Campaign for Contract Agriculture Reform

September 11, 2024

S. Brett Offutt
Chief Legal Officer/Policy Advisor
Packers and Stockyards Division
USDA AMS Fair Trade Practices Program
1400 Independence Ave. SW
Washington, DC 20250
(submitted electronically via regulations.gov)

RE: Comments on Proposed Rule
Fair and Competitive Livestock and Poultry Markets
Packers and Stockyards Act
Docket No. AMS-FTPP-21-0046; RIN 0581-AE04
89 FR 68376 (August 26, 2024)

Dear Mr. Offutt:

The Campaign for Contract Agriculture Reform (CCAR) and its member organizations strongly support this proposed rule, and we appreciate the opportunity to provide detailed comments.

CCAR is a national alliance of organizations working to provide a voice for farmers and ranchers involved in contract agriculture, as well as the communities in which they live. The member organizations of CCAR include Farm Aid, Farm and Ranch Freedom Alliance, Government Accountability Project- Food Integrity Campaign, National Family Farm Coalition, National Farmers Union, National Sustainable Agriculture Coalition, R-CALF USA, Rural Advancement Foundation International, and Western Organization of Resource Councils.

CCAR has long argued that the livestock and poultry producers protected under the Packers and Stockyards Act (PSA) do not need to prove harm to competition broadly or likelihood of such harm to prove that the harms they have suffered individually are in violation of Sections 202(a) or 202(b) of the Packers and Stockyards Act. In fact, as has been the longstanding interpretation of the Act by USDA, there is nothing in the statute that requires protected farmers or USDA on their behalf to demonstrate “harm or likelihood of harm to competition” to prove a violation of Sections 202(a) and/or 202(b) of the Act.

In that regard, CCAR greatly appreciates that the preamble to this proposed rule reiterates this long-standing interpretation by USDA, the agency charged by Congress with the authority to enforce the Act and interpret its provisions through rulemaking.

CCAR also appreciates the detailed analysis provided in the preamble regarding the history of the confusing and often-conflicting federal court rulings regarding Section 202(a) of the Packers and Stockyards Act, and the question of when and whether livestock and/or poultry producers protected under the Act must meet the “harm or likely harm to competition” test, which has been imposed by some Courts, in conflict with plain language of PSA. As pointed out in the rule’s preamble, the conflicting federal court decisions on this topic have greatly hampered USDA’s ability to enforce the Act effectively and provide the protections envisioned by Congress in passing and updating the Act. We believe that the rule’s preamble makes a very effective case of the clear need for USDA to issue a rule to provide more clarity to the Courts to help resolve the confusion demonstrated through the various judicial rulings on the topic.

While CCAR strongly supports the proposed rule, we believe that there is a need for more clarity on a few points, particularly regarding proposed § 201.308(a) and the 3-part test proposed by USDA to determine if a there has been a violation of the unfair practice prohibitions of Section 202(a) of the Act, with respect to market participants. Below we offer our detailed answers to the salient questions posed by USDA regarding ways to measure “substantial injury to one or more market participants” and ways to clarify when an injury “cannot be reasonably avoided” by one or more market participants.

Perhaps our biggest concern about the 3-part test proposed in § 201.308(a) is the lack of clarity regarding when an unfair practice by a regulated entity “cannot be justified by establishing countervailing benefits to the market participant or participants or to competition in the market that outweighs the substantial injury or likelihood of substantial injury.” Without greater clarity about this standard, we fear this part of the test would undermine the very intent of this rule, by creating new loopholes and uncertainties that will further undermine USDA’s ability to enforce Section 202(a) of the Act and cause even more confusion in the Courts. The primary focus of the “countervailing benefits” should be on benefits to the market participant or participants alleged to be harmed by the unfair practice.

