Before the
UNITED STATES DEPARTMENT OF AGRICULTURE
Washington, D.C. 20250

Fair and Competitive Livestock and Poultry Markets: Proposed Rule	**Docket No. AMS-FTPP-21-0046**

WRITTEN SUBMISSION OF THE FEDERAL TRADE COMMISSION

I. Introduction

The Federal Trade Commission (FTC or Commission), one of the nation's primary federal enforcers of and experts in competition law, supports the U.S. Department of Agriculture's (USDA) proposed rule. If finalized as proposed, the rule would add much needed clarity regarding the prohibition on unfair practices under the Packers and Stockyards Act (PSA) and its relationship to competitive injury. It would also provide functional guidance on its operation and enforcement of its prohibitions on unfair practices under the PSA.

II. Interest of the FTC

The FTC and USDA's history of collaboration on competition issues in agricultural markets dates to the early 20th century.[1] In 1917, both agencies began investigating the rising costs of meat. The agencies sought to determine "whether there was reason to believe that the production, preparation, storage distribution and sale of foodstuffs were subject to control or manipulation."[2] The Commission reported on its investigation in 1919, finding that there were long-standing agreements between the five primary meat-packing companies to control markets.[3] Following the report, DOJ obtained a consent decree to enjoin the five companies from maintaining or entering agreements in restraint of trade or from monopolizing.[4] The FTC's report also prompted Congress to pass the PSA in 1921.[5]

The FTC actively prevents unfair methods of competition in agricultural markets.[6] For example, in September 2022, the FTC and a bipartisan coalition of state attorneys general filed a complaint in federal court against pesticide manufacturers for allegedly paying distributors to block competitors from selling less expensive generic products to farmers, costing farmers millions of dollars in overcharges.[7] The district court found the FTC and states' complaint sufficiently

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[1] William B. Colver, FTC Chairman, *The Federal Trade Commission and the Meat-Packing Industry*, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE, vol. 82, 1919, pp. 170–74.

[2] *Id*. at 170.

[3] *Id*. (The group consisted of Swift & Co., Armour & Co., Morris & Co., Wilson & Co., and The Cudahy Packing Co.).

[4] Packer Consent Decree, Letter from the Chairman of the Federal Trade Commission, Feb. 17, 1925.

[5] *See* Fed. Trade Comm'n, *Report of the Fed. Trade Comm'n on the Meat-Packing Industry, Part I (Extent and Growth of Power of the Five Packers in Meat and Other Industries)*; Fed. Trade Comm'n, *Report of the Fed. Trade Comm'n on the Meat-Packing Industry, Part II (Evidence of Combination among Packers)*; Fed. Trade Comm'n, *Report of the Fed. Trade Comm'n on the Meat-Packing Industry, Part III (Methods of the Five Packers in Controlling the Meat-Packing Industry)* (1919). These reports presaged the passage of the Packers and Stockyards Act in 1921 to protect farmers from abusive business practices. The Packers and Stockyards Act's proscriptions on "unfair, unjustly discriminatory, or deceptive practice[s]" closely parallel the Federal Trade Commission Act's proscriptions on "unfair or deceptive acts or practices[.]" *See* 7 U.S.C. § 192(a); 15 U.S.C. § 45(a).

[6] 7 U.S.C. § 227(b).

[7] *FTC v. Syngenta Crop Prot. AG*, No. 1:22CV828, 2024 WL 149552 (M.D.N.C. Jan. 12, 2024) (alleging pesticide manufacturers used so-called "loyalty" programs to block and restrict generic competition). There are now twelve states prosecuting this case alongside the FTC. *See also* Press Release, Federal Trade Commission, FTC and State Partners Sue Pesticide Giants Syngenta and Corteva for Using Illegal Pay-to-Block Scheme to Inflate Prices for Farmers (Sept. 29, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-state-partners-sue-pesticide-giants-syngenta-corteva-using-illegal-pay-block-scheme-inflate.

alleged that the pesticide manufacturers' conduct violated the Sherman Act, the FTC Act, and the Clayton Act.[8] The case is ongoing.

