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Submitted to Regulations.gov, Docket AMS-FTPP-21-0046

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Dear Secretary Vilsack:

Re: "Fair and Competitive Livestock and Poultry Markets" proposed rules
Pages 53886-53911 Docket No. AMS-FTPP-21-0046

The Western Organization of Resource Councils submits these comments on the proposed rules issued by the Agricultural Marketing Service (AMS) "Fair and Competitive Livestock and Poultry Markets" Pages 53886-53911 Docket No. AMS-FTPP-21-0046. WORC is a network of nine grassroots organizations in seven Western states with 22,750 members. Our members are farmers, ranchers, small business owners and working people who seek to protect natural resources, family farms and ranches, and rural communities. WORC's member groups include Dakota Rural Action (SD), Dakota Resource Council (ND), Idaho Organization of Resource Councils (ID), North Dakota Native Vote (ND), Northern Plains Resource Council (MT), Oregon Rural Action (OR), Powder River Basin Resource Council (WY), Western Colorado Alliance (CO), and Western Native Voice (MT).

WORC has advocated for increased enforcement of the Packers and Stockyards Act (P&S Act) for decades. Unfortunately, the market factors and practices that necessitate rulemaking from the USDA are largely the same as they were 50 years ago and have only been exacerbated. Therefore, WORC is pleased to see that AMS has proposed rules which will address the abuses of meatpacking companies against ranchers. Thus, while the proposed rules are novel, the arguments presented in the background section are derived largely from WORC's comments to the USDA from 2010.

AMS's Proposed Rules are a positive next step

WORC broadly supports the proposed rules put forth by AMS. The plain language of the P&S Act subsections 202(a) and (b) reveals no intention to require ranchers prove anticompetitive harm to seek justice through the Act. As the agency properly notes in the background

discussion for the proposed rule, USDA's longstanding position is that a violation of subsections 202(a) or (b) of the P&S Act does not require proof of predatory intent, competitive injury, or likelihood of injury.[1]

WORC supports the agency's delineation between "market participants" and "markets". USDA puts forth that subsections 202(a) and (b) would not have been included by Congress as it would have been redundant if the intent was only to regulate unfair practices which have anti competitive market harms. WORC agrees with this assessment. Furthermore, we believe that the importing of the Federal Trade Commission (FTC) tests for unfairness is prudent as the P&S Act is broader than and in part derived from the FTC Act.[2] [3]

In WORC's opinion, the proposed rule is not perfect and there are several changes that we suggest for the USDA. First and foremost, the USDA must address the inevitable safe harbor that regulated entities will seek through claiming "countervailing benefits" or "legitimate business justifications". If the proposed rule is to meet the agency's goals, the USDA will need to provide greater clarity in defining what constitutes an appropriate business concern or benefit. See questions 2, 5, and 11 for WORC's suggestions.

WORC also supports the USDA's efforts to define "unfair practices" under section 202 and believes this will provide clear guidance for regulated entities, market participants, and courts. However, the test for unfair practices done to market participants and markets broadly (subsections (a)-(d)) of the proposed rule could be stronger:

- The term "countervailing benefits" is vague and could be used as a safe harbor for unfair practices to continue.
- The term "legitimate business justification" must also either be more clearly defined or stricken as part of the test's consideration.
- To provide further clarity, the USDA should consider enumerating the most egregious of unfair practices to serve as a bright red line of what is considered an unfair practice under section 202.

These changes would improve the efficacy of the rule and limit the number of legal and enforcement actions necessary. Lastly, WORC continues to raise the alarm regarding the anti-competitive effects of unregulated captive supplies (Alternative Marketing Agreements or AMAs) and urges USDA to address them in this or a future rulemaking by requiring captive supplies to be sold in an open, public market. WORC urges the USDA to improve and finalize the proposed rules and continue your work to more consistently and effectively enforce the P&S Act.