In addition, we appreciate the historical background in the preamble regarding the history of the relationship between and the Federal Trade Commission Act (FTC Act) and the Packers and

Stockyards Act (PSA), which helps to explain why USDA is recommending, in proposed § 201.308(a), the use of a 3-part test that closely mirrors one in the FTC Act. However, we recommend that the explanatory text be added to the final rule noting that the FTC Act is primarily focused on consumer protections whereas the PSA's Sections 202(a) and 202(b) are primarily focused on protection of livestock and poultry producers. This distinction is particularly important if USDA retains the language in the final rule regarding "countervailing benefits to… to competition in the market." We will further explain our reasoning on this point below in response to the questions posed by USDA.

If USDA retains the "countervailing benefits" part of the 3-part test in proposed § 201.308(a), there should be clear language to clarify that the burden of proof regarding the countervailing benefits should rest with the regulated entity, not with the protected producer or producers alleging the harm/injury as result of the actions of the regulated entity.

Lastly, we note the exclusion of any reference in the rule to Section 202(b) of the Packers and Stockyards Act. In the preamble to this proposed rule, AMS notes:

> "In 2016, the Department issued an interim final rule that, in relevant part, addressed the scope of section 202(a) and (b) of the P&S Act ("2016 IFR"). The 2016 IFR published what had been issued as the 2010 proposed rule with slight modifications. However, the 2016 IFR reiterated "USDA has consistently taken the position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of predatory intent, competitive injury, or likelihood of competitive injury." (81 FR 92556, 92567; December 20, 2016). The 2016 IFR preamble also stated that "USDA has always understood that an act or practice's effect on competition can be relevant and, in certain circumstances, even dispositive with respect to whether an act or practice violates sections 202(a) and/or (b)."

We agree with the facts of this statement but note that the proposed rule only addresses Section 202(a), which begs the question about whether a protected producer must demonstrate harm or likelihood of harm to competition broadly when alleging an undue preference in violation of PSA Section 202(b). We urge that the agency address this concern in the final rule.

CCAR is pleased to offer more detailed comments in response to the following questions posed by AMS

Question 1. Do the two tests described in this proposed rule appropriately guide enforcement of "unfair practices" under section 202(a) of the P&S Act?

Response: Yes, we agree that the two tests in this proposed rule will be effective in guiding enforcement of "unfair practices" under Section 202(a) of the PSA. However, in response to some of the questions posed below, we recommend that aspects of both tests be clarified.

Question 2. What modifications to the proposed rule would be appropriate to meet the goals of the P&S Act?

Response: In proposed § 201.308(a), the 3-part test holds that "an act by a regulated entity with respect to one or more market participants is an unfair practice for the purposes of section 202(a) of the Packers and Stockyards Act, 1921 as amended and supplemented (7 U.S.C. 192(a)) if the act causes or is likely to cause substantial injury to one or more market participants, which the participant or participants cannot reasonably avoid, and which the regulated entity that has engaged in the act cannot justify by establishing countervailing benefits to the market participant or participants or to competition in the market that outweighs the substantial injury or likelihood of substantial injury."

We support this test, in general. However, we recommend additional explanatory provisions be included in the final rule or its preamble to clarify what constitutes a "countervailing benefit." The primary focus of the "countervailing benefits" should be on benefits to the market participant or participants alleged to be harmed by the unfair practice.

For example, if a regulated entity is using an unfair practice to cut payments to a group of producers in one region where they have monopsony power, to offer higher payments to producers in another region where that are competing for more producers to grow the company's market share, that should not be considered a "countervailing benefit to market participants" that justifies the unfair practice. This "cross-market" shifting of benefits should not considered a valid countervailing benefit under the test laid out in Section § 201.308(a).

Using another example, a protected producer should not be required to prove that the economic magnitude of the harm they suffer individually from the unfair practice exceeds the economic benefit to the regulated entity employing the unfair practice to the market broadly. If a regulated entity employs a practice that unfairly reduces the income of a protected producer by $50,000 annually, but the practice allows the regulated entity to increase their own profit by $55,000 or to reduce market prices broadly by an aggregate of $55,000 annually, those should not be permitted to be used as "countervailing benefits to the market" that justify the use of the unfair practices.