The Commission has also raised concerns about manufacturers restricting repair of agricultural equipment.[9] The FTC hosted a public workshop to examine ways in which manufacturers limit third-party repairs.[10] The subsequent report highlighted potential competition problems that can arise when manufacturers restrict who can repair agricultural equipment like tractors.[11] Commission staff also recently testified in support of state legislation to expand right-to-repair laws in Colorado to cover agricultural equipment.[12]

III. Dispelling Confusion about the PSA is Important to Protecting Farmers, Growers, and Ranchers from Unlawful Conduct by the Dominant Meat Processors

Revitalizing the PSA, including dispelling confusion about its requirements, is critical to protect against unfair acts in the livestock, meat, and poultry industries. Thus, the Commission strongly supports USDA's proposed rule. As the proposed rule notes, courts applying the PSA have come to contradictory and confusing conclusions about how to interpret §§ 202(a) and (b) of the Act.[13] While some courts have read into the PSA a competitive injury requirement (often in significant tension with each other and even other decisions by the same courts), others have rejected such a requirement.[14] This confusion over the need for showing competitive injury—and what any such showing would require—has made understanding one's rights under the PSA difficult.

As farmers have explained, inconsistent applications of a competitive injury requirement, and the uncertainty around whether such a burden exists at all, undermines their right to redress under

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[8] *Syngenta*, at *19.

[9] Fed. Trade Comm'n, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions* (May 2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf [hereinafter Nixing the Fix].

[10] Fed. Trade Comm'n, *Nixing the Fix: A Workshop on Repair Restrictions* (July 16, 2019), https://www.ftc.gov/news-events/events/2019/07/nixing-fix-workshop-repair-restrictions.

[11] Nixing the Fix, *supra* note 9, at 39 ("[D]uring the 2016 right to repair hearing held by the Nebraska legislature's Committee on Judiciary, Kenny Roelofsen, a representative of an agricultural replacement company, testified that 'if [a tractor is] down for one or two days during planting season or during harvest season, they're wasting money . . . if the only person who can repair that equipment is the OEM, then if they have a tech that's already out. They don't have another tech to get out there and essentially plug in a USB port and fix their tractor, then they're out. So they're essentially tying up all the market into a monopoly to themselves, not allowing competition which drives prices up.'").

[12] Press Release, Fed. Trade Comm'n, *FTC Testifies in Support of Colorado's Right-to-Repair Law* (Feb. 29, 2024), https://ftc.gov/news-events/news/press-releases/2024/02/ftc-testifies-support-colorados-right-repair-law.

[13] 89 Fed Reg. 53,886, 53,891–93.

[14] *Id*. at 53,891 (collecting cases). *Compare, e.g., M&M Poultry, Inc. v. Pilgrim's Pride Corp.*, No. 2:15-CV-32, 2015 WL 13841400, at *12 (N.D.W. Va. Oct. 26, 2015) ("[A]nticompetitive effect is not an essential element that need be alleged to state a claim for violation of § 192(a)-(b).") *with Morris v. Tyson Chicken, Inc*., No. 4:15-CV-77-BJB, 2022 WL 68963, at *5 (W.D. Ky. Jan. 6, 2022) (holding plaintiffs satisfied a requirement to show conduct that results in or is likely to result in anti-competitive effects the PSA was designed to prevent).

the PSA.[15] A difficult-to-meet competitive injury requirement is not only counter to the plain text of the PSA and congressional intent; as a practical matter it negates the statute's private right of action, which permits a farmer to recover damages when injured by an unfair act.[16] Based on the FTC's experience in litigating cases, the type of expert economic analysis required to show market-wide harm in an antitrust case can cost millions of dollars.[17] Moreover, the type of market-wide data needed to perform such analyses are generally costly to attain in the first instance and/or require extensive discovery, and so may practically not be readily available to private litigants. Superimposing these burdens on farmers without support in the law can put access to justice out of reach for many farmers—contrary to Congress's intent in adopting a private right of action in the PSA.