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[1] *Fair and Competitive Livestock and Poultry Markets, 9 C.F.R. § 201 (2024). Page 53887 (Hereinafter "Proposed Rule")*

[2] *FTC, FTC Policy Statement on Unfairness (Dec. 17, 1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness*

[3] *Been v. O.K. Indus., Inc., 495 F.3d 1217, 1241 (10th Cir. 2007) "In that light it would be somewhat surprising if "unfair practices" under the PSA had a narrower meaning than "unfair methods of competition" in the FTCA."*

Background

Authority: A primary purpose of the P&S Act is to ensure open, competitive markets for slaughter livestock to protect producers' interests from packers' exercise of excessive market power. Since the P&S Act was enacted in 1921, the Secretary of Agriculture has held extraordinarily broad authority to issue substantive rules regulating packers both to prevent practices enumerated as unlawful and to compel lawful practices so as to induce healthy competition for slaughter livestock. In enacting the P&S Act, Congress placed the obligation on the Secretary to monitor the packing industry and adjust regulatory controls to keep pace with the state and development of the industry for the purpose of ensuring open, competitive slaughter livestock markets.

Need for the proposed rules: With decades of lax enforcement of the Act and the failure of successive administrations to issue regulations designed to check meat packer practices as their consolidation of market share skyrocketed and relationships with producers were completely restructured through vertical integration and coordination, ranchers are now faced with a slaughter livestock market that is no longer open and competitive. Instead we have an industry characterized by: (1) four-firm concentration levels that exceed those that catalyzed Congress to pass the Act;[4] (2) packer procurement practices, including ever-increasing use of captive supplies, that routinely give undue preferences in prices, market access, and market information to a few favored producers and allow packers to manipulate livestock prices;[5] and (3) virtually no open, competitive bidding for slaughter animals, which has driven down prices to producers and caused the near-complete collapse of price discovery and transparency mechanisms normally present in competitive markets.[6] It is evident from the preamble of this rule that unfair practices have been perpetrated against market participants. However, the lack of clarity concerning what constitutes a violation of section 202 of the P&S Act has created a scenario where the USDA must promulgate these rules to provide clarity and predictability in enforcing the Act.

Necessity of plain language Interpretation: It is a fundamental principle (perhaps *the* fundamental principle) of statutory interpretation that when the meaning of a statute is plain from the text, that meaning must be adhered to.[7] [8]

Subsection 202(a) of the P&S Act makes it unlawful for a packer, swine contractor, or live poultry dealer to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device." Subsection 202(b) makes it unlawful for these entities to "make or give any undue or

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[4] *MacDonald, J. M., Dong, X., & Fuglie, K. (2023). "Concentration and competition in U.S. agribusiness" (Report No. EIB-256). U.S. Department of Agriculture, Economic Research Service.* https://doi.org/10.32747/2023.8054022.ers

[5] *Packers and Stockyards Division, "Annual Report" (2020).*

[6] *U.S. Department of Agriculture, Agricultural Marketing Service, Market News, as of May 2022.*

[7] *Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others . . . a legislature says in a statute what it means and means in a statute what it says there.")*

[8] Lamie v. United States Tr., 540 U.S. 526, 534 (2004) ("It is well established that 'when a statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms'.") (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6, (2000)).

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." Neither subsection contains any language limiting its application to those practices, acts, or devices, which adversely affect competition. In contrast, the other subsections of section 202 do contain explicit language restricting their prohibitions to conduct that "restrain[s] commerce," "create[s] a monopoly," manipulates or controls prices, and/or apportions territory, purchases, or sales.

The harm to competition standard is illogical: Reading P&S Act subsections 202(a) and (b) as requiring proof of competitive injury would render them superfluous and nonsensical. Beyond rendering subsections 202(a) and (b) simply superfluous, contrary to centuries-old canons of statutory construction, any interpretation of those subsections which would limit their scope to conduct causing competitive injury would lead to absurd results. First, such an interpretation would sanction unfair, unjustly discriminatory, and deceptive practices of any type so long as the affected parties could not show competitive injury. This despite the plain text of the statute making "any" such practices unlawful. The absurd effect of a competitive injury requirement on subsection (b) would be even more striking. Twice in the span of 37 words, Congress included the phrase "in any respect" to subsection 202(b)'s proscription against undue or unreasonable preference, advantage, prejudice, or disadvantage. This repeated, all-inclusive modifier is simply incompatible with an interpretation of subsection 202(b) inferring a restrictive competitive injury requirement. There could be no reasonable explanation for Congress to have explicitly stated twice that subsection (b)'s proscription applied "in any respect" while at the same time purportedly intending for an unspoken competitive injury requirement to be read into the text. This would compound the contravention of the canon described above by not only disregarding the plain, unambiguous text of the statute but also introducing absurdity where there had been sense.

