



Office of Commissioner
Rohit Chopra

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

March 16, 2020

The Honorable Sonny Perdue
Secretary
U.S. Department of Agriculture
1400 Independence Avenue, N.W.
Washington, D.C. 20250

RE: Proposed Rule on Undue and Unreasonable Preferences and Advantages under the Packers and Stockyards Act

Dear Secretary Perdue:

The national emergency surrounding the coronavirus outbreak is a stark reminder that the United States must have a stable food supply that relies on a fair and competitive family farm system. When multinational agribusiness giants exploit their market power to abuse our nation's farmers, ranchers, and producers, our nation is less secure.

I write to share my concerns regarding the U.S. Department of Agriculture's proposal to amend rules under the Packers and Stockyards Act. This law was modeled after provisions in the Federal Trade Commission Act and other antitrust laws to ensure that powerful meatpackers and processors could not take advantage of family farmers through unfair trade practices. The USDA's proposed rules run counter to these objectives in both spirit and letter. As I discuss in the attached comment submission, the proposal fails to recognize the extreme disparity between farmers and powerful meatpackers and processors, and it ratifies some of the industry's worst abuses.

If we want to strengthen America's rural economy and protect our national security, we need the USDA to put into place strong, clear rules to curb widespread abuses in the original spirit of the Packers and Stockyards Act and our nation's antitrust laws. The USDA should go back to the drawing board on these rules.

If you have any further questions, please do not hesitate to contact me. Thank you for considering this comment, and I look forward to monitoring this proceeding carefully.

Respectfully submitted,

A handwritten signature in blue ink that reads "Rohit Chopra".

Rohit Chopra

practices in their incipiency by prohibiting particular types of conduct, including mergers and acquisitions that substantially lessen competition.

In its earliest years, the FTC published a series of reports on abuses in the meatpacking industry, detailing widespread unfair practices in violation of fair dealing and antitrust laws.² The reports set the stage for enforcement actions and the passage of the Packers and Stockyards Act in 1921 to protect America's farmers and ranchers from abusive practices by meatpackers and processors. The Packers and Stockyards Act was clearly influenced by the FTC's report. Its provisions closely mirror the Federal Trade Commission Act and other antitrust laws,³ such as the prohibitions on "unfair, unjustly discriminatory, or deceptive practice[s]," and "mak[ing] or giv[ing] any undue or unreasonable preference or advantage."⁴

The Packers and Stockyards Act specifically provides the Federal Trade Commission with authorities in the agricultural sector.⁵ For example, the Act provides the FTC with jurisdiction over transactions in poultry products and margarine; and over retail sales of meat, meat food products, and livestock products in unmanufactured form. The Act also provides, in certain cases, the FTC with jurisdiction over non-retail activities involving meat, meat food products, or livestock products in unmanufactured form.

The FTC also has additional roles in safeguarding America's food supply. For example, the Commission polices the market for unlawful mergers and conduct in the retail supermarket industry and is responsible for enforcing standards related to Made-in-USA and organic claims. Efforts to reduce protections under the Packers and Stockyards Act will harm the Federal Trade Commission's efforts to police the marketplace effectively.

Strong, Clear Rules Needed to Curb Abuse

The need for strong rules is urgent. Today, for every dollar consumers spend on food in the supermarket, the farmer receives 14.8 cents – the lowest portion since we started measuring.⁶ When food prices go up for consumers, it doesn't necessarily translate into higher pay for farmers. But when food prices go down, producers say they're the first ones to see their pay cut. When packers and processors take such a substantial share of the food dollar, farmers are left to

² U.S. Fed. Trade Comm'n, *Report of the Federal Trade Commission on the Meat-Packing Industry, Part I (Extent and Growth of Power of the Five Packers in Meat and Other Industries)*; U.S. Fed. Trade Comm'n, *Report of the Federal Trade Commission on the Meat-Packing Industry, Part II (Evidence of Combination among Packers)*; U.S. Fed. Trade Comm'n, *Report of the Federal Trade Commission on the Meat-Packing Industry, Part III (Methods of the Five Packers in Controlling the Meat-Packing Industry)* (1919).