Without further clarification of the "countervailing benefits" part of the test, we fear this part of the test would undermine the very intent of this rule, be creating new loopholes and uncertainties that will further undermine USDA's ability to enforce Section 202(a) of the Act and cause even more confusion in the Courts and for the market participants. We are concerned that the "... countervailing benefits to competition in the market" part of the 3-part test in proposed § 201.308(a) could be particularly challenging to enforce without creating new loopholes that would allow regulated entities to make bogus claims about the necessity of using unfair practices in their dealings with farmers to enable alleged "efficiencies" in the marketplace.

We also urge that the final rule clarify that the burden of proof for a countervailing benefit be on the regulated entity, not the protected producer alleging harm.

In addition, we note the exclusion of any reference in the rule to Section 202(b) of the Packers and Stockyards Act. Specifically, there is no discussion in the rule text about whether a protected producer must demonstrate harm or likelihood of harm to competition broadly when alleging an undue preference in violation of Section 202(b). This seems a glaring omission, given the agency's longstanding legal interpretation that the Packers and Stockyards Act does not require producers to provide harm or likelihood of harm to competition when they are alleging that they have been harmed individually under 202(a) or 202(b) of the Act. The rule focuses exclusively on the unfairness provisions of 202(a), which begs the question about how the agency intends to address 202(b) violations vis-à-vis the harm to competition standard. We urge that the agency address this concern in the final rule.

<u>Question 3.</u> Are the factors described in the proposed rule to contextualize the two tests appropriate? If not, are certain factors more appropriate to one or the other test?

<u>Response:</u> Yes, the factors described in the proposed rule to contextualize the two tests are appropriate, but other factors and examples should be added, such as those discussed in our comments in response to question #2 above.

Question 4. What other relevant factors may be considered in addition to or instead of the current factors?

Response: See response to question #2

Question 5. Should the Department add regulatory text to define legitimate business justifications? If so, who should bear the burden of proof and what constitutes a cognizable justification?

Response: The use of the term "legitimate business reason" in proposed § 201.308(d)(1) requires additional explanation in the final rule, particularly as to what can be considered "legitimate." A regulated entity clearly has business reasons to reduce producer pay, shift risks away from themselves and onto the producers, use deceptive practices to induce producers to make unwise investments that reduce costs to the regulated entity, or use market practices to unfairly gain market power. All these practices have the potential to increase profit to the regulated entity, yet none of these practices should be considered "legitimate." If the agency includes the "legitimate business reason" text in the final rule, it is extremely important to explain and place limits on what will be considered "legitimate" and what will not.

We do not believe that legitimate business justifications should be added to the 3-part test laid out in proposed § 201.308(a).

Question 6. Should the rulemaking consider:

(a) whether the method of competition is so facially unfair that business justifications should not be entertained;

Response: Yes, to reiterate and expand on our comment in response to question number 5 above, a few examples of methods of competition that are "facially unfair" and therefore not be considered "legitimate" business justifications or reasons include:

- A regulated entity's action to lowering grower pay in one region where a regulated entity has monopsony control in order to increase pay to producers in another region in an attempt to gain monopsony control;

- A meatpacker's action to manipulating spot market cattle prices downward through the strategic timing of sale of packer-owned livestock in order to reduce payments to cattle sellers who have signed formula contracts based on spot market prices;

- A regulated entity's action to closing one or more processing plants and refusing to put the plant up for sale in order to short the market and put producers in one region out of business;

- Interference by a regulated entity with a producer's right to sell their livestock or poultry farm operation by communicating that the regulated entity will refuse to offer a production contract to any new owner.

