RURAL ADVANCEMENT FOUNDATION INTERNATIONAL - USA

ADDRESS
P.O. BOX 640
PITTSBORO, NC 27312

PHONE
919.542.1396

WEB
RAFIUSA.ORG

S. Brett Offutt
Packers and Stockyards Division, USDA AMS Fair Trade Practices Program,
1400 Independence Ave. SW,
Washington, DC 20250-0201
Docket Number: AMS-FTPP-21-0045
September 26, 2022

Re: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act

The Rural Advancement Foundation International - USA (RAFI-USA welcomes USDA's continued work to strengthen protections for livestock and poultry producers facing corporate power abuse through its proposed rule "Inclusive Competition and Market Integrity Under the Packers and Stockyards Act," and respectfully submits the following comments regarding its improvement. As a member of the Campaign for Contract Agriculture Reform (CCAR), RAFI-USA fully endorses CCAR's detailed comments on this proposed rule, which have been attached as a supplemental file to our submission.

Broadly, RAFI-USA is supportive of USDA's proposed rule. In the following comments, we elaborate further on potential improvements that could be made to USDA's proposed protections for Market Vulnerable Individuals, suggest an addition to Section § 201.306 of the proposed rule (requiring livestock and poultry production contracts to meet a specific standard of "completeness," with regards to expected contract income and future capital expenditures, to be in compliance with the standards within Section § 201.306 against deception), and reiterate the critical importance of retaliation protections specifically for contract poultry producers.

Flexible Discrimination Protections Will Be An Asset With Further Clarification

We believe that the new category of "Market Vulnerable Individual," as defined by AMS, will be an appropriately flexible concept with which to enforce enhanced protections against discrimination in the marketplace. However, we recommend that AMS explicitly name protected classes like race/ethnicity, gender identity, and sexual orientation as market vulnerable individuals within the rule's regulatory text. Given the history of discrimination that farmers of color have faced over the course of American history, these producers should not be made to relitigate their status as market vulnerable in any given complaint.

Additionally, AMS should provide further clarification within the rule's explanatory text regarding the types of evidence that plaintiffs might marshall to establish a claim of market vulnerability. We would further advise that these standards should enable claims based on regional market power dynamics, as well as a producer's operational scale or chosen marketing practices (for example, a cattle producer's decision to participate in cash markets or enter into a forward contract).

Finally, AMS should further adjust how the burden of proof falls on producers and regulated entities in complaints brought under the proposed rule. Producers should only be required to establish their status as a market vulnerable individual and demonstrate that they have experienced discrimination. At that point, the rule should explicitly place the burden of proof on regulated entities to demonstrate that their discriminatory conduct against the plaintiff was not discriminatory based on the plaintiff's identity within the established market vulnerability.

<u>An Additional Contract Completeness Standard Will Improve Deception Protections</u>

When producers are forced to operate in regionally monopsonistic markets, with little to no ability to choose between multiple buyers or integrators to contract with, their precarity is profound. For example, knowing that contract growers' ability to find a different integrator is extremely limited or impossible in such market conditions, poultry integrators have free reign to unilaterally dictate base prices and offer incomplete and one-sided contracts to their contract producers. In our own decades of organizing poultry growers, RAFI-USA has repeatedly observed integrators coercing growers to accept degraded contract terms or incur further debt loads to finance mandatory infrastructure upgrades though take-it-or-leave-it contract revisions. As one South Carolina poultry grower relayed to us:

> The contract terms are more than unfavorable. I would think that one of the most notable issues resides with their standards of operation. What I mean by this is many of us who are new to contract poultry are not given a clear picture of the integrators operating procedures until "after" a contract has been signed. The contracts are very biased and one-sided giving the bulk of control and authority to the initiator of the contract and then, only after you have committed to playing their game you are then given the rule book. The rule book is the grower handbook which gives you all the things you must do to remain in compliance with their contract. Without getting into the numerous details of the grower handbook I will leave you with this, the grower is NOT an independent contractor as the "contract" eludes. It is very misleading and borders fraud in my opinion. Every operation on your farm is dictated by the rules in the handbook which is not revealed during a contract signing. The defense will naturally be that the integrator's practices are proprietary information but it is a grave mistake to leave that information out before allowing a contract to be signed. Again it borders fraud when contracts lead you to believe one is independent. The practices of the integrators are very calculated to insure the integrators are protected legally while entrapping the farmer into modern day indentured servitude.

