

## **The Department of Agriculture Must Strengthen the Packers and Stockyards Act to Protect Farmers and Ranchers from Abusive Meatpacker Monopolies**

The Open Markets Institute\* (OMI) welcomes the opportunity to offer its perspective on the United States Department of Agriculture's (USDA) proposed rule regarding undue and unreasonable preferences and advantages under the Packers and Stockyards Act (PSA).

The PSA is a vital statute that protects farmers and ranchers from abuse by monopolistic processors. Almost exactly one century ago, Congress passed the law to establish fair terms of trade in livestock and poultry markets. The PSA proved very successful: In 1916, the top five meatpackers controlled 70% of the market, but in 1976 the top four controlled just 26% of the beef market, for instance.<sup>1</sup> Unfortunately, the federal courts have reinterpreted this statute in ways that run contrary to its plain text and the legislative intent of Congress, undermining key farmer protections. But the USDA's proposed rule, rather than correct this dangerous rewriting of the law, threatens to weaken the PSA even further. It does so by accepting poor legal precedent, particularly the need for individual farmers to prove that an action by a meatpacker harmed not only the farmer but harmed competition across the farmers' entire industry. The proposed rule by the USDA also introduces vague criteria that could codify abusive industry practices as long as corporations can make the case that such practices are "customary in the industry."<sup>2</sup>

For these reasons, OMI strongly opposes the proposed rule and encourages the USDA to maintain its long-held position that farmers do not need to prove a harm to industry-wide

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\* The Open Markets Institute is a nonprofit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, journalists, and other members of the public.

<sup>1</sup> Patty Judge & Aaron Belkin, *The Supreme Court Has Undermined Iowa's Small Farms and Rural Communities*, TAKE BACK CT. (January 2020),

<https://static1.squarespace.com/static/5ce33e8da6bbec0001ea9543/t/5e31a3c842c06a4f5c4a1340/1580311498813/Supreme+Court+Has+Undermined+Iowa%27s+Small+Farms.pdf>.

<sup>2</sup> Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, 85 Fed. Reg. 1771 (Jan. 13, 2020) [hereinafter USDA Proposed Rule], <https://www.federalregister.gov/documents/2020/01/13/2020-00152/undue-and-unreasonable-preferences-and-advantages-under-the-packers-and-stockyards-act>.

competition in order to seek justice under the PSA. OMI also asserts that USDA has the authority to issue rules on PSA enforcement that may conflict with court precedent, under the Supreme Court doctrine of *Chevron* deference.

As Section 1 of this comment illustrates, due to the ambiguous language of the PSA and the authority delegated to the USDA by Congress,<sup>3</sup> the USDA has both express delegation and a strong claim to *Chevron* deference to issue new PSA rules, despite USDA and appellate court arguments otherwise.<sup>4</sup> By shirking this responsibility and bowing to the courts, USDA could set a precedent that dangerously undermines its own policymaking power and codifies judicial overreach that clearly contradicts the will of Congress and the American people.

OMI argues in Section 2 that, beyond validating poor court rulings, these proposed rules pose a considerable threat to farmers by dramatically reframing the standards of a PSA violation. Rather than define which actions constitute an undue or unreasonable preference, the proposed rule outlines industry-friendly criteria that meatpackers can use to justify actions that violate the intent of the law.

## **I. USDA Has Clear Authority to Issue New Rules Clarifying Enforcement of the Packers and Stockyards Act and Challenge Poor Legal Precedent**

In 2016, the USDA justified repealing the Farmer Fair Practices interim final rules on the grounds that they conflicted with court precedent and would generate litigation that “serves neither the interests of the livestock and poultry industries nor GIPSA.”<sup>5</sup> Analogously, the USDA states in this proposed PSA rule that it “does not intend to create criteria that conflict with case precedent.”<sup>6</sup> This represents a troubling abdication of agency authority to judicial overreach

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<sup>3</sup> 7 U.S.C. § 228(a) (“The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter[.]”).

<sup>4</sup> Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48594 (Oct. 18, 2017) [hereinafter Scope of PSA], <https://www.federalregister.gov/documents/2017/10/18/2017-22593/scope-of-sections-202a-and-b-of-the-packers-and-stockyards-act>; *see also* Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355 (5th Cir. 2009); London v. Fieldale Farms Corp., 410 F.3d 1295 (11th Cir. 2005).

