



March 24, 2017

M. Irene Omade
Grain Inspection and Packers and Stockyards Administration
United States Department of Agriculture
1400 Independence Ave. SW, Room 2542A-S
Washington, DC 20250-3613

Re: Comments on Interim final rule on Scope of Sections 202(a) and (b) of the Packers and Stockyard Act [81 FR 92566](#), proposed rule on Poultry Grower Ranking System [81 FR 92723](#), and proposed rule Unfair Practices and Undue Preferences in violations of the Packers and Stockyards Act [81 FR 92703](#) (December 20, 2016)

Dear:

These comments on the Grain Inspection, Packers & Stockyards Administration's (GIPSA) Interim Final Rule and two Proposed Rules implementing provisions of the Packers & Stockyards Act (PSA) are submitted on behalf of the National Sustainable Agriculture Coalition (NSAC).

NSAC supports the US Department of Agriculture (USDA) in finalizing the Interim Final Rule and two Proposed Rules in a timely manner; we offer the following comments on how to improve the two proposed rules.

NSAC represents 46 grassroots farm and rural organizations that advocate for federal policy reform to advance the sustainability of agriculture, food systems, natural resources, and rural communities. Our vision of agriculture is one where a safe, nutritious, ample, and affordable food supply is produced by family farmers who make a decent living pursuing their trade, while protecting the environment, and contributing to the strength and stability of their communities. Many NSAC organizations include farmers and ranchers who raise livestock and poultry among their members.

Congress has clearly stated in its legislative history that the central goal of the PSA is to create fair, open, efficient, and transparent markets for livestock. Overall, NSAC commends GIPSA for seeking to complete work on these rules. Farmers have been waiting nearly 100 years for action to implement the PSA and bring some fairness to the livestock and poultry production industries. This interim final and two proposed rules will help redress the striking imbalance in market power between the nation's livestock and poultry producers and large-scale multi-national packers, processors, and live poultry dealers. The proposed rules will make U.S. livestock and poultry markets more open, transparent and competitive for our farmers and ranchers. This will help

protect farmers from retaliation and give them tools to be able to have a chance at running a successful business.

Thank you for considering our viewpoint and positions on the Proposed Rule.

Sincerely,

Paul Wolfe,
Senior Policy Specialist

Comments of National Sustainable Agriculture Coalition

This document encompasses NSAC's comments for Interim Final Rule on the Scope of Sections 202(a) and (b) of the Packers and Stockyard Act [81 FR 92566](#), the proposed rule on Poultry Grower Ranking System [81 FR 92723](#), and the proposed rule on Unfair Practices and Undue Preferences in violation of the Packers and Stockyards Act [81 FR 92703](#) all published on December 20, 2016.

NSAC supports USDA finalizing the Interim Final Rule and finalizing both proposed rules with the following improvements incorporated.

I. Introductory Comments

A. The Interim Final Rule is squarely within the authority granted to USDA by Congress in the Packers & Stockyards Act (PSA)

USDA's authority to implement the interim final rule and the two proposed rules rests squarely on the Packers & Stockyards Act (PSA). Section 407 of the PSA provides that the Secretary of Agriculture may "... make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act." Therefore, USDA has clear and comprehensive authority under the PSA to provide regulatory clarification for any terms used in the provisions of the PSA and to interpret the intent of the PSA.

There has been catastrophic and massive verticalization and consolidation in the livestock and poultry industries for the last several decades that has continued unabated since this rule was first proposed in 2010. This has allowed packers and processor to continue to amass power, which has lead to an increasing number of unreported and un-remedied instances of unfair practices and undue preference. The drastic reduction in access to markets for livestock and poultry farmers as a few very large packing and processing firms have continued to merge with and buy out small and mid-scale integrators and packing and processing facilities has allowed these entities to leverage their increased power to muzzle American farmers that try to address the power imbalance. These very large packers and processing firms use unfair practices and provide undue preference as a method of retaliation to put noncompliant farmers out of business.

