

January 17, 2023

S. Brett Offutt  
Chief Legal Office/Policy Advisor  
Packers and Stockyards Division  
USDA AMS Fair Trade Practices Program  
1400 Independence Avenue SW  
Washington, DC 20250

Submitted to Regulations.gov, Docket AMS-FTPP-21-0045

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

The Open Markets Institute thanks the United States Department of Agriculture (USDA) for proposing a rule that supports and promotes fair competition for contract livestock growers. One of the central purposes of the Packers and Stockyards Act (P&SA) is to protect farmers and ranchers from meatpackers that abuse their market power as supply chain gatekeepers. USDA's proposed rule attempts to expand these protections under the P&SA to prohibit abuse and discrimination based on a farmer's membership in a historically vulnerable group. It also aims to protect farmers from retaliation, which packers often use to prevent farmers from speaking out about mistreatment. Finally, it clarifies different types of corporate deception banned by the P&SA.

USDA has identified a critical gap in P&SA enforcement that must be remedied. On the whole Open Markets applauds and supports this effort and hopes the agency finalizes this rule. However, there are some critical areas where the USDA should add more details to improve the enforceability of this rule. Open Markets' substantive concerns and suggestions for strengthening this proposed rule are reflected in a comment submitted by Food & Water Watch, which Open Markets signed as a joint commenter.

In summary, USDA must ensure that its proposed "market vulnerable individual" standard does not put an onerous burden of proof on covered producers. Most critically, to ensure that farmers can seek justice the USDA must codify its long-held position that covered producers do not need to show harm to industry-wide competition in order to bring a case under the Packers and Stockyards Act. Without this clarification, individual farmers will continue to struggle to bring retaliation and discrimination claims.

In addition to the guidance reflected in our joint comment with Food & Water Watch, the Open Markets Institute recommends the following changes to strengthen USDA's proposed rule on inclusive competition and market integrity under the Packers and Stockyards Act.

- I. To shift recordkeeping burdens, integrators should be required to justify alleged differences in prices paid or received similar to the 2010 proposed GIPSA rule.

The proposed rule attempts to improve integrator recordkeeping to discover and prevent discriminatory practices. However, in courts, regardless of an integrator's recordkeeping process, the burden still lies with farmers to prove that an integrator discriminated against them rather than with an integrator to justify their differences in prices.<sup>1</sup> Instead of merely requiring integrators to keep detailed records, the USDA should also require that regulated entities identify the basis of any differences in prices received or paid.

In 2010, USDA proposed to add a paragraph to § 201.94 of the P&SA requiring that packers, swine contractors, or live poultry dealers justify any differences in prices received or paid to producers.<sup>2</sup> Integrator comments challenging that proposed rule argued that recordkeeping on disparate prices paid or received would create an onerous burden. They also threatened to offer lower universal prices rather than comply with record-keeping requirements.

---

<sup>1</sup> See, e.g. *Been v. O.K. Industries, Inc.*, 495 F.3d 1217 (10th Cir. 2007) (growers brought action against integrator because of alleged unfair practices stemming from integrator control over factors that affect the growers' final pay but were unsuccessful because they could not carry their burden to prove that those unfair practices injured competition).

<sup>2</sup> 75 Fed. Reg. 35338 (June 22, 2010).

However, keeping disparate price justification records is simply good business practice. This requirement could prevent packers and processors from paying bigger producers more simply for being bigger and help reduce undue price discrimination against small producers.

While the proposed rule requires that regulated entities retain records “relevant to its compliance,” the USDA should add that the recordkeeping under rule § 201.304(c) requires integrators to justify price differences received or paid. Increased transparency for integrator practices would only serve to enhance competition in the marketplace and put farmers on a more level playing field.

- II. Covered communications should not be limited to government agencies. Lawful communication with media outlets and farmer support organizations should also be protected.

The USDA aims to protect lawful communications between farmers and government agencies or “other persons” involved in the business relationship or proceedings under the P&SA. These protections intend to prevent retaliation against producers for speaking out against integrators, but they do not go far enough to protect covered producers.

When farmers cannot get justice through the government for integrator abuse, they should be able to bring attention to that abuse through journalist investigations, private litigation, or public speech without fearing retaliatory measures. Integrator threats of retaliation chill many farmers’ intent to speak out because they justifiably fear contract termination.<sup>3</sup> Should an integrator terminate or take other adverse action against a grower who speaks to a journalist, lawyer, or farmer advocate in a whistleblower capacity, then that termination should constitute retaliation under the proposed rule. Identifying and publicizing abusive treatment against growers will only increase industry transparency and support market integrity.

Thus, in addition to communications with government agencies, the proposed rule should expand qualified “covered” communications to include speaking with journalists or media outlets, self-publishing on social media, and seeking advice from any organizations associated with promoting producer or animal welfare. The USDA should provide a non-exhaustive list under which a farmer’s communications would be considered covered. This list should include veterinarians, journalists, legal aid organizations, legal animal defense organizations, environmental protection organizations, producers’ rights organizations, unions, and other entities in addition to those outlined by the proposed rule.

---

<sup>3</sup> “What You Should Know About Retaliation Toward Farmer Truth-Tellers,” <https://foodwhistleblower.org/retaliation/>