<sup>5</sup> The USDA has asserted this justification at least twice. *See* Scope of PSA, 82 Fed. Reg. 48594; *see also* Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, 82 Fed. Reg. 48603 (Oct. 18, 2017) [hereinafter Violations of PSA], <https://www.federalregister.gov/documents/2017/10/18/2017-22588/unfair-practices-and-undue-preferences-in-violation-of-the-packers-and-stockyards-act>.

<sup>6</sup> USDA Proposed Rule, 85 Fed. Reg. at 1772.

in reinterpreting the PSA. The USDA has clear authority to interpret the PSA, including *Chevron* deference to promulgate rules that may conflict with court precedent.

The plain text and legislative history of the PSA delegate to the USDA a broad authority to combat both anti-competitive tactics and unfair dealing under the act. During debate on the original bill, Rep. Samuel Rayburn said about the PSA that “[Congress] gave the Federal Trade Commission wide powers, but not as wide as they give the Secretary of Agriculture under this bill”.<sup>7</sup> These powers include rule-making, as stated in Section 228 of the statute: “the Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter.”<sup>8</sup> Further, Congress reasserted this power in Section 11006 of the Food, Conservation, and Energy Act of 2008<sup>9</sup> when it directed the secretary of agriculture to establish new criteria for determining whether meatpackers gave a farmer an undue or unreasonable preference, whether mandatory additional capital investments for pork and poultry growers by dominant companies violate the PSA, and whether poultry dealers provide growers sufficient notice before suspending delivery of birds or terminating a contract.<sup>10</sup>

OMI argues that USDA is entitled, in addition to this express delegation from Congress, to *Chevron* deference to promulgate rules regarding enforcement of the PSA. In other words, the courts must defer to the rule-making authority of USDA in this instance. The Supreme Court established *Chevron* deference in its landmark and unanimous opinion in *Chevron v. Natural Resources Defense Council*.<sup>11</sup> *Chevron* deference provides a framework for determining when judicial deference to an administrative agency’s interpretation of a statute is appropriate and warranted. First, the court must determine “whether Congress has directly spoken to the precise question at issue.”<sup>12</sup> If the “intent of Congress is clear, that is the end of the matter.”<sup>13</sup> If Congress has not so spoken, however, and the statute is “silent or ambiguous” as to the precise

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<sup>7</sup> 61 CONG. REC. 1806 (1921).

<sup>8</sup> 7 U.S.C. § 228(a).

<sup>9</sup> Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651. This act is also referred to as the Farm Bill.

<sup>10</sup> *Id.* at § 11006.

<sup>11</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>12</sup> *Id.* at 842.

<sup>13</sup> *Id.*

question, then a court must engage in the second part of the *Chevron* inquiry—namely, whether an agency’s interpretation is a “permissible construction of the statute.”<sup>14</sup>

Subsequent Supreme Court cases such as *National Cable & Telecommunications Ass’n v. Brand X* affirm this stance.<sup>15</sup> In *Brand X*, Justice Thomas concurred that “judicial precedent [cannot] foreclose an agency from interpreting an ambiguous statute, as ... *Chevron*’s premise is that it is for agencies, not courts, to fill statutory gaps.”<sup>16</sup>

The PSA includes ambiguous terms such as “unfair,” “undue,” and “unreasonable.”<sup>17</sup> However, some courts have claimed those terms are unambiguous, thus precluding any contradictory agency interpretation (a so-called “*Chevron* Step One” analysis).<sup>18</sup> OMI disagrees with the current judicial precedent, which appears to contravene a Supreme Court ruling. These terms are clearly, if not intentionally,<sup>19</sup> broad and ambiguous. When interpreting the Federal Trade Commission (FTC) Act,<sup>20</sup> for instance, the Supreme Court found in *FTC v. Ind. Fed. of Dentists* that the standard of “unfairness” is “by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons[.]”<sup>21</sup> In this same vein, it is clear that Congress gave the USDA broad authority, by including these terms and express rule-making power in the text of the statute, to set future rules and criteria further defining wrongdoings and exploitative practices in the livestock industry that violate the PSA. It is ridiculous to claim that these terms have clear meanings.

