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M. Irene Omade
Grain Inspection, Packers and Stockyards Administration
United States Department of Agriculture
1400 Independence Ave. SW, Room 2542A-S
Washington, DC 20250-3613

March 8, 2017

Disclaimer: The opinions expressed herein are our own and do not necessarily reflect the views of The Johns Hopkins University.

Re: Comments on the Farmer Fair Practices Rules: Interim final rule on Scope of Sections 202(a) and (b) of the Packers and Stockyard Act [81 FR 92566](#), proposed rule on Poultry Grower Ranking System [81 FR 92723](#), and proposed rule Unfair Practices and Undue Preferences in violations of the Packers and Stockyards Act [81 FR 92703](#) (December 20, 2016)

Dear Ms. Omade,

We are researchers at the Johns Hopkins Center for a Livable Future (CLF), an interdisciplinary academic center based within the Bloomberg School of Public Health in the Department of Environmental Health and Engineering. CLF engages in research, policy analysis, and education activities guided by an ecologic perspective that diet, food production, the environment, and public health are interwoven elements of a complex system. Recognizing that equity for farmers and ranchers is crucial for ensuring a just and healthy food system, CLF is concerned about fairness in the agricultural marketplace. Accordingly, it is our position that farmers and ranchers should have fair contracts and protection from deceptive and unfair practices by large-scale corporate packers and processors. As such, we welcome the opportunity to comment on the Grain Inspection, Packers & Stockyards Administration's (GIPSA) Interim Final Rule and two Proposed Rules implementing provisions of the Packers & Stockyards Act (PSA), known collectively as the Farmer Fair Practices Rules.

We believe the Farmer Fair Practices Rules are imperative to the economic wellbeing of contract farmers and rural communities. The CLF recently worked with the public opinion research firm Greenberg Quinlan Rosner to conduct a poll of 600 Maryland voters on issues related to poultry production in Maryland. This poll oversampled on Maryland's Eastern Shore, an area that produces around 300 million broiler chickens each year. Voters showed broad support—89% of

voters statewide and 84% of Eastern Shore voters—for the following proposals to increase oversight of the poultry production contracting system:¹

- 1) Requiring that contracts between poultry companies and local growers are easily readable and transparent
- 2) Ensuring that local growers can discuss contracts and working conditions with each other freely without retaliation by poultry companies
- 3) Ending tournament pricing systems that force local growers to compete against each other

The results of this poll clearly demonstrate that voters across Maryland, including those living in areas with concentrated poultry production, support the types of protections provided in the Farmer Fair Practices Rules.

The intent of the PSA is to prohibit unfair treatment of American farmers and ranchers, not to protect the profits of large-scale livestock packers, processors, and live dealers. We urge you to finalize the Farmer Fair Practices Rules to protect contract farmers from retaliation, ensure that farmers can understand and discuss their contracts, and replace the tournament pricing system with a fair and transparent model of compensation.

Thank you for considering our comments and recommendations, provided below. Please do not hesitate to contact us with questions at (410) 502-7578 or by emailing Bob Martin, Director of the Food System Policy Program, at rmarti57@jhu.edu.

Sincerely,

Robert Martin

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¹ Food Citizen Project Poll Results: Maryland Poultry Production. Johns Hopkins Center for a Livable Future. January 2017. Accessed March 6, 2017 from <http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/pdf/projects/food-citizen/Annapolis%20Summit%20Data%20Handout.pdf>.

Comments of the Johns Hopkins Center for a Livable Future

This document encompasses CLF's comments on the Interim Final Rule on the Scope of Sections 202(a) and (b) of the Packers and Stockyard Act [81 FR 92566](#), the proposed rule on Poultry Grower Ranking System [81 FR 92723](#), and the proposed rule on Unfair Practices and Undue Preferences in violation of the Packers and Stockyards Act [81 FR 92703](#).

We strongly encourage the United States Department of Agriculture (USDA) to finalize the Interim Final Rule and both proposed rules, with improvements as indicated in Sections II, III, and IV below.

I. Interim Final Rule

The Interim Final Rule is needed to adequately support independent livestock producers and contract poultry producers, create a fairer playing field for livestock and poultry producers, and address the unfair and undue preferences for certain producers in the livestock and poultry industries.