Additionally, it is not uncommon for integrators to provide deceptive earning claims, or recruit prospective growers on the basis of non-binding assurances that are later revoked. As one North

Carolina poultry grower told us, “we were told we were guaranteed five flocks a year when we signed our contract. Then they decided to give us four per year, and we complained that we were guaranteed five, and they said, "show it to us in the contract."

Both of these accounts serve as an example of unconscionably incomplete contract arrangements. Unconscionability in contracting was defined in *Been v. O.K. Industries* as “an absence of meaningful choice on the part of one of the parties, together with contractual terms which are unreasonably favorable to the other party” in contracts established under a “gross inequality of bargaining power.”[1] USDA’s proposed [Transparency in Poultry Grower Contracting and Tournaments]() rule discussed the deceptiveness of incomplete contracts, as described above, at length:

> A poultry growing arrangement or production contract reflects the arrangement between a live poultry dealer and a poultry grower, under which the grower is compensated for raising live poultry for delivery to the dealer for slaughter. Such a contract may be viewed as complete if the terms include the substantive legal, practical, and economic promises, obligations, and contingencies needed to operate in a poultry growing arrangement. Additionally, those terms should be verifiable by a third-party and legally enforceable. Incomplete contracts may arise when practically important terms do not meet those conditions. Incomplete contracts may magnify risks with respect to the performance of the contractual counterparty and lead to other potential inefficiencies.[2] In particular, at least one party may have discretionary latitude to deviate from expectations.[3] For example, poultry production contracts often do not guarantee the number of flocks a grower will receive, even under long-term contracts, although this is a critical datapoint for understanding the value of the contract to the grower[4]...[Additionally], the type and frequency of required upgrades to existing equipment and housing are often left to the discretion of the live poultry dealer.

And elsewhere in the proposed rule:

> AMS believes that poultry growing arrangements are often incomplete contracts that may be deceptive when omissions or inadequate descriptions of key terms mislead, camouflage, conceal, or otherwise inhibit growers' ability to assess the financial feasibility and expected value of investment. For example, for a grower to estimate future revenues, it is necessary for the grower to know how many flocks the dealer will place with the grower over a given time period. When contract terms do not establish the number of flocks a grower will receive during that time period, the grower could be misled or deceived into believing he will receive an optimistically high number of

---

[1] *Been v. O.K. Indus., Inc.*, 495 F.3d at 1236.
[2] Wu, S. 2014. “Adapting Contract Theory to Fit Contract Farming”. American Journal of Agricultural Economics, Volume 96, Issue 5 (October 2014): 1241-1256.
[3] Steven Y. Wu and James MacDonald, “Economics of Agricultural Contract Grower Protection Legislation,” Choices, Third Quarter, 2015, pp 1-6.
[4] MacDonald (June 2014) Op. Cit.

placements, which might increase the grower's willingness to contract with the dealer. This risk is particularly acute if the financial statements or estimates provided to the grower paint only the most optimistic picture possible regarding the returns that may be possible under complex and opaque payment arrangements, such as the commonly used tournament ranking system, rather than the range of realistically expected outcomes.