One court has denied the USDA *Chevron* deference regarding the PSA also under a faulty analysis of *United States v. Mead*. *Mead* affirmed that agencies obtain *Chevron* deference if Congress conferred an agency “power to engage in adjudication *or* notice-and-comment rule-

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<sup>14</sup> *Id.*

<sup>15</sup> Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs. (*Brand X*), 545 U.S. 967 (2005).

<sup>16</sup> *Id.* at 982–83.

<sup>17</sup> 7 U.S.C. § 202(a)–(b)

<sup>18</sup> *Wheeler*, 591 F.3d at 373 n.3.

<sup>19</sup> See *infra* Section 1. See also S. REP. NO. 66-429, at 3 (1920); H.R. REP. NO. 66-1297, at 11 (1921); H.R. REP. NO. 67-77, at 2 (1921); 61 CONG. REC. 1806 (1921).

<sup>20</sup> 15 U.S.C. § 45.

<sup>21</sup> F.T.C. v. Indiana Fed’n of Dentists, 476 U.S. 447, 454 (1986).

making,”<sup>22</sup> the latter of which the PSA clearly grants USDA. Indeed, Justice Breyer reaffirmed this interpretation of *Mead* in his *National Cable & Telecommunications Ass’n v. Brand X* concurrence.<sup>23</sup> However, in *London v. Fieldale*,<sup>24</sup> the Eleventh Circuit claimed that under a *Mead* analysis, the USDA does warrant *Chevron* deference because the PSA confers no authority to the USDA to adjudicate alleged violations of Section 202 of the PSA by poultry growers specifically.<sup>25</sup> The Eleventh Circuit’s holding is a blatant misreading of *Mead*.

With the support of legislative history and Supreme Court precedent, OMI takes issue with previous appellate decisions and believes that the USDA should not heed them. The USDA has long held that proof of competitive injury is not necessary to violate the PSA,<sup>26</sup> and both the agency and the Department of Justice (DOJ) have submitted several *amicus* briefs in support of this interpretation.<sup>27</sup> USDA should maintain this interpretation in issuing PSA rules.

The USDA should assert its rule-making authority both for the sake of farmers and ranchers seeking justice against corporate abuse, but also for the sake of larger precedent. Disowning this authority could have long-term ramifications for the future of the PSA and other agency rule-making that may conflict with these troubling court precedents. Agencies have industry-specific knowledge that makes them better suited than the courts to oversee and guide enforcement of relevant statutes.<sup>28</sup> Through public comment periods and executive appointments, the USDA is also a more publicly accountable body than the courts. For these reasons, it is critical to keep decision-making authority within agencies. The courts have a long history of reinterpreting and rewriting antitrust and fair dealing statutes in a way that ignores congressional intent and often

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<sup>22</sup> *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (emphasis added).

<sup>23</sup> *Brand X*, 545 U.S. at 1003 (2005) (Breyer, J. concurring).

<sup>24</sup> *London*, 410 F.3d 1295.

<sup>25</sup> *Id.* at 1304.

<sup>26</sup> *See e.g.*, Scope of PSA, 82 Fed. Reg. at 48596 n.1 (citing several cases).

<sup>27</sup> *Id.* at 48596 n.2 (citing a couple of briefs authored by the U.S. government).

<sup>28</sup> In his opinion, Justice Stevens wrote, “Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices[.]” *Chevron*, 467 U.S. at 865.

benefits corporate actors.<sup>29</sup> For the sake of the PSA and the protections of farmers more broadly, the USDA must stand up to problematic court precedents.

## II. Proposed Rules Leave Farmers Exposed and Could Codify Abusive Practices

To revive the PSA to its full intent, the USDA must issue rules that affirm its long-held stance that farmers do not need to prove that an action by a meatpacker harmed industry-wide competition, in order to pursue a PSA violation. USDA's current proposal ignores this critical clarification and leaves farmers unable to challenge meatpacker abuses. Worse still, these rules reframe the standards for undue and unreasonable preferences in industry terms. Together, these critical omissions and troubling changes leave farmers without a means to challenge meatpacker mistreatment and give meatpackers more leeway to justify discriminatory practices.

