Updated: August 2021

Eliminating the Requirement to Demonstrate Harm to Competition in Packers & Stockyards Act Enforcement

BACKGROUND:

The Packers and Stockyards Act ("the Act")[1] is a century-old law that is designed to ensure competition and integrity in the livestock and meat markets. As part of the 2008 Farm Bill, the U.S. Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA) was required to issue regulations "to establish criteria the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of" Section 202(b) of the Act.[2] GIPSA merged with the Agricultural Marketing Service (AMS) in 2017. In January of 2020, AMS[3] published a Proposed Rule[4] to comply with the 2008 Farm Bill which was finalized in December of the same year.[5] However, during the 2020 Presidential transition, the Biden Administration paused implementation of the Final Rule pending review. On July 9, 2021, Secretary Vilsack announced that USDA plans to revisit the Final Rule to, "reinforce the longstanding USDA position that it is not necessary to demonstrate harm or likely harm to competition in order to establish a violation of the Act." No further details have been released by USDA at this time, but this has not been the longstanding USDA position, nor the position of federal courts.[6]

REGULATION COMPONENTS AND CONCERNS TO CATTLEMEN:

- Cattle producers utilize a number of methods to buy and sell cattle in addition to the negotiated cash market, including negotiated grids, formulas, and forward contracts (collectively referred to as "alternative marketing arrangements," or "AMAs").
- AMAs allow producers to better manage risk and receive compensation commensurate to the quality of their cattle.
- Currently, producers may file a complaint with the Packers and Stockyards Division (PSD) at USDA-AMS if they believe another market participant's conduct constitutes an undue or unreasonable preference or advantage in violation of the Act.
- Parties claiming the Act has been violated must demonstrate that the alleged violation harms, or is likely to harm, competition in the broader marketplace. This requirement cuts down on frivolous claims by compelling parties to demonstrate anticompetitive behavior.
- If this requirement were eliminated, more parties would be able to claim violations for individual transactions. This would have a number of negative impacts – larger patterns of anticompetitive behavior may be missed in the slew of person-to-person cases, and the endless adjudication of individual transactions would destabilize cattle markets and result in costly litigation between producers.
- There must be a requirement that violations of the Act truly pertain to overall competition. The Act is structured to ensure equal opportunities, not equal outcomes among competitors.
- Removing the harm to competition requirement would jeopardize use of AMAs and other efficiency-enhancing agreements which are both standard practice and beneficial to producers and consumers. Cattle processors would be hesitant to negotiate individual, innovative AMAs for fear of a less competitive customer filing suit for not getting the same deal.
- The requirement for persons alleging violations of the Act to demonstrate harm, or likelihood of harm, to competition has been affirmed by eight federal courts of appeals, with no dissenting circuits, and the U.S. Supreme Court has routinely denied review of this issue.[7]

BOTTOM LINE:

NCBA opposes elimination of the regulatory requirement for complainants to demonstrate harm and/or likelihood of harm to competition to establish a violation of the Act. Further, NCBA affirms the longstanding legal precedent established by the U.S. Circuit Courts of Appeals.

---

[1] 7 U.S.C. § 181, et seq
[2] Food, Energy, and Conservation Act of 2008, P.L. 110-246, Sec. 11006.
[3] GIPSA merged with the Agricultural Marketing Service (AMS) in 2017.
[4] 85 Fed. Reg. 1771 (Jan. 13, 2020).
[5] 85 Fed. Reg. 79779 (Dec. 11, 2020).
[6] 85 Fed. Reg. 1771, 1774 (Jan. 13, 2020) (stating, "AMS does not intend to create criteria that conflict with case precedent, so PSD expects that court precedents relating to competitive harm are likely to remain unchanged."). *See also Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277-79 (6th Cir. 2010) (stating, "All told, seven circuits—the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—have now weighed in on this issue, with unanimous results.")
[7] See *Terry v. Tyson Farms, Inc.,* 604 F.3d 272 (6th Cir. 2010).