



January 17, 2023

Packers and Stockyards Division
USDA, AMS, FTTP
Room 2097-S
Mail Stop 3601
1400 Independence Ave. SW
Washington, DC 20250-3601

RE: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act; Proposed Rule; 87 FR 60010 pages 60010-60055; Doc. No. AMS-FTTP-21-0045 and AMS-FTTP-21-0045-0404; RIN: 0581-AE05; Document Number: 2022-21114

Thank you for the opportunity to offer our comments on the proposed rule entitled “Inclusive Competition and Market Integrity Under the Packers and Stockyards Act.”

For over forty-six years the Government Accountability Project has worked to empower whistleblowers, truth-tellers and citizen activists. Our organization has represented whistleblowers from various industries and addressed their concerns touching upon many issues of vital public interest. Whistleblowers are people who speak out against waste, fraud, threats to public health and safety, and abuses of power. Very often at their own peril, they do the unthinkable when they disclose violations of the public’s trust. Government Accountability Project makes sure their voices are heard.

Government Accountability Project established the Food Integrity Campaign (FIC) (www.foodwhistleblower.org) over a decade ago to address the unique issues facing truth-tellers working in the food and agriculture sectors of the economy. Government Accountability Project, in addition to joining the Campaign for Contract Agriculture Reform’s coalition comments on this proposed rule, submits the following comment to share our unique perspective having represented over a dozen whistleblower farmers.

I. Retaliation Overview

The Packers and Stockyards Act (“PSA” or “the Act”) cannot fulfill its mandate “to assure fair competition and fair-trade practices, to safeguard farmers and ranchers...to protect consumers...and to protect members of the livestock, meat, and poultry industries from unfair, deceptive, unjustly discriminatory and monopolistic practices....” if persons cannot safely disclose violations of the Act.



Ninety percent of all meat consumed comes from industrial farms, the vulnerabilities of which have been laid bare. Exacerbating the impacts of a global pandemic, Russia's war in Ukraine amplified supply chain weaknesses impacting both fertilizer and feed. These vulnerabilities are revealing themselves against the backdrop of climate instability. With adequate anti-retaliation protections, persons working within the system can play a vital role in preventing catastrophic wrongdoing and create a less vulnerable food future.

Powerful companies exert tremendous pressure to keep farmers quiet, which in turn allows unabated systemic wrongdoing. It is well understood that no single act of retaliation occurs in a vacuum. Rather, the silencing of any one individual or group works to foment a broader culture of fear. The companies are well aware of this fear and the risks whistleblowers take when coming forward. Speaking the truth means more than just putting a job on the line - for farmers and ranchers, it's putting your family, friends, and even your home on the line, too. This culture of fear underwrites every deceptive contract.

A. Why Farmers Don't Speak Out and Barriers to Reporting PSA Violations

The "chilling effect" of retaliation has ramifications not just for individuals, but for producer communities. Outspoken producers are made examples of and serve as a warning to those who wish to challenge the status quo. To ensure a fair and competitive market, anti-retaliation efforts should take into consideration the following obstacles to reporting:

1. *Problems are Commonly Reported Internally:* Contrary to popular belief, most people raise their concerns within their companies before alerting regulators or going public. Farmers and ranchers report their issues through their chains of command as a first step. They await the changes, but with little bargaining power, can do little more than wait and hope that their concerns will be addressed. Given that farmers and ranchers use internal channels, PSA anti-retaliation protections should cover violation disclosures that are made within the chain of command and/or are part of the producer's job duties.
2. *Lack of Awareness about Available Rights:* Unfortunately, farmers have few protections when it comes to speaking out against industry-wide wrongdoing. What little protections they do have are often unknown to them. USDA must make rights of producers and the responsibilities of the companies publicly available information that is shared beginning at the inception of the contractual relationship and is sustained throughout the engagement. For example, AMS should host educational programming about PSA rights and develop language appropriate educational assets for farmers and ranchers regarding their rights and protections under PSA. Without this necessary education and outreach correlation, the promise of this rulemaking will be significantly undermined.
3. *Desire for Anonymity:* Understandably, given the current climate in the industry, most producers prefer to make their reports anonymously or through another party. For this reason, USDA/DOJ should continue to offer anonymous protected disclosures through



the joint portal but must be transparent about subsequent regulatory and enforcement activity.

4. *Belief that something is already being done:* Given the scope of the wrongdoing, farmers and ranchers believe (or hope) that something is being done by regulators to whom they raised their concerns. This again calls for a need for greater communication and transparency between USDA and producers. For this reason, there should be routine reporting and these reports should be made publicly available. This is critical to rebuilding trust in the system, ensuring transparency, and creating accountability.

