National Pork Producers Council®

The Global Voice for the U.S. Pork Industry

January 17, 2022

S. Brett Offutt
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USDA AMS Fair Trade Practices Program
1400 Independence Ave. SW
Washington, DC 20250

Re: Comments of the National Pork Producers Council in Response to Proposed Rule "Inclusive Competition and Market Integrity Under the Packers and Stockyards Act" (AMS-FTPP-21-0045)

Dear Mr. Offutt:

The National Pork Producers Council (NPPC), which represents the interests of America's more than 66,000 pork producers, submits the following comments regarding the Agricultural Marketing Service's (AMS) Proposed Rule "Inclusive Competition and Market Integrity Under the Packers and Stockyards Act" (AMS-FTPP-21-0045-0001).

NPPC appreciates the opportunity to submit comments on the proposed rulemaking regarding discrimination, retaliation, and deception and strongly agrees that there is no place for these practices in an efficient and competitive marketplace. Pork producers rely on enforcement of the Packers and Stockyards Act ("PSA") to ensure fair markets and competitive pricing opportunities, and NPPC appreciates that USDA intends for the Proposed Rule to promote inclusive competition and market integrity.

However, the definitions and regulations contained within this Proposed Rule are vague and overbroad, creating unnecessary uncertainty that would make it difficult for regulated entities to demonstrate compliance and result in burdensome and costly litigation. Regulated entities in the pork industry include not only large-scale pork packers and processors, but also small processors and independent hog farmers engaged in contract production. Producers that sell hogs to packers would also be negatively impacted as the industry responds to heightened uncertainty, confusion, and litigation. Additionally, the majority of protections afforded in the Proposed Rule are already covered by existing antitrust, anti-discrimination and other state and federal laws.

The following comments include important background information on the U.S. pork industry and a legal analysis that addresses many of USDA's questions about the associated impacts of the Proposed Rule.

Pork Industry Background

The U.S. pork industry has undergone significant changes over the last 30 years, transforming from a commodity-oriented sector that relied mainly on family labor to a more capital-intensive, science-and-technology-driven industry producing products for many consumer audiences. Over time, the pork industry has also moved from an industry consisting of hundreds of thousands of small operations that sold pigs in cash markets by truck or trailer loads to one that now has roughly 66,000 hog farms marketing their animals directly to the packer, or in some cases, to the consumer.

Though the industry has changed over time, the 2017 Census of Agriculture Farm Typology Report shows that the family farm remains the dominant business structure for the hog industry. Family farms comprise 96 percent of all U.S. hog farms and account for about 81 percent of total hog sales.[1] There are fewer farmers today than there were 30 years ago, but hog farm numbers have been relatively stable since 2000. The most recent Census of Agriculture shows an increase of 3,200 hog farms from 2012 to 2017, indicating that the trend toward fewer and larger farms has slowed.[2] Structural changes in the pork industry have been driven by various economic forces and as a response to significant levels of risk and uncertainty in agriculture. As a result, business practices that help mitigate certain types of risk, such as contract production, marketing agreements, and producer-owned packing capacity, have become increasingly prevalent in the pork industry.

Production Contracts

As correctly pointed out in the commentary of the Proposed Rule, data from the 2017 Census of Agriculture shows that contract production has been widely adopted in the pork industry. Based on the survey, about 43 percent of the U.S. hog inventory is housed by contract growers while independent producers raise 34 percent of hogs. The remaining 23 percent are cared for directly by contractors or integrators.[3]

The use of production contracts accomplishes several goals for hog producers. First, this arrangement makes it easier for pig owners to grow their farming operations without raising the capital required to construct additional facilities. Production contracts create opportunities for other farmers to build hog barns and enter into business as independent contract growers. The grower has the benefit of building equity in barns and equipment that typically holds value well beyond the length of the contract.

Second, production contracts allow hog farms to be geographically dispersed, reducing the systemic risk of loss that would exist if animals were spatially concentrated. The growth of production contracts also coincided with the development of separate-site swine production systems that segregate pigs at various growing stages to control disease, increase pig health and enhance efficiencies. Production contracts facilitated the widespread adoption of these systems by giving pig owners access to land in different areas. This system has resulted in healthier animals which directly corresponds to reduced consumer risk from biological hazards. Production contracts have also led to lower-cost production, higher output, more affordable pork products for U.S. and foreign consumers, and ready access to manure fertilizers that many crop farmers use.[4]

Finally, production contracts allow thousands of rural residents to remain on family farms, making a full-time living in agriculture. Production contracts make this possible by providing repayment assurance for bankers and, in turn, allowing growers to finance, upgrade and modernize buildings. They provide steady sources of income without the grower having to face output or market risk. Once paid off, contract buildings provide substantial cash flow that can be used to replace or expand facilities. Many growers eventually become independent hog producers thanks to the opportunity provided by a production contract.