USDA's first proposed Packers and Stockyards rule, *Transparency in Poultry Grower Contracting and Tournaments*, made some significant steps to limit live poultry dealers' ability to establish incomplete contracts. If finalized, the rule will require live poultry dealers to disclose the minimum number of flock placement and minimum flock stocking density that a contract grower can expect - both factors under integrator control that impact contract growers' bottom line. However, the rule does not require live poultry dealers to contractually guarantee a minimum base price, which still leaves contract growers in a position of uncertainty with regards to the minimum income they can expect to achieve under a contract. Furthermore, under existing law and rulemaking, integrators have the power to offer or renew contracts with prospective and current contract poultry producers with unconscionable terms, including contracts guaranteed for fewer years than the lengths of the loans contract growers take out to finance their on-farm infrastructure, and flock-to-flock contracts that do not guarantee sufficient flocks and stocking density annually to keep up with loan payments and/or standard expenses. Additionally, integrators are known to coerce growers into taking on additional debt to finance integrator preferred upgrades, under the threat of losing contracts or flock placements.

In this proposed rule's section § 201.306 on deceptive practices, USDA should establish an additional standard for "contract completeness" that clearly defines a minimum standard of completeness in livestock and poultry production contracts. This standard should include the expectation that any livestock or poultry production contract should clearly state a minimum price or rate of pay for products or services rendered, include a detailed disclosure of any potential future expected capital investments that may be requested or required for a continued contractual relationship, and make a minimum commitment of contract years, annual animal placements, and stocking density sufficient, at the minimum guaranteed price or payment rate, for the contract producer to maintain any contractually expected debt payments. Contracts that do not meet these minimum standards should be considered incomplete and unconscionable, and the use of any incomplete or unconscionable contracts should be considered an unlawful deceptive practice under the Packers and Stockyards Act. Furthermore, USDA should specifically clarify that it is unlawfully retaliatory for an integrator to coerce, intimidate, or break contract with a contract producer based on their unwillingness to implement integrator desired upgrades to their on-farm infrastructure not previously detailed in a complete contract, provided that their infrastructure is in good working order, and compliant with state and federal law.

Contract Poultry Growers Face Threats of Retaliation and Need Enhanced Protections

From their on-the-ground vantage point, the contract poultry growers that RAFI-USA partners with see the corporate power abuse rampant in our nation's livestock and poultry sectors incredibly clearly. It is vital that USDA listen to the voices of those who are directly impacted by the deceptive, discriminatory, and retaliatory practices that this rule seeks to address. However, these same producers also face high retaliation risks for making their voices heard. In our advocacy on these issues over the past decade, we have consistently observed the contract poultry producers we partner with experience retaliation from the corporations they contract or deal with. For this reason, we have conducted extensive anonymous contract grower surveying over the past year which has allowed contract growers to narrate their experiences to us. Their voices are included in the comments that follow.

With their control over so many of the variables that affect poultry growing performance and thereby price - from flock and input quality, to correct feed provision, to flock pick-up time, to tournament group composition - poultry integrators have many ways in which they can drive down and hold down the incomes of their growers. This ability can be used to compel growers to comply with upgrade requests, threaten growers who speak out against their integrator, or drive growers into debt, bankruptcy, and even suicide. As one North Carolina contract poultry grower told us, "They don't have to cut you off, they can just bleed you dry. The barn we're sitting in here hatched flocks with salmonella issues. They can send those compromised flocks to growers they want to bleed." Multiple growers in our survey conveyed their experiences of these toxic dynamics:

> My main concern is that [my integrator] operates on fear and threatening tactics to make every grower they have scared they are going to lose their contract every single day. No human being should have to live every single day in fear that their livelihood and only source of income can be taken away from them. I am sick of it, someone needs to do something to help us! I love to grow chickens and feed the world, but I do not like to live as if under a dictatorship. - Mississippi poultry grower

> When I filed a complaint with the Packers and Stockyards Division about a weight issue, in which I was proven right, I was punished with bad tournament grouping for a year. Also, I have been told by my integrator, after receiving a really bad flock of birds, that they would be sure to not let it happen next time- so they know how to make it happen! - Alabama poultry grower

> We were shut off in 2012 due to massive updates that the company required. They used the tournament system to shut growers down. Because of the system we were shut off earlier than we should have. We only had three years left on our loan. - Arkansas poultry grower

