

March 21, 2017

M. Irene Omade

Grain Inspection and Packers and Stockyards Administration

United States Department of Agriculture

1400 Independence Ave. SW, Room 2542A-S

Washington, DC 20250-3613

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](https://www.federalregister.gov/citation/81-FR-92566), proposed rule on Poultry Grower Ranking System [81 FR 92723](https://www.federalregister.gov/documents/2016/12/20/2016-30429/poultry-grower-ranking-systems), and proposed rule Unfair Practices and Undue Preferences in violations of the Packers and Stockyards Act [81 FR 92703](https://www.federalregister.gov/documents/2016/12/20/2016-30430/unfair-practices-and-undue-preferences-in-violation-of-the-packers-and-stockyards-act) (December 20, 2016)

Dear Ms. Omade:

Farm Aid welcomes 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.

Willie Nelson, Neil Young and John Mellencamp organized the first Farm Aid concert in 1985 to raise awareness about the loss of family farms and to raise funds to keep farm families on the land. Dave Matthews joined the Farm Aid Board of Directors in 2001. Since our founding, Farm Aid has been steadfast in its work to promote a strong and resilient family farm system of agriculture and to champion the critical role of family farmers in rural America.

Over our three decades of work, we have seen how growing consolidation, rapid industrialization and the expanding power of corporations in the farm sector leave farmers with tight financial margins, rising production costs and shrinking markets to sell their goods. There is no better example than the poultry industry to understand the severe consequences of these trends. We work to elevate these issues, amplify the voices of farmers and ranchers and advocate for the policies needed to level the playing field between farmers and the major corporate players that too-frequently control their markets.

This is why Farm Aid supports GIPSA in its attempts to move forward with protections that farmers and ranchers have asked for over several decades. Moving forward and finalizing the Farmer Fair Practices Rules sends the clearest signal to farmers and ranchers that our government will utilize its crucial role in antitrust enforcement to protect farmers from abuses and retaliation common in the industry and to establish a more open, competitive and fair marketplace for farmers.

Thank you for considering our recommendations on the Interim Final and the Proposed Rules.

Sincerely,

Alicia Harvie

Advocacy & Issues Director, Farm Aid

**Comments of Farm Aid**

This document encompasses Farm Aid’s comments for Interim Final Rule on the Scope of Sections 202(a) and (b) of the Packers and Stockyard Act [81 FR 92566](https://www.federalregister.gov/citation/81-FR-92566), the proposed rule on Poultry Grower Ranking System [81 FR 92723](https://www.federalregister.gov/documents/2016/12/20/2016-30429/poultry-grower-ranking-systems), and the proposed rule on Unfair Practices and Undue Preferences in violation of the Packers and Stockyards Act [81 FR 92703](https://www.federalregister.gov/documents/2016/12/20/2016-30430/unfair-practices-and-undue-preferences-in-violation-of-the-packers-and-stockyards-act), all published on December 20, 2016.

Farm Aid supports USDA finalizing the Interim Final Rule. We also support finalizing both proposed rules, with improvements as indicated in Section II and III below.

# Interim Final Rule on the Scope of Sections 202(a) and (b) of the PSA. *Federal*

# *Register*, December 20, 2016, pages 92566-92594

**USDA Authority:** The Interim Final Rule sits squarely within the authority granted to the USDA by the Packers & Stockyards Act (7 U.S.C. §§ 181-231). 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.” Hence, the Interim Final Rule is appropriate to create regulatory clarification of several terms in the provisions of the PSA and to interpret the law’s intent.

**Intent of the law does not require competitive injury:** The sections addressed by this rule state plainly that:

*Section 202: It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food productions, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry to:*

*(a) Engage in the use of 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.*

The Interim Final Rule confirms that a violation of the PSA (unfair practice or undue preference) does not require a finding that the action adversely affects industry-wide competition or has the likelihood to adversely affect competition.

In fact, a clear intent of the PSA was to address the harms that *individual* farmers might experience in their dealings with meat packers, which were not well addressed by the Sherman Antitrust Act of 1890, the Federal Trade Commission Act of 1914 and the Clayton Antitrust Act of 1914. These acts more broadly address anticompetitive behavior and issues of mergers and monopoly in the marketplace. While later sections of the PSA also address classic antitrust questions within meat, swine, livestock and poultry industries, it is clear that Sections 202(a) and 202(b) are meant to remedy the harms against individuals (e.g. “particular person”) committed by meatpackers.