In many areas, farmers and ranchers effectively have only one purchaser for their products and in many cases have been forced to give up livestock or poultry production because there are no

processing or packing facilities within a reasonable distance.

In the case of poultry, most producers only have one option for their integrator/live poultry dealer, and poultry farmers are beholden to the whims of the integrators that control every aspect of the production system. Poultry farmers are required to make large capital investments in confinement facilities but have no control over the number and quality of chicks they are provided, the quality of the feed, medications, or other significant aspects of production. The companies control everything that generates revenue while the farmer owns everything that costs money.

Since 2010 there has been an increase in the concentration of control among the four largest cattle and hog companies, further increasing the imbalance of power between farmers and packers and integrators. In the beef industry, the top four companies control 85 percent of the market, up from 80 percent in 2007. In the pork industry, concentration has reached 74 percent among the top four companies as a result of the recent JBS/Cargill merger, up from 67 percent in 2007. Power in the poultry industry remains concentrated among the top four producers; the top four control nearly 60 percent of an industry that is already completely vertically integrated. In fact just two companies – Tyson and Pilgrims Pride – account for about 40 percent of the market. The number of independent producers is minuscule. Any argument that the concentration in the poultry industry has declined or remained flat in the last five years should be viewed with great skepticism, given recent lawsuits charging collusion among poultry companies.

This high level of concentration has created a situation in which the balance of power is strongly tilted towards these large companies and away from the farmers. The PSA was passed into law to address similar kinds of ills that existed at the time of its passage in 1921. For nearly 100 years, there has been little guidance on how to interpret the Act and it is time that changed.

The two proposed rules will begin to address this gap and begin to provide some semblance of fairness in the relationship between farmers and packers processors, and live poultry dealers by addressing the rampant use of unfair practices and undue preference in contract livestock and poultry production.

The interim final rule will confirm the position on the interpretation of Section 202(a) and (b) that has been held by successive Republican and Democrat administrations up until the time that activist courts began to read into the law, words and interpretations that don't exist in the law.

II. Interim Final Rule on the Scope of Sections 202(a) and (b) of the Packers and Stockyard Act 81 FR 92566: Confirmation that a showing of “competitive injury” is not needed to prove conduct that violates PSA section 202(a) or 202(b)

A. Confirmation Supported by the PSA, USDA, and Legislative History

The Interim Final Rule confirms that a violation of the PSA (unfair practice or undue preference) does not require a finding that the action or device adversely affects competition or has the likelihood to adversely affect competition. Sections 202(a) and 202(b) of the PSA say nothing about a requirement for showing a harm to competition and this interim final rule reiterates the longstanding position of USDA that this is the case. NSAC supports the Interim Final Rule, which is supported by the plain language of the PSA.

PSA Section 202(a) clearly lays out seven separate and independent circumstances, in clauses designated (a) through (f), which constitute unlawful practices that violate the Act. The section reads as follows:

“Section 202. Unlawful practices enumerated. It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

- (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
- (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or
- (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or
- (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
- (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
- (f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or
- (g) Conspire, combine, agree or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.¹

The clauses are separated from each other by the disjunctive term “or.” By the traditional rules of statutory construction the use of “or” – in contrast to the conjunctive term “and” – clearly indicates that each clause is to be read separately. In addition, the plain meaning of the text of the statute, with its use of the disjunctive “or,” indicates that each clause is to be read separately.

Section (a) requires only a showing that a packer, swine contractor, or live poultry dealer has engaged in or used any unfair, unjustly discriminatory, or deceptive practice or device. Section (b) requires only the showing that a packer, swine contractor, or live poultry dealer has made or given

¹ Sections 202 of the Packers and Stockyards Act is codified at 7 U.S.C. 192. Therefore Section 202 and Section 192 are often used interchangeably and synonymously.

an undue or unreasonable preference or advantage to any particular person or locality in any respect, or subjected a particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.

