STATE ATTORNEYS GENERAL
A Communication from Attorneys General of Iowa, Minnesota and Montana

November 22, 2010

Hon. Tom Vilsack
Tess Butler
GIPSA, USDA
1400 Independence Avenue, SW., Room 1643–S
Washington, DC 20250–3604

RE: Farm Bill Comments, 75 Fed. Reg. 35338 (06/22/2010), 9 CFR Part 201, RIN 0580-AB07
Proposed regulations for the Packers and Stockyards Act

Dear Secretary Vilsack and Ms. Butler:

We, the undersigned Attorneys General, are writing to encourage adoption of specific proposals that were set forth in the June 22, 2010 Federal Register Notice issued by the Grain Inspection, Packers and Stockyards Administration (GIPSA) regarding Implementation of Regulations Required under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act. If adopted, the proposed regulations would enhance and clarify the Packers and Stockyards Act.[1]

The Interpretation of the Packers and Stockyard Act

Originally, the Packers and Stockyards Act was created and passed by Congress largely in response to a 1919 Federal Trade Commission report that warned of unfair, deceptive and anticompetitive business practices being used by the then "Big Five" packers. There was also concern that market concentration had become too great when only five packing companies dominated the industry. The Act was intended to broadly prohibit packers from engaging in unfair and deceptive practices, giving undue preferences to certain entities or localities, allocating supply in restraint of commerce, manipulating prices, creating a monopoly, and conspiring to aid in unlawful acts.

The packing industry is more concentrated today than it was when the Packers and Stockyards Act was created and passed. Major changes in the livestock and poultry industries have occurred since the Act's passage. Oftentimes, it is the rural economies of our States that suffer the brunt of any negative consequences that flow from high market concentration and packer-driven changes in the marketing and production of livestock and poultry commodities. Left unchecked, we also share concern that these problems could ultimately harm consumers.

[1] 7 U.S.C. §§ 181-229

The Packers and Stockyards Act was intended to level the playing field between our nation's farmers and ranchers, and the packers, stockyards, marketing agents and dealers. The results of recent, high profile lawsuits along with increased contracting in the production of livestock and poultry have left the current utility of the Packers and Stockyards Act in question among farmers, ranchers, USDA-GIPSA, academics and attorneys alike. While the historical intent behind the Act is still clear, modern developments have hindered its legal application. New GIPSA rules could bring a new clarity and direction to all involved parties as to the meaning and application of the Act in the rapidly changing livestock production and meat processing industries.

One vitally important part of the new regulations is the clarification of how Section 202 of the Packers and Stockyards Act of 1921[2] should be interpreted. The proposed § 201.210 provides examples of conduct that would be considered unfair, deceptive or unjustly discriminatory under Section 202 (a). The proposal encourages a plain language reading of Section 202, and promotes application the USDA's longstanding and consistent interpretation of the Act. In recent years, some U.S. circuit courts of appeals have not given deference to the USDA's interpretation and have effectively created an extra requirement—that a plaintiff must prove harm or likelihood of harm to competition in Section 202(a) and 202(b)[3] cases—an incorrectly applied requirement that has been shown nearly impossible to prove in court. The USDA's decision to exercise its congressionally granted rule-making authority to promulgate these regulations by expressly stating that a finding of competitive injury is not necessary to establish a violation of sections 202 (a) and/or (b) corrects the analytical framework and ensures that the courts grant a higher level of deference to the USDA's interpretation of the Packers and Stockyards Act. *Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1226-27 (10th Cir.2007), citing *Chevron U.S.A., Inc., v Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984).

The USDA is not alone in its interpretation that a finding of harm or likely harm to competition is not always necessary to establish a violation of Section 202 (a) and/or (b) of the Packers and Stockyards Act. In *Schumacher v. Tyson Fresh Meats, Inc.*, 434 F. Supp.2d 748, 752-53 (D. SD 2006) the court found that while subparts (c), (d) and (e) of Section 202 are limited to activities that have an adverse effect on competition—thus requiring such a showing—the language of section 202 (a) contained no such express requirement. As a result, the court held that Section 202 (a) of the Act is not limited to prohibiting only those unfair and deceptive practices which adversely affect competition. *Schumacher, at* 754. In *Kincaid v. John Morrell & Company*, 321 F. Supp.2d 1090, 1103 (N.D. Ia. 2004) the court followed a similar analysis in finding that the language of Section 202 (a) does not specify that a 'competitive injury' or a 'lessoning of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language.

