



March 12, 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”; Federal Register as Vol. 85, No. 8, Monday, January 13, 2020, 1771-1783.

Dear Mr. Offutt:

North Dakota Farmers Union (“NDFU”) appreciates the opportunity to comment on the proposed rule regarding “Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act.” NDFU, the largest general farm organization in North Dakota, represents more than 48,000 farm and ranch families, members, and their energy and agriculture supply cooperatives. NDFU is concerned that the criteria outlined in the proposed rule will not adequately protect family farmers and ranchers from harmful industry practices.

NDFU’s member-developed policy has long opposed the use of unfair contracts and anti-competitive practices. As industry consolidation and the use of contract production increases, we believe it is even more important to protect livestock producers from abusive practices. NDFU supports the requirements put forth in the 2008 Farm Bill to strengthen and clarify Packers and Stockyards Act (“P&S Act”) enforcement. We are disappointed by separate United States Department of Agriculture (“USDA”) actions to withdraw rules designed to satisfy those requirements.

NDFU appreciates the USDA Agriculture Marketing Services (“AMS”) issuing a proposed rule to clarify the criteria the Secretary of Agriculture would consider when determining whether an undue or unreasonable preference or advantage has occurred in violation of the P&S Act. However, the proposed criteria are overly vague and do not adequately protect farmers and ranchers.

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).

The four proposed criteria are ambiguous. The proposed rule provides examples of what could or could not be an undue preference or advantage for the four criteria. However, the criteria are vague, and the proposed rule lacks defined terms. As a result, the rule does not provide the clarity needed to appropriately address undue or unreasonable preferences or advantages.

The following sections outline NDFU's specific concerns and provide recommendations to more adequately protect family farmers and ranchers from harm by packers, integrators, and contractors.

Section 201.211(a)

Proposed Section 201.211(a) could allow any instance of "cost savings" a packer, swine contractor, or live poultry dealer receives to serve as justification that an undue or unreasonable preference or advantage was not given to one producer or locality over another. Cost alone should not be used to determine whether a violation has or has not occurred. This section should be revised to provide clear instances where cost savings are, and are not, warranted.

Section 201.211(b) and Section 201.211(c)

The proposed criteria in Sections 201.211(b) and 201.211(c) allow for undue or unreasonable preferences to be warranted on the basis of meeting competitors' prices or terms. These criteria seemingly incentivize collusion between competitors and could decrease competition in the livestock and poultry industries. As such, these criteria are in direct conflict with key provisions of the P&S Act.

Accordingly, 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 of the decision to meet a competitors' terms results in performance or efficiency gains. The proposed rule should make it clear that collusive behavior between competing firms is unacceptable.

Section 201.211(d)

Proposed Section 201.211(d) appears to protect the industry from scrutiny for customary business practices that nonetheless may create undue or unreasonable preferences or advantages. This would preserve certain practices as acceptable and allow packers, swine contractors, and live poultry dealers to maintain the status quo at the expense of farmers and ranchers. Such practices include but are not limited to the tournament system of performance assessment in the poultry sector where payment is based on factors outside the control of the grower; a variety of documented discriminatory and retaliatory practices in the poultry sector; and deals given by packers to some ranchers and feeders, but not others. Whether or not a

practice is “customary” should not be a determinant as to whether a practice violates section 202(b) of the P&S Act.

General Recommendations

Finally, by drafting the criteria in negative terms, the proposed rule fails to articulate important instances, in the affirmative, that would constitute an undue or unreasonable preference or advantage. NDFU urges USDA to develop clear and specific criteria so that a finding of a violation can be unequivocally made for different scenarios. If the criteria remain general in nature, different adjudicators may come to different conclusions when considering the same facts. Further, 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 industry differences.

As written, the four criteria discussed above do not sufficiently protect farmers and ranchers from undue or unreasonable preferences. At a minimum, specific criteria should be developed to state 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.

Conclusion

The proposed rule does not adequately address the undue and unreasonable preferences or advantages farmers and ranchers are facing in the cattle, swine, and poultry industries. Therefore, we urge AMS to amend the proposed rule and reissue a new proposed rule for additional stakeholder review and comment.

Sincerely,

NORTH DAKOTA FARMERS UNION



Mark Watne
President