Congressional intent: Because the absence of a competitive injury requirement in subsections 202(a) and (b) is plain from the text itself, the legislative history of the provisions does not come into consideration in their interpretation.[9] [10] [11] Nonetheless, because those who argue for imposition of a competitive injury requirement in subsections 202(a) and (b) are constrained by the plain text of the statute to argue from legislative history alone, it is worth noting that even the legislative history of the P&S Act shows an expansive, rather than restrictive, mandate for these provisions.

As mentioned above, subsections 202(c) through (f) explicitly target and proscribe conduct that "restrain[s] commerce," "create[s] a monopoly," manipulates or controls prices, and/or

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[9] *Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 167 (2004) ("Given the clear meaning of the text, there is no need to . . . consult the purpose of [the Act] at all...'it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'") (quoting Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 79 (1998))*

[10] *Lamie v. United States Tr., 540 U.S. at 534 (unless a statute is "ambiguous on the point at issue," a court should not resort to legislative history in interpreting it)*

[11] *Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 220 (2002) ("[v]ague notions of a statute's 'basic purpose' are...inadequate to overcome the words of its text regarding the specific issue under consideration.") (quoting Mertens v. Hewitt Associates, 508 U.S. 248, 261 (1993))*

apportions territory, purchases, or sales. Specifically, subsection 202(e) makes unlawful "any course of business or any act for the purpose or with the effect of...restraining commerce". Any interpretation of the P&S Act imposing a competitive injury requirement in subsections 202(a) and (b) would necessarily convert the conduct prohibited in those subsections into "any course of business or act...restraining commerce" thereby subsuming the proscriptions of 202(a) and (b) into the more general subsection (e) and rendering (a) and (b) wholly superfluous. That is, any act prohibited by subsection (a) or (b) under an implied competitive injury requirement would also be prohibited by subsection (e). Therefore, any attempt to impose a competitive injury requirement in subsections 202(a) or (b) is barred by the long-established canon of statutory construction that an interpretation which renders part or parts of the statute meaningless or superfluous must be rejected. Congress is presumed to have meant what it said and to have meant all of what it said.

Court decisions: Canons of statutory construction require that the language differences be given effect.[12] [13] The presumption that Congress has acted purposely in using different language is particularly strong where, as in section 202, the inquiry concerns different subsections of the very same statutory section.[14] Accordingly, the presumption must be that Congress intentionally and purposely included references to anticompetitive or monopolistic behaviors in subsections 202(c), (d), (e), and (f), and intentionally and purposely omitted such references from subsections 202(a) and (b). If Congress had intended to limit the scope of subsections 202(a) and (b) to prohibit only those acts with the effect of "restraining commerce," there's no reasonable explanation for it to have relied on an implicit limitation rather than including the same language used in subsections (c) through (f). In the same way, if Congress had intended for the courts to read "restraining commerce" into every section of the P&S Act, then there is no reasonable explanation for it to have explicitly included "restraining commerce" only in subsections (c) through (e). As Judge Garza observed in his dissent in Wheeler v. Pilgrim's Pride Corp., "the most natural reading is that those subsections with the 'restraining commerce' language require a competitive injury and those without it do not."[15]

Thus, under well-settled principles, it would be improper to read additional terms into subsections 202(a) and (b), such as those that would require an adverse effect on competition.[16] As stated by Judge Robert H. Cleland in Hoge v. Honda (6th Cir. 2004) "courts have a duty to refrain from reading a phrase into a statute when Congress has left it out".[17]

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[12] *Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")*

[13] *Bates v. United States, 522 U.S. 23, 29-30 (1997); S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 126 S. Ct. 1843, 1852 (2006)*

[14] *United States v. Granderson, 511 U.S. 39, 63 (1988) (Kennedy, J., concurring) (presumption is particularly strong when applied to provisions that are parallel and enacted in the same provision of the same Act)*