Contract hog production payments were initially made on a per-head basis, with premiums for superior performance, such as low death loss, low feed conversion rate, and more pigs per sow per year. However, this meant that potentially poor weather conditions, disease challenges, and early marketing

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[1] https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/Typology/typology_us.pdf.
[2] https://quickstats.nass.usda.gov/results/8B79962A-2585-3FE0-A90D-DEA89A70F528.
[3] https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/st99_1_0020_0023.pdf.
[4] Meyer, S. and Goodwin, B., “Structure and Importance of the U.S. Pork Industry” (2021).

or delayed pig deliveries could create situations that reduced growers' incomes and their ability to repay loans.

Other payment systems were tried, but most producers finally adopted, in general, a system that pays growers a fixed amount per animal space per year. Hypothetically, the owner of a 1,000-head finishing barn may receive $40 per pig space per year (i.e., $40,000 annually). In addition, the contract grower may receive a premium for performance that exceeds pre-specified levels, such as certain feed conversion rates or low death loss. This payment system guarantees a minimum income level to growers, provides incentives to improve performance, and allows owners flexibility in the timing of placing and marketing pigs without imposing a consequence on the grower. The system has worked very well for swine contractors and contract growers in the pork industry.

Marketing Agreements

Another business practice developed over the past 30 years is the use of marketing agreements to transfer ownership of pigs from producers to packers. Marketing agreements, like production contracts, have evolved to meet the needs of farmers and the industry.

Early marketing agreements were offered by packers to secure leaner hogs that would yield higher proportions of saleable cuts. In the 1980s and 1990s, the U.S. hog populations contained a large number of animals with too much fat and not enough lean muscle. As consumers began demanding leaner pork products, packers identified producers with lean, muscular hogs and offered them a premium if they would make a long-term commitment to selling to that packer. Another benefit is the assurance of throughput levels that maximize packing plant efficiencies. This allows producer-to-consumer price spreads to be as small as possible, keeping producer prices high and/or consumer prices low.[5]

For producers, one benefit of marketing agreements is guaranteed access to packing capacity. The importance of this access was driven primarily by the hog price crash of 1998. In that year, hog supply increases outpaced packing capacity, and hog prices fell to record lows. The inability to sell hogs on a timely basis drove many producers and their lenders to enter into marketing agreements to guarantee "shackle space" at a packer. Few producers or lenders wanted to take the risk of raising pigs without a guaranteed market, even over a short period of time. In today's environment of volatile market prices, many lenders require producers to secure a marketing contract that ensures shackle space and some degree of revenue certainty as a condition of their financing.

As marketing agreements have become more widely adopted, the volume of hogs traded on the cash or spot market has declined. There have been attempts over the years to limit how producers sell and packers buy hogs. However, such proposals would lead to more market volatility, further concentration, less stability and inevitably, more vertical integration of the pork industry, with packers simply owning hogs from birth to slaughter.

Pork Packing Capacity

The pork packing sector has also experienced changes in recent decades. Over the last 30 years, the United States has gone from being a net importer of pork to a global pork supplier to more than 100 countries. The U.S. pork industry's competitive advantage is partly due to modern, efficient packing

[5] Meyer, S. and Goodwin, B., "Structure and Importance of the U.S. Pork Industry" (2021).

plants with stellar food safety track records that differentiate U.S. pork from other protein suppliers worldwide.

Expanded export opportunities have supported the pork industry's growth over this period. In response to increased demand, the industry has added many modern plants since the 1990s, including three brand-new, state-of-the-art facilities since 2017. In recent years, new plants have been built with hog producers' involvement and investments, representing vertical integration downstream through packing and processing by producers.[6] As a result, new plants and producer-owned packing capacity have led to a decline in industry concentration. As USDA highlights in its commentary, the pork packing industry's four-firm concentration ratio (CR-4) declined from about 70 percent in 2018 to 64 percent in 2020.