³ There are many examples of similarities between the FTC Act, the antitrust laws, and the Packers and Stockyards Act. For example, both laws prohibit unfair practices without requiring a showing of market-wide competitive harms, though the proposed rule improperly seeks to create such a requirement. It is worth noting that the Packers and Stockyards Act goes further than the antitrust laws. For example, the Act prohibits conduct that might otherwise require an agreement or conspiracy under the Sherman Act. *See, e.g.,* Herbert J. Hovenkamp, *Does the Packers and Stockyards Act Require Antitrust Harm?* U. PENN. L.: LEGAL SCHOLARSHIP REPOSITORY (2011), http://scholarship.law.upenn.edu/faculty_scholarship/1862.

⁴ 7 U.S.C. § 192 (a) (b).

⁵ 7 U.S.C. § 227 (2).

⁶ Rick Barrett, *Farm income could be lowest in 12 years, falls by more than half*, USA TODAY (May 17, 2018), <https://www.usatoday.com/story/money/business/2018/05/17/farm-income-could-lowest-12-years-prices-fall/618204002/>.

struggle. This contributes to a range of social and economic problems. Rural poverty is up. Family farmers are disappearing. Despair has fueled an opioid epidemic across rural America. And suicides are far too high.

These problems are structural. Concentration has allowed a handful of firms – often referred to as “Big Meat” – to wield excessive market power over millions of American farmers, ranchers, and producers. These firms exert and maintain their control by imposing arbitrary, draconian contract terms that no rational market participant would take if they were in a position to leave.

Despite the significant record detailing the crippling conditions farmers face, the USDA’s proposal could end up extinguishing a critical legal avenue for America’s farmers and ranchers to ensure a competitive market and fair dealing.⁷ At issue is the criteria to use in determining whether a packer, swine contractor, or live poultry dealer has either made or given “any undue or unreasonable preference or advantage to any particular person or locality” in violation of the law.⁸

Rather than spelling out specific practices deemed illegal, the proposal outlines four vague criteria that could be used to defend preferential treatment. According to the proposal, preference would be justified: to save on costs between producers; to meet competitors’ prices; to meet competitors’ terms; or as a “reasonable business decision that would be customary in the industry.”⁹

Vague standards are ill-suited for addressing competitive harms because they favor incumbents looking to further exploit their market power. Dominant players can use their substantial legal budgets to turn loose terms into legal loopholes that wind up swallowing up the law. The resulting uncertainty, endless legal costs, and heightened risk deter strong government enforcement and discourage private actions. Competition rules that lay out bright-line bans on certain market structures or practices work better than highly subjective guidelines. When rules are clear-cut, violations are easier to detect, claims are easier to prove, and cases are easier to decide.

Unfortunately, the only clarity provided by this proposal overwhelmingly supports Big Meat over family farmers. Rather than spelling out for farmers which specific abusive practices are illegal, USDA did the opposite and clarified for incumbent packers and processors when abusive practices are legally justified. Adding insult to injury, the proposal also fails to restate the USDA’s long-held position that farmers do not need to show industry-wide harm to make an individual claim. As discussed earlier, this is inconsistent with our nation’s approach to halting unfair trade practices. Individual farmers do not have the means, access, or resources to prove market-wide competitive harm. Combined, these provisions make Big Meat practically bulletproof. It’s hard to see how any claim can succeed under an unattainable standard of evidence and against well-funded lawyers armed with vaguely-written legal justifications.

⁷ Dep’t. of Just. & Dep’t. of Agric., Public Workshops Exploring Competition in Agriculture, Poultry Workshop (May 21, 2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf>.

⁸ Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, 85 Fed. Reg. 1,772 (Jan. 13, 2020).

⁹ *Id.* at 1,783.

The proposal would make a bad situation even worse for many of America's farmers, ranchers, and producers. It fails to address how vertical integration and concentration have given Big Meat an unfair competitive advantage over small producers. And worse, it effectively legalizes current industry practices like the "tournament system" by giving them a safe harbor justification.

