

September 5, 2024

S. Brett Offutt
Chief Legal Officer/Policy Advisor
Packers and Stockyards Division
USDA AMS FTPP
1400 Independence Ave. SW
Washington, DC 20250

RE: Document Number 2024-14042; June 28, 2024; FR Pages 53886-53911;
Docket Number AMS-FTPP-21-0046; RIN: 0581-AE04;
“Fair and Competitive Livestock and Poultry Markets”
(submitted via regulations.gov)

Dear Mr. Offutt:

South Dakota Farmers Union is pleased to comment on the proposed rule “Fair and Competitive Livestock and Poultry Markets” on behalf of the more than 18,000 family farm and ranch members of South Dakota Farmers Union (SDFU). South Dakota Farmers Union (SDFU) believes that excellent opportunities in agricultural production form the basis for solid farm and ranch families, which in turn are vital to thriving communities.

SDFU appreciates USDA promulgating this proposed rule and asks the Department to finalize it as quickly as possible. We urge the USDA to ensure that the final rule provides solid and lasting protections and remedies for family livestock producers harmed by meatpackers, poultry integrators, or other entities regulated by the P&S Act. Fair and competitive markets are essential for family farmers and ranchers buying and selling livestock. Currently, fed cattle buyers will not purchase cattle from South Dakota family farmers and ranchers if the producers cannot consistently provide them with a monthly supply. In some cases, buyers of fed cattle will not make an offer. In today's agricultural market, buyers typically require a minimum of 50,000 pounds of cattle per week. Some family farmers and ranchers may be unable to meet this requirement, and the bids they receive are much lower than needed. Many ranchers who raise and feed calves do not have a consistent supply throughout the year, making it impossible for them to meet the demands of cattle buyers.

Similar situations arise in other agriculture sectors when purchasing products for livestock and crops. If family farmers and ranchers cannot buy high-quality feed, chemicals, seeds, fuel, or fertilizer in bulk or semi-loads, they pay more than those who can. This leads to an unequal playing field for many family farms and ranches.

SDFU fully supports the proposed rule and appreciates the legal analysis and historical context outlined in the preamble that supports the rule. However, we urge the USDA to make it more apparent in the final rule that a market participant, such as a farmer, bringing an unfair practice claim under Section 202(a) of the P&S Act does not need to demonstrate harm to competition to prove injury or likelihood of injury. We recommend that the final rule clarifies and strengthens provisions in the proposed rule regarding justifications based on countervailing benefits while prohibiting cross-market balancing. Additionally, we are concerned that the

proposed rule provides a framework for Section 202(a) of the P&S Act but fails to include an appropriate standard for Section 202(b).

Section 202 of the P&S Act does not require a demonstration of harm to competition.

SDFU's grassroots, member-driven policy aims to clarify the Packers and Stockyards Act so that individual producers can seek recourse for market power abuse without proving competitive injury to the entire marketplace.

SDFU has consistently argued that livestock and poultry producers protected by the P&S Act should not be required to prove harm to competition or the potential for such damage to establish a violation of Sections 202(a) and (b) of the P&S Act. The inconsistent judicial interpretations of Sections 202(a) and (b) of the Act, which sometimes contradict the statute's plain language, highlight the vital need for the proposed rule. SDFU's position aligns with USDA's longstanding interpretation of Section 202 of the P&S Act.

As USDA states in its proposed rule, it is USDA's well-established interpretation that the statute does not require protected farmers or USDA, on behalf of farmers, to demonstrate harm or likelihood of damage to competition to prove a violation of Sections 202(a) and (b) of the P&S Act.

As USDA outlines in the proposed rule:

From the plain language of the text, section 202 of the Act is broader than the antitrust laws and does not necessarily require harm to competition as that term is understood under the antitrust laws... USDA recognizes that some courts have recently required proof of competitive injury before finding that conduct is unfair... A competitive injury requirement cannot be imposed in a way that abrogates part of a statute. To the degree requiring a "competitive injury" precludes finding conduct is unfair when it satisfies criteria in the proposed rule, such a requirement would unduly limit the reach of section 202(a) and is improper. Moreover, the statute and P&S Act case law make plain that competitive injury under the P&S Act is broader than harm to competition under the antitrust laws...