> I was the number four ranked grower in my complex, and then went all the way to the bottom. When I asked my service tech about it, she said I had "help" to go to the bottom.
> - Texas poultry grower

It is currently very difficult for farmers to successfully bring suits against meatpackers for violating the Packers and Stockyards Act (PSA), because many judges have required farmers to prove that the company's actions have harmed competition within their entire industry. Despite these rulings in court, the law itself does not require any demonstration of harm to competition to prevail in a case under Section 202(a) or (b). Considered in a different context, this requirement is obviously ludicrous. Imagine that your car is totaled by a driver running a red light. When you sue for damages, would any judge require you to prove that the damage you experienced will affect all commuters nationally? Likewise, since any given farmer's production only represents a tiny fraction of their overall industry, it is unreasonably difficult for a farmer's case to rise to this incoherent threshold of proof. This makes it very easy for large corporations to allege that their extractive practices against any given farmer that sues them are not hurting overall competition. Additionally, the "undue preference" rule released by USDA in December 2020 creates a truck-sized loophole[5] for integrators by stating that a "reasonable business decision" - which the agency declined to define - was a legitimate justification for their actions. In other words, it is acceptable to mistreat farmers as long as you can make money doing it.

This overall imbalance of power allows integrators to treat farmers like they are disposable. We repeatedly observe integrators cutting off farmers' contracts (often in retaliation after farmers speak out against unfair practices) and leave them with millions of dollars of debt tied up in specialized, single-use structures which do not have the ability to generate revenue, or contribute to a property's value, in the absence of an active contract. The abandoned poultry houses that litter the rural landscape across the Southeast testify to this pattern. It is for this reason that we strongly support USDA's enhancement of protections against retaliation in the proposed rule.

We are grateful for this opportunity to comment on USDA's rulemaking.

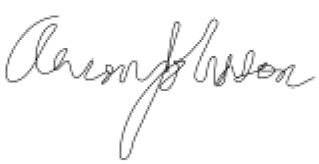
[5] https://www.rafiusa.org/blog/usda-harms-farmer-and-rancher-protections-in-final-rule-on-undue-preference/

Sincerely,

Edna Rodriguez
Executive Director
edna@rafiusa.org

Margaret Krome-Lukens
Policy Director
margaret@rafiusa.org

Aaron Johnson
Challenging Corporate Power Program Manager
aaron@rafiusa.org



These comments and recommendations were authored by Aaron Johnson, RAFI-USA Challenging Corporate Power program manager Aaron Johnson, and edited by RAFI-USA Policy Director Margaret Krome-Lukens and RAFI-USA Executive Director Edna Rodriguez. Special thanks to the contract growers who entrusted us with their feedback in the survey conducted in preparation for this comment.

Rural Advancement Foundation International - USA (RAFI-USA) is a nonprofit organization based in North Carolina that challenges the root causes of unjust food systems, supporting and advocating for economically, racially, and ecologically just farm communities. We envision a thriving, sustainable, and equitable food system: where farmers and farmworkers have dignity and agency; where they are supported by just agricultural policies; and where corporations and institutions are accountable to their community. We help farmers find markets, advocate for and with farmers who are experiencing financial crisis, convene a Farmers of Color Network (primarily in the Southeastern United States), work with farmers markets and rural faith communities to increase food access, provide infrastructure and emergency grants to farmers, and help coordinate a seed breeding cooperative. The following recommendations for addressing corporate consolidation within the food system emerge directly from this work. Our Challenging Corporate Power Program (formerly known as Contract Agriculture Reform program) has worked primarily with contract poultry growers for more than 30 years to fight for better treatment from, and regulation of, giant meatpacking corporations. In that time period we have seen the trend of corporate consolidation (both vertical and horizontal) within industrial animal agriculture continue unchecked. RAFI-USA now works with both contract and independent livestock and poultry producers to reverse the rampant negative effects of corporate concentration across the food system.