NATIONAL SUSTAINABLE AGRICULTURE COALITION

March 13, 2020

Bruce Summers
Administrator, Agriculture Marketing Service
U.S. Department of Agriculture
Washington, DC 20250

Re: NSAC Comment on Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act (Docket AMS-FTTP-18-0101)

Submitted electronically via Regulations.gov

Dear Administrator Summers:

The National Sustainable Agriculture Coalition (NSAC) welcomes the opportunity to provide comments on the proposed rule on Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act (P&SA).

NSAC represents over 40 member organizations[1] who work with, or are comprised of, a variety of producers, including livestock and poultry growers. For the past thirty years, NSAC has worked to advance federal policy to support sustainable agriculture, food systems, natural resources, and rural communities. Fair competition within markets is a critical part of both the success and long-term sustainability of our food system in this country. Because of its importance, NSAC has advocated for the protection of livestock and poultry growers and fair competition within the livestock and poultry industries for over a decade.

We recognize that the publication of the proposed rule fulfills the U.S. Department of Agriculture's responsibility under the 2008 Farm Bill to publish rules that clarify the provisions of the Packers & Stockyards Act (P&SA), and we thank the agency for complying with the mandate. However, we believe that the proposed rule needs major improvement to fulfill the underlying purpose of the P&SA, including the elimination of criterion (d). Additionally, the proposed rule does not include several key pieces that address undue preference, and we would urge the agency to revisit and promulgate rules addressing those issues. Our comments offer recommendations to bring the proposed criteria in line with the purpose of the P&SA.

We thank you for your serious consideration of our recommendations and look forward to working with you to ensure fair competition within the agricultural sector.

Sincerely,

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[1] Agriculture and Land-Based Training Association Salinas, CA; Alternative Energy Resources Organization Helena, MT; CCOF Santa Cruz, CA; California FarmLink Santa Cruz, CA; C.A.S.A. del Llano (Communities Assuring a Sustainable Agriculture) Hereford, TX; Catholic Rural Life St Paul, MN; Center for Rural Affairs Lyons, NE; Clagett Farm/Chesapeake Bay Foundation Upper Marlboro, MD; Community Alliance with Family Farmers Davis, CA; Community Involved in Sustaining Agriculture South Deerfield, MA; Dakota Rural Action Brookings, SD; Delta Land and Community, Inc. Almyra, AR; Ecological Farming Association Soquel, CA; Farmer-Veteran Coalition Davis, CA; Florida Organic Growers Gainesville, FL; FoodCorps, OR; GrassWorks New Holstein, WI; Hmong National Development, Inc. St Paul, MN and Washington, DC; Illinois Stewardship Alliance Springfield, IL; Institute for Agriculture and Trade Policy Minneapolis, MN; Interfaith Sustainable Food Collaborative Sebastopol, CA; Iowa Natural Heritage Foundation Des Moines, IA; Izaak Walton League of America St. Paul, MN/Gaithersburg, MD; Kansas Rural Center Topeka, KS; The Kerr Center for Sustainable Agriculture Poteau, OK; Land Stewardship Project Minneapolis, MN; MAFO St Cloud, MN; Michael Fields Agricultural Institute East Troy, WI; Michigan Food & Farming Systems – MIFFS East Lansing, MI; Michigan Organic Food and Farm Alliance Lansing, MI; Midwest Organic and Sustainable Education Service Spring Valley, WI; Missouri Coalition for the Environment St. Louis, MO; Montana Organic Association Eureka, MT; The National Center for Appropriate Technology Butte, MT; National Center for Frontier Communities Silver City, NM; National Hmong American Farmers Fresno, CA; Nebraska Sustainable Agriculture Society Ceresco, NE; Northeast Organic Dairy Producers Alliance Deerfield, MA; Northern Plains Sustainable Agriculture Society LaMoure, ND; Northwest Center for Alternatives to Pesticides Eugene, OR; Ohio Ecological Food & Farm Association Columbus, OH; Oregon Tilth Corvallis, OR; Organic Farming Research Foundation Santa Cruz, CA; Organic Seed Alliance Port Townsend, WA; Rural Advancement Foundation International – USA Pittsboro, NC; Union of Concerned Scientists Food and Environment Program Cambridge, MA; Virginia Association for Biological Farming Lexington, VA; Wild Farm Alliance Watsonville, CA; Women, Food, and Agriculture Network Ames, IA.

