

November 22, 2010

Tess Butler
GIPSA
US Department of Agriculture
1400 Independence Avenue SW
Room 1643-S
Washington, DC 20250

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Farm Bill Comments
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Dear Ms. Butler:

On behalf of the Nebraska Farm Bureau Federation's (NFBF) over 53,000 members, I would like to offer these comments to the proposed rule entitled "Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act."

NFBF is Nebraska's largest farm organization and is in the unique position of representing every species impacted by this rule. Generally speaking, Farm Bureau's philosophy supports a market environment where our farmers and ranchers can sell their product in a way that best fits with their individual operation and risk aversion level. While our policy strongly supports free and open markets, we understand the need for some oversight to ensure agricultural markets remain fair and competitive. However, NFBF is concerned that the United States Department of Agriculture, Grain Inspection Packers and Stockyards Administration (GIPSA) rule would have a negative impact on Nebraska's livestock producers, and while making some needed reforms via the 2008 Farm Bill, the rule largely goes beyond the intent of Congress. Therefore, NFBF opposes many of the provisions found within GIPSA's new rule.

§201.3 Competitive Injury

This section of the proposed rule has prompted substantial interest and concern among NFBF members. NFBF understands that this proposed provision (to be codified at 9 C.F.R. § 201.3(c)) would eliminate a requirement imposed under several U.S. Court of Appeals decisions that plaintiffs must prove a likelihood of "competitive injury" to prevail on a claim under § 202(a) and (b) of the Packers and Stockyards Act.

Courts have interpreted "competitive injury" to mean harm to the marketplace as a whole—such as the elimination of competitors from the market or higher prices, lower quantity, or fewer choices for consumers. Eight U.S. Courts of Appeal have interpreted section 202(a) of the Packer and Stockyards Act passed in 1921 to require a showing of competitive injury, and none has found to the contrary. The decisions were based primarily on legislative history and general principles of antitrust law. Significantly, Congress has not taken action to correct these court decisions. Most recently, the 2008 Farm Bill mandated that GIPSA promulgate certain regulations, but Congress' mandate did not

relate to section 202(a) and competition. Without new Congressional authorization, NFBF believes GIPSA lacks the statutory authority to overturn decades of well-settled law. We are especially concerned the proposed rules will lead to more litigation, higher costs, and more economic uncertainty at a time when the livestock sector can least afford it.

NFBF also opposes the proposed provision due to concerns that it could harm the ability of our livestock producers to utilize marketing contracts as the possibility of legal action might shift packers away from offering them. The possible loss or reduction in the number of marketing contracts offered would have massive implications for the entire livestock industry in Nebraska. For example, the desire to bring younger farmers and ranchers back to rural Nebraska would be greatly affected by the loss or reduction of marketing contracts. Many banks are often reluctant to offer loans for the beginning operating capital needed by many new farmers and ranchers. However, we have heard from some of our younger livestock producers that marketing contracts provide stability and help ease the lending concerns many banks have. If marketing contracts were not longer used within the livestock industry, we could continue to see fewer and fewer individuals coming back to rural communities.

§ 201.210 Unfair, Deceptive, Unjustly Discriminatory and Deceptive Practice or Device

NFBF is concerned with §201.210(a)(6) for several reasons. First, a regulation under the Packers and Stockyards Act is not an appropriate vehicle to refer farmers to other regulatory or law enforcement authorities. Indeed, USDA has not provided any statutory basis for this provision as proposed, and it does not exist within the Packers and Stockyards Act. Second, this provision will open farmers up to accusations of purported illegal behavior without any factual justification and without any safeguards against retaliation. While we understand the intent of USDA is to ensure that hollow threats and indefensible accusations are not used as mere excuses to cancel or negatively alter contracts with growers, as proposed, however, the actual implementation of this provision may prove to be very harmful to growers and result in false accusations and retaliation.

§ 201.211 Undue or Unreasonable Preferences or Advantages; Undue or Unreasonable Prejudice or Disadvantages

While NFBF understands the need to develop criteria for identifying when undue or unreasonable preferences have been given in violation of the Packers and Stockyards Act, we are concerned with this section. The Packers and Stockyards Act makes it a violation to give “any undue or unreasonable preference or advantage to any particular person or locality in any respect.” It does not say that absolutely no preference or advantage can be given to a producer or a locality. It is our opinion that the proposed rule implies that any preference to anyone who can deliver the necessary product is an undue and unreasonable preference.

NFBF believes USDA needs to recognize that some criteria are acceptable for giving preference. For example, Nebraska’s livestock producers take pride in their livestock and work hard to establish a relationship with a packer. Part of that relationship is creating a proven track record of delivering the necessary product in a timely and efficient manner. It is our opinion that this type of relationship constitutes an acceptable preference.

It is also our understanding that this rule implies that all contracts must be “made available to” all producers. In §201.211(a) the rule states that one criteria is “Whether...contracts with a price determined in whole or in part by the volume of livestock sold are made available to all poultry growers, livestock producers or swine production contract growers who individually or collectively meet the conditions set by the contract.” This is a wide net to cast. It is also unclear exactly how a packer would be expected to make a contract available to all producers. Surely USDA doesn’t intend for the burden to be so severe as to require a packer to call all producers in the area to offer the contract? In many circumstances, it may not be possible for a processor to offer the same premium to

all producers. For example, some of our members who raise hogs are offered a premium if they deliver hogs to the plant in the early morning or late at night. Their willingness to work with the processing facility to provide the hogs when needed is justification for them to receive the premium. However, this restriction on price differentials will most likely mean, in this instance, that nobody gets a premium since it is not feasible to extend that premium to everybody.

