United States Department of Agriculture Agricultural Marketing Service
January 13, 2020 Rulemaking on Packers and Stockyards Act of 1921

Public Comments of the Attorneys General of Minnesota, California, the District of Columbia, Illinois, Iowa, Nevada, New Mexico, and Virginia on Document Number 2020-00152, 85 FR 1771

March 13, 2020

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 January 13, 2020 proposed rulemaking on the Packers and Stockyards Act of 1921 (the Act) (7 U.S.C. § 181 *et seq*), 85 FR 1771 (hereinafter, the "Proposed Rule"). The Proposed Rule overall establishes criteria that the United States Secretary of Agriculture (the Secretary) would use when evaluating whether a business has violated the Act by conferring an undue or unreasonable preference or advantage. These comments oppose § 201.211(d) of the Proposed Rule, which asks the Secretary to consider whether a preference or advantage cannot be justified as a reasonable business decision that would be customary in the industry. This provision would allow the Secretary to permit anticompetitive behavior of the type the Act was intended to prevent. The Secretary should, *at a minimum*, decline to adopt § 201.211(d), and instead adopt stronger rules that would actually fulfill Congress' intent to curb anticompetitive practices.

Origins of the Packers and Stockyards Act

The Act came about in the wake of a Federal Trade Commission (FTC) report demonstrating abuses of the considerable market power held by five major packing companies. These companies had "attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortune of their competitors in their hands."

in response to the FTC's report. The Act was designed as an antitrust statute meant to "

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specifically in 7 U.S.C. § 192(b), prohibits any packer, swine contractor, or live poultry dealer from giving "any undue or unreasonable preference or advantage" to any person or locality.

The Current State of the Industry

Despite the FTC's well-founded alarm in 1919, the industry has become even more consolidated in the intervening century. There are now four major meat processing companies (also known as "integrators"): Cargill, Smithfield, JBS, and Tyson. These companies together control well over 50 percent of the market in the United States for beef, pork, and chicken (including 84 percent of the market for beef). There have been strong allegations of price-fixing within the poultry industry for years, with the federal Department of Justice even intervening in a class-action price-fixing lawsuit last year. David Yaffe-Bellany, *Why Chicken Producers are Under Investigation for Price Fixing*, N.Y. Times (June 25, 2019). These and many other anticompetitive practices could evade sanction under the Proposed Rule, simply because they are 'customary in the industry.'

As another example, production contracts are extremely common in the poultry industry. Under these contracts, meat integrators own the birds, as well as supply the bird-growers with medication and feed. The growers provide the care, labor, and housing until the birds are large enough to market. This requires the bird-growers to invest in a significant amount of capital, and when contracts run out, the growers may be forced to accept a far lower rate of return than what was expected. The bird-growers are often unable to pit suppliers against each other in contract negotiations, because industry concentration means only one or two integrators are available in their area. Integrators can also demand that growers install additional assets, then refuse to compensate the growers for these assets once they are installed, while still insisting on a lower price for the product due to the efficiencies these new assets create. This is referred to as a "hold-up" risk, and its likelihood rises as market concentration grows. As this is both a common industry practice and a reasonable business decision for the integrators, the Proposed Rule would permit this anticompetitive conduct.

Current Interpretations of the Packers and Stockyards Act

The USDA has long stated that proof of harm or likely harm to competition was *not* required to prove a violation of the Act. Unfortunately, many courts have held that, because the USDA's interpretation was not an actual *rulemaking*, it was entitled to minimal to no deference. These courts proceeded to disagree with the USDA and find that proof of harm or likely harm to competition *was* necessary to prove a violation. *See, e.g.*, savings, (b) the basis of meeting a competitor's prices, or (c) the basis of meeting other terms offered by a competitor. These provisions all look to legitimate business justifications for granting preferences. Section 201.211(d) of the Proposed Rule, on the other hand, asks only if the conduct is a 'reasonable business decision' that is 'customary within the industry,' without any consideration of whether the 'customary' practice is legitimate or lawful.

As a result, in its current form, section 201.211(d) of the Proposed Rule has the potential to overwhelm the rest of section 201.211. Anticompetitive behavior is nearly always motivated by profit, making it almost definitionally a 'reasonable business decision' from the perspective of the anticompetitive actor. Moreover, when corporate consolidation and other problematic tactics are common within the industry, this rule would allow them to continue. Congress passed the Act to reign in an industry where the parade of problematic conduct described in the 1919 FTC report had become standard. The goal was to fix things, not keep them as they were. This rulemaking, by contrast, seeks to preserve the existing anticompetitive status quo.

Alternatives to the Proposed Rule

Simply removing section 201.211(d) from the Proposed Rule would be a significant positive improvement, and would preserve the ability to prosecute the worst offenses. It would, however, also preserve the current regulatory environment, in which aggrieved parties—despite the plain language of 7 U.S.C. § 192(a) and (b)—bear the considerable burden of proving actual or likely competitive harm. Instead, the Secretary should adopt a rule similar to the prior attempts at rulemaking, which USDA eventually abandoned. *See* 81 FR 92703 (December 20, 2016); 81 FR 92566 (December 20, 2016).

Specifically, 81 FR 92566 would have formally established that proof of actual or likely competitive harm is not needed for violations of § 192(a) and (b). 81 FR 92703, published the same day, would have done four things: created a non-exclusive list of "per se" violations of the Act (such as attempted delays of payment), created a second list of conduct which violates the act absent demonstration of a legitimate business justification, established that any conduct which harms or likely harms competition is a violation of the Act, and created a different list of criteria for evaluating violations of § 192(b).

These proposed rules would have done much to address the current competitive imbalance in the market. Meat integrators have far more power than growers, allowing them to effectively hold growers hostage unless they agree to financially advantageous (advantageous to the integrator, that is) terms. The list of "per se" violations and list of likely violations would prohibit much of the harmful conduct described above, including proposed § 201.210(b)(5) of 81 FR 92703, which would explicitly prohibit the cause of "hold-up" behavior.

81 FR 92703 would also provide more specific, grounded criteria for evaluating violations of § 192(b), including whether a grower is treated fairly as compared to other similarly situated growers who have engaged in lawful assertion of their rights, or is treated differently due to arbitrary reasons unrelated to the grower's livestock or poultry operation.

Rulemakings such as these would help to preserve competition and fairness within the industry. 85 FR 1771 would do the opposite, and therefore we oppose its adoption.

Respectfully Submitted,

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