

RECOMMENDATIONS FOR UNDUE PREFERENCES RULES

The 2008 Farm Bill requires the U.S. Department of Agriculture to write rules defining the term “undue and unreasonable preferences” in the Packers and Stockyards Act. On behalf of WORC and the Campaign for Family Farms and the Environment, Farmers’ Legal Action Group has submitted recommendations for this rulemaking. This summary outlines those recommendations. A copy of the recommendations is available from Jeri Lynn Bakken, at WORC’s Lemmon, South Dakota, office.

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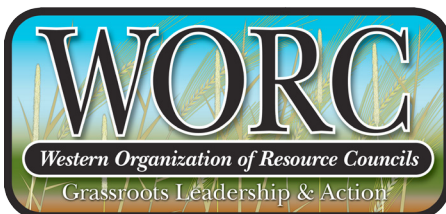
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The recommendations provide four general principles for the Grain Inspection and Packers and Stockyards Administration (GIPSA) to consider when drafting the undue preference rules.

- Evaluate whether common practices developed over the years by packers and poultry processors have the potential to create undue preferences violating the Packers and Stockyards Act;
- Establish detailed and specific criteria to ensure that under certain factual scenarios a finding of a violation will be made;
- Develop separate criteria addressing each sector of the poultry, hog and cattle industries; and
- Create different sets of criteria for analyzing different aspects of the relationships between packers/processors and livestock producers/poultry growers.

The recommendations contain proposed regulatory language defining the following violations of the undue preference rules:

- Pricing and procurement of slaughter livestock;
- Packer ownership of livestock;
- Packer ownership interests in custom feedlots;
- Packers giving selected livestock producers grade and yield information;
- Packers providing selected livestock producers with important information about its buying practices; and
- Packers penalizing livestock producers for exercising their rights by publicly speaking for policies in the producers’ interests.

The recommendations outline what GIPSA should analyze when determining whether an undue preference has been given with regard to pricing and procurement of slaughter livestock. The analysis should look at the methods of procurement used and terms of purchase of the particular livestock at issue in comparison with the procurement methods used to purchase other livestock slaughter. GIPSA should identify and compare benefits and advantages of various purchase agreements, including, but not limited to:

- Price terms;
- Grade, quality, and/or yield premiums and discounts;
- Volume premiums or discounts;

- Transportation terms or practices;
- Weighing conditions and timing, and calculation of shrink;
- Any financing by the packer of a livestock producer's operation;
- Shackle space guarantees or commitments;
- Any terms or practices allowing any form of compensation or discount for factors other than those addressed above, such as seller's membership in a trade association or particular type of organization;
- An analysis of the combination of all or any relevant portion of the terms or practices listed above to assess the overall value and benefits of the purchase agreement for the livestock at issue and a comparison with the value of benefits, costs, advantages, and disadvantages of the other purchase agreements for livestock slaughtered by the packer's relevant plants during the relevant time period; and
- Identifying and comparing which sellers received the higher benefits purchase agreements.

To determine whether any higher benefit or advantage is undue or unreasonable, the agency should evaluate several factors, including:

- If the packer expressly offered all of the various purchase agreements used to procure livestock for slaughter during the relevant time period in relevant plants in a way that all sellers could participate.
- If the packer's bid for livestock procured under each and every one of the various purchase agreements in an open, public manner, and the terms of the agreements did not make it impossible for some livestock sellers to participate.

If the packer did not take the above actions, determination of whether the contracts with the complaining livestock seller are undue or unreasonable will be based on the assessment of these factors:

- If some purchase agreements price terms provide for paying the seller something over a formula base price and that formula incorporates within it the price paid to the complaining livestock seller of category of sellers to which he belongs;
- If some purchase agreements provide for either direct volume premiums or indirectly provide higher per animal prices through other individual or combination of terms or practices to livestock sellers that produce significantly larger volumes of animals than the complaining seller produces, then the dollar value of those direct or indirect volume premiums will be presumed to be an unlawful, undue, or unreasonable preference or advantage.
- It is not an undue or unreasonable preference or advantage for a packer to pay a livestock producer a premium for a characteristic or factor that is specifically identified in the market of the meat for which consumer demand has demonstrated an increased value in the meat.

In addition, the recommendations state that:

- The rules should not narrow or limit the application of prohibition against undue or unreasonable preferences or advantages;
- The rules must make clear that it is not necessary to show anti-competitive impact to find an undue preference; and
- The rules must be adjusted to keep pace with industry practices as dealings between the packers, swine contractors, and live poultry dealers and livestock producers and poultry growers change over time.