It appears that USDA is attempting to make it undue or unreasonable to give an individual producer, who can fulfill a contract, preference over a group of producers that can collectively provide the same contract. The preamble to the rule states that this is a problem. However, a collection of growers and an individual grower are not equal in the eyes of a packer if the packer must negotiate, get signatures from, keep paperwork on and cut checks to every single producer in the collective group of growers. It is not unreasonable for a packer to want to avoid such significant additional paperwork.

§ 201.212 Livestock Purchasing Practices

NFBB has a number of concerns with this provision. We do not support USDA's move to ban the sale of livestock from one packer to another. USDA already has clear authority to bring suit against any company participating in illegal price manipulation this new rule claims to prevent. Additionally, there are legitimate business reasons for packers to sell products to other packers, and these reasons have nothing to do with sharing prices or price discovery. For example, if a packing line goes down in one facility because of equipment malfunction, employee strikes or other unforeseeable events occur, it is important that animals be moved to other processing facilities. Not to move animals in these situations could lead to animal welfare concerns and weight loss that could impact a producer's payment for his or her product. In some cases, the nearest alternative packing facility may be owned by another company, and to sell the animals to this nearby facility simply makes more sense than to incur the expense and risk of shipping longer distances.

While the necessity for such a provision is not clear, the negative impact that the provision could have on some farmers and ranchers is abundantly clear. A number of farmers and ranchers are members of cooperatives that operate packing and processing facilities. These facilities provide another market for producers to sell their product. The cooperative facilities are typically smaller, and many members sell both to the cooperative and to other packers. The way this rule is written, those farmers and ranchers who are part-owners in a cooperative could be labeled as packers. Therefore, they would be forced to sell all of their livestock to the cooperative (which in many cases would not be able to process all of the livestock of all of its members) or to liquidate their interest in the cooperative. They could not remain in the cooperative and sell a portion of their livestock to other packers, as that would be deemed a packer to packer sale. NFBB opposes this type of limitation on the ability of our farmers and ranchers to market their products.

The requirement in this rule that dealer buyers can only work for one packer also gives us pause. Many stockyards currently have a small number of dealer buyers, with each dealer often buying for multiple companies and for multiple (and distinct) products for those companies. The State of Nebraska has numerous auction markets, both large and small, across the state. If dealers are prohibited from buying for multiple companies, it seems that packing companies will likely decrease the number of auction markets where they purchase livestock so that they don't have to hire large numbers of new dealers. In other words, the number of packers purchasing at each stockyard will decrease and could cause some of Nebraska's auction markets to shut their doors. We urge USDA to remove §201.212 from the final rule.

§ 210.216 Capital Investment Criteria

NFBB policy strongly supports this provision. One of the most common grievances of poultry growers is that they are asked to make constant and unnecessary upgrades to their buildings or

equipment without any financial incentive to do so. This is a reform NFBB pushed for poultry producers during the 2008 Farm Bill.

The case in the hog industry is not nearly as extreme as it is in the poultry industry. Cash markets and marketing contracts are typical in many parts of the country, and it is only in the Eastern United States where production contracts like those used in poultry are prevalent. Hog farmers also often have more options for marketing their livestock than poultry growers have for marketing their birds.

Generally speaking, the complaints from the hog industry about additional capital investments are not as loud, but they still exist. We believe that those hog farmers who use production contracts and have limited access to alternative contracting arrangements will still benefit from this provision.

§ 201.217 Capital Investment Requirements/Prohibitions

Again, NFBB is supportive of provisions, such as this, that would place reasonable rules on the types and amount of capital investment that can be required of farmers without some expectation that they will be able to recuperate their investment. That said, we hope that USDA will consider several changes to this provision before the final rule is issued.

For example, in §201.217(a), the rule states that packers and integrators who require capital investments must provide contracts that allow growers to recoup 80 percent of their investment. Unlike other portions of the rule dealing with capital investments, this provision explicitly applies to both initial and additional capital investments. It is unclear to us how a packer or integrator could require of someone who does not have poultry or hog buildings already that they invest in one. Yet the current language implies that even those producers who are not already in the pork or poultry industry and have complete free will over whether or not they plan to enter the business will also face this same requirement.

We do not believe such a requirement is necessary for those who are not already in the industry. First, people who are not already in the industry cannot be forced or coerced into entering the industry and building new hog or poultry houses. If they do not believe the contract offered by a packer or integrator is sufficient to provide them with an acceptable return on their investment, they can simply walk away without any fear that it will impact their current livelihood. Second, the financial institution that a new producer chooses to use will almost certainly help guide him or her through these types of decisions. Since the banker will better know the details of that person's financial situation than USDA, the bank will almost certainly be better situated to provide guidance on the need for contracts that will allow an adequate recoupment of their investment. Lastly, if this provision applies to all investments, both initial and additional, then this provision could be interpreted to require the re-negotiation of all contracts that do not currently meet this standard. Such renegotiation would come with overwhelming administrative costs and would open these contracts to other changes that may not be favorable to growers.

In closing, NFBB would like to thank Secretary Vilsack for extending the comment period for this rule. This additional time has allowed us to reach out to our farm and ranch families across the State of Nebraska to obtain their feedback and listen to their concerns.

Thank you for this opportunity to share with you our position on this very important issue.

Sincerely,



Keith R. Olsen
President