B. Protected Activity

AMS has identified three categories of activities that they propose to protect from retaliation “due to concerns about retaliatory behavior from packers, live poultry dealers, and swine contractors”. AMS has stated that these behaviors contravene the PSA’s purpose “to safeguard farmers and ranchers against receiving less than the true market value of their livestock and poultry.” We agree with this assertion and add the following for consideration:

1. **Assertion of rights:** The proposed rule prohibits attempts to limit, deter, or curtail producers' assertions of rights, or removes a primary producer tool for proper enforcement of their rights. Given the imbalance of power in contracting, the rule should be clear that these rights cannot be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.
2. **Associational participation:** We agree that “attempts to limit, deter, or curtail associational participation” should be prohibited because they “limit lawful information exchanges and prevent or dilute the potential for covered producers to engage in pro-competitive collaboration”. However, the benefits of association without fear of retaliation and its concurrent freedom to refrain from associating are two sides of the same coin (i.e., it is this “freedom” that will create the conditions for actual negotiation terms rather than contracts of adhesion.)
3. **Lawful communication:** Under the proposed rule, covered producer communications would include any lawful communications with government agencies or other persons for the purpose of improving the production or marketing of livestock or poultry, exploring a possible business relationship, or supporting proceedings under the Act against a regulated entity. In addition, we suggest that lawful communications should also include situations where the complainant “provided, caused to be provided, or is about to provide or cause to be provided information regarding conduct that the protected person believes or reasonably believes is in violation of the Packers and Stockyards Act.” Further, whether in-person, in-writing, or by email, all complaints should be accepted and in any language.

Most producers are not familiar with their rights under the PSA. For this reason, the PSA proposed rule should be clear that the complainant does not need to mention specific PSA



violations when making a disclosure. Moreover, the protected individual or entity does not have to be correct that the information that he or she provided relates to an actual violation of the PSA. Rather, in keeping with other corporate anti-retaliation provisions, the complainant should need only have a subjective, good faith belief that the conduct complained of is in violation or will result in a violation of the PSA. They should receive anti-retaliation protections so long as a reasonable person with the same training and experience could also believe that the relevant conduct is a violation - even if that belief is mistaken.

Lastly, farmers and ranchers should be able safely participate as witnesses in any proceeding or investigation relating to violations of the Packers and Stockyards Act. Unfortunately, there are recent examples of cattle rancher witnesses who were threatened and intimidated so much so that they decided not to testify before Congress on a hearing about cattle markets. The ability to testify without fear of retaliation is essential to promoting fair and competitive markets in the livestock and poultry industries. In addition to testimony, AMS should ensure that participation, assistance with, or intent to participate in any PSA investigation violation is protected from retaliation.

C. Adverse Retaliatory Actions

An adverse action is any action that could dissuade a reasonable person (i.e. a person with similar training, knowledge, and experience) who believes that a violation occurred, is occurring, or is likely to occur, from engaging in PSA-protected activity. Adverse actions can take many forms. The tactics companies employ to silence producers are myriad. However, adverse actions are said to occur when there is clear evidence of hostility towards the protected activity followed by the disparate treatment levied at the complainant. Companies routinely give pretextual reasons for the change in behavior.

To encourage compliance with the Act, AMS should provide examples of adverse actions. For speaking out, retaliation could include such things as negative performance reviews, denials of bonuses, assault, harassment, threats, investigations, increased scrutiny, termination, and blacklisting. Too often, outspoken farmers receive reduced quality of inputs (e.g., sick birds, less/low quality feed and medication). Low quality and/or insufficient inputs mean severely diminished paychecks. The proposed rule should cover adverse actions in contract terms such as price terms, including any base or formula price; formulas used for premiums or discounts related to grade, yield, quality, or specific characteristics of the animals or meat; the duration of the commitment to purchase or to contract for the production of animals; transportation requirements; delivery location requirements; delivery date and time requirements; terms related to who determines date of delivery; the required number of animals to be delivered; layout periods in production contracts; financing, risk-sharing, and profit-sharing; or terms related to the companies' provision of inputs or services, grower compensation, or capital investment requirements under production contracts.



D. Protected Persons

The PSA rule should provide anti-retaliation protection to all natural or legal persons who provide information that they reasonably believeⁱ is evidence of any violation of the PSA or because they refused to take actions that the person reasonably believes would violate the Act.