Congress enacted the PSA in 1921 to combat the harms of corporate consolidation and prohibit unfair and deceptive trade practices in the livestock industry.<sup>30</sup> At the time of the enactment of the PSA, the five largest meatpackers controlled between 61 to 86% of the meat industry.<sup>31</sup> Today, the top four meatpackers control between 51 to 85% of their respective markets, in part because the courts have gutted the USDA's ability to enforce the PSA and farmers' ability to pursue claims under the PSA.<sup>32</sup>

As previously discussed, Congress enacted the PSA to widely prohibit dominant meatpackers from engaging in unfair or deceptive practices, attempts to monopolize, *and* market manipulation. The act gave substantial power to the USDA to challenge horizontal and vertical

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<sup>29</sup> See generally, Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. 479 (2019). Antitrust conduct also increasingly governed by the rule of reasons, which benefits defendants. See Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) (stating "Courts dispose of 97% of cases at the first stage [of the rule of reason], on the grounds that there is no anticompetitive effect.").

<sup>30</sup> In a report from the Committee on Agriculture preceding the enactment of the PSA, Rep. Gilbert Haugen, the sponsor of the bill, wrote that "the evils of the packing industry are not so much isolated instances of unfairness, as a general course of action for the purpose of destroying competition, and the bill should be broad enough to secure proper control of the packer in all his dealings." H.R. REP. NO. 66-1297, at 11 (1921).

<sup>31</sup> FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT PACKING INDUSTRY (1919).

<sup>32</sup> See Claire Kelloway & Sarah Miller, *Food and Power: Addressing Monopolization in America's Food System*, OPEN MARKETS INST. (Mar. 2019), [https://openmarketsinstitute.org/wp-content/uploads/2019/05/190322\\_MonopolyFoodReport-v7.pdf](https://openmarketsinstitute.org/wp-content/uploads/2019/05/190322_MonopolyFoodReport-v7.pdf).

integration in the livestock industry, anti-competitive conduct, and unjustly discriminatory tactics.<sup>33</sup> In the legislative debate surrounding the PSA’s passage, Rep. Gilbert Haugen, the sponsor of the bill, wrote that the act “should be broad enough to secure proper control of the packer in all his dealings.”<sup>34</sup>

However, since the 1960s, courts have claimed that the PSA was narrowly passed to preserve market competition, and thus only actions by packers that caused harm to competition or cause competitive injury count as violations. To make matters worse, courts have ruled that this competitive injury must be industry-wide, so courts can claim that it does not violate the PSA even when a farmer can prove that a packer harmed the farmer personally, unless that action lessened industry-wide competition.<sup>35</sup> This troubling precedent is built on questionable judicial overreach and novel interpretations of the statute. One of the first cases to claim that an action could not violate the PSA “absent some predatory intent or some likelihood of competitive injury” was *Armour & Co. v. United States* in 1968.<sup>36</sup> In their justification, the Seventh Circuit did not point to any circuit cases that required this burden of proof. In their opinion, the Seventh Circuit only cited “case law and legislative history[.]”<sup>37</sup> The Seventh Circuit claimed that the court had grounds to interpret the law because language such as “unfair” was overly broad (ironic, considering that subsequent decisions would deny the USDA its *Chevron* deference by arguing that the term was unambiguous). Finally, the Seventh Circuit grossly misrepresented a hypothetical contemplation in a previous opinion,<sup>38</sup> which had reasoned that proof of competitive injury *could* violate the PSA, extrapolating this hypothetical supposition to claim proof of competitive injury was *necessary* to violate the PSA. Such an interpretation was unprecedented and grounded in a logical fallacy, yet future courts could cite this decision as grounds for further limiting the claims that could qualify as violations of the PSA.<sup>39</sup>

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<sup>33</sup> The plain text of the statute enumerates “unfair”, “deceptive”, and “unjustly discriminatory” practices as separate from (and additional to) “monopolistic” practices, and seems to suggest that members of the 85th Congress, in amending the PSA pursuant to this understanding, understood the Act as intended to cover more than anti-competitive practices. 7 U.S.C. § 192(a).

<sup>34</sup> H.R. REP. NO. 66-1297, at 11 (1921).

<sup>35</sup> Judge & Belkin, *supra* note 1

<sup>36</sup> *Armour & Co. v. United States*, 402 F.2d 712, 717 (7th Cir. 1968); *see also* Judge & Belkin, *supra* note 1, at 8.

<sup>37</sup> *Armour*, 402 F.2d at 717–23; *see also* Judge & Belkin, *supra* note 1, at 8.

<sup>38</sup> *Swift & Co. v. Wallace*, 105 F.2d 848, 862 (7th Cir. 1939).