IV. USDA Correctly Recognizes that the Packers and Stockyards Act Protects Individual Farmers, Growers, and Ranchers from Unlawful Conduct More Broadly Than the Antitrust Laws

The text of the PSA grants USDA broad authority to assure "fair competition and fair-trade practices to safeguard farmers and ranchers . . . to protect consumers . . . and to protect members of the livestock, meat, and poultry industries from unfair, deceptive, unjustly discriminatory and monopolistic practices[.]"[18] Most relevant here, § 202(a), the subject of USDA's proposed rule, provides that "[i]t shall be unlawful . . . to . . . [e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device."[19]

The proposed rule correctly identifies that by its terms, the PSA is broader than the FTC Act. Courts, describing congressional intent, have confirmed the PSA was meant to go beyond the scope of both the FTC Act and other antecedent antitrust statutes.[20] The legislative history

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[15] Joe Harris, *Farmers Press Eighth Circuit to Clear Regulatory Hurdle*, COURTHOUSE NEWS SERV. (Sept. 26, 2018), https://perma.cc/G34M-E93K.

[16] 7 U.S.C. § 209(a).

[17] *See* Khushita Vasant & Chris May, *US FTC's Khan Cites "Arms race" for Costly Economic Experts in Antitrust Cases, Staff Salaries in Seeking More Funding*, MLEX (May 16, 2024) (quoting testimony of FTC Chair Lina Khan: "Antitrust litigation has also become extraordinarily expensive, because we have to use economic experts, and these experts routinely are charging millions of dollars.").

[18] Packers and Stockyards Act of 1921, Pub. L. No. 67-51, 42 Stat. 159 (codified as amended at 7 U.S.C. §§ 181-229b).

[19] 7 U.S.C. § 192.

[20] *De Jong Packing Co. v. U.S. Dep't of Agric.*, 618 F.2d 1329, 1335, 1335 n.7 (9th Cir. 1980) (PSA "was drafted to go beyond the scope of antitrust statutes" including "the Sherman Act and other pre-existing legislation such as the Clayton Act and the [FTC Act]."); *Armour & Co.* v. *United States*, 402 F.2d 712 (7th Cir. 1968) (Congress intended section 192(a) to be "read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the Federal Trade Commission (15 U.S.C. § 45) and also to reach any of the special mischiefs and injuries inherent in livestock and poultry traffic.").

likewise confirms the PSA "goes further than" the FTC Act's prohibition on unfair methods of competition.[21]

As the rule explains, the plain text of the PSA's § 202(a) affirms Congress did not intend the PSA to require for proof of an adverse effect on competition as an element of a claim, as § 202(a) lacks any textual limitation to acts having an adverse effect on competition.[22] Notably, elsewhere in the same section, Congress explicitly sought to limit statutory provisions to certain anticompetitive or monopolistic conduct.[23] When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[24] Congress intentionally and purposefully included references to anticompetitive or monopolistic conduct in §§ 202(c), (d), (e), and (f), while intentionally and purposefully omitting these elements from § 202(a).[25]

The FTC Act does not require proof of competitive injury with respect to claims of unfair or deceptive practices, further supporting the proposed rule's interpretation of the PSA's requirements. Section 5 of the FTC Act proscribes "practices as unfair or deceptive in their effect upon consumers, *regardless of their nature or quality as competitive practices or their effect on competition.*"[26] Rather, the FTC has explained that "the principal focus of [its] unfairness policy is on the maintenance of consumer choice or consumer sovereignty, an economic concept that permits specific identification of conduct harmful to that objective."[27] In 1994, Congress added to the FTC Act a three-part test for Commission determinations under the FTC's unfairness authority, providing that actions are unfair if they: (1) cause or are likely to cause substantial injury to consumers; (2) which is not reasonably avoidable by consumers themselves; and (3) are

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[21] 61 Cong. Rec. 1805 (1921) (statement of Rep. Anderson) (arguing Act "goes further than" Federal Trade Commission Act's prohibition of unfair methods of competition because it is not limited to injury to competitors); *id*. at 1806 (statement of Rep. Rayburn) (Federal Trade Commission given "wide powers, but not as wide as [those given] the Secretary of Agriculture under this bill").

