June 9, 2009

The Honorable Tom Vilsack
Secretary of Agriculture
200-A Jamie L Whitten Building
1400 Independence Avenue, SW
Washington, DC 20250

Dear Secretary Vilsack,

We are writing to thank you for sending a clear signal that the directed rulemakings in the Livestock Title of the 2008 Farm Bill will be adopted as final rules before the end of this calendar year and to forward to you our views on the direction those rules should take.

We urge you to swiftly write regulations pursuant to the mandate of Section 11006 of the 2008 Farm Bill establishing the criteria the agency will use to determine whether the actions of packers, swine contractors, and live poultry dealers constitute "**undue or unreasonable preference or advantage**" in violation of the Packers and Stockyards Act prohibition. These regulations promulgated under Section 11006 of the 2008 Farm Bill should --

1. Not narrow the application of statutory language: The Packers and Stockyards Act (P&SA) prohibition against packers, swine contractors, and live poultry dealers giving undue or unreasonable preferences or advantages is extremely broad statutory language. It prohibits undue or unreasonable preferences that may be given not only to individuals but also that may prefer any particular location over another. It is imperative that USDA, in issuing the regulations required by the Farm Bill, does nothing that would in any way restrict, limit, or narrow the possible interpretation of this extremely broadly worded statutory provision by the courts.

2. Make clear it is not necessary to show anti-competitive impact: The rules must explicitly state that it is not necessary to show an anti-competitive impact in order to find an action of a packer, swine contractor, or live poultry dealer to be unlawful as an undue or unreasonable preference or advantage. Similarly, the rules must state that just because a packer, swine contractor, or live poultry dealer presents a legitimate business reason for the challenged action, this alone will not keep it from being unlawful under § 192(b) of the P&SA. As USDA has repeatedly argued in court cases, the plain, clear, and unambiguous language of § 192(b) of the P&SA does not require any proof of an adverse effect on competition or of restraint of commerce or trade.

3. Recognize undue preferences may arise in any aspect of packer-producer transactions: The rules must recognize that an "undue or unreasonable preference or advantage" may arise under many aspects of the transactions, including for example base or formula pricing; formulas

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used for premiums or discounts; duration of the purchase or contract commitment; delivery location requirements; delivery date and time requirements; and terms related to the companies' provision of inputs or services, grower compensation, and capital investment requirements under production contracts. It is easy for packers to unlawfully prefer large-volume livestock producers over smaller-volume producers in very subtle ways. Such unlawful actions may occur when certain types of purchase arrangements – forward contracts, marketing agreements, and cash market purchases – are offered to some producers but not to others.

4. Clarify that it is unlawful for packers to prefer large-volume livestock producers over smaller-volume producers in any manner that is not substantiated by actual, verifiable quality or transportation and transactional expenses: Premiums should be allowed for measurable and verifiable differences in carcass and meat quality only if those premiums are available to producers of all sizes. Premiums should be allowed for a specified time of delivery or delivery in times of urgent need only if those premiums are available to producers of all sizes. Premiums should be allowed for real and verifiable efficiencies in the cost of procuring, transporting, handling, and other transactions that occur outside the plant, but there should be no premiums for efficiencies that occur within the plant unless those efficiencies are real and verifiable and consequent premiums are made available to producers of all sizes.

5. Recognize situations unique to poultry production contracts: Key criteria that should be used in determining an undue or unreasonable preference include:

- When a grower is penalized relative to other growers based on performance factors that are outside the control of the grower and within the control of the poultry company.

- When a grower is penalized relative to other growers based on the free exercise of rights protected by law.

Producer organizations can provide the Department with many specific examples for each of these two criteria.

6. Keep Pace with Industry Practices: Because the procurement practices in the livestock and poultry industries change over time, it is imperative that USDA continuously monitor such practices and amend the rules whenever necessary to ensure that they appropriately address changes in industry practices.

7. In addition to providing for USDA response to individual complaints of undue or unreasonable preferences, implement a process of continuous USDA oversight of individual packer and processor procurement practices to ensure that they are not providing undue or unreasonable preferences: Establishing a claim of undue or unreasonable preferences may involve comparing how a packer or processor deals with numerous sellers. This information is generally within the hands of the packer or processor and may not be readily available to an individual producer or group of producers. Therefore, a regulatory system that relies primarily on individual complaints from livestock producers may not detect significant violation of regulations prohibiting undue or unreasonable preferences. In addition to monitoring overall

practices within the industry, USDA should also implement a process to monitor the procurement practices of individual packers and processors.

Section 11006 of the Farm Bill also requires USDA to propound **three regulations to improve contract fairness**. The first of these is to define when **suspension of delivery** of new birds to poultry contract growers is an unlawful "unfair practice" and to require "reasonable notice" of when a suspension or delay of delivery will occur.

Poultry processors sometimes halt or delay the delivery of new birds, a practice that devastates the cash flow of growers under contract.

Regulations must be developed to require processors to give growers written notice of any suspension of delivery of birds at least 90 days prior to the removal of the last flock, with an explanation of the reason for the suspension, the grower's appeal rights, and the date that the bird delivery will resume.

The second issue relates to **investment requirements in production contracts**. Processors often require poultry growers or swine producers, after the initial production contract is signed and houses built to company specifications, to make additional capital upgrades to their production houses and other production facilities that cost tens of thousands of dollars. Section 11005 of the 2008 Farm Bill requires disclosure of potential future capital investments. Section 11006 requires USDA to propound regulations describing when capital investment requirements violate the Act.

Regulations should be issued that state that any capital investment that the company requires beyond the original housing and other production facility specifications is unlawful unless poultry growers or swine producers are additionally and fairly compensated at the time of the upgrade. Companies should also be prohibited from forcing growers to upgrade their houses or other production facilities prior to selling their farms, or in any way interfering with the right to sell their farms.

The third issue relates to **the termination of contracts and the effect on recapture of capital investment**. Poultry and swine contract growers make very large investments in facilities. Chicken and swine houses and other facilities are sole-purpose structures, and growers rarely have more than one poultry or swine company in their area. Because of the large investment, growers are very vulnerable to contract termination, often without cause, leaving them with a large stranded investment and no way to pay the loans. Section 11006 of the 2008 Farm Bill requires USDA to promulgate rules defining a reasonable period of time for a live poultry dealer or swine production contract grower to remedy a contract breach that could lead to termination of a contract.

We also urge you to amend Packers and Stockyards Act regulations to require a poultry integrator to reimburse growers for capital investments made for purposes of the contract if the contract is cancelled prematurely without cause and to provide similar protection for swine producers. We recommend that GIPSA include a 120-day minimum requirement for companies to allow contract growers or swine producers to remedy any alleged breach, and that the rule

should further specify that the company may not cancel the contract if the breach is remedied within that timeframe.

Framing the new rules in this manner will help fulfill an important campaign promise of the Obama Administration to "fight to ensure family and independent farmers have fair access to markets, control over their production decisions, and transparency in prices" and to "strengthen anti-monopoly laws, change federal agriculture policy to strengthen producer protection from fraud, abuse, and market manipulation, and make sure that farm programs are helping family farmers, as opposed to large, vertically integrated corporate agribusiness."

We look forward to commenting on a strong proposed rule in the near future. Thank you for considering our views.

Sincerely,

Ferd Hoefner *Martha L. Noble*

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