Ignores Unfair Advantage Created by Big Meat's Concentration

The proposal fails to acknowledge the extreme disparity between farmers and powerful meatpackers and processors. Like so many other modern industries, the meat and poultry business operates as a contracting model, where the contractors do the work at great personal cost, while the middlemen make the serious money. In the meat industry, the middlemen are the meatpackers, and farmers are the contractors.

Thanks to decades of unchecked consolidation and vertical integration, just a few huge, multinational firms, like Smithfield Foods, JBS, Tyson, and Cargill, now control all of the essential parts of the meat supply chain from farm to table.¹⁰ The firms' ubiquity has made Big Meat, its bottlenecks, and its bullying unavoidable. While producers have just a few firms that will bring their supply to market, dominant packers and processors have thousands of producers to go to for supply. Big Meat has used its power disparity to exploit contract animal farmers, turning a once stable livelihood into one of desperation and despair.

This is not a new concern. Today's significant concentration has, in effect, simply resurrected the meat cartel of the early twentieth century. More than a century ago, the President asked the FTC to investigate the concentration in the meat packing industry. In 1918, the FTC published a report finding that a small number of companies had "attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands."¹¹ The Commission's investigation found that the packers' practices were so egregious that large numbers of producers were closing shop altogether.¹² A hundred years later, many family farmers feel like they are reliving this history.

Ratifies Existing Abuses

The hearings held nearly a decade produced a substantial record detailing a laundry list of abuses.¹³ Most of this abuse is executed through the punishing and exploitative contracts that dominant firms imposed on farmers and ranchers. These contracts have functionally become private laws imposed on farmers by multinational corporations from afar. Through these one-sided contracts, Big Meat maintains unilateral control over farmers, their farms, and farming.

¹⁰ Claire Kelloway & Sarah Miller, OPEN MARKETS INST., FOOD AND POWER: ADDRESSING MONOPOLIZATION IN AMERICA'S FOOD SYSTEM (2019), https://openmarketsinstitute.org/wp-content/uploads/2019/04/190322_MonopolyFoodReport-v7.pdf.

¹¹ U.S. Fed. Trade Comm'n, *Report of the Federal Trade Commission on the Meat-Packing Industry* 88 (1919).

¹² The Commission wrote, "It is our opinion that the failure of American meat production to keep pace with population is in large measure due to the conditions created and maintained in the markets by the Big Five. Their conspiracies and unfair practices have disheartened producers of livestock by destroying their confidence in the fairness of the marketing system to such an extent that large numbers have abandoned or curtailed their operations." *Meat-Packing Report*, *supra* note 11, at 71.

¹³ Dep't. of Just. & Dep't. of Agric., *supra*, note 7.

Family farmers are so dependent on one big firm that any preference or disfavor can have a profound and existential impact on their livelihood.

Nowhere is the power of preference more apparent than the “tournament system,” an apt moniker for the rigged game that animal farming has become. Most prevalent in the poultry market, the tournament system ranks animals according to their health and weight and then compensates each farmer based on where they fall within the rankings, rather than paying everyone the same rate. It is an opaque, arbitrary system where Big Meat’s thumb on the scale can be make-or-break.

In hearings and in court filings, producers report that they are exploited at every stage. Big Meat controls the sale of livestock and their feed, the critical entry point for animal farming. To be eligible to buy animals, powerful packers and processors require farmers to foot the full bill for farming facilities and their ongoing maintenance. These capital costs create significant debt and risk for farmers – and huge savings for the firms that don’t have to invest in farms or pay for upkeep. It also gives Big Meat the upper hand from the start; a farmer in debt is in no position to negotiate for the supply they need to recoup their investment.

And that supply matters a great deal. The health of the animals and the quality of the feed plays a big role in their ultimate ranking within the tournament system. When a farmer receives subpar supplies, they risk receiving less pay per pound if their animals rank lower. Sick animals are a significant setback that few farmers can afford, but having no access to animals is even worse. Faced with the choice between paying full price for damaged goods or receiving nothing at all, farmers take what they can get.