USDA has consistently held that each clause in Section 202 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. USDA’s interpretation is buttressed by the fact that each clause in Section 202 *(a)–(g)* is separated using the word “or.” But the agency has failed until now to promulgate regulations supporting its position. The consequences of its historic inaction have been dramatic.

For example, in recent years, a few activist 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 across the industry. Such a requirement sets an absurdly high bar that essentially nullifies Sections (a) and (b). For farmers who have otherwise demonstrated that they have been harmed by unfair and deceptive practices or undue preferences or prejudicial actions, the competitive injury test essentially makes it impossible for farmers to secure justice from companies violating the Packers and Stockyards Act. This is not the intent of the law.

This rulemaking necessarily clears up that confusion and returns implementation of the law to its original meaning. Farm Aid believes this interim final rule reiterates the longstanding position of USDA – held by successive Republican and Democratic administrations – regarding the scope of Sections (a) and (b), and we support the Interim Final Rule, which is supported by the plain language of the PSA.

**Leveling the playing field:** More broadly, the Interim Final Rule serves to affirm the need for fair and level playing field for livestock and poultry farmers who contract with major meatpackers and integrators. Farm Aid staff in attendance heard the following testimony from growers (now publicly available) at the May 2010 joint Department of Justice and USDA workshop in Normal, Alabama, which covered antitrust issues in the poultry industry. Growers described some of the deceptive or unfair practices common in the industry:

*“[Integrators] bring in a new grower’s contract and you have to sign it before you can receive your next flock. And there’s been no negotiation and no communication between the grower or a group of growers for that company and negotiation of that contract with the integrator. So you either sign it or you don’t receive your next flock. And when you have that kind of debt load over you, of course, you’re going to choose to sign the contract. You feel that there’s no other option when you owe, you know, a half a million dollars or a million dollars.”* ***Seventh generation family farmer, DOJ/USDA Workshop. May 21, 2010.***

*“In my county alone, we’ve got two…they do not cross lines at this time anyway…as it stands now with the contracts that we’re offered now it’s either a take it or leave it situation. So it really puts us in a bind as growers.”* ***Poultry grower, DOJ/USDA Workshop, May 21, 2010***

*“I’ve been in the business for nine years. At that time I had a 7-year contract. Four years ago I changed integrators and I was given a 3-year contract. Last year I signed a new contract, flock-to-flock. What that means is every 60 days that’s the only time I’m actually under contract to grow chickens. At the end of that 60 days, I can be terminated. I’ve personally borrowed a million and a half dollars. And everything I’ve got is mortgaged so I can be a poultry grower. I’ve got eight poultry houses, two dwelling houses, a hundred and eighty acres of land and all the life insurance policies I’ve got. As a poultry grower with everything I’ve been mortgaged, I had no choice but to sign that flock-to-flock contract. Like many of them of said, either I sign it or I ain’t got no chickens. Without any chickens, I can’t pay any bills. I can’t pay my mortgage because chicken houses are designed for one thing, grow chickens.”* ***Poultry grower, DOJ/USDA Workshop, May 21, 2010***

*“In our area we have more than one company, but it seems to be a written rule that if you go grow for one company, you really don’t have the opportunity to even cross those lines to go to another company.”* ***Former poultry grower, DOJ/USDA Workshop, May 21, 2010***

*“And then the company … decide[s] … we’re not going to grow this six pound bird anymore, we’re going to grow a nine pound bird. So that means although you just build these houses four years ago, you’re going to have to go back in debt $80,000 because we want these big fans put in there. We want more cooling system put in there because we’re going to this bigger bird and it’s got to be cooled more. So the grower foots that expense for the company to grow the birds that’s going to make them more money. And the thing about it is when you put those upgrades in sometimes like the companies will say, ‘Okay…you do this and we will give you a little bit extra.’ But that extra will never cash flow to pay for that expense.”* ***Third generation farmer, DOJ/USDA Workshop, May 21, 2010***

Hog producers have also described this kind of treatment:

*“[T]he smaller producers have got to put up with [certain conduct], or they get left out. The big guy, he can ship loads all over, but the little guy, if we wants to deliver the contract when he should deliver it, you don’t really have a lot of choices. They’ll call and tell him when they’re going to pull the contract, and if they’re going to die on Monday, he has to be there on Sunday for no extra pay, and it’s not right.”* ***Independent hog producer, GIPSA Town Hall Meeting, October 16, 2008***