In addition to large-scale packing plants, hundreds of small and very-small pork packing plants in the United States operate under both state and federal inspection. Though small-scale plants account for a very small percentage of total U.S. pork production, they provide additional capacity in local communities and support economic activity in rural areas. Small plants, however, operate at a disadvantage in economies of scale and efficient throughput compared to larger plants. Additional fixed costs (such as those imposed by increased regulations) are also felt most significantly by smaller plants that cannot spread the additional overhead across as many hogs and therefore see additional administrative and labor costs accounting for a larger portion of revenue.

Legal Analysis of the Proposed Rule

The Proposed Rule, "Inclusive Competition and Market Integrity under the Packers and Stockyards Act," seeks to address issues of discrimination and unjust prejudices against certain producer groups, retaliation against producers for participating in certain protected activities, and deceptive practices that impact contracts in the pork, beef, and poultry industries.

The regulations consist of three main components under two sections: Section 201.304, covering discrimination and retaliation, and Section 201.306, covering deceptive practices. USDA also proposes a recordkeeping requirement under Section 201.304 requiring regulated entities to keep compliance-related records for five years. While the regulations may be well-intended, the Proposed Rule does not appear to address any specific existing issue and instead could create significant uncertainty, confusion, and needless litigation in the pork industry.

The following sections explain how each of the three main components of the Proposed Rule is already prohibited under existing laws, inappropriately extends the scope of the PSA, and is overly vague and broad such that compliance would be difficult or even impossible. Thus, as described below, any benefit that could be gained from the Proposed Rule would be substantially outweighed by the costly and burdensome litigation resulting from the Proposed Rule as it applies to the pork industry.

Non-Discrimination under Proposed Rule Section 201.304(a)

Under Section 201.304(a) of the Proposed Rule, "a regulated entity may not prejudice, disadvantage, inhibit market access, or otherwise take action against a covered producer . . . based upon the covered producer's status as a market vulnerable individual or [as] a cooperative."[7]

Proposed Section 201.304(a) over-extends the PSA to cover conduct that is both prohibited under existing laws and outside the scope of the type of conduct that the PSA was enacted to regulate.

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[6] Meyer, S. and Goodwin, B., "Structure and Importance of the U.S. Pork Industry" (2021).
[7] 87 Fed. Reg. 60010 (Oct. 3, 2022) (to be codified at 9 C.F.R. pt. 201) ("Proposed Rule") at § 201.304.

However, even if Section 201.304(a) can be viewed as necessary and within the scope of the PSA, it is vague and overbroad, which will likely lead to uncertainty in complying with the Proposed Rule and eventually to costly and burdensome litigation.

Proposed Rule Section 201.304(a) Largely Covers Conduct Prohibited Under the PSA, Antitrust, and Anti-discrimination Laws

Sections 202(a) and 202(b) of the PSA already prohibit unjust discrimination and undue prejudices or preferences that have an anticompetitive effect.[8] As has long been recognized, the purpose of the PSA is to regulate anticompetitive conduct in the meat packing industry. Accordingly, the PSA was drafted to address anticompetitive actions and economic injury.[9]

However, USDA has clearly indicated in the commentary to the Proposed Rule that it seeks to remove the anticompetitive harm requirement by delineating specific discriminatory and prejudicial conduct deemed to cause market-wide harm. The Proposed Rule would expand the already existing protections against discriminatory, anticompetitive behavior in the PSA to include a new cause of action based on a covered producer's status as a "market vulnerable individual" or member of a cooperative that—in USDA's view—would not require proof of anticompetitive harm. In essence, the USDA seeks to expand the PSA into an anti-discrimination or civil rights statute, expanding the PSA well beyond what Congress intended.

Congress has enacted statutes that directly protect individuals and organizations (including producers and cooperatives) against such discriminatory conduct. To the extent that these statutes do not already protect producers from discrimination they may face in the meat packing industry, it is up to Congress to amend existing laws or create new ones to address discriminatory conduct in the meat packing industry.

For example, the Civil Rights Act of 1964 already broadly prohibits entities that receive federal assistance from discriminating against established protected classes, which include color, race, religion, sex, and national origin.[10] Indeed, the Proposed Rule contemplates the possibility of using existing "protected classes" from federal statutes to define "market vulnerable individual."