Sections (c)-(e) are in sharp contrast to Sections (a)-(b), in that they require not only proof of prohibited acts but also additional showings that the prohibited acts have the tendency or effect of restraining commerce or creating monopoly or the purpose or effect of manipulating or controlling prices. These additional showings required under Sections (c)-(e) are commonly referred to as “competitive injuries.”

USDA has consistently, under multiple Republican and Democrat administrations, held the position that each clause in Section 202 is to be read separately and that clauses (a) and (b) do not require that farmers and ranchers must make a showing of a competitive injury. But the agency has failed until now to promulgate regulations supporting its position. In recent years, a few activist federal courts of appeals have ruled – in some cases overruling juries of the people – that farmers and ranchers seeking redress for harms proven under Sections (a) and (b) must also demonstrate harm to competition or likely harm to competition arising from the PSA violation. These courts have chosen to read words and intent into the statute and ignore the conventions of statutory construction to find a requirement in (a) and (b) for a showing of “competitive injury” even though neither the text of these sections nor the legislative history of the PSA require such a finding.

The imposition of a competitive injury test is a high bar to the remedies of the PSA for farmers and ranchers who have clearly demonstrated that they have been harmed by unfair and deceptive practices or undue preferences or prejudicial actions. In some cases, the economic harm inflicted on individual farmers or ranchers, or even a large group of farmers and ranchers, will simply not result in a competitive injury to the entire sector, especially where a court requires proof of an actual or likely increase in the resale price or consumer prices for the product. In other cases, the harm could result in a competitive injury but the costs to farmer or rancher plaintiffs of proving the injury can be prohibitive, especially when the information needed to show the competitive injury is in the hands of the packing and processing sector. The discovery actions necessary to obtain the information may be both extensive and prohibitively expensive.

This interim final rule is critically important to contract livestock and poultry farmers. The rule clearly provides to the courts USDA’s determination that a showing of a competitive injury is not required for farmers and ranchers to bring successful actions under PSA Sections 202 (a) and (b). It correctly interprets the plain language of the statute and the PSA’s legislative history and will serve to rein in those courts which have imposed a judicially-fashioned competitive injury test on PSA Sections 202 (a) and (b).

Without this measure, farmers and ranchers clearly injured by violations of the PSA will continue without a remedy because of the judicially fashioned competitive injury test imposed by some courts. The courts’ test does not comport with the plain language of the statute or the longstanding interpretation of the Act by USDA. Thus, we strongly support the interim final rule and urge its timely adoption as a final rule without any further change.

III. Proposed Rule on Poultry Grower Ranking System – NSAC Supports the Proposed Rule with Improvements

This proposed rule seeks to clarify how Section 202(a) and (b) apply to the poultry grower ranking system or tournament system for calculating farmer pay.

The tournament system is the most prevalent payment system in the contract poultry industry. Under this system, farmers receive a base payment and either have money added or taken away based on their efficiency as compared with other farmers who received chicks on the same day. The problem with this system stems from the fact that farmers do not control the two biggest factors – quality of the feed and chicks – that determine whether they perform above or below the baseline.

This unsound comparison allows companies to game the system to their advantage, but what is even more concerning is the fact that companies frequently manipulate these two variables to punish outspoken growers or growers that refuse to make expensive upgrades. Several farmers testified and submitted testimony during the USDA/DOJ workshop on May 21, 2010 about the practice of integrators supplying inferior feed and chicks to farmers that were out of favor with the companies, particularly those who speak out about the unfair practices or who work with other chicken farmers to form associations of farmers. Many of those farmers are no longer in the chicken businesses because of this willingness to report on and document the company's actions.