[15] *Wheeler v. Pilgrim's Pride Corp, 591 F.3d 355, 377 (5th Cir. 2009) (Garza, J., dissenting)*

[16] *Bates v. United States, 522 U.S. at 29 (courts should "resist reading words or elements into a statute that do not appear on its face")*

[17] *Hoge v. Honda of Am. Mfg., Inc., 384 F.3d 238, 246-47 (6th Cir. 2004)*

It would be incorrect to state that the courts are unified in their interpretation of this statute, and even if that were true, courts have employed flawed logic in their rulings.[18] And even in the cases where courts have ruled that harm to competition is required, the decision was not derived from the language of the Act, nor its relationship to other antitrust laws of its ilk, but instead was an arbitrary policy judgment of the court. “In each case, the courts accepted that the defendant's conduct was harming producers, treating some producers differently than others, or affecting the market price for livestock or poultry. None of the plaintiffs invoked the provisions that require proving a strain on commerce or monopolization.” [19] Whereas the courts all accepted that harm was done, and to varying degrees ruled that harm to competition must be considered (even if it was not invoked by the plaintiff) it begs the question as to the intent of Congress including subsections 202(a) and (b). “The courts, out of fear of an avalanche of litigation, are rewriting the act. In doing so, the courts risk elimination of protections from the packer abuses that Congress intended to provide to producers.”[20]

Conclusion

In conclusion, WORC strongly supports the USDA AMS’s proposed “Fair and Competitive Livestock and Poultry Markets” rule. We applaud the department's extensive preamble which provides deep analysis and background which clearly demonstrates Congress’s intent and the necessity of these regulations. It is clear from the historical record that Congress intended for individual ranchers to be able to bring forth complaints of unfair practices on the part of the packers without demonstrating wider market harms. The decisions of select courts have read in standards contrary to this intent. This has resulted in ambiguity and harm, and emboldened regulated entities to skirt the law. The USDA is correct to propose these rules, and should strengthen them by closing safe harbor through ambiguous terms, and ensuring that there are bright red lines of conduct so that the rule will have the greatest possible effect.

Addressing Questions from the USDA

1. Do the two tests described in this proposed rule appropriately guide enforcement of “unfair practices” under section 202(a) of the P&S Act?

WORC believes that the proposed rule would be an appropriate guide for the enforcement of the P&S Act. We believe that importing the tests from the FTC Act provides a firm bedrock of legal and policy precedent and predictability for market participants, regulated entities and courts. The definitions provided for harms to market participants and anticompetitive harms to markets allow for a wide range of prevalent unfair practices to be brought to account and for novel, future unfair practices to be given due scrutiny.

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[18] *Michael Kades, “Protecting Livestock Producers and Chicken Growers,” Washington Center for Equitable Growth, May 5, 2022, Page 40, Table 1, https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/. (Hereinafter “Kades”)*

[19] *Kades pg 34*

[20] *Kades pg 36*

2. What modifications to the proposed rule would be appropriate to meet the goals of the P&S Act?

Countervailing Benefits: WORC believes that the inclusion of the countervailing benefits clause of the proposed subsection (a) definition of unfair practices will serve as a safe harbor for unfair practices against market participants to persist. The purpose of the P&S Act is to even the power imbalance between livestock producers and the packers. This language will certainly be used by packers to justify their unfair business practices and the harm they have caused to market participants. Alternatives to this language will be listed in our answer to questions 11 and 12. We urge the USDA to strike the following phrase from subsection (a) of the proposed rule:

> *"and which the regulated entity that has engaged in the act cannot justify by establishing countervailing benefits to the market participant or participants or to competition in the market that outweighs the substantial injury or likelihood of substantial injury."*

Alternatively, AMS should consider removing language which implies that regulated entities may use wider market benefits to legitimize unfair practices to market participants. USDA correctly asserts that subsections 202(a) and (b) uniquely address the needs of individual ranchers and producers, and the inclusion of regulatory verbiage to the contrary could allow courts to incorrectly interpret the purpose of this rule and allow safe harbor for unfair practices to continue. To address this, the USDA should strike phrases such as *"...or to competition in the market,"* from subsection (a) as factors in the proposed test.