Some examples of such protected persons may include, but are not necessarily limited to:

1. Employees of meatpackers and integrators reporting violations of the PSA;

In addition to producers, the proposed rule should cover *any* individual or entity who makes a protected disclosure of a violation of PSA. On its website, USDA encourages anyone to report a violation of the Act.ⁱⁱ Because of this, the proposed rule should acknowledge the risks a person or entity takes when making a complaint to AMS. It has been FIC's experience that in broiler production there are often conscientious company employers such as flock supervisors, drivers, and hatchery workers who, during their employment, become aware of PSA violations (e.g., they may have knowledge that growers are being shorted or given lower quality inputs). These employees should be able to safely make complaints to AMS and receive the benefit of the Act's anti-retaliation provision.

2. Employees, contractors, and subcontractors of protected farmers or ranchers;

Farmers and ranchers routinely employ contractors and employees to perform services on their farms. In some cases, these individuals "manage" the facilities and are in the best position to alert regulators of PSA concerns. Similarly, anti-retaliation protections should be extended to these reporting individuals.

3. Associates and relations of protected persons or entities.

It has been our experience that retaliatory behavior is often levied against friends and relatives of farmers engaging in protected activity. This is known as associational discrimination/retaliation. Associational discrimination occurs when someone is discriminated against because of their relationship with another person who is part of a protected class (for example, race, gender, religion, disability status). Similarly, *associational retaliation* happens when an entity retaliates against an employee because of their relationship with someone who engaged in legally-protected conduct. Growers have shared with us that this form of retaliation occurs when friends or family members are denied broiler contracts because their relationship to or business dealings with a known "troublemaker farmer" or entity.



E. Retaliation Exception

The proposed rule states that it *does not* protect farmers and ranchers from retaliation who act in contravention of the PSA. This language should be clarified to except from protection only individuals acting without express or implied direction from the covered entity (or its agent) and deliberately and willfully cause a violation of any requirement relating to any violation or alleged violation of any order, rule, regulation, standard, or ban under the PSA. This distinction is important in broiler production contracts where farmers are deceived into believing they are independent contractors yet are subject to extraordinary company control. Thus, despite being labeled “independent contractors,” their actual circumstances do not allow them to act under their own agency. This scenario allows companies to point the finger back at the farmer who blows the whistle on PSA violations.

II. Undue Prejudice and Unjust Discrimination

The culture of fear is compounded in historically marginalized populations. For example, in different states across the nation, FIC investigations have uncovered grower complexes comprised of Vietnamese growers. Many of these Vietnamese growers were enticed to sell profitable businesses and family homes and take out huge loans to enter broiler production contracts. Bearing all the same burdens of other broiler producers, they were further victimized by language barriers, cultural differences, and blatant mockery and exploitative behavior. In some cases, to keep their contracts, Vietnamese growers were asked to do additional work that was not required of white counterparts. Many of the Vietnamese farmers we have spoken to have likened the abusive and threatening behavior of their integrators to the communist government from which they fled.

The agency has a stated interest in protecting farmers who may be at a higher risk for mistreatment and “prohibits certain prejudices and disadvantages against covered producers”. Specifically, the proposed rule seeks to protect “market vulnerable individuals” who are those at heightened risk of adverse, exclusionary treatment in the marketplace. We agree that discrimination of a Market Vulnerable Individual (“MVI”) should be covered by the rule in addition to known protected classes.

A. Market Vulnerable Individuals and Protected Classes

The proposed rule’s prohibition on discrimination should cover both MVI’s and known protected classes.ⁱⁱⁱ As discussed earlier, in broiler production, geographic consolidation leaves farmers with no other option than to go with a particular integrator – a scenario that creates a de facto



MVI situation. However, we have also heard allegations of discrimination based on ethnicity and national origin. While it is true that most broiler producers are white males, as rural regions shift demographically, the PSA should be forward looking to anticipate more protected classes entering the agricultural sector.

While legitimate efforts to diversify the agricultural sector may be incentivized by USDA through certain programs, we suggest that no incentives should be provided or granted in regions where it has been determined that such incentives would create more MVI's. To that end, USDA should clarify the qualifications for MVI status and create criteria for what constitutes an MVI to include considerations like geographic location, as well as percentage of income derived from livestock or poultry operations. With a more exhaustive MVI criteria in place, it may be possible for companies to make legitimate business excuses for discriminatory behavior.

ⁱ Meaning a person with similar training, knowledge, and experience believe that a violation occurred, is occurring, or is likely to occur

ⁱⁱ <https://www.ams.usda.gov/rules-regulations/packers-and-stockyards-act#:~:text=As%20stated%20by%20Congress%2C%20the,unfair%2C%20deceptive%2C%20unjustly%20discriminatory%20and>

ⁱⁱⁱ Race, color, national origin, religion, sex, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or gender identity.