This rule is squarely within the authority granted to USDA by Congress in the Packers & Stockyard Act (PSA). Section 407 of the PSA provides that the Secretary of Agriculture may "...make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act." Therefore, USDA has clear and comprehensive authority under the PSA to provide regulatory clarification for any terms used in the provisions of the PSA and to interpret the intent of the PSA. CLF supports the Interim Final Rule, which is supported by the plain language of the PSA.

The rule confirms that a violation of the PSA does not require a finding that the action or device adversely affects competition or has the likelihood to adversely affect competition. USDA has consistently held that each clause in Section 202 of PSA is to be read separately and that clauses (a) and (b) do not require that farmers and ranchers must make a showing of a competitive injury. But the agency has failed until now to promulgate regulations supporting its position. In recent years, federal courts of appeals have ruled—in some cases overruling juries of the people—that farmers and ranchers seeking redress for harms proven under Sections (a) and (b) must also demonstrate harm to competition or likely harm to competition arising from the PSA violation, even though neither the text of these sections nor the legislative history of the PSA require such a finding. This interpretation of competitive injury essentially prevents farmers from successfully bringing legal action against a company that is in clear violation of the PSA. The Interim Final Rule will clear up confusion and return implementation of the PSA to its original meaning.

II. Proposed Rule on Poultry Grower Ranking System

This proposed rule seeks to clarify how Section 202(a) and (b) apply to the poultry grower ranking system or tournament system for calculating farmer pay. We support this Proposed Rule but recommend a few changes, described below.

This proposed rule provides a non-exhaustive list of criteria to determine whether a poultry integrator is using a tournament system “in an unfair, unjustly discriminatory, or deceptive manner, or in a way that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage.”

We have talked with Maryland contract poultry growers who describe receiving inferior inputs (chicks and feed) from their integrator company, resulting in a lower price under the tournament system for calculating pay. While we support this rule’s goal of preventing integrator companies from using the tournament system to target a specific producer in retaliation, we believe the rule must be strengthened to protect all poultry growers. The rule should clearly designate that any tournament system where a farmer’s pay is penalized due to performance contingent upon inputs outside of the farmer’s control is a case of undue preference. We urge USDA to strengthen and finalize this rule.

III. Proposed Rule on Unfair Practices and Undue Preference in Violation of Packers and Stockyards Act

We support this proposed rule with improvements, as noted below. In particular, we support:

- USDA’s inclusion of the eight clear examples of common actions that constitute unfair, unjustly discriminatory, and deceptive practices or devices in the 2010 proposed rule.
- The inclusion of a list of “per se” violations of Section 202(a) of the PSA.
- The inclusion of a non-exhaustive list of Section 202(a) violations in 201.210(b). However, we strongly urge you to remove the “legitimate business justification” loophole. Actions such as retaliation, limiting legal rights of farmers, and limiting rights to juries or full arbitration participation are clear violations of Section 202(a) and should be prohibited.
- The inclusion of Sections 201.210(b)(3)-(7) clarifying that failing to comply with the requirements of Section 201.100 is an unfair, unjustly discretionary, or deceptive practice.
- The inclusion of language designating violations of the regulations required by the 2008 Farm Bill and codified in a final rule published on December 9, 2011 as an unfair, unjustly discretionary, or deceptive practice.
- The inclusion of Section 210(c) making plain that conduct or an action that harms or is likely to harm competition is an unfair, unjustly discriminatory, or deceptive practice or

device and thus a violation of Section 202(a). We urge the agency to finalize this subsection but without the legitimate business interest loophole.

- The inclusion of the four criteria in 202.211 for the Secretary to consider if there has been an unfair, unjustly discretionary, or deceptive practice. We also support the clarification that the criteria are not exhaustive and that the intent of the rules is not to prohibit alternative marketing arrangements.

We request the restoration of the criteria included in the 2010 rule related to disclosure. Critical information regarding acquiring, handling, processing and quality of livestock should be disclosed to all producers when it is disclosed to one or more producers. It will reduce the practice of packers and processors providing more favorable terms to certain producers in order to retaliate against those out of favor.

IV. Legitimate Business Justification

Language in the proposed rule relating to both Sections 202(a) and 202(b) of the PSA allows a processor, packer, or live poultry dealer to utilize a claim of a “legitimate business justification” to avoid a violation of these sections of the PSA. We believe this language creates a loophole for processors and packers to violate Section 202(b) of the PSA. This language was not included in the 2010 proposed rule and we oppose its inclusion in this proposed rule.