Harms to competition in the market are addressed in subsections 202(c) and (d). Including them in the section dedicated to harms done to market participants creates ambiguity in our opinion.

Legitimate Business Justification: Similarly to the above point. The USDA must either remove clauses which will provide safe harbor for unfair practices to proliferate or provide further clarity in their definitions. Further information will be provided in our responses to questions 5 and 6.

Enumerate Unfair Practices: While WORC broadly supports the usage of the tests proposed in sections (a) and (c) of the proposed rule, it would be prudent for the USDA to list out prevailing unfair practices which have been brought to their attention over the years. This will provide a bright red line which will have the dual effect of putting bad actors on notice that their unfair practices will no longer be tolerated, and provide much needed clarity to market participants that if they are subjected to this treatment, they are entitled to challenge the practice. We suggest that the USDA include this list of unfair practices as a non-exhaustive list. This list was compiled in coalition with R-CALF USA and Farm Action, and derived from experiences of producers.

1) Entering into forward contracts that are not sold in an open, public market.
2) Entering into arrangements that have been shown to reduce cattle prices. Such arrangements include: top-of-the-market pricing (TOMP); formula-type contracts that do

not include a base price that can be equated to a fixed dollar amount at the time of the agreement; and packer ownership, feeding, or control of cattle for more than 7 days before slaughter.

3) Limiting, restricting, or denying timely market access by
    a) Blackballing or otherwise retaliating against any particular cattle feeder.
    b) Shunning the negotiated cash market during a particular week (e.g., rule could require that packers purchase each week no less than X% of their annual average weekly cash purchases during the previous three years).
    c) Refusing to make bona fide purchase offers for negotiated cash cattle anytime during a three business-day period each week (to end the current one-hour or so trading window late in the week).
    d) Coercing cattle feeders into entering forward contract arrangements in return for a guarantee of timely market access.
    e) Offering a cash bid for cattle contingent upon an agreement to delay delivery for longer than seven days.
    f) Refusing to unload trucks with cattle for which the price was a delivered price in the order of arrival at the plant (to end practice of granting an unloading preference to trucks delivering imported cattle or cattle from a preferred feeder).
4) Providing any monetary compensation to any cattle feeder not related to the market value of the cattle at the time of the purchase transaction (e.g., bonuses for total volume or weight delivered, or for any other reason). This could be worded as any compensation not already reported under the Livestock Mandatory Price Reporting Program at the time the cattle are purchased (e.g., negotiated sales) or delivered (e.g., forward contracts).
5) Providing financing arrangements to some cattle feeders while denying others of the same financing terms.
6) Providing risk-sharing terms to some cattle feeders while denying others of the same risk-sharing terms including but not limited to cost-plus contracts, stop-loss contracts, profit share, loss-share, agreements to pay for feed or feeding, or other arrangements that effectively deflect the financial risk of feeding cattle.
7) Applying differential transportation terms to any cattle feeder (e.g., refusing to purchase F.O.B. live from a cattle feeder when similar terms are offered to other cattle feeders; or perhaps worse, discontinuing all F.O.B. live purchases and requiring all sales to be on a carcass-weight basis where the cattle feeder pays transportation costs.)
8) Refusing to provide written documentation of grade and yield calculations to some cattle feeders when such documentation is provided to others.
9) Applying discounts to carcasses without providing written documentation evincing the factors to which the discounts applied.
10) Applying differential premiums and discounts to carcasses delivered by a cattle feeder when compared to those applied to other cattle feeders.
11) Applying discounts to heavy-weight cattle when those cattle were previously offered to the packer, but the packer had refused to offer a bona fide bid.
12) Discounting cattle for factors that do not affect the value of the resultant beef (e.g., discounting red cattle).