Indeed, because many producers are completely reliant on an individual powerful firm for high-quality supplies, they lack the leverage to turn down bad deals that make exploitation a condition of access. Big Meat takes full advantage of the precarious financial position they put farmers in by forcing them into abusive, one-sided contracts. These contracts read like a laundry list of demands: specific and exacting conditions for care that must be followed in order to bring the animals back to sell. Big Meat imposes these terms without any commitment to compensate for meeting them.

These contracts give Big Meat nearly complete control over the way the animals are raised – a sharp departure from independent farming. Farmers are micromanaged to such an extent that an investigation by the Small Business Administration’s Inspector General found that the control imposed by poultry processors “overcame practically all of a grower’s ability to operate their business independent” of them.¹⁴ And farmers are expected to meet their standards, to endure their oversight, and to do the hard work of caring and feeding with no guarantee that Big Meat will buy their animals back for slaughter and sale.

Assuming that their animals successfully make it to maturity, producers face further tournament troubles at point of sale. For example, grown animals are often evaluated by powerful firms behind closed doors, away from the farmer who lacks the means of independent verification and

¹⁴ SMALL BUS. ADMIN., REP. NO. 18-13, EVALUATION OF SBA 7(A) LOANS MADE TO POULTRY FARMERS at 1 (2018), <https://www.sba.gov/document/report-18-13-evaluation-sbas-7a-loans-poultry-farmers>.

must trust the measurements.¹⁵ Without factoring in the size and health of the animals that were initially supplied, these metrics are then stacked against competing farmers. This means that it's the farmer, not Big Meat, who takes the financial hit for subpar supplies by paying the same amount for them but receiving less compensation than farmers who received healthier animals or higher-quality feed.

Without protections, many farmers that raise concerns about the tournament system and other practices report that they face retaliation, putting them at a further disadvantage.¹⁶ In pursuit of economic survival, many simply comply with orders and rules forced upon them by companies, even when those powerful firms are violating the law.

Conclusion

U.S. Senator Charles E. Grassley has reminded the public that “the USDA is the U.S Department of Agriculture, not the U.S. Department of Big Business.”¹⁷ America's family farms are clearly in crisis. Rather than being independent businesses charting their own destiny and contributing to their communities, many find their fortunes dictated by foreign-owned companies. Our nation's health and security depends on a flourishing family farming economy. The proposed rule would contribute to further decline in family farms, making our country and our communities less secure, especially in a time of conflict.

Vertical integration and concentration has turned the animal supply chain into a series of choke points used by Big Meat to coerce farmers and ranchers into accepting terrible terms as a price of participation. The result is that growers take on all of the risk but have little to show for it while a few incumbents retain complete control over the process and pocket most of the profits. Because these abuses may represent “customary” business practices, they would potentially be justified under the proposal's safe harbor loophole. Rather than ridding the market of its exploitation, it is treated as business-as-usual and given a legal blessing. The proposal should be scrapped, and the USDA should go back to the drawing board.

If we want to strengthen America's rural economy and protect our national security, we need the USDA to put into place strong, clear rules to curb widespread abuses in the original spirit of the Packers and Stockyards Act and our nation's antitrust laws.

¹⁵ Lina Khan, *Obama's Game of Chicken*, WASH. MONTHLY (2012),

<https://washingtonmonthly.com/magazine/novdec-2012/obamas-game-of-chicken/>.

¹⁶ Comment of Open Markets Inst., Docket No. AMS-FTTP-18-010, Proposed Rule on Undue and Unreasonable Preferences and Advantage, The Department of Agriculture Must Strengthen the Packers and Stockyards Act to Protect Farmers and Ranchers from Abusive Meatpacker Monopolies at 10 (Mar. 13, 2020).

¹⁷ Audio Recording: Farm Broadcasters Call, Grassley Comments on GIPSA Withdrawal (Oct. 17, 2017) (on file with U.S. Senate), <https://www.grassley.senate.gov/news/audio/grassley-comments-gipsa-withdrawal>.