[22] 89 Fed Reg. 53,886, 53,888 (June 28, 2024); *see Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961) ("[T]he language in section [192(a)] does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language."); *United States v. Donahue Bros.*, 59 F.2d 1019, 1023 (8th Cir. 1932) ("The Secretary is granted authority to enforce just and reasonable practices and to prevent those unjust and unreasonable.").

[23] *See* 7 U.S.C. § 192(c) (prohibiting specified apportionment "if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly"); *id*. § 192(d) & (e) (forbidding specified acts done "for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly . . . , or of restraining commerce"); *id*. § 192(f) (forbidding monopolistic conspiracy).

[24] *S.D. Warren Co. v. Me. Bd. of Env't. Prot.*, 126 S. Ct. 1843, 1852 (2006) (internal quotation marks omitted); *accord Tex. Coalition of Cities for Util. Issues v. FCC*, 324 F.3d 802, 808 n.4 (5th Cir. 2003).

[25] *See Kinkaid v. John Morrell & Co.*, 321 F. Supp. 2d 1090, 1102–03 (N.D. Iowa 2004) (comparing § 192(a) with § 192(e) and observing that "the structure of [§ 192] suggests that 'unfair' or 'deceptive' practices are prohibited separately and apart from anticompetitive or 'monopolistic' practices, where these classes of conduct are prohibited in separate subsections").

[26] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972) (emphasis added).

[27] *In re International Harvester Co.*, 104 F.T.C. 949, 1061, n.47 (1984).

not outweighed by countervailing benefits to consumers or to competition.[28] These added requirements do not demand proof of competitive injury to establish an unfair practice; and notably, Congress did not impose any such test or limitation on the PSA's unfairness prohibition, instead leaving intact the PSA's broader scope. Thus, at a minimum, meeting the more rigorous standards of the FTC Act for unfair acts—which plainly do not require any showing of competitive injury—is sufficient to establish a PSA violation under § 202(a). To the extent courts have interpreted § 202(a) to require a showing of competitive injury, such an interpretation is belied by the plain text of the PSA.

Regardless, even if the PSA did require a showing of competitive injury, that showing should not be more onerous and burdensome than that required under the FTC Act's prohibition on unfair methods of competition, given that the PSA is broader than the FTC Act. The Supreme Court has stated that the FTC Act's prohibition on unfair methods of competition was "designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts[.]"[29] At a minimum, meeting the standards of the FTC Act for unfair methods of competition should be sufficient to establish a PSA violation under § 202(a).

Recognizing the relationship between the PSA and the FTC Act, the proposed rule gets it right. Because the PSA's prohibition on unfairness is by its plain text broader than the FTC Act, and the FTC Act's unfair trade practices prohibition does not itself require a showing of market-wide ongoing harm to competition, the proposed rule correctly recognizes that competitive injury is not required for a PSA violation.[30]

V. Conclusion

Finalizing the proposed rule is an important step toward revitalizing the PSA to promote a more fair, free, and resilient food system. The FTC stands ready to engage, support, and assist USDA staff in the agency's rulemaking and enforcement efforts in this crucial area.

[28] 15 U.S.C. § 45(n).

[29] *Fed. Trade Comm'n v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394–95 (1953) (internal citations omitted).

[30] 89 Fed Reg. 53,886, 53,897 ("[T]here does not need to be any proof that any harm to market has yet occurred: only that the threat the Act is designed to prevent is likely.").