Poultry integrators often argue that the tournament system is the ultimate free market system because it encourages efficiency and rewards those that work the hardest to be the most efficient. However, because the farmers don't start from the same baseline this is at best false advertising. Given the nature of hen physiology, certain percentage farmers will start with poorer quality chicks every week, which thus builds in a disadvantage that cannot be overcome by hard work, dedication, or superior animal husbandry practices. Farmers that often finish near the average for a tournament are "losers" in this system and ultimately have their pay cut due to factors out of their control.

While we support a rule addressing tournament system abuse, NSAC is concerned that this proposed rule is a major step back from the 2010 proposed rule, which would have provided a greater level of fairness to poultry farmers by prohibiting certain conduct prescribing other conduct. This rule contains no requirement for companies to maintain written records that provide justification for the differential pricing.

This proposed rule merely provides a non-exhaustive list of criteria to determine whether a poultry integrator is using a tournament system "in an unfair, unjustly discriminatory, or deceptive manner, or in a way that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage."

We support this rule's goal of prohibiting poultry integrators from using the tournament system to target a specific producer to receive inferior chicks or feed. However, it does not go far enough in leveling the playing field for contract poultry producers.

We encourage USDA to move forward with this rule, but to also strengthen it. NSAC supports modifying this proposed rule to clearly designate any tournament system as one

providing an undue preference, and thus a violation of Section 202 when a farmer's pay is cut based on inputs affecting performance, which are not within the control of the farmer.

There are more objective payment systems such as a square-footage system where farmers are paid based on the square footage of the grower owned poultry house that is used by the integrator. This alternative approach to the rule would ensure that companies cannot pass along the cost of inferior feed and chicks to punish farmers that speak out.

IV. Proposed Rule on Unfair Practices and Undue Preference in Violation of Packers and Stockyards Act – NSAC Supports the Proposed Rule with Improvements

NSAC strongly supported USDA's inclusion of the eight clear examples of common actions that constitute unfair, unjustly discriminatory, and deceptive practices or devices in the 2010 proposed rule. While we felt this was a good approach, we understand there were negative comments received, which lead to the current approach to the rule, which we strongly support, with certain modifications.

A. 202(a)

1. Per Se Violations

NSAC strongly supports the inclusion of a list of “per se” violations of Section 202(a) of the PSA and urge the agency to finalize it exactly as proposed.

2. Violations of 202(a) Regardless of Harm to Competition

NSAC also supports the inclusion of a non-exhaustive list of Section 202(a) violations in 201.210(b), if the “legitimate business justification” loophole is removed. (Please see Section “V” below for our specific objections to the “legitimate business justification” loophole.) Actions such as retaliation, limiting legal rights of farmers, and limiting rights to juries or full arbitration participation are clear violations of Section 202(a) and should be prohibited. NSAC also encourages the inclusion of language to make it clear that these actions are a violation regardless of whether they harm or are likely to harm competition.

This illustrative list is important to help producers, contractors, packers, processors, and live poultry dealers know how to avoid a violation of the PSA since the terms unfair, unjustly discriminatory, or deceptive have never been specifically defined. In the absence of specific guidance, integrators and packers have been able to retaliate against farmers that have spoken out or joined associations with other contract producers to better their situation. They do this by undertaking practices such as providing inferior feed and chicks purposefully to retaliate against producers that have spoken out about the conditions they face.

The current balance of power in livestock production and marketing contracts unfairly burdens farmers and ranchers; and the prohibitions included in 201.210(a) and (b) will help in a small but significant way to create a fairer playing field.

We support the inclusion of language confirming that there is no requirement to show an injury to competition to prove a violation of Section 202(a) of the PSA. This is consistent with the separate interim final rule.

NSAC supports the inclusion of Sections 201.210(b)(3)-(7) clarifying that failing to comply with the requirements of Section 201.100 is an unfair, unjustly discriminatory, or deceptive practice.

We also support the inclusion of language clarifying that violations of the regulations required by the 2008 Farm Bill and codified in a final rule published on December 9, 2011 976 (FR 76874) as unfair, unjustly discriminatory, or deceptive practice.