I. Comments on the Proposed Rule Criteria

Congress clearly stated in its legislative history that the central goal of the P&SA is to create fair, open, efficient, and transparent markets for livestock. Section 202 details conduct that is unlawful by packers and swine contractors, also known as integrators. The focus on unlawful conduct by integrators assumes that there is a group harmed by such conduct. Based on the context of the P&SA, it is clear that the group harmed by the unlawful conduct enumerated in Section 202 consists of livestock and poultry growers. Therefore, the purpose of Section 202 is the protection of livestock and poultry growers from harmful conduct by integrators and the purpose of subsection (b) specifically is the protection of livestock and poultry growers from actions by integrators that confer "undue or unreasonable preference to any particular person or locality."[i]

In direct contrast to this purpose, the proposed rule seems to be designed expressly for the protection of integrators. Under the proposed rule, when faced with a claim of undue or unreasonable preference, the Secretary will consider whether the conduct in question cannot be justified based on one of the four proposed criteria. These justifications would be defenses to a claim of undue preference. The only group that would need a defense to a claim of undue preference is integrators. However, as established above, Section 202 is designed to protect livestock and poultry growers. Therefore, the proposed rule contradicts the purpose of Section 202.

A. Proposed Rule Criterion (a)

a. Integrators should be required to maintain written records to prove cost savings related to dealing with different producers, sellers, or growers

Criterion (a) of the proposed rule would allow alleged undue or unreasonably preferential conduct to be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers. In order to prove a cost savings, integrators should be required to maintain written records that provide proof of these circumstances. The records should be kept contemporaneously with the situation that gives rise to the allegation of undue or unreasonably preferential action. For instance, if an integrator is contracting with a specific grower over another similarly situated grower on the basis of saving costs, the integrator should be required to maintain written records that detail the actual costs of contracting with each grower and those records should be established at the time the integrator contracts with the chosen grower.

b. Cost savings based solely on volume should be prohibited to avoid discriminating against smaller livestock or poultry growers

An integrator can easily claim cost savings based on volume by contracting with a large-scale livestock or poultry grower over a smaller-scale livestock or poultry grower or an association of smaller growers. This would result in small-to-medium sized growers routinely being unduly disadvantaged and undue preference being given to larger growers strictly based on size of operation. Criterion (a) should be revised to explicitly state that cost savings based solely on volume are not a justification to a claim of undue or unreasonable preference.

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[i] 7 U.S.C. 192(b)

Criterion (a) should allow cost savings as a justification when:

1. There are measurable and verifiable differences in carcass and meat quality, if those standards are applied to producers of all sizes

2. There is a specified time of delivery or times of urgent need for delivery, if those criteria are offered to producers of all sizes

3. There are volume-related savings that result from documented efficacies in the cost of procuring, transporting or handling livestock and conducting other transactions that occur outside of the plant. However, it should be explicitly stated that so-called efficiencies that occur within a processing plant or from operating the plant at full capacity are prohibited. For example, hog producers who pool their hogs and deliver a truckload that is the size commonly handled by a processing plant should be on the same footing as a larger single producer who provides the same size truckload to the plant.

B. Proposed Rule Criterion (b) - Integrators should be required to maintain written records to prove a basis of meeting a competitor's prices

Criteria (b) of the proposed rule would allow alleged undue or unreasonably preferential conduct to be justified on the basis of meeting a competitor's prices. In order to prove that the integrator acted to meet a competitor's prices, integrators should be required to maintain written records that provide proof of these circumstances. The records should be kept contemporaneously with the situation that gives rise to the allegation of undue or unreasonably preferential action.