Congress has also already specifically acted to prevent discrimination against cooperatives and other organizations through the Agricultural Fair Practices Act ("AFP Act").[11] The AFP Act prohibits handlers—which would include packers and processors as defined under the AFP Act[12]—from discriminating "against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an

[8] 87 Fed. Reg. 60010 (Oct. 3, 2022) (to be codified at 9 C.F.R. pt. 201) ("Proposed Rule") at § 201.304.

[9] See, e.g., Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968) (finding PSA should be construed "in accord with its purpose to prevent economic harm"); De Jong Packing Co. v. United States Dep't of Agriculture, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980) (finding PSA "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation such as the Clayton Act and the Fair Trade Commission Act."); London v. Fieldale Farms Corp., 410 F.3d 1295, 1304 (11th Cir. 2005) ("long-time antitrust policies . . . formed the backbone of the PSA's creation").

[10] 42 U.S.C. § 2000(e).

[11] 7 U.S.C. § 2301 et seq.

[12] The AFP Act defines "handler" as "any person engaged in the business or practice of (i) acquiring agricultural products from producers or associations of producers for processing or sale; (ii) grading, packaging, handling, storing, or processing agricultural products received from producers or associations of producers." 7 U.S.C. 2302(3)(a)(i)-(ii).

association of producers."[13] The AFP Act also prohibits handlers from "refusing to deal with any producer because of the exercise of his right to join and belong to" an association.[14]

Antitrust laws also prohibit certain discriminatory conduct that is economic in nature. For example, the Robinson-Patman Act ("RPA") prohibits price discrimination that injures competition.[15] In addition to other requirements, to prove a claim under the RPA, a plaintiff must show that it paid a different price to a seller than other buyers purchasing the same or a substantially similar commodity.[16] The federal antitrust enforcement agencies have recently shown a renewed interest in RPA enforcement.[17]

The Proposed Rule prohibits similar actions, such as "offering contract terms that are less favorable than those generally ordinarily offered," but then includes open-ended language prohibiting disadvantaging a market vulnerable individual or cooperative with respect to "any matter." In the commentary to the Proposed Rule, USDA notes that the Proposed Rule is intended to address price discrimination that is based on a producer's status as a "market vulnerable individual." To the extent that price discrimination is the concern, the RPA (including its exceptions) addresses the issue. But to the extent USDA's concern is broader, the Proposed Rule is too vague and limitless in prohibiting discrimination as to "any matter" against "market vulnerable individuals."

Section 201.302 Definitions Are Vague and Overbroad

As described above, Section 201.304(a) seeks to create a cause of action for a category of individuals defined under Section 201.302 as "market vulnerable individuals." The definition of a "market vulnerable individual" in the Proposed Rule is extremely vague and subjective, such that it may inappropriately capture a vast number of individuals and entities and lead to substantial uncertainty as to who fits within the definition.

For example, the Proposed Rule defines "market vulnerable individual" as an individual who is part of a group that is "subject to, or at a heightened risk of, adverse treatment." The rule provides no guidance as to determine who is subject to "heightened risk" or what that even means. Moreover, under the definition, even those that are "perceive[ed] to be a member" of such a group becomes "market vulnerable individuals." Such a subjective definition leaves substantial uncertainty over who may be considered a "market vulnerable individual."

The Proposed Rule also defines a "market vulnerable individual" to include "a company or organization where one or more of the principal owners, executives or members would otherwise be a market vulnerable individual." The plain reading of the Proposed Rule means that a company or other organization that has (or is perceived to have) a single "market vulnerable" executive would fit the definition and could bring a discrimination claim under the PSA pursuant to Section 201.304; functionally, this is likely to provide numerous organizations with standing to bring discrimination claims.

The commentary to the Proposed Rule does not provide additional guidance on as to how to define "market vulnerable individual," but leaves it to the industry to decide. Indeed, in the commentary to

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[13] 7 U.S.C. § 2303(b).

[14] 7 U.S.C. 2303(a).

[15] 15 U.S.C. § 13(a).

[16] See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176 (2006) (citing 15 U.S.C. § 13(a)).

[17] See Returning to Fairness, Prepared Remarks of Commissioner Alvaro M. Bedoya Federal Trade Commission, FTC.gov (Sept. 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.