<sup>39</sup> *See e.g., Wheeler*, 591 F.3d 355; *Been v. O.K. Indus., Inc.*, 495 F.3d 1217 (10th Cir. 2007).

Beyond the analysis limiting competitive injury, courts have also denied PSA’s congressional intent to address unfair livestock markets, by carving out abusive contract terms from PSA’s purview.<sup>40</sup> Courts maintain that farmers have freedom to negotiate contracts, so the PSA cannot be used against unfair contract terms.<sup>41</sup> However, this overlooks the power imbalance in livestock markets that leaves farmers with virtually no real ability to negotiate contract terms, a dynamic the PSA was created to address.

By refusing to assert that farmers do not need to prove competitive injury, and by accepting problematic court precedents surrounding the PSA, this proposed rule leaves the act largely unenforceable for individual farmers and ranchers.<sup>42</sup> In addition to what this proposed rule ignores and excludes, the proposed rule introduces new, troubling language that could further erode farmers’ ability to challenge meatpackers’ unfair treatment or undue preferences.

The proposed rule establishes new criteria for the secretary to determine whether a potentially undue or unreasonable preference violates the PSA. This proposal reverses the frame of reference from clearly defining actions that qualify as an undue or unreasonable preference to establishing four conditions under which unequal treatment could be justified. This shift largely favors potential violators by framing violations in terms of what corporate packers can reasonably justify rather than what actions constitute unfair treatment to farmers. In other words, rather than approaching actions from the perspective of vulnerable farmers, the proposed rule privileges the point of view of powerful packers.

The four criteria proposed by the USDA create substantial openings for packers to codify abusive practices into law. Any action that can be justified on the basis of “cost savings related to dealing with different producers, sellers, or growers ... meeting a competitor’s prices ... meeting other terms offered by a competitor” or that can be justified “as a reasonable business decision that would be customary in the industry” would not violate the PSA, under these proposed criteria.<sup>43</sup> This language is vague and creates incentives for industry collusion.

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<sup>40</sup> *Mahon v. Stowers*, 416 U.S. 100 (1974); *IBP, Inc. v. Glickman*, 187 F.3d 974 (8th Cir. 1999).

<sup>41</sup> *Mahon*, 416 U.S. 100; *IBP*, 187 F.3d 974.

<sup>42</sup> Judge & Belkin, *supra* note 1.

<sup>43</sup> USDA Proposed Rule, 85 Fed. Reg. at 1772.



The final criterion in particular suggests that, as long as a business practice is “customary in the industry,” then it is permissible. This condition encourages meatpackers to universally adopt discriminatory or unfair practices so that they become “customary in the industry.” Furthermore, many actions that could be considered an undue or unreasonable preference are already well-documented and customary in contract livestock production.<sup>44</sup> Poultry integrators, for instance, control the main factors of contract growers’ success by dictating the type of chicken house and equipment they must invest in and delivering farmers their chicks, feed, and medicines. A report by the U.S. Small Business Administration inspector general found that poultry integrators’ control over contract growers “overcame practically all of a grower’s ability to operate their business independent of integrator mandates,” thus disqualifying contract poultry growers as small businesses eligible for SBA loans.<sup>45</sup> Poultry growers have also testified that integrators will pick winners and losers by sending some farmers better chicks than others, or delivering improper or insufficient feed.<sup>46</sup> These undue or unreasonable disadvantages often fall on growers who have raised concerns with the company or spoken out against unfair treatment. A 2019 investigation by *ProPublica* also documented how poultry corporations systemically favored white growers over African American farmers, requiring African American farmers to invest in costly farm upgrades not required of similarly situated white farmers.<sup>47</sup>

The interim Farmer Fair Practices rules of 2016 clarified that treating a farmer or contract grower more favorably “on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status” violated the PSA.<sup>48</sup> The interim final rules also made clear that livestock corporations could not disadvantage growers who “have

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<sup>44</sup> UNITED STATES DEP’T OF JUSTICE & UNITED STATES DEP’T OF AGRIC., PUBLIC WORKSHOPS EXPLORING COMPETITION IN AGRICULTURE (2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf>; UNITED STATES DEP’T OF AGRIC., RURAL COOPERATIVES: ADDING VALUE TO MEMBER’S CROPS (July/August 2002), <https://www.rd.usda.gov/sites/default/files/CoopMag-jul02.pdf>.