We cannot overstate the level of fear and intimidation felt by poultry growers who contact us over our 1-800-FARM-AID hotline or other means, who have been stuck with unfair contract terms or practices that leave them in a tough spot, with no recourse. Trapped in debt, they often have little choice but to accept the company’s terms. If they do choose to stand up or speak out, they risk their contracts – and often their land and homes – in the process. This was echoed repeatedly in farmer testimony from the 2010 joint workshops:

*“[N]umerous growers are not attending these workshops because of being afraid of retaliation on them by their integrator. A grower this morning has already been threatened by his service person if he attends and speaks at this forum. All the integrator has to do is make sure that particular grower receives inferior chicks to start a grow out with and maybe short his feed delivery, which can lead to a higher feed conversion rate. This happens, really it does****.” Poultry grower, DOJ/USDA Workshop, May 21, 2010***

*“I’ve spoken to numerous growers about attending this meeting, but most of them were afraid to come for fear of retribution from their poultry company. You have to do as you are told or you could be refused placement of birds or could face a drop in the number of birds places or worse.”* ***Poultry grower, DOJ/USDA Workshop, May 21, 2010***

*“I cannot reveal my identity for fear of severe consequences, like no more chickens. There is, incidentally, a blacklist among integrators so any grower cut off will not be picked up by another integrator.”* ***Poultry grower, DOJ/USDA Workshop, May 21, 2010***

Farm Aid has stated publicly that we believe the retaliation that is so common in the poultry industry is not only a violation of the PSA, but also infringes on their first amendment rights to free speech and association (see 2015 [*Washington Post* op-ed](https://www.washingtonpost.com/opinions/us-poultry-farmers-rights-are-under-siege/2015/07/07/cce6ad60-23fc-11e5-b77f-eb13a215f593_story.html?hpid=z3&utm_term=.c02a519087f6)).

**Hence, Farm Aid fully supports the Interim Final Rule on the scope of Sections 202 (a) and (b) of the PSA.**

# Proposed Rule on Poultry Grower Ranking Systems. *Federal Register*. December 20,

# 2016, pages 92723-92740

# This proposed rule seeks to clarify how Sections 202(a) and (b) apply to the poultry grower ranking system or tournament system for calculating farmer pay. Farm Aid supports this Proposed Rule, provided some critical improvements are added.

# Most poultry growers are paid based on a ranking system that essentially pits growers against one another in competition for pay. This ranking system, which is more commonly referred to as a tournament system, lacks transparency and is extremely unfair to the grower.

After the company picks up grown chickens from farmers, it ranks the finished flocks of a cohort of growers according to their feed conversion efficiency. Growers with top rankings receive bonuses for good performance, which is paid for by pay cuts to growers ranked at the bottom. But performance is completely out of farmers’ control. The company determines the quality of the day-old chicks and feed delivered to growers. That means the company can rig the system to their advantage in a few ways.

First, in the absence of a base pay that guarantees some kind of income floor for growers, it means the company can essentially force farmers to absorb costs that the company would otherwise assume from the inevitable variability in feed and chick quality – in other words, the cost of doing business in this industry. For example, we know that the age of the breeder hen influences the quality of chicks and feed conversation potential. Namely, very young and very old hens produce chicks that are less efficient in feed conversion. A company is always working with a range of breeder hen flocks and will always have some that are more “productive” than others. Without a fair base pay, the company can choose which growers will make more or less in a given round of flocks.

Second, many growers report that companies will deliver sub-standard chicks or feed as a form of retaliation if they speak out about the conditions they face. The consequences of this systematic retaliation have been severe; in many cases, it has forced growers out of business and put their land and homes – frequently collateral on their loans – at risk. There is ample testimony from farmers in the public record that describe this:

*“…the ranking system is controlled by the company. I think it’s unfair because the lack of transparency gives the company the ability to terminate or penalize growers based on false claims of poor performance that, in fact, is out of the grower’s control.”* ***Former poultry grower, DOJ/USDA Workshop; May 21, 2010***

*“If I get more male birds on my farm and Joe down the road, you know, gets more females…if he’s a halfway decent poultry farmer and sees after his chickens, I’m going to beat him out because I got the…more dominant bird. I got the male bird. Now, how fair is that? If I run out of feed during the course of a grow out and let’s just say…I’m out of feed for 48 hours. Well, let’s say Joe down the road, he’s not out of feed, we’re selling together under this so-called fair ranking system…”* ***Poultry grower, DOJ/USDA Workshop, May 21, 2010***