- Limiting, restricting, or denying market participants full and timely access to cattle markets, or giving some ranchers preferential deals without a clear, legitimate justification for doing so. There are many specific examples that should be considered by AMS in this regard, including:

    1. Blackballing or otherwise retaliating against any particular cattle feeder.
    2. Shunning the negotiated cash market during a week (e.g., rule could require that packers purchase each week no less than X% of their annual average weekly cash purchases during the previous three years).
    3. Refusing to make bona fide purchase offers for negotiated cash cattle anytime during a three business-day period each week (to end the current one-hour or so trading window late in the week).
    4. Coercing cattle feeders into entering forward contract arrangements in return for a guarantee of timely market access.
    5. Offering a cash bid for cattle contingent upon an agreement to delay delivery for longer than seven days.
    6. Refusing to unload trucks with cattle for which the price was a delivered price in the order of arrival at the plant (to end practice of granting an unloading preference to trucks delivering imported cattle or cattle from a preferred feeder).
    7. Providing any monetary compensation to any cattle feeder not related to the market value of the cattle at the time of the

purchase transaction (e.g., bonuses for total volume or weight delivered, or for any other reason). This could be worded as any compensation not already reported under the Livestock Mandatory Price Reporting Program at the time the cattle are purchased (e.g., negotiated sales) or delivered (e.g., forward contracts).

8. Providing financing arrangements to some cattle feeders while denying others of the same financing terms.
9. Providing risk-sharing terms to some cattle feeders while denying others of the same risk-sharing terms including but not limited to cost-plus contracts, stop-loss contracts, profit share, loss-share, agreements to pay for feed or feeding, or other arrangements that effectively deflect the financial risk of feeding cattle.
10. Applying differential transportation terms to any cattle feeder (e.g., refusing to purchase F.O.B. live from a cattle feeder when similar terms are offered to other cattle feeders; or perhaps worse, discontinuing all F.O.B. live purchases and requiring all sales to be on a carcass-weight basis where the cattle feeder pays transportation costs.)
11. Refusing to provide written documentation of grade and yield calculations to some cattle feeders when such documentation is provided to others.
12. Applying discounts to carcasses without providing written documentation evincing the factors to which the discounts applied.
13. Applying differential premiums and discounts to carcasses delivered by a cattle feeder when compared to those applied to other cattle feeders.
14. Applying discounts to heavy-weight cattle when those cattle were previously offered to the packer, but the packer had refused to offer a bona fide bid.
15. Discounting cattle for factors that do not affect the value of the resultant beef (e.g., discounting red cattle).
16. Bypassing in-region showlist cattle and transporting out-of-region cattle at a higher/uneconomical cost (to end practice of manipulating the in-region average price to which the packer’s formula cattle are tied).

17. Bypassing in-region showlist cattle in the United States and transporting foreign cattle at an uneconomical cost (to end the practice of manipulating U.S. cattle prices by suppressing demand for domestic cattle with higher-cost imported cattle).
18. Purchasing cattle after the close of mandatory reporting or the Chicago Mercantile Exchange day, on Friday afternoon (to end practice of paying certain feedlots a higher cattle price without contributing to the week's average price or to cattle futures prices to which the packer's formula contracts and forward contracts, respectively, are tied).
19. Shorting the cattle futures market (to end the practice of exercising the packers' dominant position in the cattle futures market to reduce cash and futures cattle prices).
20. Providing exclusive agreements that require a cattle feeder to commit all cattle fed by the feeder to the packer.
21. Refusing to allow cattle feeders to price their forward contracted cattle no earlier than during the week prior to slaughter.
22. Entering into arrangements that have been shown to reduce cattle prices. Such arrangements include: top-of-the-market pricing (TOMP); formula-type contracts that do not include a base price that can be equated to a fixed dollar amount at the time of the agreement; and packer ownership, feeding, or control of cattle for more than 7 days before slaughter.
23. Making public pronouncements of the packer's intent to reduce its weekly slaughter volume when, in fact, the packer's future slaughter volume remains the same (to end the practice of incentivizing cattle feeders to accept a lower price out of fear there may not be sufficient shackle space in the near future).
24. Selling cattle to a competing packer without offering the cattle for sale in a market where other packers can offer a bid.
25. Refusing to purchase cattle during the period leading up to the end of a futures contract month, causing cattle hedged in a futures contract to become overfed, which limits the hedger's options, i.e., the cattle must be sold to a packer and cannot go back on feed. If a hedge fund or the packer shorts the market at the end of the contract month, driving the futures price down the limit, the cattle would have to be delivered to the packer.

26. Manipulating output of competing proteins to manage cattle demand.
27. Requiring cattle feeders to offer the packer a right of first refusal when the cattle feeder is assessing offers from two or more packers.
28. Requiring, as a condition of market access for cattle, that domestic producers incur the costs of certification or verification, such as Beef Quality Assurance certification or third-party production verification based on electronic identification.

(b) whether the party claiming a business justification must show that the asserted justification for the method of competition is legally cognizable, non-pretextual, and narrowly tailored to bring about a benefit while limiting the harm to the competitive process and to market participants; or

> Response: It is hard to imagine any legitimate business justification for a regulated entity using an unfair practice with regard to markets that represents a "collusive, coercive, predatory, restrictive, deceitful or exclusionary method of competition that may negatively affect competitive conditions." However, in the very rare and unexpected event that there is such legitimate justification for such a practice, it should be very narrowly tailored without any clear attempt to deceive market participants or limit their fair access to the market. The burden of proof for such a business justification should be on the regulated entity, with the clear presumption of USDA that there are no legitimate justifications for such actions, except in rare circumstances.

(c) whether the party claiming a justification must show that the claimed benefit occurs in the same market where harm is alleged?

> Response: Yes. Similar to our response to question number 2 above regarding cross-market countervailing benefits, any business justification should be relevant to the regional market where the injury has occurred. If the term "cross-market" is used to mean some segregation or distinction between types of products within one region, or a "production market" versus "consumer market", even these cross-market countervailing benefits or business justifications should not be permissible as excuses for using unfair practices.

Question 7. Does the proposed rule appropriately define what behavior is "reasonably avoidable"? Should this language be delineated more precisely or more broadly or in other ways, and if so, how?

> Response: Yes, while the rule already includes some good explanation of the appropriate application of the term "reasonably avoidable," further explanation is needed. For example, if a live poultry dealer (LPD) operating in an economically depressed region of the country where there are few economic opportunities deceptively offers prospective growers very attractive payment rates and terms that are unlikely to be realized, it should be not considered that the grower could have reasonably avoided entering a business relationship with the regulated entity. Such growers often sign contacts with LPDs assuming that the company is operating in good faith, and for the grower, the deception they experience and its related economic harm, are largely unavoidable.
>
> Similarly, if a protected producer goes deeply into debt to build facilities on their land to service a livestock or poultry production contract with a regulated entity, using their own home and land as collateral, it is very difficult for that producer to extract themselves from contract relationship with facing bankruptcy, even if that contract relationship proves to be deception, abusive, and unfair. The rule should make it clear that growers and producers in this circumstance cannot reasonably avoid the situation.

Question 8. Should AMS provide additional guidance around incipient harms to the market, and if so, should AMS draw from Clayton Act standards, such as whether the effect "may be substantially to lessen competition, or to tend to create a monopoly."

> Response: Yes, the final rule should be clear that unfairness in its incipiency can and should be considered. As noted in the preamble, the Sherman Act, Clayton Act, FTC Act, and PSA all allow for consideration of incipiency. It is far better to stop an unfair practice before it causes harm or injury to a producer or to the market, than to have to address the practice after the harm has already occurred. Providing clarity about what practices are and are not allowed will minimize confusion in the marketplace and reduce litigation seeking to achieve clarity via the Courts. The final rule should make it clear what constitutes a fully articulated harmful practice in order to avoid disparate interpretations and conjecture regarding incipient harm. Examples of such harmful practices include making exclusive deals that consolidate market structure.

Question 9. What benefits would this proposed rule provide for producers or other persons?

Response: Currently, the confusing array of Court rulings regarding the legal requirements for proving a violation of Section 202(a) and (b) of the Packers and Stockyards Act has greatly limited USDA's ability to enforce the Packers and Stockyards Act. This lack of enforcement has resulted in a lack of confidence by protected producers in the ability of USDA to provide the protections envisioned by the Act. This proposed rule, if finalized, will provide greater clarity to all market participants, and to the Courts, in a manner that will enable more robust enforcement of the Act by USDA.

Question 10. What burdens would this proposed rule create for regulated entities?

Response: As it stands, packers and swine contractors are already under scrutiny for practices that operate in bad faith. Refusal to honor contracts, stifling competition, modifying contract terms after delivery, or arbitrarily delaying payment to sellers all create conditions that cannot be reasonably avoided by market participants. This is an opportunity for regulated entities to demonstrate how they are an asset to a fair and competitive market. Regulated entities only stand to benefit from adhering to rules that allow for fair and competitive conditions, as an equitable market is a robust market with ample competition.

Question 11. What is your preferred way to measure countervailing benefits?

Response: This question highlights one of the challenges of using "countervailing benefits," as part of the 3-part test. Specifically, it raises the question about whether those benefits are to be measured based on a quantifiable dollar figure or based on a more qualitative analysis of the egregiousness of the alleged unfair practice relative to the alleged benefits of that practice. Our preference would be that the countervailing benefits be measured using a qualitative analysis, which would allow USDA and the Courts to analyze how industry practices impact individual producers, versus a quantitative comparison, which would make it hard for an individual producer to demonstrate that the harm they have suffered exceeds some marketwide analysis of benefits.

Question 12. Should some things be categorically excluded from consideration as countervailing benefits, such as cross-market balancing?

Response: Yes, as explained in our response to question #2 above, if a regulated entity is using an unfair practice to cut payments to a group of producers in one region where they have monopsony power to offer higher payments to producers in another region where that are competing for more producers to grow the company's market share, that should not be considered a "countervailing benefit to market participants" that justifies the unfair practice. This type of cross-market balancing should not be considered a justifiable countervailing benefit. In addition, many of the practices discussed in our response to question 6(a) should also be considered as practices for which "countervailing benefit" justifications should be allowed.

Question 13. How would you describe conduct that is oppressive?

Response: Conduct that is collusive, coercive, predatory, restrictive, deceitful or uses exclusionary competition methods that may negatively impact competitive conditions.

Question 14. How would this proposed rule affect competitive conditions in the livestock and poultry industries?

Response: Due to severe market consolidation and concentration in the livestock and poultry sectors of our economy, the dominant firms in these markets have been able to use their market power to impose many forms of unfair practices on the farmers providing services and products for those firms. While this rule is not likely to reduce the concentration of those markets, it will likely reduce the ability of those firms to exercise their market power to use unfair and deceptive practices in their dealings with farmers in those markets. In addition, by establishing clear tests for enforcing section 202(a) of the PSA, this rule will likely result in more robust enforcement of the Act by USDA.

Question 15. Should the proposed rule treat private causes of action differently from violations of section 202(a) of the Act when enforced by the Federal Government, and if so, how?

Response: The legal standards that apply to USDA regarding PSA cases should also be the same ones that apply to private causes of action (i.e. private lawsuits on behalf of producers). There is no clear justification for the legal burden to be higher for farmers bringing PSA section 202(a) cases privately versus those cases brought by USDA directly.

Question 16. Would this proposed rule have any other effects on the market or market participants? If so, in what ways should they be addressed?

Response: Ultimately, if a clear legal standard is laid out in the final rule that makes it easier for USDA to enforce the PSA to prohibit unfair practices by regulated entities against protected producers, it will have the effect of deterring regulated entities from using unfair practices that negatively affect market participants or the market more broadly. Having clear rules of the road and an effective cop on the beat will be beneficial to all, including the regulated entities themselves who will have clarity about what business practices are prohibited.

Thank you for consideration of these comments.
Respectfully,

Steven D Etka, Policy Director