

“Competitive and Fair Agricultural Markets Act of 2007”

By Mr. **HARKIN** (for himself, Mr. **ENZI**, Mr. **FEINGOLD**, Mr. **THOMAS**, Mr. **DORGAN**, Mr. **BAUCUS**, and Mrs. **MCCASKILL**):

S. 622. A bill to enhance fair and open competition in the production and sale of agricultural commodities; to the Committee on Agriculture, Nutrition, and Forestry.

Mr. HARKIN. Mr. President, today I am introducing the “Competitive and Fair Agricultural Markets Act of 2007.” Cosponsors joining me in introducing this legislation are: Senators **ENZI**, **FEINGOLD**, **THOMAS**, **DORGAN**, **BAUCUS** and **MCCASKILL**. This legislation seeks to level the playing field for agricultural producers by strengthening and clarifying the Packers and Stockyards Act of 1921 and the Agricultural Fair Practices Act of 1967 and strengthening enforcement of both laws by USDA. I intend to use this legislation as the basis for developing a proposed competition title in the new farm bill this year.

Consolidation is happening in all sectors of agriculture and having a negative effect on producers and consumers across the Nation. Consolidation in itself is not a violation of the Packers and Stockyards Act, but when some entities become larger and more powerful that makes enforcement of the Packers and Stockyards Act absolutely critical for independent livestock and poultry

producers. The statistics speak for themselves. For example, today, only four firms control 84 percent of the procurement of cattle and 64 percent of the procurement of hogs. Economists have stated that when four firms control over 40 percent of the industry, marketplace competitiveness begins to decline. Taken together with fewer buyers of livestock, highly integrated firms can exert tremendous power over the industry.

The Grain Inspection, Packers and Stockyards Administration, GIPSA, at USDA has the responsibility to enforce the Packers and Stockyards Act. This Act is critical, and protects livestock producers from unfair, unjustly discriminatory and anti-competitive practices in the marketplace. For years I have had my doubts about whether USDA was serious about enforcing the Packers and Stockyards Act. In 2005, I requested an audit by USDA's Inspector General to investigate USDA's oversight, and enforcement of the law. Last year, the Inspector General confirmed the concerns I had and uncovered even more systemic problems. The report described widespread inaction, management of the agency actively blocking employees from conducting investigations into anti-competitive behavior and a scheme to cover up the lack of enforcement by inflating the reported number of investigations conducted.

That is why today, the legislation I introduce will reorganize the structure in how USDA enforces the Packers and Stockyards Act and create an office of special counsel on competition matters. The special counsel would be appointed by the President with advice and consent from the U.S. Senate. Some would argue that Senate advice and consent is not needed. However, for over five years, GIPSA failed to move competition investigations forward and no one above the level of deputy administrator at GIPSA seemed to have any idea that any problems were

going on, despite the fact I was sending letters to the Secretary of Agriculture pointing out that USDA was failing to enforce the law.

In the past year, GIPSA has worked in good faith to improve its enforcement activities. However, GIPSA only investigates potential violations of the law, they do not litigate and follow-through with the investigation to the end. Litigating cases is reserved only for USDA's Office of General Counsel, OGC, unless they refer it to the Department of Justice.

USDA's Office of General Counsel has not been active on cases involving anti-competitive practices in recent years since GIPSA was not referring cases to them. To be sure, only two cases involving anti-competitive practices were referred to OGC in 5 years. But there are concerns that OGC is not as committed to enforcing competition investigations as they should be. This lack of commitment was clearly evident last year in testimony provided by OGC Assistant General Counsel in the Trade Practices Division at a hearing by the Senate Committee on Agriculture, Nutrition, and Forestry.

Concerns about OGC's attitude toward enforcing the Packers and Stockyards Act are not new. USDA's Inspector General stated in its 1997 audit that Packers and Stockyards program officials were concerned that OGC did not want to litigate competition cases "because they are complicated and time consuming" and OGC had "limited expertise" with them. In 2000, the Government Accountability Office found "disagreements" between OGC and GIPSA regarding the interpretation of the Act's competition provisions. By combining investigation and prosecution activities into the proposed special counsel office, designated to handle competition issues, it reduces the ability for investigations to be batted back and forth within USDA.

This legislation also makes many important clarifications to the Packers and Stockyards Act. The Packers and Stockyards Act prohibits unfair, unjustly discriminatory and anti-competitive practices, but some courts have ruled that producers need to prove an impact on competition in the market in order to prevail in such cases involving unfair or deceptive practices. For example, the United States Eleventh Circuit Court of Appeals ruled that a poultry grower operation failed to prove how its case involving an unfair termination of its contract adversely affected competition. The court indicated that the grower had to prove that their unfair treatment affected competition in the relevant market. That is very difficult to prove and was never the intent of the Packers and Stockyards Act.

This legislation also modifies the Packers and Stockyards Act so that poultry growers have the same enforcement protections by USDA as livestock. Currently, it is unlawful for a livestock packer or live poultry dealer to engage in any unfair, unjustly discriminatory or deceptive practice, but USDA does not have the authority to enforce violations because the enforcement section of the law is absent of any reference to poultry. This important statutory change is long overdue. In addition, to better reflect the integrated nature of the poultry industry, this legislation also ensures that protections under the law extend to all poultry growers, such as breeder hen and pullet operations, not just those who raise broilers.

The Agricultural Fair Practices Act of 1967 was passed by Congress to ensure that producers are allowed to join together as an association to strengthen their position in the marketplace without being discriminated against by handlers. Unfortunately, this act was passed with a clause that essentially abolishes the actual intent of the law. The act states that "nothing in this Act shall prevent handlers and producers from selecting their customers" and it also states that

it does not ``require a handler to deal with an association of producers." This clause in effect allows handlers to think of any reason possible to not do business with certain producers, as long as the stated reason is not because they belong to an association.

I propose to expand the Agricultural Fair Practices Act to provide new needed protections for agricultural contracts. As I have mentioned earlier, consolidation in all sectors of agriculture is reducing the number of buyers of commodities and for the very few who are left, many require contracts to conduct business. With so few buyers, it increases the chances that some firms will force unfair contracts upon producers. As a result, some producers have little or no choice but to contract with a firm with questionable practices or face leaving the industry they have known for their whole lives.

This amendment to the Agricultural Fair Practices Act requires that the contract spell out in clear language what is required by the producer. This legislation prohibits confidentiality clauses, ensuring producers the ability to share the contract with family members or a lawyer to help them make an informed decision on whether or not to sign it. This legislation also prevents companies from prematurely terminating contracts without notice when producers have made large capital investments as a condition of signing the contract. And it only allows mandatory arbitration after a dispute arises and both parties agree to it in writing. Producers should not be forced to sign contracts with arbitration clauses thereby preventing them from seeking legal remedy in the courts.

Mr. President, producers deserve to have a fair and evenhanded market in which to conduct business. This legislation won't be able to turn back the clock, but it will strengthen laws and enforcement of them so that markets operate more fairly.

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