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RURAL AFFAIRS



## Packers and Stockyards Act – Unreasonable Preference Rulemaking

**Position Statement from *Real Leadership for Rural People*** – “The 1921 Packers and Stockyards Act prohibits price discrimination by meatpackers against small and midsize farmers, but the law has not been enforced. Obama will issue regulations for what constitutes undue price discrimination and his administration will enforce the law”.

**Recommended Administrative Action:** Move swiftly to write regulations that define "undue or unreasonable preference" and satisfy Section 11006 of the 2008 Farm Bill\* (see below). These regulations should disallow purely volume-based premiums, but allow premiums for:

- 1) Measurable and verifiable differences in carcass and meat quality, if those premiums are available to producers of all sizes,
- 2) Specified time of delivery and for delivery at times of urgent need if those premiums are available to producers of all sizes,
- 3) Volume related savings that result from real and verifiable efficiencies in the cost of procuring, transporting or handling livestock and conducting other transactions that occur outside the plant. The rule should include a "bright line" test that disallows premiums for so-called efficiencies that occur within the plant from operating at full capacity, unless those premiums are made available to producers of all sizes.

The rule should clarify that unreasonable preferences can take many forms and occur at any stage of packer/producer transaction, including offering forward contracts, marketing agreements and spot market purchases to large-volume producers while withholding the same from smaller-volume producers. Discriminatory terms with regard to time of delivery, the offering of contracts, grading standards and a broad range of practices by packers in dealing with producers can constitute "undue and unreasonable" preferences.

Finally, the rule should clarify that demonstrating anti-competitive impact is not necessary for an action by a packer to be an undue preference.

### Background

It is commonplace for smaller volume hog producers to be offered \$6 per hundredweight less than large volume producers selling to the same buyer. A \$6 per hundred weight discount would cost a family farmer with a 150 sow farrow-to-finish operation over \$50,000 per annum.

However, courts have constrained USDA in acting against price discrimination because the Department has never issued regulations defining “undue or unreasonable preferences”. The Department’s failure to establish criteria by which volume based premiums can be evaluated has contributed significantly to the loss of thousands of family farm livestock producers.

To address that problem, Section 11006 of the 2008 farm bill directs: “As soon as practicable, but not later than 2 years after the date of the enactment of this Act, the Secretary of Agriculture shall promulgate regulations with respect to the Packers and Stockyards Act, 1921 (7 U.S.C. § 181 et seq.) to establish criteria that the Secretary will consider in determining— (1) whether an



undue or unreasonable preference or advantage has occurred in violation of such Act;”

Courts have also mistakenly ruled that undue preferences must have anti-competitive impacts to violate the act. That is a misreading of the Act. Its legislative history demonstrates that Congress intended to prohibit unfair practices that adversely impact producers, without regard to whether they restrain trade, create a monopoly or control prices. USDA has repeatedly argued in court cases that the plain language of this subsection of the Packers and Stockyards Act does not require the proof of an adverse impact on competition or of restraint of commerce or trade. But only with formal rulemaking will courts consistently interpret the law as it was intended.

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\* The Packers and Stockyards Act (7 U.S.C. section 192(b)) provides that 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:... (b) make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever."