

**United States Department of Agriculture Agricultural Marketing Service
October 3, 2022 Rulemaking on the Packers and Stockyards Act of 1921**

**Public Comments of the Attorneys General of Minnesota, California, Illinois, and
Maryland on Document Number AMS-FTPP-21-0045**

January 17, 2023

We, the undersigned Attorneys General, submit these Comments in response to the United States Department of Agriculture Agricultural Marketing Service's (AMS) request for public comment in connection with its October 3, 2022 proposed rulemaking on the Packers and Stockyards Act of 1921 (the "Act") (7 U.S.C. § 181 et seq), 87 FR 60010 (hereinafter, the "Proposed Rule"). Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 Fed. Reg. 60010 (proposed Oct. 3, 2022) (to be codified at 9 C.F.R. pt. 201).

The Proposed Rule prohibits discrimination that may exclude or disadvantage "market-vulnerable individuals." It would identify specific retaliatory practices that would clearly be unjust discrimination under the Act. The rule would support USDA monitoring and enforcement of these prohibitions by requiring certain recordkeeping by regulated entities. The Proposed Rule also intends to specifically identify certain unlawfully deceptive practices that would clearly be violations of the Packers and Stockyards Act.

These comments support the Proposed Rule but question if the definition of market-vulnerable individuals provides sufficient protections to include prejudice faced by small rural farmers, and whether the activities protected from retaliatory conduct address communications between farmers and the regulated entities themselves. The United States Secretary of Agriculture should adopt the Proposed Rule but should consider including specific locality protections under §201.304(a) and revising §201.304(b)(2)(ii) by explicitly including notifications by covered producers to regulated entities of potential contract violations.

The Current State of the Meat Packing and Processing Industries

The past few decades have seen ever increasing consolidation in the livestock, meats, poultry, and live poultry markets. The market share of the four largest beef packing firms has increased from 25% in 1977 to 85% as of 2018. CLAIRE KELLOWAY & SARAH MILLER, FOOD AND POWER: ADDRESSING MONOPOLIZATION IN AMERICA'S FOOD SYSTEM 3 (Open Mkts. Inst., Mar. 2019). In many regions cattle ranchers report that there are as few as two buyers in their market. FOOD & WATER WATCH, HORIZONTAL CONSOLIDATION AND BUYER POWER IN THE BEEF INDUSTRY (Aug. 3, 2010) [hereinafter HORIZONTAL CONSOLIDATION]. Increasingly, although there may be more than one buyer attending a feedlot auction, there may be only one buyer bidding for specific cattle. KELLOWAY & MILLER, at 3. This consolidation allows beef packers to engage in unfair practices that can distort the prices farmers receive for their livestock. HORIZONTAL CONSOLIDATION, at 2. For example, though the cost of ground beef has increased 70% over the past two decades, farmers' share of the retail price for beef has declined 8%. FOOD & WATER WATCH, FACTORY FARM NATION: 2020 EDITION 9 (Apr. 2020).

In the pork industry, the market share of the four largest hog processing firms increased from 33% to 70% from 1976 to 2018. KELLOWAY & MILLER, at 4. While in 1993 more than 80% of hogs were sold on the competitive spot market, that number has fallen to as low as three percent as production contracts and marketing contracts have become the norm. FOOD & WATER WATCH, THE ECONOMIC COST OF FOOD MONOPOLIES: THE HOG BOSSES 3 (May 2022). Production contracts involve processors paying farmers to raise hogs owned by the processors, while in a marketing contract, farmers agree to deliver a set number of hogs on a set date. *Id.* Each involves hog farmers turning over their independence and ability to negotiate between different buyers for a guaranteed income. *Id.* Market domination by hog processors combined with few negotiated hogs on the spot market has given the processors greater leverage and an ability to manipulate the market. *Id.* This has led to a shrink in profit share for farmers. In Iowa, for example, farmers' share per pound of pork sold has dropped two-thirds from 1982 to 2017. *Id.* at 4.

The poultry industry has seen a smaller, but still concerning, rise in market share among the largest four poultry processing firms from 35% in 1986 to 54% in 2018. KELLOWAY & MILLER, at 3. Particularly concerning, however, is that 9 out of 10 broiler chickens are grown through contract farming. TINA L. SAITONE & RICHARD J. SEXTON, CONCENTRATION AND CONSOLIDATION IN THE U.S. FOOD SUPPLY CHAIN: THE LATEST EVIDENCE AND IMPLICATIONS FOR CONSUMERS, FARMERS, AND POLICYMAKERS (Fed. Rsrv. Bank Kan. City, Sep. 25, 2017). Further, half of chicken farmers in the United States work in regions that are dominated by one or two chicken processors. KELLOWAY & MILLER, at 3. High buyer concentration in local markets allows poultry processors to respond punitively to any grower's complaints about their contract. *Id.* This leaves poultry growers no room to negotiate their employment contracts. Dean Zimmerli, *Something Old, Something New: Relying on the Traditional Agricultural Cooperative to Help Farmers Solve the Power Imbalance in Modern Meatpacker Production Contracts*, 24 SAN JOAQUIN AGRIC. L. REV. 59, 68 (2014).