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[2] 7 U.S.C. §192

[3] "It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
(b) Make or give any undue or 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"

It is well established that when a statute's language is plain, the sole function of the courts is to enforce it according to its terms.[4] The plain text of Section 202 (a) and (b) do not require an adverse impact on competition. That being said, the plain text of 202 (c), (d) and (e) do expressly require proof of adverse effect on competition. The U.S. courts of appeals that have not given deference to USDA's consistent interpretation and have not applied a plain language reading have effectively, yet incorrectly, injected the language requiring proof of adverse effect on competition in 202 (c), (d) and (e) into 202 (a) and (b), rendering the prohibitions in 202 (a) and (b) nearly impossible to enforce and also rendering the inclusion of that element in 202 (c), (d) and (e) superfluous.

The statute itself expressly states which provisions require a competitive effect and which provisions do not. By drafting the statute in this manner, Congress intended the statute be "more than just a mirror of the antitrust laws."[5] We support GIPSA's proposal that clarifies Section 202 (a) and (b).

Concerning Vertical Integration in the Livestock Industry

The proposed regulations do much to address the wave of issues that have arisen in the almost totally vertically integrated poultry and swine sectors. Without some restrictions, the contractual relationship between the integrator and the grower is one-sided. The proposed rules go a long way toward leveling the playing field in the contract swine and poultry markets. New § 201.210 helps to level the playing field by providing defined prohibited acts which have in the past been utilized to take advantage of the integrator's dominant position. New § 201.213 helps to create some transparency in the market as growers will be able to determine whether other growers are receiving similar contract terms. New § 201.214 injects fairness into the tournament systems used for paying dealers. The new regulations require that live poultry dealers pay the same base pay to growers that are raising the same types of birds, prohibit growing arrangements below the base pay amount, and require integrators to rank growers in groups with other growers with similar facility types.

Currently, poultry dealers have no mandatory notice requirements regarding the suspension of a delivery of a flock to a producer. New § 201.215 prohibits the arbitrary or unreasonable suspension of delivery of birds. It requires that poultry dealers provide adequate notice of any suspension of delivery at least 90 days before the suspension occurs. This rule allows the producer at least a reasonable amount of time to consider options for utilizing their operation in the absence of a flock and making payment arrangements for their outstanding loans.

Generally, a poultry or swine grower is required by the integrator to assume the financial burden of any capital investments required in his operation. Complaints abound of integrators abusing superior contractual power to drive their producers into crippling debt via one capital investment requirement after another. New §§ 201.216 and 201.217 provide much-needed protections for a grower's capital investment. Section 201.216 provides the criteria to be considered in determining whether a particular capital investment requirement is unfair. Furthermore § 201.217 requires that a production contract be of sufficient length to allow poultry and swine growers the ability to recoup 80% of capital investment

[4] *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S. Ct. 1942 (2000).
[5] *Spencer Livestock Commission Co. v. Department of Agriculture*, 841 F. 2d 1451, 1455 (9th Cir. 1988).

costs. This regulation should result in fewer producers being driven into default on their operating loans.

Finally, §§ 201.218 and 201.219 provide legal protections for growers by creating standards for a breach of contract process which includes notice, an opportunity to rebut and a reasonable time period in which to remedy a breach. Section 201.219 provides criteria for the Secretary of Agriculture to determine whether an arbitration clause in a contract provides a meaningful opportunity for the grower to participate fully. Importantly, the new section requires that the grower be informed in conspicuous print that he has the right to decline arbitration.

Together, a new set of rules with the components described above will go a long way to protect contract growers of poultry and livestock without damaging in any respect the profitability of poultry and livestock integrators. We have one suggestion: GIPSA's expectations of a packer, swine contractor, or live poultry dealer in the actual documentation of premium payments or application of discounts should be made still more clear – not only to clarify the intent of the proposed rule, but also to provide interpretive tools for the practical application of § 201.210 (a)(5). While there is nothing in the proposed rule that explicitly eliminates the ability of packers or processors to provide premiums to producers for providing certain quantities or qualities of livestock, any final rule should take into account the notion that this may be an unintended consequence of the proposed rule. Careful consideration should be taken so as not to limit the ability of producers to receive premiums for their innovations.

We support the adoption of a workable rule that incorporates the components described in this comment.

Sincerely,

Tom Miller
Attorney General of Idaho

Steve Bullock
Attorney General of Montana

Lori Swanson
Attorney General of Minnesota