("Certain laws were clearly passed under what you could call a fairness mandate—laws like Robinson-Patman—directly spell out specific legal prohibitions. Congress's intent in those laws is clear. We should enforce them.").

the Proposed Rule, the USDA has suggested adopting a "flexible definition" of "market vulnerable individual" to permit an "evolving" and "market specific application of the regulation." The commentary even seeks comment on whether the protections should be extended to "all persons buying and selling meat." A "flexible definition" of "market vulnerable individual" would lead to even more uncertainty over who has standing to bring an action under the Proposed Rule. If the Proposed Rule is to be implemented, any definition of "market vulnerable individual" should be clearly and narrowly defined to provide as much certainty as possible over who can bring a claim under the Proposed Rule.

The Proposed Rule also seeks to add as a "covered producer," a category of "livestock producers," a group of persons not previously defined under the PSA. This category would include not only producers of livestock, but any individual engaged in the "raising" or "caring" of livestock. This would create a broad new category of individuals that can bring an action under the PSA without any logical connection to the enforcement of anticompetitive conduct.

Section 201.304(a) Enumerated Prohibited Conduct Is Vague and Overbroad

The Proposed Rule provides a non-exhaustive list of prohibited conduct that is extremely vague and broad, leaving open the possibility that almost any type of conduct that treats one producer differently than another may be considered an "undue prejudice" or "unjust discrimination" under the Proposed Rule where the producer meets the broad definition of a "market vulnerable individual." Further, the Proposed Rule broadly prohibits conduct not only based on status as "market vulnerable individual," but also status as a cooperative.

While the Proposed Rule enumerates certain "prejudices or disadvantages" that are prohibited under the Proposed Rule, the commentary notes the enumerated conduct is an "inexhaustive list of prejudices . . . the regulation[s] prohibit." The Proposed Rule also identifies other broad forms of prohibited conduct that are left undefined. This conduct includes "inhibiting market access" or "otherwise taking adverse action against a covered producer with respect to any matter related to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry."

The enumerated conduct defined as "prejudice or disadvantage" is itself vague and overbroad and would prohibit lawful conduct with a legitimate justification. Moreover, the prohibition of such legitimate business decisions would be exacerbated if the requirement to demonstrate harm to competition were eliminated.

For example, the Proposed Rule defines "prejudice or disadvantage" to include "offering contract terms that are less favorable than those generally or ordinarily offered." Such vague language will result in costly litigation about what is "generally" or "ordinarily" offered and what makes one term "less favorable" than another. In the pork industry, "favorable" contract terms depend on current market dynamics that vary significantly over time.

The Proposed Rule also identifies as a "prejudice or disadvantage" actions that result in "differential contract performance or enforcement." As such, industry participants will be left to litigate (and courts will be burdened with the tasks of deciding) what constitutes "differential" treatment.

The Proposed Rule also includes "refusing to deal" or "termination of a contract or non-renewal of a contract" as "prejudice or disadvantage." Prohibiting such actions— particularly if read in conjunction

with USDA's commentary purporting to remove the competitive harm requirement— would conflict with long-established antitrust precedent, which holds that virtually all unilateral refusals to deal are legal.[18]

Moreover, Section 201.304(a) offers no guidance on or consideration of legitimate business reasons to engage in any of the purported "prejudicial" or "disadvantaging" conduct. While Section 201.304(a) states that the conduct is only prohibited where it is "based on" the individual's status as a "market vulnerable individual" or a cooperative, it may be difficult for a regulated entity to prove that it acted based on legitimate business reason. Further, the Proposed Rule provides no guidance as to whose burden it will be to prove that the regulated entities' conduct was "because of" status as a "market vulnerable individual" or some other legitimate reason.

In effect, the Proposed Rule may require regulated entities to give all producers the same contract and terms just to avoid costly litigation under the Proposed Rule. This effect directly contradicts the PSA. As courts have long held, the PSA does not require packers to offer contract terms that are the same across all producers. Congress did not enact the PSA to "upset the traditional principals of freedom of contract," and thus, the PSA does not "statutorily create an entitlement to obtain the same type of contract" as others.[19] Like the antitrust laws, Congress designed the PSA to protect competition, not protect competitors and/or aid a specific category of competitors.[20]

Section 201.304(a) Will Lead to Burdensome and Costly Litigation

The broad and vague terms in the Proposed Rule, as described above, will likely result in unnecessary and costly litigation to resolve claims brought under the Proposed Rule. Moreover, Section 201.304(a) would open the floodgates for plaintiffs' lawyers seeking damages. The proposed definition of "market vulnerable individual" would allow a broad array of individuals and entities to bring a claim under Section 201.304 (a) of the Proposed Rule. The burden of this increased litigation would likely not be limited to packers and could have wide-ranging impacts on producers and marketing opportunities.