This imbalance in market power between meat packers and processors and farmers has created growing concern over packers and processors abusing their market power, impeding farmer choices, excluding farmers from participating in certain markets, and coercing farmers into inefficient agreements. See Mary K. Hendrickson & Harvey S. James, Jr., *The Ethics of Constrained Choice: How the Industrialization of Agriculture Impacts Farming and Farmer Behavior* 18 J. AGRIC. & ENV'T. ETHICS 269 (2005); see also C. ROBERT TAYLOR, HARVEST CATTLE, SLAUGHTERED MARKETS? (Apr. 27, 2022). For instance, farmers have complained of packers and processors not accepting or paying for cattle with no explanation; having contracts terminated without explanation; and having large capital investment requirements sprung on them years after signing a contract. CAMPAIGN FOR CONTRACT AGRICULTURE REFORM ET AL., TRANSITION RECOMMENDATIONS: ON ISSUES RELATED TO AGRICULTURAL CONCENTRATION AND COMPETITION (USDA, DOJ, FTC, & SBA, Nov. 9, 2020). Packers and processors also retaliate against farmers for challenging these market conditions. Multiple farmers reported they were unwilling to testify about the behavior of packers and processors before Congress out of fear of retaliation, for example. See *An Examination of Price Discrepancies, Transparency, and Alleged Unfair Practices in Cattle Markets: Hearing Before the H. Comm. on Agric.*, 117th Cong. (2022) (statement of Rep. David Scott, Chairman, H. Comm. on Agric.); see also *Cattle Price Discovery and Transparency Act of 2022 and Meat and Poultry Special Investigator Act of 2022: Hearing*

on S.4030 and S.3870 Before the S. Comm. on Agric., Nutrition, and Forestry, 117th Cong. (2022) (statement of Sen. Deborah Fischer).

Racial and ethnic minority farmers are particularly vulnerable, as they account for a small percentage of production contracts. NATIONAL AGRICULTURAL STATISTICS SERVICE, 2017 AGRICULTURE CENSUS (USDA, 2019). Further, Black and Native Hawaiian farmers have lower gross revenue on average than their white counterparts. *Id.* For example, in the past decade two Black farmers in Mississippi alleged that Koch Foods discriminated against them and used its market power to drive them out of business, leading to a USDA investigation that found “evidence of unjust discrimination.” Isaac Arnsdorf, *How a Top Chicken Company Cut Off Black Farmers, One by One*, ProPublica (June 26, 2019 5 AM), <https://www.propublica.org/article/how-a-top-chicken-company-cut-off-black-farmers-one-by-one>. Providing individual farmers greater protections against unjust prejudice, discrimination, and retaliation—along with increased transparency requirements for packers and processors—will promote economic equality among farmers and allow farmers to make informed decisions that are in their best interests.

Current Interpretations of the Packers and Stockyards Act

Farmers across the United States have called for more robust regulation of the meatpacking industry. See Claire Kelloway, *Farmers Speak Out About Meatpacker Mistreatment, Call on USDA for Stronger Protections*, OPEN MKTS. INST. (2019), <https://www.openmarketsinstitute.org/publications/farmers-speak-meatpacker-mistreatment-call-usda-stronger-protections>; see also *Fairness for Farmers: A Farmer’s Union Project*, NAT’L FARMERS UNION, <https://nfu.org/fairness-for-farmers/>. Farmers argue that packers and processors have colluded to pay lower prices to farmers and drive-up prices for consumers. Diana L. Moss & Rob Larew, *Modern Farmer Highlights AAI-NFU Op-Ed: Don’t Stop at Big Tech – We Need to Bust Big Agriculture, Too*, AM. ANTITRUST INST. (February 3, 2021), <https://www.antitrustinstitute.org/work-product/aa-and-national-farmers-union-opinion-dont-stop-at-big-tech-we-need-to-bust-big-agriculture-too/>. They have also alleged that packers and processors use their market power “to drive out marginalized producers or dissidents.” See Kelloway.

Since the Proposed Rule was introduced, it has been applauded by rural and agricultural advocacy organizations and the nation’s leading whistleblower advocacy organization as an important step toward evening the scales between farmers and processors. Laura Zaks, *Release: New USDA Proposed Rule to Give Livestock and Poultry Growers Fair Shake*, NAT’L SUSTAINABLE AGRIC. COAL. (Oct. 3, 2022), <https://sustainableagriculture.net/blog/release-new-usda-proposed-rule-to-give-livestock-and-poultry-growers-fair-shake/>; Amanda Hitt, *Leading Whistleblower Protection Organization Applauds USDA Proposed Rule to Combat Discrimination and Retaliation Against Farmers*, GOV’T ACCOUNTABILITY PROJECT FOOD INTEGRITY CAMPAIGN (Sept. 29, 2022), <https://foodwhistleblower.org/press-release-usda-proposed-rule-discrimination-and-retaliation-against-farmers/>.