The proposed rule is necessary to resolve the inconsistent judicial interpretation of the P&S Act statute, which has hindered its effective enforcement. SDFU is pleased that the proposed rule addresses this issue regarding Section 202(a) of the Act.

Requested clarifications and adjustments to the proposed rule

While SDFU supports the proposed rule, certain areas must be strengthened or amended. The final rule should clearly state that using the term "competition in the market" in Section 201.308(a) of the proposed rule does not imply the need to prove competitive injury. Furthermore, the final rule should specify that the burden of proof regarding countervailing benefits should lie with regulated entities and that cross-market balancing should be prohibited. The final rule should also establish a regulatory framework for Section 202(b).

Clarify "Competition in the market" from Section 201.308(a)

The USDA is proposing the addition of Section 201.308(a) and (b) as a comprehensive rule or test for unfair practices concerning market participants and Section 201.308(c) and (d) as a comprehensive rule or test for unfair practices for markets. The South Dakota Farmers Union believes, based on the reading of the proposed rule's preamble, that the USDA does not intend for either the market participants test or the markets test to require proof of market-wide harm to competition for the finding of a violation of the Act.

The courts have inconsistently interpreted the Act regarding "competitive injury." Therefore, we are concerned about including language related to "competition in the market" in Section 201.308(a). We recommend that the USDA clarify in its final rule that the use of this terminology does not mean that market participants need to prove competitive injury for a violation of the Act to occur.

Clarify and strengthen the burden of proof on the regulated entity regarding "countervailing benefits" and disallow a cross-market balancing justification.

The "test" described in Section 201.308(a) of the proposed rule determines whether an action by a regulated entity towards one or more market participants is an unfair practice under Section 202(a) of the P&S Act. This test has three main components or burdens of proof. The market participant must demonstrate the first two components: that an action by a regulated entity causes or is likely to cause significant harm to a market participant and that the action is something the market participant(s) cannot reasonably avoid. The third burden of proof relates to any benefits to the market participant(s) or to competition in the market that outweigh the harm caused.

SDFU appreciates that, concerning countervailing benefits, USDA requires that the burden of proof rests with the regulated entity, not the market participant(s). USDA should clarify in its final rule that this is indeed its intention. It would be unreasonable to expect any individual market participant or participants to establish or provide analysis for countervailing benefits. If the burden of proof for countervailing benefits is retained in the final rule, it should rest with the regulated entity."

We ask the USDA to explicitly exclude cross-market balancing as a justification for a countervailing benefit in the final rule. Allowing this practice could lead to many harmful and unfair actions. For instance, if a regulated company reduces payments to producers in one region with significant market power and justifies this by providing higher payments to producers in another area to increase their market share, we believe this should be considered an unfair practice. We are concerned that allowing cross-market balancing as justification could enable such harmful practices to continue.

To the extent that counterbalancing benefit justifications should be considered, they should only be evaluated about the market participant(s) claiming injury or the potential for injury rather than benefits to anyone else under consideration.

Address the omission of an updated regulatory framework concerning Section 202(b) of the P&S Act.

SDFU is disappointed that the USDA did not try to create a plan for handling Section 202(b) of the P&S Act concerning unfair preferences and advantages. The USDA explains in the introduction to this suggested rule its



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past attempts to create rules for 202(a) and (b), which would have shown that violations under both sections may, in some instances, be proven without demonstrating competitive harm.

While SDFU appreciates USDA's creation of a framework for enforcing Section 202(a) of the Act, we also request that USDA establish a framework for enforcing Section 202(b). We appreciate that the proposed rule's preamble reiterates USDA's longstanding position concerning both Section 202(a) and (b) of the Act, stating that proof of competitive injury is not required in all cases to demonstrate a violation of the Act. However, this should be incorporated more clearly into the proposed new regulatory language.

South Dakota Farmers Union appreciates the chance to share comments representing 18,000 farmers and ranchers. If you have any questions or want to discuss SDFU's position further, please get in touch with me at dsombke@sdfu.org or 605-350-4211. Thank you.

Sincerely,
Doug Sombke, President of the South Dakota Farmers Union