13) Bypassing in-region showlist cattle and transporting out-of-region cattle at a higher/uneconomical cost (to end practice of manipulating the in-region average price to which the packer's formula cattle are tied).
14) Bypassing in-region showlist cattle in the United States and transporting foreign cattle at an uneconomical cost (to end the practice of manipulating U.S. cattle prices by suppressing demand for domestic cattle with higher-cost imported cattle).
15) Purchasing cattle after the close of mandatory reporting or the Chicago Mercantile Exchange day, on Friday afternoon (to end practice of paying certain feedlots a higher cattle price without contributing to the week's average price or to cattle futures prices to which the packer's formula contracts and forward contracts, respectively, are tied).
16) Shorting the cattle futures market (to end the practice of exercising the packers' dominant position in the cattle futures market to reduce cash and futures cattle prices).
17) Providing exclusive agreements that require a cattle feeder to commit all cattle fed by the feeder to the packer.
18) Refusing to allow cattle feeders to price their forward contracted cattle earlier than during the week prior to slaughter.
19) Making public pronouncements of the packer's intent to reduce its weekly slaughter volume when, in fact, the packer's future slaughter volume remains the same (to end the practice of incentivizing cattle feeders to accept a lower price out of fear there may not be sufficient shackle space in the near future).
20) Selling cattle to a competing packer without offering the cattle for sale in a market where other packers can offer a bid.
21) Refusing to purchase cattle during the period leading up to the end of a futures contract month, causing cattle hedged in a futures contract to become overfed, which limits the hedger's options, i.e., the cattle must be sold to a packer and cannot go back on feed. If a hedge fund or the packer shorts the market at the end of the contract month, driving the futures price down the limit, the cattle would have to be delivered to the packer.
22) Manipulating output of competing proteins to manage cattle demand.
23) Requiring cattle feeders to offer the packer a right of first refusal when the cattle feeder is assessing offers from two or more packers.
24) Requiring, as a condition of market access for cattle, that domestic producers incur the costs of certification or verification, such as Beef Quality Assurance certification or third-party production verification based on electronic identification.

Furthermore, if any of the above unfair practices fail the tests proposed rule, the USDA should consider expanding and amending the rule to capture them.

3. Are the factors described in the proposed rule to contextualize the two tests appropriate? If not, are certain factors more appropriate to one or the other test?

Yes, we believe that the factors described are appropriate, with the exceptions noted elsewhere in our comments.

4. What other relevant factors may be considered in addition to or instead of the current factors?

WORC refers the USDA to answers to question 2 for further factors to consider in addition to the current factors.

> *5. Should the Department add regulatory text to define legitimate business justifications? If so, who should bear the burden of proof and what constitutes a cognizable justification?*

Yes. As stated above, we would prefer that the USDA not consider business justifications in their determination of whether or not a practice is unfair.

If the agency must include these justifications WORC recommends that add regulatory text which defines legitimate business justifications within the confines of a benefit specifically to the market participant harmed, within the same livestock industry (cattle, hogs, poultry), and within the same geographic region.

Corporate greed cannot be the sole justification. Instead regulated entities should bear the burden to prove that their conduct's harm is outweighed by benefits to the potential plaintiff. Put another way, there are no legitimate business justifications for breaking the law, and if the USDA includes this language it must be promulgated with stronger definitions of countervailing benefits (see questions 6, 11, and 12) and the burden of proof should fit squarely with the regulated entity.

> *6. Should the rulemaking consider: (a) whether the method of competition is so facially unfair that business justifications should not be entertained; (b) whether the party claiming a business justification must show that the asserted justification for the method of competition is legally cognizable, non-pretextual, and narrowly tailored to bring about a benefit while limiting the harm to the competitive process and to market participants; or (c) whether the party claiming a justification must show that the claimed benefit occurs in the same market where harm is alleged?*

As discussed above WORC recommends that business justification language be eliminated in the final rule. However, if this is not done, and business justifications are part of the analysis, then yes, all three of these considerations also should be included.

As to the (a) consideration, all of the meatpacker practices specifically described in response to USDA's Question 2 above should be identified as so facially unfair to competition that a business justification should not be entertained.

As to the (b) consideration, it is essential that a close, thorough evidentiary assessment must be conducted to ensure that any alleged business justification is "legally cognizable, non-pretextual, and narrowly tailored." The regulated entity must be required to present compelling demonstrative evidence that the specific practice, and its relevant constituent parts, (1) are essential to the continuing viability and necessary functioning of the regulated entity; (2) directly and substantially further the alleged business justification; and (3) that there is no

practice that would feasibly further the alleged business justification which is less restrictive or less harmful to the producers selling livestock for slaughter.