Effects of the Current Rulemaking

The Proposed Rule will add Subpart O – Competition and Market Integrity to the Packers and Stockyards Act. The addition of §201.304 will address concerns with undue prejudices or disadvantages and unjust discrimination. Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 Fed. Reg. 60010 at 60,015 (proposed Oct. 3, 2022).

First, §201.304(a) prohibits discriminatory behavior by a regulated entity (swine contractors, live poultry dealers, and packers) towards “market vulnerable individual[s]” or cooperatives. *Id.* at 60,054. A market vulnerable individual is defined by the proposed rule as a person who is, or is perceived by a regulated entity to be, a member of a group subjected to, or at a higher risk of, discrimination due to being a member of that group without regard for their individual qualities. *Id.* This broad definition is preferable to the traditional protected classes definition because it will allow for flexibility both among different markets and as different forms of prejudice and discrimination may develop. The rule could be improved, however, by specifically addressing the vulnerability of small, rural farmers due to their location or production size. Small rural farmers do not have enough (if any) local processors, and preference is given to packer-owned and contract livestock for the limited packing plant capacity that is available. *See* DAN ZIMMERLI & THERSA KEAVENY, LIVESTOCK SURVEY REPORT 4–5 (Reg’l Sustainable Dev. P’ships, May, 2020); *see also* DAVID ANDREWS & TIMOTHY J. KAUTZA, IMPACT OF INDUSTRIAL FARM ANIMAL PRODUCTION ON RURAL COMMUNITIES 11 (Pew Comm’n Indus. Farm Animal Prod., 2008).

Section 201.304(a)(2) lists actions that constitute prejudice or disadvantage toward a market vulnerable individual. 87 Fed. Reg. 60010, at 60,054. The Proposed Rule addresses individual instances of prejudice and discrimination because individually and cumulatively these acts can negatively affect the market. *Id.* at 60,017. Packers and processors should not be able to leverage their market power to injure marginalized farmers while hiding behind claims that they have not injured competition. §201.304(a) is a needed protection against these individual harms.

The Proposed Rule also builds on the Agricultural Fair Practices Act to further protect cooperatives by prohibiting regulated entities from isolating cooperatives through contract termination and preventing cooperatives from accessing the market. *Id.* at 60,025. Cooperatives are vital to helping small farmers meet the large quantities of product packers and processors demand. *Id.* at 60,024. These protections will ensure small farmers can continue to compete in the market. *Id.*

Second, §201.304(b) prohibits regulated entities from retaliating against producers and growers for participating in certain protected activities. *Id.* at 60,054–55. Having protected activities listed is an important step, but the current proposed list may unintentionally leave out farmers raising concerns to the regulated entities themselves. Farmers such as Anthony Grigsby—a rural chicken farmer in Alabama—have documented being subjected to retaliation when they communicate with regulated entities issues such as irregularities in the quality of chicken and feed they receive. *See* Kelloway. Consequently, the USDA should expand §201.304(b)(2)(ii) to include not only a protection for bringing a legal or administrative action by the covered producer against a regulated entity asserting contract rights, but also notification by the covered producer to the

regulated entity of a potential breach of contract to ensure this retaliatory conduct does not slip through the cracks of the Proposed Rule's protections.

The Proposed Rule also lists actions that constitute retaliation. 87 Fed. Reg. 60010, at 60,055. Explicitly stating in the rule that this list is not meant to be exhaustive of actions that would constitute prohibited retaliation avoids any suggestion that the list is meant to be limiting. *Id.* at 60,027.

Section 201.304(c) aims to support compliance with paragraphs (a) and (b) by requiring regulated entities to retain all records relevant to their compliance for no less than five years. *Id.* at 60,055. It includes a list of records that *may* be deemed relevant in §201.304(c)(2). *Id.* Access to these retained records will be vital to assist the AMS in assessing industry practice, market standards, and individual compliance with the proposed rules. *Id.* at 60,029.

Section 201.306 focuses on prohibiting regulated entities from engaging in specific deceptive practices in “any matter related to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry.” *Id.* at 60,055. The prohibition on deceptive practices relates to (1) contract formation; (2) contract performance; (3) contract termination; and (4) contract refusal. *Id.* §201.306 is broader than the proposed Transparency in Poultry Growing Contracting and Tournaments rule because it also addresses deception in hog and cattle markets, and it focuses on general circumstances that may give rise to regulated entities providing false or misleading information. *Id.* at 60,032. The Proposed Rule will serve the important purpose of establishing a clearer duty on regulated entities of honesty and market integrity. *Id.*

Conclusion

The Proposed Rule will provide greater individual protection to farmers, particularly those who are part of groups who face a higher risk of discrimination based on their identities, from discrimination, prejudice, and retaliation. Additionally, the Proposed Rule would foster greater honesty and integrity in the market by prohibiting specific deceptive practices by packers and processors.

As such, we, the undersigned Attorneys General, support adoption of the Proposed Rule. We further recommend that the Proposed Rule should be strengthened by revising §201.304(a) to address the market vulnerability of small rural farmers and revising §201.304(b)(2)(ii) to explicitly include a protection for covered producers notifying regulated entities of potential contact violations.

Respectfully Submitted,



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