In addition, the commentary on the Proposed Rule reiterates USDA's view that a plaintiff may bring a claim under the PSA for the vague conduct enumerated in the Proposed Rule without proving harm to competition. If allowed to stand despite existing precedent to the contrary, this would open the floodgates to a myriad of petty contract disputes in federal courts in direct contradiction to the purpose of the PSA to combat anticompetitive conduct. Indeed, many of the Circuit court cases that have dismissed claims under the PSA because the plaintiff could not prove harm to competition were based on conduct that was also alleged to be a breach of contract.[21]

Retaliation under Proposed Rule Section 201.304(b)

Section 201.304 of the Proposed Rule also seeks to prohibit retaliatory conduct against covered producers. More specifically, Section 201.304(b) of the Proposed Rule prohibits a "regulated entity" from "retaliat[ing] or otherwise tak[ing] an adverse action against a covered producer" because of the

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[18] See Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407-08 (2004) (finding antitrust law "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal" (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919))).

[19] Jackson v. Swift Eckrich, Inc., 53 F.3d 1452, 1458 (8th Cir. 1995) (affirming judgment as a matter of law for defendant on claim based on Plaintiff's allegation that it did not receive same contract options as other growers); IBP, Inc. v. Glickman, 187 F.3d 974, 977 (8th Cir. 1999) (purpose of the PSA "was not to so upset the traditional principles of freedom of contract, as to require an entirely level playing field for all"); Griffin v. Smithfield Food, Inc., 183 F. Supp. 2d 824, 828 (same).

[20] See Armour & Co. v. United States, 48 F.3d 712, 719-20 (7th Cir. 1968) (determining the PSA is "not intended to protect a business against loss in a competitive market").

[21] See, e.g., Been v. O.K. Indus., 495 F.3d 1217, 1229 (10th Cir. 2007); London v. Fieldale Farms Corp., 410 F.3d 1295, 1299-1300 (11th Cir. 2005); Philson v. Goldsboro Mill. Co., 164 F.3d 625 (4th Cir. 1998).

covered producer's participation in an enumerated list of protected activities. The retaliatory acts prohibited include: "termination of contracts or non-renewal of contracts; adversely differential performance or enforcement of a contract; refusing to deal with a covered producer; interference in farm real estate transactions or contracts with third parties."

Like the proposed section on unjust prejudice and discrimination, the Proposed Rule covers conduct that existing laws already prohibit and falls outside the scope of the type of conduct the PSA was designed to prohibit. Moreover, proposed Section 201.304(b) is also vague and overbroad, which will lead to uncertainty with respect to compliance and costly and burdensome litigation in the industry.

The Covered Activities under Proposed Rule Section 201.304(b)(2) Are Already Protected Under Other Laws

Congress has already enacted multiple laws that prohibit retaliation against essentially all of the covered activities under Section 201.304(b) of the Proposed Rule. To the extent retaliatory actions that covered producers may face in the meat packing industry are not covered by these rules, it is up to Congress to amend statutes that already prohibit retaliation or enact new laws. The PSA is not the proper vehicle to regulate conduct that can be perceived as retaliatory.

For example, the AFP Act already prohibits packers and other related entities from "coercing" or "intimidating" producers from "exercis[ing] their right to join or belong to . . . an association of producers" and from "refus[ing] to deal with any producer because of the exercise of his right to join and belong to such an association."[22]

Cooperatives, and similar organizations and associations, are also protected against actions under the antitrust laws as a form of retaliation under the Capper-Volstead Act, which grants such organizations immunity from the antitrust laws.[23] The Proposed Rule also contemplates protection from retaliation based on a witness's collaboration with a government investigation. However, federal laws already protect farmers from retaliation if they act as a witness in federal investigations, including by the USDA.[24]

As such, existing statutes protect most, if not all, of the protected activities in Proposed Section 201.304(b)(2). Rather than increasing protection for covered producers from retaliatory conduct, the more likely outcome of the Proposed Rule is to increase the litigation burden faced by industry participants, as industry participants may face more claims based on vague allegations of perceived retaliation, as discussed in the next section.

