S Act.

IV. Poultry Grower Ranking Systems

NFU appreciates the efforts USDA has taken to promulgate rules on the poultry grower ranking system. This system is the predominant payment system for broilers raised in the US. Under poultry grower ranking systems, the integrator owns the hatchery, the genetics, the chicks, the feed, the trucks and the processing facility. The farmer owns the land, the buildings, and the waste from the chickens. A set amount of funding is available for a pool of growers. The average grower in the pool receives the base pay, and those that perform better or worse receive higher or lower compensation. This is not an incentives-based system. It pits farmer against farmer in the same community, competing against one another for the limited compensation. Some farmers are “winners” in this scenario, while others are losers. Some may argue that this is a fair system to incentivize growers to perform better and rewarding growers who perform well.

Unfortunately, in the vertically integrated contract poultry model, growers have very little impact on their performance. In other words, the tournament is rigged. The vast majority of the factors that impact feed conversion (or the grower’s success in the tournament) are based on inputs that are beyond the grower’s control. The chick genetics and health, density, feed and medication largely determine the conversion feed ratio, and the grower’s performance.

The tournament system and zero-sum payment scheme allows poultry companies to offload inherent risk or costs in agriculture to farmers. Young and old breeding hens produce inferior chicks that result in less efficient feed conversion. The company delivers all of the chicks to the growers, despite knowing that some of the chicks will be inferior, resulting in less pay for the grower. The company ultimately rewards or penalizes growers based off of chicks of varying quality. There is no transparency in this system.

The proposed rule on Poultry Grower Ranking Systems amends the Packers & Stockyards Act to help provide additional information on undue or unreasonable preferences, advantage, prejudice, or disadvantage for poultry grower ranking systems. The proposed rule identifies criteria for the Secretary to consider when determining whether an integrator has violated the Act.

Proposed 201.214(a) enables the Secretary to evaluate whether a live poultry dealer gave sufficient information to growers to allow them to make informed business decisions. Information like anticipated number of flocks per year and average gross income is important information for a grower to have. Poultry companies often target economically depressed areas and suggest that growers will have great success with poultry growing. These prospectuses are often wildly inaccurate. Growers make business decisions, including long-term investments that require collateralization of land and homes, based on the information in prospectuses. This proposed rule would help address this harmful practice.

Proposed 201.214(b) addresses another harmful practice that occurs with poultry grower ranking systems. The inferior chicks and feed have been targeted towards individual

growers as a means of retaliation for any number of different actions, including asking for more pay, speaking to members of Congress, or forming grower associations. 201.214(b) makes it clear that targeting inferior chicks or feed to growers would be a violation of the Act. While it would be preferable for companies to absorb the costs of inferior chicks into their business costs rather than offloading them to farmers, this proposed rule would make sure that poultry companies randomized the distribution of the inferior chicks and other inputs.

Proposed 201.214(c) creates criteria for determining whether a company ranked growers with dissimilar production variables. As it currently stands, poultry companies can and do rank growers with other growers with differing density, ages, and breeds, all of which can greatly impact a grower's performance, and ultimately, compensation.

NFU strongly supports the above criteria and encourages USDA to finalize these criteria immediately. These are common sense reforms that will limit the worst abuses of the poultry companies and are clear examples of where the poultry grower ranking system is unfair and violates the Packers and Stockyards Act.

The final criteria proposed, 202.214(d), on "whether a live poultry dealer has demonstrated a legitimate business justification for use of a poultry grower ranking system that may otherwise be unfair, unjustly discriminatory, or deceptive or gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or advantage" is incredibly problematic. This criteria provides a strong defense for poultry companies in any legal challenges. For example, the criteria would allow poultry companies to defend their actions to purposefully target growers with inferior chicks because they spoke with a member of Congress. Is it the intent of GIPSA to have retaliation be a legitimate business justification? Without further clarity, this criterion could threaten the effectiveness of the other listed criteria. NFU opposes this language and encourages USDA to eliminate it in the final rule.

V. Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act

NFU also supports the proposed rule on Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act. The new proposed rule offers much needed clarity on "per se" violations of the Packers and Stockyards Act. The terms "unfair," "unjustly discriminatory", and "deceptive" have never been adequately defined by law or regulation, leading to ambiguity that has been inconsistently treated in the courts. Additionally, this proposed rule restates the plain language of the rule that a finding of competitive injury or likelihood of competitive injury is not required under 202(a).

The Packers and Stockyards Act enumerates unlawful practices in Section 202(a) through (g). Section 202(a) states that is unlawful for any packer, swine contractor or live poultry dealer to "engage in or use any unfair, unjustly discriminatory, or deceptive practice or device" but there are additional unfair practices enumerated in the Act. Section 409(c) deems a delay in payment or attempt to delay payment as an unfair practices. This proposed rule would make it clear that a violation of section 409(c) is also a violation of 202(a). This is additional clarity that will help make it clear that the application of the competitive injury requirement to Section 202(a). The additional unfair practices enumerated in the act make it clear that the Act

is not solely an antitrust act and competitive injury is not always a requirement for a violation of the Act.

Additionally, this proposed rule clarifies what consists of an “unfair, unjustly discriminatory, or deceptive practice or device” under Section 202(a), regardless of harm to competition. The proposed rule offers an illustrative list of conduct that is a violation including:

- Retaliation or threat of retaliation
- Limiting the legal rights and remedies
 - Right to a trial by jury
 - Right to a trial in the Federal judicial district in which the principal part of the performance took place under the arrangement or contract
 - Right to pursue all damages available under applicable law
 - Right to seek an award of attorney fees
- Failing to comply with the requirements of Section 201.100 regarding records to be furnished to poultry growers and sellers
- Failing to provide notice to grower of suspension of delivery of birds
- Requiring unreasonable additional capital investments
- Failing to provide a reasonable period of time to remedy a breach of contract
- Failing to provide a meaningful opportunity to participate fully in the arbitration process
- Failing to ensure accurate scales and weighing of livestock, poultry or feed
- Failing to ensure the accuracy of electronic evaluation systems

This list addresses some of the many unfair practices that occur in the livestock and poultry sector.

The proposed rule also offers additional criteria for 202(b), further defining undue or unreasonable preferences or advantages. Section 202(b) 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 “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.”

NFU appreciates the additional clarity USDA provides with the non-exhaustive list of criteria included under 201.211. The plain language of the proposed rule does not preclude packer or swine contractors or live poultry dealers from offering premiums for natural, organic or Certified Angus Beef, as has been suggested by the meatpackers. The plain language of the proposed rule does not interfere with a contractor’s ability to offer premiums. The proposed rule includes criteria for a violation of 202(b) if a grower or producer is treated differently for engaging in lawful communication, association or assertion of their rights; for allegedly violating any law, rule or regulation without a reasonable basis to determine whether or not a violation was committed; for an arbitrary reason; or on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status. These are important criteria that will help ensure clarity both for producers and growers, but also for the companies they contract with.

NFU, however, adamantly opposes the inclusion of “legitimate business justification” language. As stated above, this is a loophole that provides protection to live poultry dealers and packer and swine contractors to violate the law if they have a good business reason to do so.

VI. Conclusion

Thank you for the opportunity to submit comments on Scope of Sections 202(a) and (b) of the Packers and Stockyards Act; Interim Final Rule (RIN0580-AB25); Poultry Grower Ranking Systems; Proposed Rule (RIN 0580-AB26); Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act (RIN 0580-AB27). These rules, the Farmer Fair Practices Rules, are long overdue. Family farmers and ranchers operating in an extremely consolidated marketplace should have the full protection of the Packers and Stockyards Act of 1921. Over the last few decades, judicial decisions have weakened the original act, providing farmers and ranchers with less protection in a more challenging marketplace. These rules will go a long way to make sure that farmers and ranchers can continue to operate with basic protections under the law.

Sincerely,

Roger Johnson
President