November 22, 2010

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Room 1643-S
Washington, DC 20250-3604.

Re: Farm Bill Comments "Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act", June 22, 2010, *Federal Register*, Vol 75, No 119, pages 35338-35354

Thank you for the opportunity to comment on the proposed rule "Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act" published in the *Federal Register* on June 22, 2010. This proposed rule has the potential to significantly change the turkey industry and we have serious concerns about the intended and unintended consequences of the rule.

The National Turkey Federation (NTF) represents all segments of the turkey industry, including growers, processors, breeders, hatchery owners and allied companies. NTF's membership produces nearly 100 percent of all turkey processed in the United States. NTF is the only national trade association representing the turkey industry exclusively.

The Contract Model and Its Advantages for Growers and Processors

As is well documented, the turkey industry is vertically integrated. There are nearly 2,500 turkey farms that service the major processors. Ninety percent of turkeys in the US are raised on private family farms operating under production contracts or marketing contracts. Marketing contracts account for approximately 10 percent of all turkeys and are an arrangement in which the grower owns the birds and supplies the feed and medicine while contracting with a specific processor to process and sell the finished product. The majority of turkeys (80 percent) are raised utilizing production contracts in which the integrated processor owns the birds and supplies the feed and medication. This is advantageous to the grower because it keeps their cost and risk to a minimum. Approximately 10 percent of turkeys are raised on company-owned farms with employees caring for the turkeys. Chart 1(next page) illustrates the breakdown of production.

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In this context, we would note that Subsection (r) defines a livestock marketing agreement as an "oral or written agreement." While the definition of "livestock" in the Act makes it clear that this Subsection does not apply to turkey or other poultry, we have a concern. It immediately precedes the definition for "production contract" for poultry and swine operations contained in Subsection (s) and the definition in Subsection (s) refers only to "contracts" making no specification regarding written or oral. NTF will not presume to speak to the appropriateness of the definition in Subsection (r) since it does not apply to the turkey industry, but coupled with the vague nature of Subsection (s), it creates a potential problem.

As part of clarifying any definition of production contracts for poultry, the agency should make it clear that oral agreements are not contractually binding. While agriculture still does business over a handshake, contracts on the scale necessary for poultry production are written, and it is that written agreement to which any regulation should apply. There should be no room for court interpretation on this matter, as it would be disastrous for all segments of the industry if there were an opportunity to litigate over oral conversations that occur outside the written contract itself. Whatever oral discussions may occur between parties to a poultry production contract may have, only the written language in the contract should be subject to regulation or litigation.

Additionally, we would note that the following Section 201.3 contains a Subsection (b) that outlines its applicability to contracts. That Subsection says "The regulations in this part, when referencing contracts or agreements generally, applies to all swine production contracts, *poultry growing arrangements*, and livestock production and marketing contracts . . ." Why would the agency define "production contract" in the previous section and then use an entirely different (and undefined) term – "growing arrangements" – immediately after when discussing applicability of the rule? Again, clarity in the definition and consistency in the usage of defined terms is absolutely essential.

We object to the definitions of "competitive injury" and "likelihood of competitive injury," which are so vague and ambiguous that contracting parties would have no idea what would be required to do to comply with the law. For example, the rule would prohibit companies from impairing a grower's ability to compete with other growers and from impairing a grower from receiving the "reasonable expected full economic value from a transaction." What conduct would be encompassed within this language?

Section 201.3
We object to the attempt of GIPSA to eliminate the competitive injury requirement to prove violations of Sections 202 (a) and (b) of the Packers and Stockyards Act (P&S Act). Not only is this regulation in direct conflict with judicial precedent dating back more than 70 years, it would remove the legal standard for determining whether our actions might be "unfair" or give "undue preference." In the absence of this standard, any grower or producer could sue a processor based on an allegation that the processor's actions or contracts adversely affected them, and the processor would be at the mercy of a jury to decide whether its conduct was "fair" or not.

Coupled with definitions of "competitive injury" and "likelihood of competitive injury" noted above, the agency clearly and deliberately is creating ambiguity about a legal standard central to

the contracting process. In the preamble to the rule, the agency expressly encourages court review of existing precedent on the competitive injury question.

What is most disturbing about this action is that it disregards for the fundamental roles of the various government branches. The federal courts ruled that Sections 202(a) and (b) of the P&S Act, as written, requires demonstration of competitive injury to prevail in a suit brought under these sections. *See e.g., Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010), *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 362-63 (5th Cir. 2009). In normal governmental process, Congress would review the court's decision and if it felt the decision were in conflict with Congress' intent; Congress could pass legislation revising the statute to expressly eliminate the requirement. In writing the 2008 Farm Bill, Congress considered the issue of competitive injury at great length and ultimately chose to leave the statute unchanged. Thus, you have multiple courts agreeing that the statute in fact contains the competitive injury requirement, and you have Congress – by declining to change the statute – affirming the courts' rulings.

For a government agency to ignore both the courts and Congress and to try to overturn court rulings by regulation, and then to essentially invite lawsuits on the matter, is extraordinary behavior.

Section 201.94
We are concerned about the additional recordkeeping requirements of this proposed rule for several reasons. First, any additional recordkeeping is an added cost to our industry. Second, in the proposed rule, the records, and the circumstances in which they are required, are not clearly defined.

> What are "standard price or contract terms"?
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> What amount and type of documentation would be needed to justify price and contract terms to sufficiently stand up in a GIPSA audit or jury trial?
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> Are weight records and payment records adequate?
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> Who determines what is adequate recordkeeping?
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> Are electronic records accepted or paper?
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> How long should records be maintained and in what conditions?
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> What about the confidentiality of the records?
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> What are the costs of these recordkeeping requirements to small, medium and large processors?

Again, the lack of forethought and clarity in writing a proposed regulation with such significant implications is surprising.