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Sent via [regulations.gov](https://www.regulations.gov)

Re: R-CALF USA's Request for Extension of Time in Docket No. AMS-FTTP-18-0101, RIN 0581-AD81: Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, Proposed Rule

Dear Sir or Madam:

The Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA) hereby requests an extension of time of not less than 90 additional days beyond March 13, 2020 for which to provide public comments to the U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS) Packers and Stockyards Division (PSD) regarding the above captioned Docket No. AMS-FTTP-18-0101 (hereafter "the Proposed Rule"), available at 85 Fed. Reg., 1,771-1,783 (Jan. 13, 2020).

Additionally, R-CALF USA requests that the USDA-AMS-PSD respond to this request for an extension of time no later than March 3, 2020, to allow us time to prepare what semblance of comments we can under short notice should the agency choose not to grant our request.

R-CALF USA is the largest trade association that exclusively represents United States cattle farmers and ranchers within the multi-segmented beef supply chain. Its thousands of members reside in 43 states and include cow-calf operators, cattle backgrounders and stockers, and feedlot owners.

For the reasons stated below, R-CALF USA respectfully makes this request for an extension of time of at least 90 additional days from March 13, 2020.

A. On Its Surface, the Proposed Rule Appears Nonresponsive to Congress' Directive.

The 2008 Farm Bill directed the Secretary of Agriculture to "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[.]"

The usual and customary meaning of the plural noun "criteria", according to the Merriam-Webster Dictionary, is a standard on which a judgement or decision may be based, which means it is a means of determining what a thing should be.¹ Another definition is that it is a characterizing mark or trait.²

In other words, Congress directed the Secretary of Agriculture to establish standards on which to base a decision regarding whether a packer has engaged in conduct in violation of the Packers and

¹ See <https://www.merriam-webster.com/dictionary/criterion>.

² See *Id.*

Stockyards Act (PSA), and those standards should affirmatively establish what conduct constitutes a violation of the PSA.

However, rather than establishing criteria for determining if a packer's conduct violated the PSA, and what conduct actually constitutes a violation, the Proposed Rule instead provides a laundry list of defenses the packers can deploy whenever confronted with an allegation that they have violated the PSA's prohibition against the making or giving of any undue or unreasonable preference or advantage or of subjecting any particular person or locality to any undue or unreasonable prejudice or disadvantage.

Simply put, rather than establishing affirmative criteria for determining when a violation of the PSA has occurred, the agency has instead established specific conclusory criteria for determining when a violation of the PSA has not occurred. This approach appears to turn Congress' directive on its head and appears to render the PSA's express prohibitions meaningless.

R-CALF USA intuitively believes the USDA's interpretation of Congress' clear directive is erroneous and that its approach in this rulemaking constitutes a radical departure from the agency's prior rulemakings that appropriately establish affirmative criteria with which to implement congressionally passed statutes.

Before R-CALF USA can even begin to consider the merits of the Proposed Rule it must first conduct extensive research on the propriety of USDA's highly unusual approach in this rulemaking, i.e., R-CALF USA must first research whether USDA has even answered the right question and whether the Proposed Rule is even responsive to Congress' directive. R-CALF USA estimates it will take several months to complete its research on this fundamental prerequisite before it can begin to offer meaningful comments on the merits of the Proposed Rule.

B. On Its Surface, the Proposed Rule Appears to Rely Upon Baseless Assumptions.

Further, the Proposed Rule is replete with assumptions for which the USDA provides no basis, all of which will require extensive research before R-CALF USA can provide meaningful comments. For example, the Proposed Rule makes the broad, sweeping assumption that court precedents have generally required the demonstration of harm to competition and, consequently, those precedents are likely to remain unchanged.³ This sweeping generality then forms the basis for the Proposed Rule's assumption that litigation costs would decline in five years.⁴

However, this broad generalization and associated assumption is unsupported by any evidence. R-CALF USA is aware that numerous courts have not required the demonstration of harm to competition as a prerequisite to finding a violation of Section 202 of the PSA. Indeed, R-CALF USA believes that Eight Circuit case law directly contradicts this broad generalization. Where, as here, the agency fails to provide any evidence to support the broad, sweeping generalizations that form the basis for the Proposed Rule, the public is left at a distinct disadvantage as they must first conduct extensive research to determine the validity of the agency's generalizations and assumptions before any meaningful comments can be formulated.

³ Proposed Rule, at 1,774.

⁴ *See id.*, at 1,778.

Before R-CALF USA can even begin to consider the merits of the Proposed Rule, it must first conduct extensive research to determine the validity of the unsupported, sweeping generalized assumptions the agency has offered up as a basis for its Proposed Rule. R-CALF USA estimates that this research will take several months to complete.

C. On its Surface, the Proposed Rule Appears to Promote Unlawful Collusion.

The very agency that issued the Proposed Rule, i.e., USDA-AMS, had established a standing policy that unequivocally protects the confidentiality of prices and terms of sale that individual packers pay for cattle. This protection against public disclosure of cattle prices paid and terms of sale offered by packers is known as the 3/70/20 Confidentiality Guidelines purportedly established pursuant to the Livestock Mandatory Reporting Act of 1999.⁵ Pursuant to these guidelines, the agency prevents public disclosure of cattle prices if such disclosure would reveal the prices and terms of sale that one or more packer has paid for cattle in certain regions of the United States.

And yet, the agency in the Proposed Rule now offers as a defense to an alleged violation of the PSA that a showing that the alleged violation involved prices and terms of sale offered by one packer are similar or identical to prices and terms offered by a competing packer. Thus, the agency has established a standard involving prices and other terms of sale as a defense to an alleged PSA violation that is not available or otherwise known to the public.

Nevertheless, the Proposed Rule, on its surface, appears to facilitate and promote collusion among packers to share confidential pricing and terms of sale information with each other to ensure that the prices and terms they offer are similar, if not identical, to the prices and terms offered by competitors.

R-CALF USA must conduct extensive research to determine the appropriateness/lawfulness of a proposed rule that establishes a standard that, on its surface, will promote and facilitate the sharing of confidential/proprietary information among and between packers while simultaneously shielding such confidential/proprietary information from the public.

R-CALF USA estimates it will take several months to conduct this essential research before it can offer any meaningful comments regarding the merits of the Proposed Rule.

D. Conclusion.

For the foregoing reasons, R-CALF USA respectfully requests an extension of time for which to provide public comments in the Proposed Rule of at least 90 additional days beyond March 13, 2020. R-CALF USA further requests that USDA-AMS-PSD provide notice by March 3, 2020 regarding whether our request is granted.

Sincerely,



Bill Bullard, CEO

⁵ See, e.g., <https://www.ams.usda.gov/sites/default/files/LMRConfidentialityGuidelinePresentation.pdf>.