In addition to providing written records to verify a need to meet a competitor's prices, the difference in prices must be quantified, verified, and statistically significant to ensure they are not just favorable prices given to entice market entrants, which is a form of price discrimination against existing producers. Prices that are not quantified, verified, and determined to be statistically significant would be considered undue preference if they are offered by competitors to one group of producers, but not to another group of similarly situated producers. Requiring quantified and documented evidence, verifiable by an outside party, to justify meeting a competitor's prices would help to eliminate bias and undue preference.

C. Proposed Rule Criterion (c) - Integrators should be required to maintain written records to prove a basis of meeting a competitor's terms

Criteria (c) of the proposed rule would allow alleged undue or unreasonably preferential conduct to be justified on the basis of meeting other terms offered by a competitor. In order to prove that an integrator acted to meet a competitor's terms, integrators should be required to maintain written records that provide proof of these circumstances. The records should be kept contemporaneously with the situation that gives rise to the allegation of undue or unreasonably preferential action.

D. Proposed Rule Criterion (d) - This criterion should be eliminated in its entirety

Criterion (d) would allow actions that confer an undue or unreasonable preference to be justified if it is a "reasonable business decision that would be customary in the industry." The historical failure of USDA to promulgate regulations that support the original intent of the P&SA has allowed many unfair industry practices to become commonplace and there are multiple business decisions that are customary in the industry that result in an undue or unreasonable preference.

The tournament system in the poultry industry is a prime example. Despite being promised a base pay, producers are pitted against each other by integrators in a ranking system that awards a premium to certain producers, taken as a deduction from the pay of other producers. The ranks are determined by metrics like the weight gain of the birds, which is directly impacted by the quality of the inputs supplied to producers by the integrator. The integrator exercises control over the entire system, to the disadvantage of some producers and advantage of others. This criterion would enable integrators to justify use of the tournament system and other practices that give undue and unreasonable preference because these practices are customary to the industry.

Additionally, retaliation is a customary practice in the poultry industry and used to unreasonably disadvantage certain growers based on their membership in producer associations, their lawful communications with government officials and the public about their concerns regarding poultry company practices, or on the basis of race.

In the cattle industry, it can be customary for packers to give "sweetheart" deals to certain ranchers or feeders over others, even when the ranchers or feeders are similarly situated in locality and ability to meet the packer's needs.

These examples illustrate the problem with allowing customary industry practices to justify behavior that gives an undue or unreasonable preference. The customary use of a practice does not make it reasonable or right.

E. Integrators should be required to clearly communicate actions that appear to be but are not undue preference to all the growers under contract with that integrator

The proposed rule lists several examples of actions that would not be considered undue or unreasonable preference by an integrator, such as giving a premium to a grower who agrees to use experimental vaccines on a flock of chicks. These actions and scenarios would appear to be undue and unreasonable preference because an advantage is given to one grower over another. Because of this, the opportunities or scenarios where these advantages might occur should be clearly communicated to all the growers under contract with an integrator so there is equal opportunity for all growers to participate in these opportunities. This communication should be required both at the signing of a contract between a grower and an integrator and in routinely updated communications from the integrator to all the growers under contract with that integrator.

F. The examples listed as potential undue preference should be explicit violations of Section 202(b)

The 2008 Farm Bill charged USDA with providing clarity to the provisions of the P&SA. The examples listed as potential undue preference in the proposed rule offer clear guidelines of actions that would violate Section 202(b). Additionally, the listed examples further the goal of the P&SA and Section 202 by providing protection to livestock and poultry growers by explicitly naming

actions that would be in violation of the P&SA. Therefore, establishing the given examples in the proposed rule as actions that constitute undue preference will help to bring the proposed criteria (a)-(c) into line with the purpose of the P&SA and the 2008 Farm Bill mandate from Congress.