*“I’ve had some flocks of chickens that were delivered that were sick. One had aspergillosis and the company knew it. It come from the hatchery, and I had a high mortality and the birds didn’t perform…And I would up with a, I think one of them was a hundred and sixty-seven and one of them was a hundred and eighty-four points below average. And the company knew that it wasn’t anything I did, but I’m the one that suffered the loss. They took my performance and subtracted it from base pay and that’s what I got. I’ve had them bring feed out that would be molded and you couldn’t get it out of the bins. To them it doesn’t matter, you know. It keeps you in debt one way or the other, you know. They may give you a raise, but they cut weights and you still can’t make any more money”* ***Poultry grower, DOJ/USDA Workshop, May 21, 2010***

*“Often the lack of transparency in the ranking system has been a tool for companies to retaliate against growers who attempt to speak out about the abuses or organize with other growers to try to bargain for better contract terms. It is very common for such outspoken growers to suddenly see their ranking fall drastically, costing them thousands of dollars.”* ***Poultry grower witness testimony, hearing before the U.S. Senate Committee on Agriculture, Nutrition and Forestry: April 18, 2007***

This proposed rule provides a non-exhaustive list of criteria to determine whether a poultry integrator is using a ranking or 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.”

Farm Aid has devoted significant effort to bringing popular attention to this aspect of the poultry industry, and we support this proposed rule’s goal of preventing the tournament system from targeting specific growers for retaliation. However, we are deeply concerned about the inclusion of § 201.214(d), which states that the Secretary will consider:

*“Whether a live poultry dealer has demonstrated a legitimate business justification for use of a poultry grower ranking system that may otherwise be unfair, unjustly discriminatory, or deceptive or 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.”*

**This “legitimate business justification” provision is unnecessary, dangerous and contradictory to the intent of the law.** Farm Aid sees no way to justify practices and actions common to poultry grower ranking systems that the agency has already demonstrated are in violation of the Act. We take issue with this loophole to even suggest that there are legitimate reasons for live poultry dealers to systematically target poultry growers with inferior feed or chicks of which they have no control, which results in significant financial harm to growers. We oppose the inclusion of this language and recommend its removal from the final rule.

We also would suggest including a requirement that companies maintain written records that provide justification for differential pricing. This rule could also be strengthened by establishing a truly competitive and fair payment system for growers. An example is one already commonly used in the contract poultry system for pullet growers: pay based on square footage of the poultry house.

**With the removal of the “legitimate business provisions,” we encourage the USDA to move forward with this proposed rule.**

# Proposed Rule on Unfair Practices and Undue Preference in Violation of Packers

# and Stockyards Act. *Federal Register,* December 20, 2016, pages 92703-92723

Farm Aid supports most of this proposed rule and is submitting the following suggestions for improvements.

**Section 201.210(a):** The inclusion of a list of “per se” violation of Section 202(a) of the PSA

**Farm Aid urges you to finalize this common-sense language exactly as proposed.**

**Section 201.210(b):** Violations of 202(a) regardless of harm to competition.

In general, Farm Aid supports the inclusion of this non-exhaustive list of Section 202(a) violations included in 201.210(b). We also applaud the clarification that these violations do not require a demonstration of harm or likelihood of harm to industry-wide competition.

**However, we strongly urge you to remove the loophole language allowing processors, packers or live poultry dealers to claim a “legitimate business justification” for violations of the Act.** 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 flatly prohibited. This language was not included in the 2010 proposed rule, and we urge the USDA to remove it.

**Section 201.210(b)(1)-(3)**

Farm Aid strongly supports this sections regarding retaliatory action or threat of retaliatory action against livestock, swine and poultry growers. We cannot overstate the level of fear and intimidation felt by poultry growers in particular who contact us over our 1-800-FARM-AID hotline or other means, who have been stuck with unfair contract terms or practices that leave them in a tough spot, with no recourse. Trapped in debt, they often have little choice but to accept the company’s terms. If they do choose to stand up or speak out, they risk their contracts – and often their land and homes – in the process. This was echoed repeatedly in farmer testimony from the 2010 joint workshops:

*“[N]umerous growers are not attending these workshops because of being afraid of retaliation on them by their integrator. A grower this morning has already been threatened by his service person if he attends and speaks at this forum. All the integrator has to do is make sure that particular grower receives inferior chicks to start a grow out with and maybe short his feed delivery, which can lead to a higher feed conversion rate. This happens, really it does****.” Poultry grower, DOJ/USDA Workshop, May 21, 2010***

