Re: *Fair and Competitive Livestock and Poultry Markets*, Doc. No. AMS-FTPP-21-0046, 89 Fed. Reg. 53886 (June 28, 2024)

To whom it may concern:

I applaud the Department's resolve to provide additional clarity to the administration of the Packers and Stockyards Act and to bring closure to the lengthy rulemaking proceedings of the last decades. I write to urge the Department to rethink the current, unfortunately vague proposed regulatory text. While the Department's proposed approach is understandable, it should instead adopt, or at the very least consider adopting, more specific regulatory text that would give regulated and protected parties much greater ability to plan.

The Act imposes very vague duties on regulated parties: among other requirements, they must not "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device."[1] These terms—in particular "unfair" and "unjust[]"—are basically contentless, at least when taken on their own[2]; to offer useful guidance for regulated and protected parties alike, they must be given content. The Act was enacted in 1921, during the early years of an era notable for its confidence in the efficacy of such open-ended commands. The need to interpret open-ended statutory terms in light of changing or unknown circumstances is of course one reason often given in favor of broad delegations to administrative agencies, which are thought to be able to respond more quickly than can Congress. Subsequent decades have cast much doubt on the initial confidence in open-ended mandates and broad delegations to interpret them. Regardless of how we may view today the wisdom of administrative structures like those created by the Act, one thing is clear: if it is possible to make open-ended mandates practicable, it is only because there is some method of giving actionable content to them.

Whatever we may think of the case for open-ended *statutory* mandates, the case for open-ended *regulatory* requirements is far weaker. For one thing, vague statutes depend on clear regulations to attain the kind of actionable direction that makes compliance possible. For another, because the regulatory system is premised on agencies' ability to respond much more swiftly and surely to new or newly-understood circumstances than Congress can, the concerns about legislative inadaptability that drive open-ended delegations do not apply to the crafting of regulatory text.

Unfortunately, the Department's proposed regulatory text fails to provide the needed clarity. The proposed text depends on several vague terms. For instance, an unfair practice is defined as one causing or likely to cause "substantial injury … which the participant or participants cannot reasonably avoid."[3] How much injury is substantial? And what sort of avoidance is reasonable? The proposed regulation does not tell us.

---

[1] 7 U.S.C. 192.
[2] *See, e.g.*, James Landis, *The Administrative Process* 66 (1938).
[3] 89 Fed. Reg. at 53910.

The factors listed in proposed 201.308(b) do not make things better. In the first place, the regulation provides only that the Secretary "may" consider these factors; he is neither required to consider them nor prohibited from considering others. Nor does the regulation explain how the factors are to be weighed against each other. And the factors themselves are quite vague. The regulation states, for instance, that the "extent to which the [challenged] practice may impede or restrict the ability to participate in a market, interfere with the free exercise of decision-making by market participants, tend to subvert the operation of competitive market forces, deny a covered producer the full value of their products or services, or violate[] traditional doctrines of law or equity" may be relevant, but it says nothing about how much impedence, restriction, interference, etc. is too much.[4] It states that an "injury may be substantial if it causes significant harm to one market participant or if it imposes a small harm to many market participants," but it does not define "significant," "small," or "many"—and in any event, the regulation tells us only that such harms "may" be substantial.[5] It states that the "extent to which [a] producer would have to take unreasonable steps to avoid injury" is relevant, but it does not tell us what steps are unreasonable.[6] It does identify two examples of unreasonable steps, but one is "making unreasonable additional investments or efforts."[7] Defining unreasonableness in terms of unreasonableness is unilluminating. Vagueness similarly presents itself in the requirements and factors of proposed 201.308(c) and (d).

The vagueness of the proposed regulatory text presumably is the fruit of the Department's concern to give itself adequate powers to prevent and punish all forms of conduct unlawful under the "comprehensive" statutory program.[8] That is a fair concern, but it cannot be the only one that determines the clarity with which the proposed regulation is crafted. At least as important is the need of regulated and protected parties to obtain meaningful, legally-binding definitions of what the law demands of them and entitles them to expect. This need must be balanced against the Department's need for adequate enforcement authority.

To my mind, the Department's ability to revise its regulations with relative speed tilts the balance decisively in favor of additional clarity. After all, if the Department specifies a list of prohibited practices and omits a practice it would later like to include, it can simply, and relatively swiftly, amend its regulation to prohibit such practice. The downside of omitting needed prohibitions is thus minimal and cannot, it seems to me, fully offset the need of regulated and protected parties to be able to plan their decisions in reliance on a clear and definite knowledge of their duties and rights.

At the very least, the Department owes it to the public to consider the need for additional regulatory clarity and to explain why, in this case, its need for relatively unbounded enforcement authorities outweighs that need. The Department does not appear to have considered the alternative of listing particular unlawful practices to be amended as needed in future

---

[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *See id.* at 53889.

rulemakings.[9] It should do so and should identify the costs and benefits of such an approach and compare them to the costs and benefits of its preferred approach.

Thank you for your consideration.

Cordially,

Paul J. Ray[10]

[9] *See id.* at 53901.

[10] Director of the Thomas A. Roe Institute for Economic Policy Studies at the Heritage Foundation. I file this comment in my individual capacity rather than as an employee of the Heritage Foundation; information regarding my institutional affiliation is provided for informational purposes only.