As to the (c) consideration, the final rule must make clear that only benefits that accrue to participants in or the competitiveness of the market where the harm from the challenged practice occurs may be considered to be countervailing benefits in the analysis of whether an unfair practice has occurred. Cross-market balancing of harms and benefits must be prohibited in this analysis. For example, when a producer selling cattle for slaughter is harmed by the challenged regulated entity's practice, only benefits that accrue to all producers selling cattle for slaughter in general may be considered as countervailing. Benefits from the challenged practice that inure to consumers in general or that improve the challenged meatpacker's position with regard to other meatpackers must not be considered as countervailing benefits.

The burden of proof on these issues must rest with the regulated entity. However, USDA and/or private party claimants may provide evidence and argument to rebut the regulated entity's position.

> *7. Does the proposed rule appropriately define what behavior is "reasonably avoidable"? Should this language be delineated more precisely or more broadly or in other ways, and if so, how?*

Yes, however, the definitions, explanations, and examples of "reasonably avoidable" behavior should be more encompassing and expounded upon. The USDA should do more to explain that as a result of insufficient enforcement of the P&S Act and other antitrust laws, concentration has reached new extremes, and the effect of that concentration. For example Michael Kades describes in his report, the experiences of feedlot owners as "a persistent lack of competition: The same packer wins the cash negotiations every week, meaning either the alternative packers do not bid or simply offer a lower price".[21] Additionally, when one considers the distance traveled, loss of weight during transport, trucking expenses, etc., producers have been put in an impossible situation where they have few if any viable options for sale. Furthermore, the USDA should add to the final rule related to avoidance of harm language that makes clear that a market participant is not required to pay additional costs that have a measurable impact on profits in order to avoid the harm from the challenge practice if all market participants would not need to incur such costs.

Another consideration is that as producers have been pushed to the brink, they are forced to acquiesce to the packers' prices and schemes. According to the 2022 Census of Agriculture, there was a 6.9% drop in the total number of farms nationwide since the last census in 2017, and almost all of those losses were of farms less than 5,000 acres.[22] Specifically in the case of hog producers "[b]etween 2002 and 2022, the proportion of hogs on smaller operations (with fewer than 2,000 hogs) declined from 25% to 5%. The proportion of larger operations (5,000

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[21] Kades pg 27, in reference to Leonard, Meat Racket: The Secret Takeover of America's Food Business, pages 217–219.

[22] USDA, National Agricultural Statistics Service, "2022 Census of Agriculture: Highlights, Farms and Farmland", issued March 2024

hogs or more) increased from 53% to 75%."[23] These statistics clearly show a marketplace where producers are struggling to remain in business and where producers' choices are severely limited.

In a competitive market, where multiple packers are bidding in an open and transparent market, they not only have to compete to offer better prices but also as better business partners. In the current hyperconcentrated market, ranchers are forced to accept risks they would not in a healthy market. For many, it's a choice between taking the risky deal that's too good to be true or losing the family business and land. The USDA should add regulatory language which expands the definition of "reasonably avoidable" so that the artificially escalated risk appetite (at the fault of the packers) of market participants is considered.

> *8. Should AMS provide additional guidance around incipient harms to the market, and if so, should AMS draw from Clayton Act standards,[134] such as whether the effect "may be substantially to lessen competition, or to tend to create a monopoly."*

As the USDA eloquently described in its thorough legal analysis contained in its explanation of the proposed rules, subsection 202(a) of the P&S Act does not require a showing that a challenged practice or act cause harm to competition or have a tendency to create a monopoly in order to be a violation of that subsection. This principle must hold true for any claims asserting that practices or acts of a regulated entity cause incipient harm to producers and/or the market in which they sell their livestock. For this reason, it is imperative that any rule language or explanatory discussion about incipient harm caused by a regulated entity's practice make clear that it is NOT NECESSARY to show the effect "may be substantially to lessen competition, or to tend to create a monopoly" for there to be a violation of subsection 202(a). However, if such standard is met it is a one clear method demonstrating incipient harm in violation of 202(a).