*“I’ve spoken to numerous growers about attending this meeting, but most of them were afraid to come for fear of retribution from their poultry company. You have to do as you are told or you could be refused placement of birds or could face a drop in the number of birds places or worse.”* ***Poultry grower, DOJ/USDA Workshop, May 21, 2010***

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Farm Aid has stated publicly that we believe the retaliation that is so common in the poultry industry is not only a violation of the PSA, but also infringes on their first amendment rights to free speech and association (see 2015 [*Washington Post* op-ed](https://www.washingtonpost.com/opinions/us-poultry-farmers-rights-are-under-siege/2015/07/07/cce6ad60-23fc-11e5-b77f-eb13a215f593_story.html?hpid=z3&utm_term=.c02a519087f6)). **Hence, Farm Aid strongly supports this section and urges you to finalize it exactly as proposed.**

**Sections 201.210(b)(2)-(3)**

Farm Aid supports these sections on limiting or attempts to limit the legal rights and remedies afforded by law to growers, and the records and notifications requirements for companies. **Farm Aid supports urges you to finalize this language as proposed.**

**Sections 201.210(b)(4)-(7)**

The 2008 Farm Bill required GIPSA to promulgate regulations establishing criteria the Secretary will consider in determining:

*(1) Whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement;*

*(2) when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the P&S Act;*

*(3) whether a live poultry dealer or swine production contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of their arrangement or contract that could lead to the termination of the poultry growing arrangement or swine production contact; and*

*(4) whether the arbitration process provided in a contract provides a grower or producer a meaningful opportunity to participate fully in the arbitration process.*

Based on those directives, GIPSA published the regulations establishing the criteria in a final rule on December 9, 2011 [[76 FR 76874](https://www.federalregister.gov/citation/76-FR-76874)]. The regulations are codified in [9 CFR part 201](https://www.federalregister.gov/select-citation/2016/12/20/9-CFR-201) as [9 CFR 201.215](https://www.federalregister.gov/select-citation/2016/12/20/9-CFR-201.215),[[1](https://www.federalregister.gov/documents/2016/12/20/2016-30430/unfair-practices-and-undue-preferences-in-violation-of-the-packers-and-stockyards-act" \l "footnote-1-p92705)]201.216, 201.217 and 201.218, respectively. These criteria establish clear guidelines to guide the Secretary in determining whether certain conduct in violation of the Act has occurred. However, the connection between the criteria and the ability for the Secretary to hold companies accountable for their actions in conflict with those standards has been lacking.

**Farm Aid supports this proposal to make a direct linkage between these four “criteria” regulations and the enforceable sections of the regulations and urges you to include this language in the final rule.**

**Sections 201.210(b)(8)-(9)**

Existing regulations under the PSA govern the weighing of livestock, poultry, and feed. The regulations that prohibit companies from rigging the scales used to weigh the birds and livestock used to determine farmers’ pay should be linked to regulations that allow GIPSA to take enforcement action against such actions.

**Farm Aid supports these sections and urges them to be included in the final rule**.

**Section 201.210(c): Conduct or action that harms competition**

We agree with the agency in making plain that any conduct or 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). **However, we take issue with the inclusion of the “legitimate business justification,” and urge the agency to remove this language.**

**Section 201.211: Undue or unreasonable preferences or advantages.**

Section 11006(1) of the 2008 Farm Bill directed GIPSA to amend the Packers and Stockyards Act regulations to establish criteria that the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the P&S Act. In June 2010, GIPSA published a proposed rule, which included a new regulation addressing this Congressional mandate, § 201.211.

**Section 201.211(a)-(d)**

Farm Aid supports the inclusion of these four criteria in 202.211 for the Secretary to consider if there has been an unfair, unjustly discriminatory, 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.

**Farm Aid** **urges the agency to include this in the final rule.**

**Section 201.211(e)**

Farm Aid sees no reason for creating a “legitimate business justification” loophole that would even suggest that there are legitimate reasons for live poultry dealers, packers or swine contractors to employ any of the section 202(a) or (b) violations described in this proposed rule.

**Farm Aid strongly opposes this provision and recommends its removal in the final rule.**

**Section 201.211(f)**

Provided this section does not contradict the language in Section 201.210, which states that actions or conduct do not require a harm or likelihood of harm to be considered a violation, we support this language.