Sections 201.304(b)(2) and (3) Are Vague and Overbroad

The Proposed Rule's Sections 201.304(b)(2) and (3) are written so broadly that they would allow essentially any producer to bring an action under the PSA for purported retaliation based on overly broad categories of protected activities.

For example, one of the covered activities protected under the Proposed Rule is a covered producer "assert[ing] the right to join a producer or grower association or organization." In theory, this would mean that any "covered producer" that wishes to join or joins the NPPC, or similar trade association,

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[22] 7 U.S.C. § 2303(a).

[23] 7 U.S.C. §§ 291-92.

[24] 18 U.S.C.S. § 1515(a)(1)(C) (prohibiting witness tampering/intimation when a witness is involved in "a proceeding before a Federal Government Agency which is authorized by law").

could make a claim under Section 201.304(b) against a "regulated entity" (e.g., a packer or contractor) for engaging in perceived retaliatory behavior on account of that producer's membership in the NPPC.

Other broad activities that could trigger a perception of retaliation include, for example, "asser[ting] any rights granted under the [PSA]" and "assert[ing] contract rights." This could be read to mean that even carrying out the terms of a contract is a protected activity under the Proposed Rule. The Proposed Rule also includes communicating with "a person for the purposes of improving production or marketing of livestock or poultry." This provision could be read to mean that many communications related to a producer's business are a protected activity.

In addition, the defined forms of retaliation in Section 201.304(b)(3) consist of the same broad range of activities as those enumerated in Section 201.304(a)(2) that a regulated entity may have legitimate business reasons to carry out, such as "termination of contracts or non-renewal of contracts," "adversely differential performance or enforcement of a contract," and "refusal to deal." As described above, such terms may force regulated entities to treat every producer the same and restrict the right to freely deal or not deal, which conflicts with the PSA and the antitrust laws. Section 201.304(b)(3) also describes the additional action of "interference in farm real estate transactions or contracts with third parties." That conduct is vaguely described such that it would be difficult for a regulated entity to determine whether its actions are prohibited under the Proposed Rule.

Essentially, if producers were to engage in common conduct—such as joining a cooperative, asserting their rights under a contract, or communicating with anyone to carry out their business—those producers could make a claim under Section 201.304(b)—characterizing the conduct as retaliation—if a regulated entity terminates a contract or gives differential treatment to the producer. While the Proposed Rule prohibits only retaliation "based on" the activities listed, in practice, it may be difficult for regulated entities to prove that they acted for a legitimate purpose and not in retaliation.

Moreover, like the anti-discrimination provisions in Section 201.304(a), the retaliation provisions in the Proposed Rule offer no guidance on or consideration of legitimate business reasons to engage in any of the purported retaliatory conduct. Nor does the Proposed Rule provide guidance as to whose burden it will be to prove that the regulated entities' conduct was "because of" the producer's participation in the list of enumerated activities or some other legitimate reason.

Section 201.304(b) Would Lead to Burdensome and Costly Litigation

The broad and vague terms in the Proposed Rule, as described above, will result in costly litigation to resolve claims brought under the Proposed Rule. Moreover, like the anti-discrimination provision, the USDA has also suggested that a plaintiff would not need to prove harm to competition to bring a retaliation claim under Section 201.304(b) of the Proposed Rule. This would again lead plaintiffs to believe that they could bring a claim based on a broad form of alleged retaliatory conduct under Section 201.304(b) without having to prove harm to competition, which is in conflict with judicial precedent and would open the floodgates to litigation.

Deceptive Practices under Proposed Rule Section 201.306

Section 201.306 of the Proposed Rule prohibits a number of deceptive practices related to contract formation, contract performance, contract termination, and refusal to deal. Unlike the Proposed Rule sections covering discriminatory and retaliatory conduct, this section is not limited to conduct against market vulnerable individuals or covered producers. Rather, Section 201.306 broadly prohibits regulated entities from engaging in the activities enumerated in the section.

The vast majority of the conduct described in Section 201.306 is already prohibited under various federal and state laws. Moreover, to the extent the Proposed Rule purports to add protections not

afforded under those other laws, its overly broad and vague prohibitions will lead to uncertainty and costly and burdensome litigation.

