

1. Rule's Stated Goal: Eliminate Proving Injury to Competition or Likelihood of Competitive Injury as an Element in a Packers and Stockyards Act Lawsuit

The proposal would eliminate the need for a plaintiff to demonstrate injury to competition in lawsuits involving alleged unfair or undue preference activities.

Consequence: In *Pickett v. Tyson Fresh Meats Inc.* the company was sued by a group of producers who alleged that Tyson's use of marketing agreements with other producers was an unfair practice. The company won because the court concluded that in an unfair practice case showing injury to competition or likelihood of injury to competition was necessary. The proposed rule would attempt to remove that requirement such that producers who are not offered such agreements by a packer or producers who choose not to use agreements but contend that their use affects cash market prices could more easily bring lawsuits. In addition, certain producer groups have alleged that

- Packer ownership of livestock affects the markets or distorts competition (JBS ownership of Five Rivers – an acquisition approved by DOJ)
- Agreements between feedlots and a packer adversely affect the market (RCALF letter regarding National Beef and Hitch Enterprise agreement)
- Allowing packers to process in more than one species can adversely affect the market (RCALF letter to DOJ regarding JBS acquisition of Pilgrim's Pride -- an acquisition approved by DOJ).

In short, these types of transactions and many marketing agreements would all be subject to the threat of litigation if this element of the proposed rule goes through.

That such a change would have a dramatic impact is evidenced by at GIPSA commissioned study conducted in 2007 by the Research Triangle Institute. That study found that a reduction over 10 years of 25 percent of the marketing agreements would cost feeder cattle producers \$5.1 billion, fed cattle producers \$3.9 billion, and consumers \$2.5 billion. In addition the RTI study found that if marketing agreement were eliminated, over 10 years, the cumulative losses for producers and consumers would total \$60 billion.

2. Rule's Stated Goal: Ensure Producers are not Subject to Unfair Practices

The rule would define "likelihood of competitive injury" such that any action that "impairs a producer's or grower's ability to compete with other producers or growers or impairs a producer's or grower's ability to receive the reasonable expected full economic value from a transaction ..." and such a finding is an unfair practice.

Consequence: A packer that needs 1000 head to cover tomorrow's kill and gets only 500 head on the first offer may/will likely have to "pay up" to get the next 500 head, which could result in paying two producers that operate next door to each other different prices within the same hour. Does this fact pattern constitute "impairing a producer's or grower's ability to receive the reasonable expected full economic value from a transaction in the market channel or marketplace" and is that question simply left to a jury of 12 people in Ottumwa, Iowa to decide?

Consequence: If a beef packer has three or four buyers in the field (e.g., in the same state) at the same time and all four buyers negotiate different prices for the packer to pay, what is necessary to substantiate the differences in the prices, which must be documented? Also, do the three producers who received lesser prices have an authentic case that they did not "receive the reasonable expected full economic value from a transaction in the market channel or marketplace" if or when they find out that another seller got a higher price for his livestock?

3. Rule's Stated Goal: Enable Producers to Recoup Capital Investment Costs

The proposed rule requires a contract's duration to be such that the producer can recoup 80 percent of the capital improvements.

Consequence: The proposal guarantees an 80 percent recoupment of the investment – regardless of the producer's performance. Thus, a poorer performing producer would have to have a longer term contract in order to be able to recoup 80 percent.

Consequence: The proposal does not distinguish between investments necessary to comply with the

law, or changes in the law (e.g., gestation crate bans) and investments required by the packer for efficiency or other reasons (e.g. animal welfare considerations). A packer would be responsible for ensuring that the contract duration was long enough to allow an 80 percent recoupment of the investment even if the producer was simply responding to a change in local laws – like a statewide ban on gestation crates -- that had nothing to do with the packer’s requirements.

4. Rule’s Stated Goal: Increase Competition for Livestock and Preclude Price Manipulation by Banning a Packer’s Ability to Sell Cattle to Another Packer

The proposed rule bans a packer from buying livestock from any other packer or entity associated with a packer, like a packer-owned feedlot or farm.

Consequence: A beef packer with only one packing plant in Washington State and who owns cattle in Kansas feedlots will no longer be permitted to sell his cattle to other plants in Kansas or Nebraska. Instead, he can only use them in his own plant and to do so he will be forced to transport those cattle a distance of more than 1500 miles, over the Rocky Mountains to Washington where his plant is located. This would subject the cattle to the needless stress of a long haul.

The packer’s only other option would be to sell his Kansas cattle to a broker or dealer. That dealer or broker will be forced to mark up the price or pay less than market value to the packers in order to sell them to a Kansas or Nebraska packer. This scenario adds costs to the system and the only one who might benefit is the middle man, while the consumer ends up paying more at retail.

Consequence: Vertically integrated pork packers will not be able to sell excess market hogs or cull sows to other packers as they historically have, but instead will be forced to sell them to third party livestock dealers,

who in turn will sell to the hogs to packers, introducing added costs and inefficiencies into the system. For example, Packer X, which owns hogs located close to a packing plant in Guymon, Oklahoma, that is owned by Packer Y would have to haul those hogs an additional 450 miles to the Packer X plant in Crete, Nebraska. These hogs would then “displace” market hogs from farmers that are located in the Crete area. The newly displaced hogs would then need to be hauled that same 450 miles to the Guymon plant or some other, more distant facility. The result is that both operations would not only incur incremental freight costs but also have a larger impact on the environment etc. And again, pigs, which are particularly vulnerable to transport stress would be subjected to needlessly longer hauls.

Consequence: A beef packer that also owns cattle and operates a plant in Texas will ship all its cattle to that Texas plant because it must do so under the proposed rule. This will require converting that plant to a sole source user and displacing other cattle sellers who historically have found that plant to be a possible market for their livestock. The alternative, again is to sell the cattle to a dealer or broker, again introducing unnecessary costs and inefficiencies into the system.

Consequence: The ban doesn’t just introduce inefficiencies. It could close some operations. For example, a West Coast facility processes approximately 1.8 million hogs per year, with the majority of these hogs obtained from a producer affiliated with another packer. There are too few non-packer-affiliated production facilities near this facility to supply sufficient replacement hogs.

Theoretically, an option is to ship market hogs from the Midwest, but transportation costs and animal welfare considerations make this an undesirable option. The other option is to limit the pigs processed to company-owned hogs only, but there are insufficient company-owned hogs to fill the plant. The company would have to expand its vertical integration (if possible) or, failing that, cease plant operations.