3. Conduct or Action that Harms Competition

NSAC supports the inclusion of Section 210(c) making plain that conduct or an action that harms or is likely to harm competition is an unfair, unjustly discriminatory, or deceptive practice or device and thus a violation of Section 202(a). We urge the agency to finalize this subsection but without the legitimate business interest justification (see part V below).

B. 202(b)

1. Undue or Unreasonable Preferences or Advantages

NSAC supports some of the changes to the proposed rule implementing Section 202(b) of the PSA as a result of comments received on the 2010 proposed rule, but opposes some of the changes.

2. Four Criteria for Violations of Section 202(b)

We support the inclusion of the four criteria in 201.211 for the Secretary to consider if there has been an unfair, unjustly discriminatory, or deceptive practice. It is clear that that these four criteria are important.² **We also support the clarification that the criteria are not exhaustive and that the intent of the rules is not to prohibit alternative marketing arrangements.**

We also support the inclusion of explicit language in the summary of changes section of the rule indicating that “GIPSA did not intend to limit the use of AMAs.” Many of NSAC’s member organizations represent livestock and poultry producers who are highly engaged in the value added-production chain, including organic and grass-fed production, and who strongly support moving forward with the proposed rule. As the rule states, there has been a rapid growth in the value-added industry that has benefit many producers and we agree with the rule’s conclusion that the structure

² Because the farmer has engaged their right of free speech and association; the packer or integrator believes but cannot reasonably determine that the farmer violated an applicable law, rule or regulation; an arbitrary reason unrelated to the operation; and because the farmer was part of a protected class (e.g. a racial minority).

and scope of the rule will not impact marketing agreements and we encourage GIPSA to be as clear as possible on this point.

3. Price Premiums and Discounts

We take issue with the elimination of several items from this rule, which we see as a weakening of the protections proposed in the 2010 rule. The elimination of the criteria relating to premiums or discounts based on volume is especially problematic since even the original text of the 2010 proposed rule did not go far enough to level the playing field. **We request restoration of the volume related language and a strengthening of the language to prohibit volume related premiums or discounts.** Premiums or discounts should be allowed for:

- Measurable and verifiable differences in carcass and meat quality, if those premiums are available to producers of all sizes;
- Specified time of delivery and for delivery at times of urgent need, if those premiums are available to producers of all sizes; and
- Volume related savings that result from real and verifiable efficiencies in the cost of procuring, transporting, or handling livestock and conducting other transactions that occur outside the plant. The Final Rule should, however, include a "bright line" test that disallows volume-based premiums for so-called efficiencies that occur within the plant or from operating at full capacity. 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.

We also request the restoration of the criteria included in the 2010 rule related to disclosure. Critical information regarding acquiring, handling, processing and quality of livestock should be disclosed to all producers when it is disclosed to one or more producers. It will reduce the practice of packers and processors to provide more favorable terms to certain producers in order to retaliate against those out of favor and to favor a select few producers.

C. Legitimate Business Justification

Finally, we oppose the inclusion of the Section 202.211(e), which creates a loophole for processors and packers to violate Section 202(b) of the PSA. This provision allows a company to raise a "legitimate business justification" as a reason for violating the PSA, which is not included anywhere within the plain language of the Act. Please see Section "V" below for our specific objections to the "legitimate business justification" loophole.

V. Legitimate Business Justification

NSAC is concerned with the inclusion of language in the proposed rule relating to both Sections 202(a) and 202(b) of the PSA that allow a processor, packer, or live poultry dealer to utilize a claim of a "legitimate business justification" to avoid a violation of these section of the PSA. **NSAC recommends removal because of the loophole it creates for processors, packers, and live poultry dealers to continue to justify unfair practice and undue preference violations as legitimate business decisions even if they would otherwise be in violation of the PSA. This exemption appears nowhere in the plain language of the PSA and should not be read into**

the law. As just one example among many, NSAC does not believe there is any legitimate business justification for actions such as retaliating against a grower who has joined a grower association by cutting them off. Who is to say that a company could not claim that cutting off a grower that may cause them to have to pay more to farmers is not a legitimate business justification?