USDA should expand upon its guidance with regard to incipient harm. As USDA pointed out in the preamble, the P&S Act (as well as the Clayton and FTC Acts) were intended by Congress to build upon the Sherman Act and correct its failures, including interrupting harm in its incipience. Therefore we believe that adopting guidance on incipient harm similar to that for the Clayton Act, to the extent that such guidance does contradict the principle discussed in the previous paragraph, would be prudent and appropriate.

> *9. What benefits would this proposed rule provide for producers or other persons?*

Under the current proposed rules, market participants would have greater clarity of the protections granted to them by the P&S Act. Potential plaintiffs would no longer need to worry that their case would be thrown out if they could not prove that the harm caused to them harmed the market. This proposed rule correctly interprets Congress's intent to have the P&S Act protect both competitive markets and market participants from unfair packer practices. Furthermore, if the USDA adopts the suggestions laid out in these comments, market

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[23] *USDA, National Agricultural Statistics Service, "2022 Census of Agriculture: Highlights, Hogs and Pigs", issued May 2024*

participants would enjoy the clarity provided by enumerated unfair practices, it would be the responsibility of the packer to prove that their actions have merit to the producer, and unfair behavior will finally be addressed.

10. What burdens would this proposed rule create for regulated entities?

Minimal, WORC believes that the assessment provided in the proposed rule is a fair estimation of the burdens imposed on regulated entities.

11. What is your preferred way to measure countervailing benefits?

In our opinion, the preferred method to measure countervailing benefits would be to not consider them when there is a violation of section 202 in question. If the USDA must consider countervailing benefits WORC would ask the USDA to consider devising a qualitative as opposed to quantitative set of factors to measure countervailing benefits. This would allow courts and regulated entities to more easily understand the lived impact of unfair practices. Whereas, a quantitative method would likely result in wider market factors outweighing the damage caused to individuals (which we have argued above that protecting individual market participants is the purpose of section 202 of the P&S Act).

12. Should some things be categorically excluded from consideration as countervailing benefits, such as cross-market balancing?

WORC strongly believes that cross-market balancing should not be considered as a countervailing benefit. Refer to WORC's responses to questions 2, 6, and 11 for further explanation.

13. How would you describe conduct that is oppressive?

Oppressive conduct in this context could be best described as "conduct which creates or seeks to create a dominant to subordinate relationship between regulated entities and market participants, and limits market participants' ability to participate in the market in the way that they prefer." For example, limiting competition between rivals so that strong arm negotiating tactics are tolerated where they would not in a competitive market. One example of oppressive conduct is that of a rancher who is currently engaged in a direct to consumer model who would prefer to expand to a commodity scale operation but cannot as the prices are so deflated and the number of potential buyers is so limited. Because of the anticompetitive practices allowed to fester as a result of lackluster enforcement, packers have limited the ability for ranchers to operate in their market as they see fit, limiting their market freedoms.

14. How would this proposed rule affect competitive conditions in the livestock and poultry industries?

If this rule was to be finalized, the market be more competitive as well as more fair.[24] Additionally, with further clarity between courts, packers, and producers, bad actors will be deterred from acting unfairly or face the consequences resulting in fairer prices overall. Furthermore, the provisions laid out for subsections (c) and (d) provide the Secretary of Agriculture with a framework to determine where market practices are unfair in their incipiency, resulting in wider mitigation of harm, and relieve the pressure for all section 202 violations to be put on the shoulders of market participants.

> *15. Should the proposed rule treat private causes of action differently from violations of section 202(a) of the Act when enforced by the Federal Government, and if so, how?*

No, private causes of action should not be treated differently from enforcement actions by the Federal Government. For the sake of clarity and consistency, private cases concerning violations should be subject to the same tests as those brought forth by the USDA. Furthermore, the burden of proof should remain with the regulated entity.

> *16. Would this proposed rule have any other effects on the market or market participants? If so, in what ways should they be addressed?*

If finalized, the proposed rule would result in greater efficacy in the enforcement of the P&S Act, protecting market participants from unfair practices, laying clear rules of the road for regulated entities, and state emphatically the intended purpose of the P&S Act for courts. This will result in fewer unfair practices occurring in markets, as regulated entities will be deterred or held accountable in court.

[24] *Kades pgs 7,8*