Common Law, State Laws, and Federal Laws Already Prohibit the Conduct under Proposed Rule Section 201.306

As the commentary highlights, USDA takes the position that essentially all of the conduct proscribed by Section 201.306 is already unlawful under the PSA. Indeed, the commentary identifies numerous examples of successful actions brought by the USDA for deceptive practices in both administrative courts and federal courts under the PSA.

Certain activities described in the commentary on the Proposed Rule would also likely constitute violations of other federal and state laws, such as consumer protection laws, laws prohibiting unfair and deceptive practices, and the Federal Trade Commission (FTC) Act.[25] Moreover, as the commentary highlights, Congress passed the Perishable Agricultural Commodities Act just following the PSA Act to prohibit "deceptive practices in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce."[26]

In addition, general contract law already prohibits using "false or misleading statements" or the "omission of material facts" with respect to contract formation.[27] Common law contract claims such as fraud or fraudulent inducement are already available to industry participants and are better suited to prohibit such conduct because the law is well-established and settled.

Congress never intended the PSA to cover contract disputes that are more appropriately governed by state law. Indeed, Section 308(B) of the PSA expressly provides that the remedies provided by the PSA "shall not in any way abridge or alter remedies now existing at common law or by statute, but the provisions of this [Act] are in addition to such remedies."[28] However, the Proposed Rule essentially seeks to turn contract and common law fraud claims into federal claims.

Proposed Rule Section 201.306 is Vague and Overbroad and Will Lead to Costly Litigation

To the extent that current laws do not address any issues in Section 201.306 of the Proposed Rule, it is unclear from the broad and vague description of prohibited conduct what the new provisions would add and whether such an extension of the law is warranted.

For example, the Proposed Section 201.306 would prohibit deceptive practices with respect to "any matter" related to "livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry." The term "any matter" is all-encompassing, which will create uncertainty as to what conduct is captured and could result in costly litigation. The Proposed Section 201.306 also prohibits the "omission of material facts necessary to make a statement not false or misleading" without providing any definition or guidance on what constitutes a "material" fact. To the extent "material omission" is to mean the same as it does under common law or existing statutes, the new provision does not add any additional protections over and above existing law.

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[25] See, e.g., N.Y. Gen Bus L. § 349 (Prohibiting "deceptive acts or practices in the conduct of business" in New York) and Tex. Bus. & Com. Code § 17.46(a) (Prohibiting "false, misleading, or deceptive acts or practices in the conduct of trade or commerce" in Texas); FTC Act § 5 (prohibiting "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce").

[26] 7 U.S.C. § 499(b).

[27] See, e.g., Pasternack v. Lab Corp. of Am. Holdings, 27 N.Y.3d 817, 827 (2016) (providing the elements of fraudulent inducement, including "material misrepresentation or omission of fact").

[28] 7 U.S.C. § 209(b).

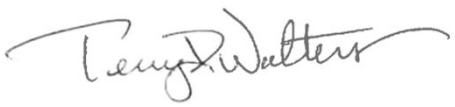
Conclusion

As stated above, NPPC strongly feels that there is no place for discrimination, retaliation, or deception in an efficient and competitive marketplace. However, the Proposed Rule does not appear to address any specific existing issue in the pork industry that would be solved by these regulations and instead could create new issues. Additionally, the vast majority of protections named in the Proposed Rule are already covered by existing laws. While the regulations may be well-intended, the vague nature of the Proposed Rule creates significant uncertainty that would result in costly and burdensome litigation. The uncertainty imposed by the rule could be harmful to all industry participants, including independent hog farmers, contractors, and smaller pork processors that are less equipped to manage additional compliance-related costs.

Furthermore, USDA stated in its May 2022 report to the White House Competition Council intentions to develop and propose "a modern set of rules under the Packers and Stockyards Act."[29] This Proposed Rule represents only the second in a series of three rules. Given the impacts described above and the potentially overlapping impacts of future rules, NPPC asks that USDA consider re-proposing all of the new regulations together and allowing sufficient time for industry stakeholders to evaluate and provide comments on the entire set of rules.

If USDA should have any questions regarding these comments as it develops additional rules related to the Packers and Stockyards Act, please contact NPPC's Public Policy Office at 202-347-3600.

Respectfully Submitted,



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[29] https://www.ams.usda.gov/sites/default/files/media/USDAPlan_EO_COMPETITION.pdf.