Should the agency, despite our strong recommendation to remove this loophole, nonetheless proceed to retain it in some form, we would make these additional recommendations.

Absent the removal of the legitimate business justification exception, we recommend that GIPSA create consistency between the treatment of 202(a) and 202(b) of the PSA by adopting the standard included in Section 201.211 (202(b)) of the proposed rule for both 202(a) and 202(b). Under Section 201.211, “legitimate business justification” is included as one of six criteria that can be considered in assessing if there has been an undue or unreasonable preference or advantage. This ensures that even if there is some indication of a legitimate business justification, an action could still rightly be found to be a violation of the PSA. Legitimate business justification should be added to the “illustrative list of conduct” included in Section 201.210 of the proposed rule.

As proposed, Section 201.210, it makes a finding of a “legitimate business justification” a bar to finding a violation of 202(a) no matter the unfairness, injustice, discrimination, or deceptiveness of the practice. As written, 201.210 does not allow for a finding of a violation if there is a “legitimate business justification, “ whereas under 201.211 that is still possible as legitimate business justification is one of several criteria to be taken into account and weighed in the balance.

Also absent the removal of the legitimate business justification exception, NSAC recommends that the rule be modified to ensure that the burden of disproving or rebutting the existence of a legitimate business justification does not fall on the farmer and that the final rule should be very clear about that point. The proposed language could be interpreted as placing the burden on the farmer, which would just replace one burden on the farmer, a competitive injury finding, with another equally burdensome requirement, to prove the justification is not legitimate.

VI. Cost Benefit Analysis of on Interim Final and Propose Rules

We appreciate USDA’s efforts to undertake another cost-benefit analysis of the three rules to more realistically assess the costs of these rules versus the 2010 proposed rules. The published estimate of the 10-year cost of all three rules is \$144 million³, which is significantly less than the industry cost estimates of the 2010 version of these rules.

As part of a September 19, 2016 letter to USDA opposing the publication of these rules, several industry groups, released an updated economic analysis claiming that a reissue of the 2010 proposed rules would have 10-year costs running over \$1 billion. However, as is very clear, that analysis is not reflective of the contents of these two proposed rules, which are scaled down greatly from the 2010 proposed rule.

³ \$66 million (competitive injury) \$54 million (undue and unfair) \$34 million (tournament)

This estimate on the cost of the rules and any further estimates submitted as part of this docket by packers, processors, live poultry dealers or groups representing these parties should be viewed with a skeptical eye given that they have been generated by parties that have a vested interest in the status quo. The organizations that signed the September 19, 2016 letter to USDA have no clear loyalty to the farmers and ranchers that benefit from these rules.

The PSA was never intended to protect the profits of multi-national packers, processors, and live poultry dealers; it was intended to remedy unfair treatment of rural Americans, farmers and ranchers.

We are also concerned that USDA did not complete an analysis of the economic benefits of the rules to farmers. We believe that these rules will create a more level and fairer playing field for farmers, increase their ability to fairly negotiate contracts, and ultimately give them a realistic chance at making a living as a contract livestock or poultry farmer. There are clearly financial benefits to farmers from having a more level playing field, which USDA has failed to quantify.

At the end of the day, the total cost of these rules is minimal for these multinational companies. Tyson Foods, the largest live poultry dealer, had sales of \$36 billion in 2016, Pilgrims, the second largest, had nearly \$8 billion in sales in 2016. Any increased costs spread across the industry as a result of this rule are quite reasonable to create the fairer playing field for farmers and ranchers across rural America as promised by the Packers and Stockyards Act.