<sup>45</sup> UNITED STATES SMALL BUS. ADMIN., REPORT NO. 18-13, EVALUATION OF SBA 7(A) LOANS MADE TO POULTRY FARMERS (2018), [https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report-18-13\\_0.pdf](https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report-18-13_0.pdf).

<sup>46</sup> Claire Kelloway, *Farmers Speak Out About Meatpucker Mistreatment, Call on USDA for Stronger Protections*, FOOD & POWER (July 18, 2019), <http://www.foodandpower.net/2019/07/18/livestock-farmers-speak-out-about-meatpucker-mistreatment-call-on-usda-for-stronger-protections/>.

<sup>47</sup> Isaac Arnsdorf, *How a Top Chicken Company Cut Off Black Farmers, One by One*, PROPUBLICA (June 26, 2019 5:00 AM), <https://www.propublica.org/article/how-a-top-chicken-company-cut-off-black-farmers-one-by-one>.

<sup>48</sup> Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, 81 Fed. Reg. 92703, 92723 (Dec. 20, 2016) (section 201.211(d)), <https://www.federalregister.gov/documents/2016/12/20/2016-30430/unfair-practices-and-undue-preferences-in-violation-of-the-packers-and-stockyards-act>.

engaged in lawful communication, association, or assertion of their rights.” These proposed rules make no such specifications and leave room for discrimination and retaliation against growers to continue.

As another example, payment systems such as the tournament system<sup>49</sup> are customary throughout the industry but penalize the very contract growers experiencing unreasonable treatment. The tournament system compares how efficiently growers raised their chickens and doles out bonuses to top-performing farmers by docking the pay of those who rank at the bottom. However, growing efficiency can be wholly determined by the integrators themselves, based on the inputs farmers receive, so this payment system arguably gives massive, undue financial advantages to some farmers over others. Furthermore, as a common industry practice, it would remain entirely legal under this proposed rule. Rules proposed in 2010 for PSA enforcement attempted to provide greater clarity for opaque and discriminatory payment systems by requiring “that packers, live poultry dealers, and swine contractors maintain records justifying differences in prices” paid to farmers. This rule neither requires this transparency and justification, nor does it take any steps to clearly define and prohibit payment systems that bake in such unreasonable preferences.

## **Conclusion**

Given the staggering levels of consolidation and corporate control in the livestock industry, ranchers and contract growers need the Packers and Stockyards Act revived to its full intent. During the past decade, hundreds of farmers took the risk to speak up about the intimidation, retaliation, and corporate abuse that they suffer from dominant meatpackers; they did so in hopes of reviving the PSA, and many farmers faced retaliation for expressing themselves.<sup>50</sup> Farmers waited for years while Congress passed riders preventing the implementation of strong new PSA rules in 2010, only to have those rules weakened in 2016 and

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<sup>49</sup> The tournament system refers to a payment method in which contract poultry growers are pitted against one another in a performance-based “tournament” that determines their pay. Growers who rank in the bottom half of the tournament receive a dock to their base pay, while growers who rank in the top receive a bonus.

<sup>50</sup> Lina Khan, *Obama’s Game of Chicken*, WASH. MONTHLY (Nov./Dec. 2012), <https://washingtonmonthly.com/magazine/novdec-2012/obamas-game-of-chicken/>.

eventually withdrawn by the USDA in 2017. These proposed rules do not remedy the harms done to farmers during the decades of stunted PSA enforcement. By introducing new, industry-friendly criteria, these proposed rules threaten to leave farmers even more exposed.

Further, by abdicating their rule-making power and deferring to judicial reinterpretations of the PSA, the USDA threatens to set a dangerous precedent that could set back the agency's authority well into the future. The USDA has clear *Chevron* deference to issue rules that reaffirm the congressional intent and plain text of the PSA. Failing to do so could make it difficult to undo the decades of poor court precedents that have gutted farmers' protections under the PSA and allowed meatpackers to intimidate and abuse farmers with impunity. OMI urges the USDA to uphold its long-standing position that harm to industry-wide competition is not necessary to violate the PSA, and to issue new rules that clearly lay out examples of unfair, abusive, and discriminatory conduct, as well as examples of unfair and undue preferences, in line with the 2010 proposed GIPSA rules.<sup>51</sup>

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<sup>51</sup> Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338 (June 22, 2010).