Premiums that are offered to one person or locality that are not offered to other persons or localities similarly situated should be a clear violation of Section 202(b). If people or localities are similarly situated, there is little reason for preferencing one person or locality over another.

Livestock packers negotiating preferential live basis prices with only one favored livestock supplier and not similarly situated suppliers should be a clear violation of Section 202(b). Again, if the suppliers are similarly situated, there is little reason for preferencing one person or locality over another.

Live poultry dealers offering a higher base price to a favored grower but not to other growers in the same complex with the same housing types should be a clear violation of Section 202(b). If a favored grower is in the same complex with the same housing type as another grower, the only significant difference between them is the chicks and feed that they receive. Poultry dealers exercise complete control over the chicks and feed given to growers. If a grower has better outcomes, with the same housing types as other growers, then it is primarily attributable to better inputs available to that grower. The grower has better inputs because the poultry dealer has given them better inputs, which means the poultry dealer has structured the system to favor certain growers over others. If all things are equal, the only reasons to preference one grower over another is the personal interests of the poultry dealer, which is the definition of undue preference.

II. Comments on Issues Not Mentioned in the Proposed Rule

A. Clearly state that there is no requirement to prove "competitive injury"

A significant omission from the proposed rule is the clarification that the P&SA does not require a livestock or poultry grower to show harm to the entire industry in order to prove undue or unreasonable preference. Nowhere in the P&SA does it require a livestock or poultry grower to meet that evidentiary threshold. Additionally, Congress has clarified that it is not legally required to show "competitive injury" when bringing a claim of undue or unreasonable preference. USDA has also had a longstanding position that a livestock or poultry grower is not required to prove "competitive injury."

It is court precedent that holds a producer must prove competitive harm to the entire industry in order to bring a claim for personal harm from anticompetitive practices. Not only does the proposed rule fail to clearly establish that this standard is not required, it explicitly states that the rule is not intended "to create criteria that will conflict with case precedent" so case law on competitive harm "is likely to remain unchanged."

The "competitive injury" requirement is a significant obstacle for livestock and poultry growers, akin to having to prove that an arsonist burning down your house caused harm to the real estate market as a whole in order to receive relief under the law. Without clear language in the final rule

establishing that establishing "competitive injury" is not required, livestock and poultry growers will continue to face an insurmountable obstacle to bring a claim of undue and unreasonable preference.

B. Provide protection based on protected class

Unlike the proposed 2016 rule on undue preference, the current proposed rule does not provide explicit protection on the basis of protected class. Race, sex, and national origin are all constitutionally protected classes, which means discriminatory behavior towards an individual or group of individuals based on those characteristics is inherently unlawful. The proposed rule does not provide that protection, despite there being several documented cases of discrimination based on the race in the poultry industry. Additionally, there is no protection on the basis of other categories, like political beliefs, disability, or marital or family status.

C. Provide protection based on the right to association and communication

The proposed rule does not protect a producer's right to lawfully join in producer associations or speak to the media or elected officials about their growing contract without suffering retaliation from an integrator. It is common for poultry producers who speak out about issues within the industry to receive lower quality inputs, like sick chicks or lower quality feed, which leads to lower quality chickens and reduction in a producer's pay. This right should be protected in the proposed rule.

D. Establish methods to continuously review and monitor industry practices to ensure that new practices do not result in violations of the P&SA

In the absence of strong protections for livestock and poultry growers, harmful industry practices have become customary. Continuous monitoring and review of industry practices is necessary to ensure that new practices are not evolving that continue to circumvent the purpose of the P&SA. USDA should establish a system to proactively monitor industry practices, through outreach to and engagement with livestock and poultry growers and integration of market data, to ensure that new business practices developed by integrators do not circumvent the purpose of the P&SA.